Short Form Order

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

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

----------X

CHRISTOPHER BRAUN, infant by his father and natural guardian EDWARD BRAUN, and EDWARD BRAUN, individually,

Plaintiffs,

-against-

LONGWOOD JUNIOR HIGH SCHOOL, LONGWOOD CENTRAL SCHOOL DISTRICT, LONGWOOD BOARD OF EDUCATION, AMBOY BUS CO., INC., ATLANTIC EXPRESS TRANSPORTATION CORP., THE BUS DRIVER KNOWN AS "LAURA" (last name unknown),

Defendants.

----------X

INDEX NO.: 240/07
CALENDAR NO.: 201201374OT
MOTION DATE: 12/13/12
MOTION NO.: 002 CASEDISP

PLAINTIFFS' ATTORNEY:
SOUREN A. ISRAELYAN, ESQ.
39 Broadway, Suite 950
New York, New York 10006

DEFENDANTS' ATTORNEY:
SILVERMAN SCHLAR SHIN
& BRYNE, PLLC
381 Park Avenue South, 16th Floor
New York, New York 10016

Upon the following papers numbered 1 to 30 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-12 ; ~~Notice of Cross Motion and supporting papers~~ ___ ; Answering Affidavits and supporting papers 13-28 ; Replying Affidavits and supporting papers 29-30 ; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (motion sequence no. 002) of defendants Longwood Junior High School, Longwood Central School District, Longwood Board of Education, Amboy Bus Co., Inc., Atlantic Express Transportation Corp., and Laura Ducz (s/h/a "The Bus Driver known as Laura [last name unknown]) for an order pursuant to CPLR R. 3212 granting summary judgment dismissing the complaint is granted.

This is an action to recover damages, personally and derivatively, from the defendants for injuries allegedly sustained by the plaintiff Christopher Braun, then an eighth-grade student at Longwood Junior High School, as a result of being struck in the face by another student while a passenger on a school bus owned by Amboy Bus Co., Inc. ("Amboy"), a subsidiary of Atlantic Express Transportation Corp. Bus transportation was provided pursuant to a contract between the Longwood Central School District (referred to hereinafter, along with the School Board and the Longwood Junior High School, as the "Longwood defendants"). The complaint alleges that defendants were negligent in, among other things, the ownership, operation, supervision, maintenance and control of the bus and its employees and in failing to properly supervise the students on the bus in their custody and care.

Defendants now move for summary judgment dismissing the complaint against them on the grounds that they did not negligently supervise the infant plaintiff or other students; that there was no prior conduct on the part of the student involved that would have put them on notice of any danger to other students; and that there is nothing they did or did not do that proximately

caused the infant plaintiff to suffer injury. In support of the motion defendants submit, *inter alia,* their attorney's affirmation, the pleadings, the verified bill of particulars, and transcripts of the depositions of plaintiff Christopher Braun and defendant Laura Ducz. In opposition, the plaintiffs have submitted, *inter alia*, their attorney's affirmation, the pleadings, the verified bill of particulars, transcripts of the depositions of the plaintiffs and defendant Laura Ducz, and a copy of the plaintiffs' notice to admit and the defendants' response thereto.

Plaintiff Christopher Braun testified at his deposition that on the date of the incident he was on the bus going home from school. The bus driver's first name was Laura; he did not know her last name. Plaintiff testified that the behavior of the students on the bus was generally loud and rowdy, and that five of his friends who were seated on the bus behind him were having a "paper fight," throwing balls of paper at one another. At some point a piece of paper hit a student named Anthony Bullock ("Anthony"), who was seated two seats in front of plaintiff. Plaintiff testified that he did not know Anthony and had never spoken to him. He testified that Anthony got up from his seat and walked back toward plaintiff and his friends and started to curse and shout, trying to figure out who had hit him with the paper. He demanded several times to know who threw the paper at him, but no one answered him. Plaintiff testified that Anthony then turned to plaintiff and said "if you throw this paper at me again see what happens." Anthony then threw the paper at plaintiff which hit him on the head and landed on his shoulder. Plaintiff testified that he "flicked" the paper off his shoulder and it struck Anthony, who then punched plaintiff in the face several times and then returned to his seat. Plaintiff testified that after the attack his nose was bleeding heavily and the bus driver pulled over and stopped the bus. She called him up to the front of the bus and handed him paper towels to stop the bleeding. He testified that the driver "radioed into base" to see what she should do, then made one more stop before dropping him off at his regular stop. Plaintiff went to a friend's house where his mother picked him up and then took him to the hospital. Plaintiff testified that he was suspended from school for three weeks after the incident, as the principal thought that he had been involved in the paper fight.

