Larkin v William Floyd Union Free School Dist.
2012 NY Slip Op 30227(U)
January 11, 2012
Sup Ct, Suffolk County
Docket Number: 05495/2010
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Jeanette Larkin, individually and as parent and natural guardian of Timothy Larkin,

Plaintiffs,

-against-

William Floyd Union Free School District and Robert Hodgson,

Defendants.

Motion Sequence No.: 002; MG CDISPO

Motion Date: 9/27/11

Submitted: 9/27/11

Index No.: 05495/2010

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Clerk of the Court

Upon the following papers numbered 1 to 19 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 15; Answering Affidavits and supporting papers, 16 - 17; Replying Affidavits and supporting papers, 18 - 19.

In this action, plaintiffs seek to recover damages for personal injuries sustained by the infant plaintiff Timothy Larkin and, derivatively, by the infant plaintiff's mother Jeanette Larkin on November 17, 2008 when the 13 year-old infant plaintiff fainted while watching a film in health class at William Floyd Middle School, a school which is part of the defendant William Floyd School District. The class was under the supervision of the health teacher, defendant Robert Hodgson. According to the infant plaintiff, he began to feel lightheaded while he was watching the film. He got up from his desk to ask Hodgson for permission to go to the nurse, fainted and struck his head

on a desk. In the complaint, the plaintiffs allege that the infant plaintiff sustained injuries as a result of the negligence of the defendant school district and defendant teacher. Specifically, the complaint alleges that the defendants were negligent in (1) failing to exercise reasonable care and judgment in their supervision and control and failing to provide proper and adequate instruction to their students in showing a video containing material of a graphic nature which may be unsuitable for their students, especially the infant plaintiff; (2) failing to provide proper and adequate notice, information and warnings to their students about the graphic nature of the material contained in a video to be viewed by their students, especially the infant plaintiff, and that such material may be unsuitable for children; and (3) permitting and encouraging their students, including the infant plaintiff, to view a video containing graphic material that may be unsuitable for children. The bill of particulars further elaborates that the defendants were negligent in failing to exercise the reasonable care required with regard to a child entrusted to their care; failing to properly train their employees in the supervision, safety and care of the infant plaintiff; causing and creating a dangerous condition; and in failing to exercise reasonable care and judgment in their supervision and control of the infant plaintiff.

The defendants now move for summary judgment dismissing the complaint on the grounds, *inter alia*, that the plaintiff's fainting was an unforeseeable, sudden and spontaneous event, that it could not have been prevented and was not proximately caused by their negligence.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v City of New York, 49 NY2d 557 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

In support of the instant motion, the defendants submit, *inter alia*, the infant plaintiff's 50 (h) hearing testimony and deposition testimony, the infant plaintiff's mother's 50 (h) hearing testimony and deposition testimony and the deposition testimony and affidavit of Robert Hodgson. As is relevant to this motion, the infant plaintiff's testimony during his 50 (h) hearing and his deposition was substantially similar. He testified that on the date of the incident he was watching a video in his third period health class which started at approximately 9:45 a.m. There were approximately ten students in the class. The video was about the human body and how it reacts in certain dangerous situations. For instance, one scene involved a person falling off a cliff and her leg getting ripped open. They showed her bloody leg for three or five seconds. Prior to that scene, there was a little bit of blood in the movie, but not so much. Another scene in the video showed a person with a giant boulder on his chest who was trying to push it off. That man was also bleeding a little

bit, but the infant plaintiff did not recall from where. He was taking notes on the movie because his teacher told him there was going to be a test on it. While he was watching the movie, approximately five or ten minutes into the movie, he began to feel woozy and dizzy. At his deposition, the infant plaintiff testified that most of the movie was blood and the blood was making him feel a little sick and woozy. At the 50 (h) hearing he testified that he felt woozy for a couple of seconds prior to getting up. During his deposition he testified that when he started to feel woozy he tried to ignore the feeling and draw, but that did not make him feel better. He then put his head down and closed his eyes for five seconds but this did not help because he could still see the image. He, thereafter, got up from his seat and went to walk to the teacher's desk in the front of the room where he intended to ask for a pass to the nurse. He did not tell anyone he was not feeling well prior to getting up. The teacher's desk was a couple of desks in front of his. He took approximately seven steps towards the teacher's desk and then he passed out, struck his head on a desk and landed on his stomach on the ground. He had started to get tunnel vision as he was walking, but did not say anything. When he woke up the teacher was next to him. The teacher walked him to the back of the room to sit on a couch that was there. The nurse came a minute later and brought him to her office in a wheelchair. The nurse called his parents. As a result of the incident, the infant plaintiff required stitches in his right eyebrow.

