Brown v East Islip Union Free Sch. Dist.
2018 NY Slip Op 33272(U)
December 6, 2018
Supreme Court, Suffolk County
Docket Number: 15-490
Judge: Sanford N. Berland
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SHORT FORM ORDER

INDEX No. 15-490
CAL. No. 17-01161OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. SANFORD N. BERLAND
Acting Justice Supreme Court

MOTION DATE 11-17-17
ADJ. DATE 5-1-18
Mot. Seq. # 001 - MotD

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STEPHANIE BROWN,

Plaintiff,

- against -

EAST ISLIP UNION FREE SCHOOL DISTRICT,

Defendant.

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Upon the following papers numbered 1 to 49 read on this motion for summary judgment : Notice of Motion and supporting papers 1-40 ; Answering Affidavits and supporting papers 41-47; Replying Affidavits and supporting papers 48-49; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted to the extent set forth, and is otherwise denied.

Plaintiff commenced this action to recover damages for injuries allegedly sustained by her during a gym class conducted on an outside soccer field at East Islip High School, located at 1 Redmen Avenue, East Islip, New York. The incident happened on October 18, 2013, when plaintiff was in the twelfth grade. The notice of claim, complaint and verified bill of particulars allege that the School District was negligent in failing to maintain the soccer field in a reasonably safe condition and in failing to properly supervise plaintiff, among other things.

Defendant East Islip Union Free School District now moves for summary judgment dismissing the complaint on the grounds that there was no dangerous condition on the soccer field that caused plaintiff's injuries, and that it did not have notice of any dangerous condition. The School District argues further that plaintiff was properly supervised and that any lack of supervision was not a proximate cause of plaintiff's

injuries. In support of the motion, the School District submits copies of the pleadings, the verified bill of particulars, the transcripts of the testimony of the plaintiff and of her mother, Laura Brown, at a 50-h hearing, transcripts of the parties' deposition testimony, an affidavit by Eric Woellhof, photographs of the field and an incident report.

Plaintiff testified that on the date of the incident, she was in twelfth grade and was attending her gym class at East Islip High School. She testified that it was a sunny day, and that her gym teacher, Mr. Lavey, brought them outside to play soccer on one of the fields. She testified that the class was divided into four groups of approximately six students and the field was divided in half so that two groups played on each side of the field. Plaintiff testified that she had played soccer on several occasions, both in gym class and when she was younger, and that on the date of the incident she played goalie. She testified that while she was running towards the end of the field with the ball, she kicked it with her left foot, which became stuck in mud causing a knee twisting injury. Plaintiff testified that she had observed the muddy spot on prior occasions, and described it as grassy, muddy mixture approximately three feet long with an oval shape, but she never complained about it to anyone who worked at the school, including Mr. Lavey. She testified that it was located at the center of the field, and that she did not observe any sprinklers in the area. Plaintiff testified that Mr. Lavey stood to the left of the center of the field and observed the students play during class.

Laura Brown testified that on the date of the incident, plaintiff phoned her and told her that she had had an accident on the soccer field and had injured her knee. Brown testified that she drove to the school and went straight to the soccer field, where plaintiff and Mr. Lavey were waiting, and that plaintiff told her that she got stuck in the mud. She testified that she did not observe any mud on the field, but when plaintiff's sneakers were removed by the emergency technicians, she noticed that they were very muddy. Brown testified that she spoke to Mr. Lavey and to the nurse about plaintiff's injuries, but they did not discuss how the incident occurred.

Mr. Lavey testified that he has worked for the School District for fourteen years as a physical education teacher and health instructor, and that he coaches football and men's lacrosse. He testified that he teaches five physical education classes per day, and that the students are separated by gender and grade level; ninth and tenth graders are in one gym class and eleventh graders and twelfth graders form a separate gym class. Mr. Lavey testified that plaintiff was in the class that consisted of eleventh and twelfth grade female students and that it was held at ninth period, which is the last period of the day. He testified that the class began at 1:25 p.m. and ended at 2:05 p.m., and that the subject incident occurred at 1:55 p.m. He testified that there are 30 students in the class, and that it is conducted on alternate days of the week. He testified that on the date of the incident he brought the class outside to play soccer on the boy's varsity soccer field, and that he divided the field into two sections so that two separate scrimmages were held on the field. Lavey testified that the fields are inspected each morning by the "grounds crew," and that it is normal practice for the crew to line the fields the day before each varsity game. He testified that on the date of the incident, he was pretty sure there was a boy's junior varsity game scheduled after ninth period.