The bus driver, defendant Laura Ducz (Ms. Ducz), testified at her deposition that she was employed as a bus driver by defendant Amboy for approximately six years. On the day of the incident, she was driving the bus that took plaintiff Christopher Braun to and from Longwood Middle School. Ms. Ducz testified that she had a mirror to enable her to look back into the bus, but her vision was limited because of the height of the seats. She testified that she could only look back into the bus every few seconds because she had to keep her eyes on the road. Ms. Ducz testified that she did not see the attack on plaintiff, which she testified must have been "momentary." She testified that she previously may have seen something being thrown toward the rear of the bus, which may have been paper, but she wasn't sure. Ms. Ducz testified that she first became aware that something was wrong when she looked back and saw that plaintiff was standing in the aisle and that his face was bleeding. She pulled the bus over, had plaintiff sit in the front seat and gave him paper towels or tissues to hold against his nose to stop the bleeding. She radioed a report in to her company immediately and was told to proceed with her run and that they had secured someone to be at his stop when he got off. Plaintiff testified that she believed she dropped him off at his house, and that his older brother met him when he got off the bus. She filed an incident report. She testified that she spoke with both plaintiff and Anthony about what happened, and Anthony admitted punching plaintiff in the face, claiming that plaintiff had thrown paper at him. Ms. Ducz testified that she asked the other students on the bus if they saw anything

and they said they did not. She testified that everyone in the bus, including plaintiff, denied throwing papers. She said that there was nothing she could have done to prevent the assault.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (*Mirand v City of New York*, 84 NY2d 44, 614 NYS2d 372 [1994]; *Brandy v Eden Central School District*, 15 NY3d 297, 907 NYS2d 735 [2010]). This duty stems from the fact of physical custody over them (*Pratt v Robinson*, 39 NY2d 554, 560, 384 NYS2d 749 [1976]). The duty owed derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians (*Mirand v City of New York*, *supra*). "In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party act could reasonably been anticipated" (*Mirand v City of New York*, *supra*, at p. 49 of 84 NY2d; see, also, *Buchholz v Patchogue-Medford School District*, 88 AD3d 843, 931 NYS2d 113 [2d Dept 2011]). Even if the school breached its duty of supervision, the inquiry is not ended in an action arising out of student injuries caused by the acts of fellow students. The question arises whether the school's negligence was the proximate cause of the injury sustained. The test to be applied is whether, under all circumstances, the chain of events that followed the negligent act or omission was the normal or foreseeable consequence of the situation created by the school's negligence (*Mirand v City of New York*, *supra*, 84 NY2d at 50).

A school's common-law duty to adequately supervise its students does not generally extend beyond the school premises (*Stephenson v City of New York*, 19 NY3d 1031, 954 NYS2d 782 [2012]). Where a school district has engaged an independent contractor to provide bus transportation, the school district cannot be held liable based on physical custody once the children board the contractor's bus (*Chainani v Board of Education of the City of New York*, 87 NY2d 370, 639 NYS2d 971 [1995]; *Ferraro v North Babylon Free School District*, 69 AD3d 559, 892 NYS2d 507 [2d Dept 2010]; see, also, *Banks v New York City Department of Education*, 70 AD3d 988, 895 NYS2d 512 [2d Dept 2010] [holding that school district did not owe a duty of care to an eighth-grade student who was injured by a firecracker thrown by a fellow student while riding a city bus during a school trip, where student was not on school property or under school's physical control at the time of the accident; the school's duty to adequately supervise the student ended once the student was safely aboard the city bus]).

Where an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not the proximate cause of the injury and summary judgment in favor of the defendant school is warranted (*Tanenbaum v Minnesauke Elementary School*, 73 AD3d 743, 901 NYS2d 102 [2d Dept 2010]; *Link v Quogue Union Free School District*, 38 AD3d 719, 832 NYS2d 623 [2d Dept 2007]; *Eberwein v Newburgh Enlarged City School Dist.*, 31 AD3d 492, 818 NYS2d 255 [2d Dept 2006]; *Convey v Rye School Dist.*, 271 AD2d 154, 710 NYS2d 641 [2d Dept 2000]). An injury caused by the impulsive, unanticipated act of a fellow student will not give rise to a finding of negligence on behalf of a school absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury causing act (*Rosborough v Pine Plains Central School District*, 97 AD3d 648, 948 NYS2d 372 [2d Dept 2012]; *Buchholz v Patchogue-Medford School District*, *supra*; *Velez v Freeport Union Free School District*, 292 AD2d 595, 740 NYS2d 364 [2d Dept 2002]).