The infant plaintiff did not recall if the health teacher told him what they would be doing that year and what the rules and regulations of the health class were. He said they would be studying the different parts of the body. The infant plaintiff testified that prior to the date of the incident he had watched other videos about the human body in his health class. He had a little lightheadedness during these videos but he did not tell anybody. He recalled the health teacher telling the class that they could opt out of watching a different video if the movie made them uncomfortable. He did not recall the teacher stating you could opt out of the video at issue, although he admitted that the teacher never stated that he had to stay to watch the video. The infant plaintiff admitted that he never told his health teacher that he did not like these types of movies.

The infant plaintiff testified that he had never fainted in school, or otherwise, prior to the date of the incident. He testified that he had a similar feeling to the feeling he got before fainting a few years prior when he was watching a video at home. He also testified that he felt lightheaded or woozy in science class the year before when his teacher was describing a bloody scene from the television program CSI. He did not tell his science teacher that her description was making him woozy, but told her it was making him uncomfortable and she let him get a drink of water. Prior to the date of the incident, he did not tell anyone at the school that things made him woozy and he had never fainted. When he was younger, if he got a cut he would feel lightheaded. He never contacted the principal, guidance counselor or anyone affiliated with the school to state that this was a problem for him. Since the date of the incident, there was one occasion where they were reading a book in English class about people eating each other and he started to feel woozy and the teacher got the nurse.

The testimony of the infant plaintiff's mother during the 50 (h) hearing and her deposition also was substantially similar. She testified that she first learned of the incident when she received

a phone call from the school nurse stating that her son had passed out and struck his head. The infant plaintiff had never passed out previously. She took the infant plaintiff to various physicians following the incident and the neurologist opined that the fainting was a vasovagal reaction. The infant plaintiff's mother knew that the infant plaintiff did not like blood but did not know that he had a tendency to get lightheaded when he saw blood or "ookey" things and did not know he could pass out from it. She never told anyone at the school district at any point that her son would get upset when he was bleeding. She also never sent any letters or notes to the school stating that her son should not or could not watch movies like the one at issue. The infant plaintiff's mother never made any complaints to the district prior to the date of the incident about the health program or the health teacher and she did not know of anyone that made such complaints. She never had any conversations with the principal, teacher or guidance counselor after the incident and figured that the nurse would relay any relevant information to them. To the best of her knowledge, the infant plaintiff has not fainted since the date of the incident.

Robert Hodgson testified that he has worked for the defendant school district for the past twenty two years and has over thirty years of teaching experience. He taught health for several years. He took three or four seminars on teaching health ranging from teaching methods to safety. Hodgson testified that the curriculum was set up by the health coordinator. He was provided with the topics to be discussed prior to the commencement of the school year and at the several training sessions that they had throughout the year. At training sessions the entire staff meets and discusses curriculums.

On the date of the incident, he was showing a 30 minute video in class entitled "The Heart and the Human Pump." The movie was within the eight grade health curriculum which encompassed discussion of the systems of the body and diseases and disorders. It was at the discretion of the teacher to determine how to relay the topics of the curriculum. He stated that he decided to show the subject video because it was a part of a series of videos that they utilize which follows a systemic approach to health. He had been using the subject video for four or five years. He purchased the video after viewing the program on the discovery channel. This video was aired on general television without a disclaimer and Hodgson did not see anything objectionable about the video to any age group. He submitted the video to his department chair and principal prior to utilizing it and it was approved. Other than the incident at issue, there was never any other incident related to this movie. He has continued to use the movie following the incident.

At the start of class on the date of the incident, he told the students briefly what to expect and advised them that if anyone was uncomfortable or upset to let him know and they would be excused. Hodgson testified that it was the policy of the school to let students determine their comfort level with any given topic. At the beginning of each school year he gives his students an overview of the class. He relates the policy that if someone is upset for any reason by a topic, they can be excused. In addition, the school policy is to send a student to the nurse if they feel sick. The parents also receive a packet prior to the students taking the state-mandated health program and the parents can opt their child out of certain sections. After speaking to the students on the date of the incident, Hodgson started the movie and walked around the room for a little bit. Towards the end of the movie and, about two-thirds the way through the class, he went to his desk in the front of the room.

The infant plaintiff approached him and mentioned that he felt faint. The infant plaintiff looked pale and Hodgson immediately attempted to go around his desk towards him. He could not get to the infant plaintiff in time and he fell between the desks. The infant plaintiff regained consciousness shortly afterwards. Hodgson asked another student to get the nurse and the nurse arrived with a wheelchair. Hodgson testified that if the nurse had any information that would affect the instruction of a student, she would notify all of the student's teachers. He never received notification from the nurse with respect to the infant plaintiff.

