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Short Form Order

ORIGINAL

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

Vincent Falzone,

Plaintiff,

- against -

The City of New York, New York City Department of Education and New York City Board of Education,

Defendants.

Index Number: 34445/09

Motion Date: 11/27/13

Motion Cal. Number: 19

Motion Seq. No.: 5

2013 DEC 16 AM 11:56

QUEENS COUNTY CLERK FILED

The following papers numbered 1 to 10 read on this motion by defendants for leave to amend their answer, deeming the answer served *nunc pro tunc,* and for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply-Exhibits.....	8-10

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by defendants for leave to amend their answer to assert the defense of waiver is granted. That branch of the motion by defendants for summary judgment dismissing the complaint against them is also granted.

Plaintiff sustained lacerations to his hand while playing basketball in the gym at P.S. 101 in Queens County on June 17, 2009. He testified in his 50-h hearing, "It was during the game, I went to block a shot and I, when I was running, I tried to stop myself before I hit the wall and there was a door there with a glass window and my hand went right through the window." He also testified that the door was approximately 10 feet behind the basket. The photographs annexed to the moving papers show a double set of exit doors with narrow glass panels directly behind the basket. Plaintiff also testified that he was playing basketball at

P.S. 101 as part of a league of which he was a member. He paid $100-$150 to the league to join the league. When he joined, he signed a waiver before he played in the league.

The evidence on this record is that the league, called Cobblestones, was issued a permit by the DOE to use the P.S. 101 gym to play league basketball for a fee of $1,224. Also annexed to the moving papers is a copy of a Waiver, Release of Liability and Indemnification Agreement issued by Cobblestones and signed by plaintiff on June 17, 2009 in which plaintiff agreed that, in consideration of being allowed to play in the league, he releases, discharges and agrees not to sue the league or P.S. 101 for any injuries that may be sustained in playing basketball there on June 17, 2009.

Pursuant to CPLR 3025(b), leave to amend the pleadings "shall be freely given..." In the absence of a showing of prejudice, leave to amend the answer to assert the affirmative defense of the signing of a waiver of liability against a municipal entity to play in league competition should be granted (see Stuhlweissenburg v Town of Orangetown, 223 AD 2d 633 [2nd Dept 1996]; see generally Lanpont v. Savvas Cab Corp., Inc., 244 AD 2d 208 [1st Dept 1997]). Plaintiff has failed to demonstrate that the amendment would result in prejudice. Indeed, since plaintiff was aware that he signed a waiver, he could not claim prejudice or surprise (see e.g. Caceras v. Zorbas, 74 NY 2d 884 [1989]).

Accordingly, defendants are given leave to amend their answer to plead waiver as an affirmative defense. The proposed amended answer annexed to the moving papers is deemed served and filed, nunc pro tunc.

With respect to the action against the City, P.S. 101 is a public school under the New York City Department of Education. The Department of Education of the City of New York (formerly known as the Board of Education) is a separate and distinct legal entity from the City of New York (see NY Education Law §2551; Campbell v. City of New York, 203 AD 2d 504 [2nd Dept 1994]).

Pursuant to §521 of the New York City Charter, although title to public school property is vested in the City, it is under the care and control of the Board of Education for purposes of education, recreation and other public uses. Since the City does not operate, maintain or control the subject public school, it is entitled to summary judgment (see Miner v City of New York, 78 AD 3d 669 [2nd Dept 2010]; Leacock v City of New York, 61 AD 3d 827 [2nd dept 2009]; Cruz v. City of New York, 288 AD 2d 250 [2nd Dept 2001]). Suits involving public school property may only be brought

against the Department of Education (Board of Education). New York City Charter §521(b) provides, "Suits in relation to such property shall be brought in the name of the board of education." Moreover, although the 2002 amendments to the Education Law granted the Mayor greater control over public schools and limited the power of the Department of Education (L 2002, ch 91), such amendments did not alter the fact that the City and the Department of Education are separate legal entities and did not serve to abrogate the rule that tort actions involving public schools may not be brought against the City (see Perez v. City of New York, 41 AD 3d 378 [1st Dept 2007]). Therefore, the City is entitled to summary judgment as a matter of law.