Lavey testified that when he walks his students to the field, he looks around to see if it is "safe and playable," and that if he observed any unsafe condition on the field, he would not use it. He testified that no one ever complained about the conditions of the subject field and that he is unaware of any

similar incidents. He testified that he stands at the center of the field while the students are playing so he can view all of them, and that he watches them the entire time. Lavey testified that he did not observe plaintiff trip or fall and that when he was informed of the incident, he immediately went to her and observed an injury to her knee. Lavey testified that while he and the other students waited for an ambulance, plaintiff and the other students were talking about how she slipped while she kicked the ball. He testified that he did not observe any mud on plaintiff's clothing or her shoes and that he did not observe any mud on the soccer field. When asked if he had looked at the ground where plaintiff fell, he testified that he did not, as he was only concerned with the appearance of plaintiff's knee injury.

The affidavit of Eric Woellhof is submitted. In his affidavit, Woellhof states that he is the director of facilities for East Islip Union Free School District and was working at the time of the incident. He testified that he is unaware of any similar incidents prior to the subject one, and that he was unaware of any muddy conditions on the field. He states that the fields are mowed and striped two to three times per week, and that if any dangerous condition was observed by the maintenance crew, they would have advised him of same. Woellhof states that the sprinkler system is activated every other day at 8:00 p.m. and operate for two hours and forty minutes.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion, who must produce evidentiary proof in admissible form sufficient to r, equire a trial of the material issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980].

The liability of a school district for conditions on its premises is determined by the same principles which govern the liability of private landowners (***Stevens v Central School Dist. No. 1***, 25 AD2d 871, 270 NYS2d 23 [2d Dept 1966], *affd* 21 NY2d 780, 288 NYS2d 475 [1968]). A landowner who holds its property open to the public has a nondelegable duty to maintain the property in a reasonably safe condition to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]). However, a landowner is not an insurer of the safety of others using its property (*see* ***Maheshwari v City of New York***, 2 NY3d 288, 778 NYS2d 442 [2004]), and may only be liable for dangerous conditions that exist on its property if it created the condition which caused the injury or had actual or constructive notice of its existence (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]).

To provide constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Id* at 837). "To meet its burden on the issue of constructive notice, a defendant is required to offer evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall" (***Baez v Willow Wood Associates, LP***, 159 AD3d 785, 69 NYS3d 814 [2d Dept 2018]). Absent evidence

regarding specific inspection practices of the area in question, defendant cannot meet its burden of establishing that it did not have constructive notice of the dangerous condition (***Quinones v Starret City, Inc.***, 163 AD3d 1020, 81 NYS3d 184 [2d Dept 2018]; ***Perez v Wendell Terrace Owners Corp.***, 150 AD3d 1162, 54 NYS3d 655 [2d Dept 2017]). However, where the condition concerns a latent defect that would not be discoverable upon a reasonable inspection, constructive notice will not be imputed (*see* ***Marinaro v Reynolds***, 152 AD3d 659, 4 NYS3d 87 [2d Dept 2017]; ***Jackson v Conrad***, 127 AD3d 8167 NYS3d 355 [2d Dept 2015]).

A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see* ***Livingston v Better Med. Health, P.C.***, 149 AD3d 1061, 52 NYS3d 482 [2d Dept 2017]; ***Fernandez v Bucknell Realty Ltd. Partnership***, 123 AD3d 972, 999 NYS2d 862 [2d Dept 2014]; ***Mercedes v City of New York***, 107 AD3d 767, 968 NYS2d 519 [2d Dept 2013]). Here, while the School District established that it did not have actual notice of the condition, it has not eliminated triable issues of fact as to whether it had constructive notice of the condition. No evidence has been submitted to establish the extent to which the condition was or was not visible and as to whether a reasonable inspection would or would not have discovered it. No testimony or affidavits from anyone in the "grounds crew" is submitted to provide information regarding inspection procedures or when inspections are conducted, and no records are submitted to establish same. Lavey did not provide any details of the manner in which he "checks" the field while he walks towards it with the students, and, thus, nothing compels the conclusion that a reasonable inspection would not have revealed the condition that allegedly caused plaintiff's injury. Therefore, defendant failed to meet its burden on whether it had constructive notice of the condition, and failed to establish, prima facie, that it maintained its premises in a reasonably safe condition, thus obviating a review of the sufficiency of plaintiff's opposition papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316; ***Tavarez v Pistilli Associates III, LLC***, 161 AD3d 1129, 77 NYS3d 450 [2d Dept 2018]; ***Santopetro v Parish***, 155 AD3d 1080, 64 NYS3d 5 [2d Dept 2017]).