In his affidavit, Robert Hodgson states that the video he was showing his health class on the date of the incident was titled "The Human Pump." He submitted a photocopy of the front and back of the video case and CD. He asserted that there were no warnings on the video case or the label of the CD whatsoever. Likewise, once the CD was playing there were no warnings displayed prior to or during the movie. Hodgson averred that he had viewed the video many times with many other eighth grade classes and never received any complaints about the movie. Hodgson further avers that the movie described by the infant plaintiff during his deposition was another movie from the same series entitled "Strength." He submitted a photocopy of this CD as well. Hodgson avers that there were no cautions or warnings on this video, CD or video case either. He avers that he has also watched this video many times with eighth grade classes and has never had any complaints about it or its contents.

The evidence submitted establishes the defendants' *prima facie* entitlement to summary judgment dismissing the complaint. It is well-settled that schools have a duty to adequately supervise their students and to exercise the same degree of care toward its students as would a reasonably prudent parent (see, Mirand v. City of New York, 84 NY2d 44, 49 [1994]; Brandy B. v. Eden Cent. School Dist., 15 NY3d 297 [2010]; Rodriguez v. Riverhead Cent. School Dist., 85 AD3d 1147 [2nd Dept., 2011]). A school, however, is not an insurer of its students' safety and will be held liable only for foreseeable injuries proximately related to the absence of adequate supervision (see, Mirand v. City of New York, 84 NY2d 44 [1994]; Rodriguez v Riverhead Cent. School Dist., 85 AD3d 1147 [2nd Dept., 2011]). In this regard, it is well settled that schools cannot reasonably be expected to continuously supervise and control all of the students' movements and activities (see, Keaveny v. Mahopac Cent. School Dist., 71 AD3d 955 [2nd Dept., 2010]; see also, Tanenbaum v. Minnesauke Elementary School, 73 AD3d 743 [2nd Dept., 2010]). Moreover, a school district's alleged lapse in supervision is not a proximate cause of an accident where the accident occurs in so short a span of time that even the most intense supervision could not have prevented it (see, Tanenbaum v. Minnesauke Elementary School, 73 AD3d 743 [2nd Dept., 2010]).

The evidence submitted here demonstrates that the defendants properly supervised the infant plaintiff and, in any event, that any lack of supervision was not a proximate cause of the infant plaintiff's injuries (see, O'Brien v. Sayville Union Free School Dist., 87 AD3d 569 [2nd Dept., 2011]; Schleef v. Riverhead Cent. School Dist., 80 AD3d 743 [2nd Dept., 2011]; Tanenbaum v Minnesauke Elementary School, 73 AD3d 743 [2nd Dept., 2010]). In this regard, the evidence shows that the defendants exercised reasonable care and judgment in their supervision and control of the infant plaintiff and were not negligent in displaying the movie to the class. The evidence further

demonstrates that the infant plaintiff's purported response to the movie and his subsequent injuries were not a foreseeable consequence of the defendants' conduct in displaying the movie (see, generally, Brandy B. v. Eden Cent. School Dist., 15 NY3d 297 [2010]). Indeed, it is undisputed that the defendants did not have any knowledge or notice of a likelihood of injury to the infant plaintiff related to his viewing of the subject movie (cf., Harris v. Debbie's Creative Child Care, Inc., 87 AD3d 615 [2nd Dept., 2011]; Gomez v. Floral Park-Bellrose Union Free School Dist., 83 AD3d 778 [2nd Dept., 2011]). Further, to the extent that the plaintiffs allege that the defendants are liable for a failure to warn the infant plaintiff of the contents of the movie, such contention is lacking in merit. There is no duty to warn against a condition which is readily observable, or an extraordinary occurrence, which would not suggest itself to a reasonably careful and prudent person as one which should be guarded against (see, Harris v. Debbie's Creative Child Care, Inc., 87 AD3d 615 [2nd Dept., 2011]). Likewise, there is no duty to warn an individual about a condition of which he or she is actually aware (see, Johnson v. Cantie, 74 AD3d 1724 [4th Dept., 2010]; Atanasoff v. Elmont Union Free Sch. Dist., 18 AD3d 678 [2nd Dept., 2005]).

In opposition to the defendants' *prima facie* showing of entitlement to summary judgment, the plaintiffs failed to submit evidence to raise a triable issue of fact (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]). Accordingly, it is

ORDERED that the motion by the defendants for summary judgment dismissing the complaint is granted.

Dated: 1/11/2012

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

__X__ FINAL DISPOSITION_____ NON-FINAL DISPOSITION