Plaintiff's counsel's argument in opposition that the City failed to show evidence that, as an out of possession landlord, it did not retain the right of re-entry to perform repairs or that the defect in question was not a structural defect over which it, as the property owner, would remain liable, is without merit, and the cases cited by him for such proposition are inapposite in that they do not involve public schools but merely landlord-tenant scenarios. As heretofore stated, suits involving public school property may only be brought against the DOE and not the City. Therefore, the City is entitled to summary judgment as a matter of law.

The DOE is also entitled to summary judgment in that it is undisputed that plaintiff signed a waiver, releasing P.S. 101 (and, therefore, the DOE which controls and operates the school and which is the only party that can be sued in relation to school property) from any liability for any injuries that he might sustain in playing league basketball at the school. Contrary to plaintiff's counsel's argument, the waiver agreement was not void pursuant to General Obligations Law §5-326, since that provision only voids purported waivers of liability sought to be enforced by facilities against a plaintiff as "the user of such facilities" who pays a fee "for the use of" the facility pursuant to an agreement between the "owner or operator" of the facility and the "user of such facilities". Where the plaintiff does not pay the facility directly (in this case, the DOE which runs P.S. 101) a fee for the privilege of being allowed to use the facility, General Obligations Law §5-326 is inapplicable (see Brookner v New York Roadrunners Club, Inc., 51 AD 3d 841 [2nd Dept 2008]; Stuhlweissenburg v Town of Orangetown, supra).

Plaintiff's counsel argues that the payment by Cobblestones of $1,224 to the DOE to use P.S. 101, when coupled with plaintiff's payment of a membership fee to Cobblestones, is sufficient to allow plaintiff to invoke the protection of GOL §5-326 against the DOE and serves to distinguish the facts of this case from those in

Stuhlweissenburg wherein although the plaintiff's softball league paid a fee to the town for the use of its softball field, there was no evidence that the plaintiff paid a fee, in counsel's words, "to the league or the Town of Orangetown".

The flaws in counsel's argument are these: The Appellate Division, Second Department, held that notwithstanding the payment of a fee to the town by the plaintiff's softball league, GOL §5-326 applies to void the plaintiff's release of liability agreement only if said individual paid a fee for the use of the facility. Therefore, it is irrelevant whether plaintiff paid a fee for membership in a league; what is relevant is whether he paid a fee for the use of the facility. Here, there was no contract between plaintiff and the DOE whereby plaintiff paid the DOE to allow him to use the P.S. 101 gym. There was only a contract between him and Cobblestones for membership in that league. The $100-$150 paid by him to Cobblestones was a fee for membership in that private basketball league. It was not a payment for the use by him of the P.S. 101 gym. Plaintiff's counsel's contention that the holding in Stuhlweissenburg hinged upon the absence of evidence that the plaintiff paid a fee not only to the town but "to the league" is an attempt to redraft the opinion of the Appellate Division, Second Department.

Moreover, counsel's attempt to daisy-chain plaintiff's payment to Cobblestones of a membership fee onto Cobblestone's payment of a fee to the DOE for Cobblestones' use of the P.S. 101 gym as a way of reaching GOL §5-326 is unwarranted, contrary to the rationale expressed by the Appellate Division, Second Department, and is unsupported by any controlling authority. Contrary to counsel's argument that an interpretation of the statute as requiring payment of the fee by the individual directly to the owner or operator of the facility would be "unduly restrictive", such requirement derives from the plain language of the statute and is the unequivocal interpretation of controlling case law.

For example, the plaintiff in Brookner v New York Roadrunners Club, Inc. (supra) sued the New York Road Runners Club (NYRRC), the sponsor of the NYC marathon, and the City for negligence for injuries sustained by him during his participation in the 2004 marathon, and sought to invalidate the release he signed, pursuant to GOL §5-326. In affirming the trial court's dismissal of the complaint against the City and the NYRRC, the Appellate Division, Second Department, held, inter ano, "Contrary to the plaintiff's contentions, General Obligations Law §5-326 does not invalidate the release, since the entry fee the plaintiff paid to the NYRRC was for his participation in the marathon, and was not an admission fee allowing him to use the City-owned public roadway over which the

marathon was run (*see, Stuhlweissenburg v Town of Orangetown*, 223 AD 2d 633, 634 [1996])."