The Longwood defendants argue, in addition to alleging that they had no prior notice of any propensity to violence on the part of Anthony Bullock, that it is well settled law that once a student is away from school grounds and out of the custody and control of school authorities, no duty is owed by the school to the student and, therefore, they cannot be held liable for the injuries suffered by the infant plaintiff. As noted above, a school's common-law duty to adequately supervise its students does not generally extend beyond the school premises (*Stephenson v City of New York*, *supra).* The plaintiffs and the defendants both cited two cases which constitute exceptions to this general rule: *Bell v Board of Education of the City Of New York,* 90 NY2d 944, 665 NYS2d 42 [1997] and *Ernest v Red Creek Central School District,* 93 NY2d 664, 695 NYS2d 531 [1999]. In *Bell* a sixth-grade student suffered injuries when she was raped after she left the park where a class field trip was held and found that her class had left when she returned. The Court of Appeals held that the evidence supported the determination that the rape was the foreseeable result of the danger created by the school's failure to adequately supervise the student. In ***Ernest,*** the infant plaintiff was struck by a truck as he crossed a highway adjacent to his elementary school. The highway had no sidewalk, forcing students to walk along and cross the street from the highway's shoulder. The Court of Appeals held that the school district had a continuing duty to supervise the child if it released the child without further supervision into a forseeably hazardous setting. These cases are easily distinguishable from the matter before the Court. The students in those cases were injured as a result of their being left without supervision, which resulted in injury. Here the Longwood defendants' duty to adequately supervise the infant plaintiff ended when he was turned over to the custody of the school bus driver (*see Banks v New York City Department of Education*, *supra).* Thus, the Longwood defendants are entitled to summary judgment herein.

With respect to the bus company defendants, Amboy Bus Company, Inc., Atlantic Express Transportation Corp. and Laura Ducz, the submissions reflect that such defendants had no knowledge or notice of any prior dangerous conduct by the student who caused the injuries to plaintiff, wherein the assault herein could have reasonably been anticipated or prevented (*see Janukajtis v Fallon,* 284 AD2d 428, 726 NYS2d 451 [2d Dept 2001]). In this action, the school bus driver had not experienced any disciplinary problems with the student who assaulted the plaintiff since the beginning of the school year, and was not aware of the assault until after it occurred. Thus, the defendants Amboy Bus Company, Inc., Atlantic Express Transportation Corp. and Laura Ducz did not have the opportunity to intervene on the infant plaintiff's behalf to prevent injury or to stop dangerous conduct (*see DeMunda v Niagara Wheatfield Board of*

Education, 213 AD2d 975, 625 NYS2d 764 [4th Dept 1995]; *compare, Blair v Board of Education of Sherburne Earlville Central School*, 86 AD2d 933, 449 NYS2d 566 [3d Dept 1982]). Here, these defendants have established entitlement to judgment as a matter of law by submitting evidence that they did not have actual or constructive notice of any dangerous conduct by the student who attacked the plaintiff Christopher Braun, and that the incident occurred in so short a period of time that any alleged lack of supervision was not the proximate cause of the infant plaintiff's injuries.

In opposition, the plaintiffs failed to raise a triable issue of fact. Although the plaintiffs assert that the students were "loud and rowdy" and had thrown paper around the bus, this does not establish proximate cause between any alleged negligence by the defendants and the manner in which the infant plaintiff was injured. There was no testimony to establish facts giving rise to actual or constructive notice to these defendants of the sudden, unanticipated attack by a fellow student. The plaintiffs have raised no factual issues concerning whether the defendant bus driver could have prevented the incident or could have intervened in order to prevent injury to the infant plaintiff (see *Corona v Suffolk Transportation Service, Inc.*, 29 AD3d 726, 815 NYS2d 254 [2d Dept 2006]). Thus, defendants Amboy Bus Company, Inc., Atlantic Express Transportation Corp. and Laura Ducz are entitled to summary judgment dismissing the complaint against them.

In light of the foregoing, defendants' motion for summary judgment dismissing the complaint is granted.

Dated: March 19, 2013

PAUL J. BAISLEY. JR.

J.S.C.