Diaz-Herrera v City of New York
2014 NY Slip Op 33445(U)
December 3, 2014
Supreme Court, Bronx County
Docket Number: 3500558/09
Judge: Mitchell J. Danziger
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]
FILED Dec 12 2014 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

CHRISTIAN DIAZ-HERRERA, AN INFANT BY HIS FATHER AND NATURAL GUARDIAN, CHRISTIAN DIAZ,

Plaintiff(s),

- against -

THE CITY OF NEW YORK AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendant(s).

DECISION AND ORDER

Index No: 3500558/09

In this action for negligent supervision of a student within a public school - such negligent supervision resulting in an alleged injury - defendants move for an order granting them summary judgment as to plaintiffs' claims of negligent supervision. Defendants aver that insofar as plaintiff CHRISTIAN DIAZ-HERRERA's (Diaz-Herrera) injuries were caused by the sudden and spontaneous act of another student, defendants bear no liability as a matter of law. Alternatively, defendants seek an order pursuant to CPLR § 3211(a)(7) dismissing this action against defendant THE CITY OF NEW *YORK* (The City) on grounds that because the complaint evinces that the accident alleged occurred within a school, as a matter of law, this action can only be maintained against defendant THE BOARD OF EDUCATION OF THE CITY OF NEW YORK (the Board), rather than City, a separate and distinct legal entity, not responsible for public schools. Thus, defendants argue that as against the City, the

FILED Dec 12 2014 Bronx County Clerk

complaint fails to state a cause of action. Plaintiffs oppose the portion of defendants' motion seeking summary judgment preliminarily averring that insofar as this motion was served upon them more than 120 days after they filed their Note of Issue, the instant motion is untimely and no good cause exists warranting consideration of defendants' belated motion. Moreover, plaintiffs aver that inasmuch as Diaz-Herrera's accident was precipitated and preceded by an altercation between him and the student which caused his accident, the accident herein was foreseeable and extant questions of fact as to whether this accident was spontaneous and whether defendants provided adequate supervision preclude summary judgment. Plaintiffs do not oppose the portion of defendants' motion seeking dismissal of this action against the City.

For the reasons that follow hereinafter, defendants' motion is hereby granted, in part.

The instant action is for alleged personal injuries premised on the negligent supervision of a student within a school playground. The complaint alleges that on February 9, 2009, Diaz-Herrera, while a student within PS 89 - a school owned, maintained, and operated by the defendants - was pushed and kicked off the Monkey Bars located on school grounds by another student. Plaintiffs allege that defendants were negligent in failing to adequately supervise the students, such negligence causing the

FILED Dec 12 2014 Bronx County Clerk

accident and the injuries resulting therefrom. Plaintiff CHRISTIAN DIAZ (Diaz), Diaz-Herrera's father, asserts a derivative loss of services claim.

Preliminarily, the Court holds that defendants establish good cause for the delay in making this motion within the time prescribed by the CPLR insofar as the record establishes that attempts to serve this motion upon plaintiffs within the 120 days following plaintiffs' filing of their Note if Issue were fruitless solely because plaintiff's counsel failed to apprise defendants that he had moved his office to a new location.

CPLR §3212(a) prescribes the time within which summary judgement motions may be made and states that

> the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

Absent a showing of "good cause" for the delay in timely filing a motion for summary judgment, a court cannot consider such a motion on the merits and must instead decline to hear the motion outright (*Brill v City of New York*, 2 NY3d 648, 652 [2004]; *Miceli v State Farm Mutual Automobile Insurance Company*, 3 NY3d 725, 727 [2004]; *Glasser v Ibramovitz*, 37 AD3d 194, 194 [1st Dept 2007]; *Rocky Point*

FILED Dec 12 2014 Bronx County Clerk

Drive-In, L.P. v Town of Brookhaven, 37 AD3d 805, 808 [2d Dept 2007]). Accordingly, whether a motion has merit, the cause of action is meritless, summary judgment is in the interest of judicial economy, or that the opponent will not be prejudiced by the court's consideration of the motion, the foregoing shall not, absent a showing of good cause, be sufficient grounds for the court to hear a belated motion for summary judgment (*Brill* at 653). This is because "statutory time frames - like court-ordered time frames - are not options, they are requirements, to be taken seriously" (*Miceli* at 727).

For purposes of CPLR § 3212, good cause means a good excuse for the delay in filing the motion, meaning a satisfactory explanation for the delay (*Brill* at 652). More specifically,

> [g]ood cause is written expression or explanation by the party or his legal representative evincing a viable, credible reason for the delay, which, when viewed objectively, warrants a departure or exception to the timeliness requirement

(*Bruno Surace v Diane Lostrappo*, 176 Misc2d 408, 410 [Supreme Court Nassau County 1998]). Ultimately, what constitutes good cause has less to do with the merits of the actual motion and more to do with reason for the untimeliness (*Luciano v Apple Maintenance & Services, Inc.*, 289 AD2d 90, 91 [1st Dept 2001]), and, thus, provided that good cause is shown, a court is always within its

FILED Dec 12 2014 Bronx County Clerk

discretion to hear a motion for summary judgment regardless of the delay in making the same (*id.*).