The import of this opinion is twofold:

First, a fee paid for admission to run in the marathon is wholly distinct from a fee paid for the use the roadway to run in the event, just as a fee paid for membership to play league basketball is distinct from a fee paid for permission to use a specific basketball court. Although the Brookner plaintiff paid the NYC marathon sponsor, the NYRRC, a fee to run in the race, he did not pay specifically for the use of the roadway itself, notwithstanding that his admission to run in the marathon consequently resulted in his being given access by the event organizer to the roadway to run in the event. Therefore, in order for the statute to apply, the direct purpose of the payment made by the plaintiff must be for the use of a facility per se, and not for admission to participate in an event which would consequently entail engaging in that activity at the facility chosen by the organizer.

Thus, although plaintiff paid Cobblestones a membership fee to play in that league's basketball games, he did not personally pay specifically for the use of the gym at P.S. 101, notwithstanding that the result of his admission to the league was his playing in the league's game at the gym. It was not the DOE that gave him access to the gym, but Cobblestones. The payment by Cobblestones to the DOE for the use of the gym, and Cobblestones' admittance of plaintiff to play in its league game in the gym does not, upon some relation-back theory, translate to a granting of permission by the DOE to plaintiff to use its facility, and his payment of a membership fee to Cobblestones does not translate into a licensing fee whereby the DOE gave him permission to use its facility.

Second, it follows from the above that in order to invoke the protection of the statute, the Brookner plaintiff would have had to pay a fee directly to the owner of the roadway, the City, for his use of the roadway, just as plaintiff in our case would have had to pay the DOE directly for the use of its facility at P.S. 101. It is quite obvious, and hardly bears mention, that a license to use a roadway cannot be issued by a private third party but can only be issued by the owner of the roadway, the City, just as a license to use a public school facility cannot be issued by a private club but only by the entity that controls that facility, the DOE. Thus, the fact that plaintiff paid a fee for membership in Cobblestones whereby he was afforded a position in the league to play a game organized by Cobblestones at the school does not equate to the payment of a fee to the school for the use of its facility

for purposes of GOL §5-326.

Inasmuch as the Appellate Division, Third Department, in Williams v City of Albany (271 AD 2d 855 [3rd Dept 2000]), cited by plaintiff, is of a contrary opinion, wherein the Third Department expressly declined to follow Stuhlweissenburg, this Court is constrained by stare decisis to follow the precedent set by the Second Department and, therefore, may not follow Williams (see Mountain View Coach Lines, Inc. v. Storms (102 AD 2d 663 [2nd Dept 1984]).

The bottom line is that just as the Stuhlweissenburg plaintiff was not entitled to invoke the protection of GOL §5-326 to invalidate her waiver of liability against the town because there was no evidence that she paid a fee to use the town's softball field but only that her league paid a fee to the town for the use of the field, and just as the Brookner plaintiff could not likewise invoke the statute because he only paid an entry fee to the NYRRC to participate in the NYC marathon and not a fee for his use of the roadway, so too plaintiff, in our case, is not entitled to the protection of the statute against the DOE, since he did not pay a licensing fee to the DOE to use the P.S. 101 gym but only paid a membership fee to Cobblestones for membership in the league to play league basketball.

Finally, plaintiff's counsel's argument that the language of the waiver was insufficient to constitute a release of liability against the DOE is without merit. Although the waiver does not contain language specifically barring suits for personal injuries, it clearly conveys the same understanding, and any claim to the contrary is disingenuous. Indeed, there is no testimony by plaintiff that he did not understand the waiver which he admittedly signed as barring him from suing the school for personal injuries.

Accordingly, the action is dismissed in its entirety.

Dated: December 5, 2013

KEVIN J. KERRIGAN, J.S.C.