Nor has defendant established prima facie that there was no dangerous condition that caused plaintiff to trip and fall (***McElhiney v Half Hollow Hills Cent. Sch. Dist.***, 158 AD3d 615, 70 NYS3d 237 [2d Dept 2018]; *cf.* ***Touloupis v Sears, Roebuck & Co.***, 155 AD3d 807, 63 NYS3d 518 [2d Dept 2017]; ***Witkowski v Island Trees Pub. Lib.***, 125 AD3d 768, 4 NYS3d 65 [2d Dept 2015]). Accordingly, the School District's motion for summary judgment in its favor on the issue of negligence for its failure to maintain its premises in a safe condition is denied.

The School also moves for summary judgment in its favor on the issue of negligent supervision. A school has a common law duty adequately to supervise its students, as they have physical custody of the students, and stand in for their parents while in attendance (***Stephenson v City of New York***, 19 NY3d 1031, 954 NYS2d 782 [2012]). As such, the school's duty of care is the same duty of a parent, and it is required to exercise such care as a parent of ordinary prudence would observe in comparable circumstances (***Mirand v City of New York***, 84 NY2d 44, 614 NYS2d 372 [1994]). Schools are not insurers of safety, however, and they cannot supervise and control all movements and activities of their students (***Nash v Port Wash. Union Free School Dist.***, 83 AD3d 136, 922 NYS2d 408 [2d Dept 2011]).

Therefore, to impose liability on the school for inadequate supervision, the injuries must have been foreseeable and caused by the lack of adequate supervision (***Binani v City of New York***, 131 AD3d 1080, 16 NYS3d 610 [2d Dept 2015]). A lack of supervision is not the proximate cause of plaintiff's injury where the accident occurs in so short a span of time that even the most intense supervision could not have prevented it (***Guerriero v Sewanhaka Cent. High School Dist.***, 150 AD3d 831,55 NYS3d 85 [2d Dept 2017]; ***Santos v City of New York***, 138 AD3d 968, 30 NYS3d 258 [2d Dept 2016]; ***Convey v City of Rye School Dist.***, 271 AD2d 154, 710 NYS2d 641 [2d Dept 2000]).

Here, the testimony by plaintiff and Mr. Lavey establish that the class was properly instructed and adequately supervised while playing on the field. Furthermore, plaintiff had sufficient experience with the game of soccer, and more importantly, the School District established that a lack of supervision was not the proximate cause of plaintiff's injury (*see* ***Hinz v Wantagh Union Free Sch. Dist.***, ___AD3d ___, 2018, NY Slip 07105 [2d Dept 2018]; ***Tzimopoulos v Plainview-Old Bethpage Cent. Sch. Dist.***, 155 AD3d 987, 64 NYS3d 323 [2d Dept 2017]). In opposition, plaintiff has failed to submit proof to raise a triable issue of fact regarding proximate cause. The affidavit by Amanda Mannella submitted with plaintiff's opposition confirms how quickly the incident happened. In her affidavit, Mannella states that she was participating in the subject gym class and that the class had been playing soccer for three to four weeks prior to the subject incident. She states that on the date of the incident, she observed plaintiff advancing the ball, and that when she attempted to kick it with her right foot, her left foot appeared to "stick in the turf and she immediately crumpled to the ground." Accordingly, the branch of the School District's motion for summary judgment in its favor on the issue of negligent supervision is granted.

The foregoing constitutes the decision and order of the court.

Dated: 12/6/2018

A.J.S.C.
HON. SANFORD NEIL BERLAND

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**