It is well settled that law office failure, or ignorance, does not constitute good cause warranting consideration of a belated motion for summary judgment (*Giudice v Green 292 Madison*, LLC, 50 AD3d 506, 506 [1st Dept 2008] ["Nor are we persuaded by USADATA's argument, raised for the first time on appeal, that good cause existed by reason of the ambiguity created by the court's preliminary compliance order and compliance conference orders. USADATA's failure to appreciate that its motion was due within 45 days after the filing of the note of issue is no more satisfactory than a perfunctory claim of law office failure" (internal quotation marks omitted).]; *Azcona v Salem*, 49 AD3d 343, 343 [1st Dept 2008] [Defendant's motion for summary judgment was denied as untimely because court held that defendant's failure to learn that new note of issue had been filed, which started the clock on the time within which to make such motion, constituted law office failure and was, thus, not tantamount to good cause.]; *Crawford v Liz Claiborne, Inc.*, 45 AD3d 284, 286 [1st Dept 2007] [Defendant's motion for summary judgment denied when made after the deadline set by the court. Court held that defendant's failure to be aware that the court had shortened the time to make motion was tantamount to law office failure, which does not constitute good cause], *revd on other grounds* 11 NY3d 810 [2008]; *Farkas v Farkas*, 40 AD3d 207, 211

FILED Dec 12 2014 Bronx County Clerk

[1st Dept 2007] [Court held that plaintiff's failure to abide by statutory time frame due to oversight was tantamount to law office failure, which does not amount to good cause], *revd on other grounds* 11 NY3d 300 [2008]; *Breiding v Giladi*, 15 AD3d 435, 435 [2d Dept 2005] [Court held that clerical inadvertence and reassignment of counsel were not tantamount to good cause so as to warrant consideration of a belated motion for summary judgment.]).

Here, while it is true - as evinced by their affidavit of service - that defendants did not properly serve plaintiffs' counsel with the instant motion until July 1, 2014 almost seven months after January 30, 2014, the date when plaintiffs filed their Note of Issue, the very same affidavit evinces that defendants attempted to serve plaintiffs' counsel with the instant motion on May 30, 2014, within the 120 days after the Note of Issue was filed. However, as evinced by the defendants affidavit of service and the envelope within which the instant motion was mailed, the motion was returned as undeliverable to the very address listed within plaintiffs' Notice of Claim and summons and complaint. Ultimately, defendants learned of plaintiff's counsel current address and on July 1, 2014, served him with the instant motion.

Because, as per CPLR §2211 "[a] motion on notice is made when a notice of the motion or an order to show cause is served" (*Ageel v Tony Casale, Inc.*, 44 AD3d 572, 572 [1st Dept 2007]; *Gazes v Bennett*, 38 AD3d 287, 288 [1st Dept 2007]), there is no question

that this motion was made when it was properly served upon plaintiffs in July, well beyond the 120 days within which to timely make it. However, since defendants were never properly apprised that plaintiffs' counsel had relocated, they mistakenly served him at the address they had on file and once apprised of his new address promptly and properly served him there. Thus, defendants establish good cause for making this belated motion and the Court will decide the same on the merits. Notably, the mistake here cannot be deemed inexcusable law office failure because although plaintiffs' counsel new address was listed within the Note of Issue he filed in January, he nevertheless failed to formally and officially apprise defendants that he had moved his office. Thus, defendants were entitled to assume and rely on the address initially provided to them as early as April 20, 2009, which was listed within the Notice of Claim filed by plaintiffs.

On the merits, however, defendants' motion for summary judgment must be denied insofar as plaintiffs' evidence raises an issue of fact as to whether the accident was spontaneous and whether defendants properly supervised Diaz-Herrera so as to prevent his accident and the resulting injuries.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of

law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). Once movant meets the initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

It is well settled that "[s]chools 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, 49 [1994]; *Doe v Rohan*, 17 AD3d 509, 511 [2d Dept 2005]; *Doe v Orange-Ulster Bd. of Coop. Educ. Servs.*, 4 AD3d 387, 388 [2004]). 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* at 49; *Pratt v Robinson*, 39 NY2d 554, 560 [1976] ["The duty owed by a school to its students, however, stems from the fact of its

FILED Dec 12 2014 Bronx County Clerk

physical custody over them. As the Restatement puts it, by taking custody of the child, the school has deprived the child of the protection of his parents or guardian. Therefore, the actor who takes custody of a child is properly required to give him the protection which the custody or the manner in which it is taken has deprived him. The school's duty is thus coextensive with and concomitant to its physical custody of and control over the child. When that custody ceases because the child has passed out of the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child's protection, the school's custodial duty also ceases." (internal citation and quotation marks omitted)]).

However, schools are not insurers of safety and cannot reasonably be expected to continuously supervise and control all movements and activities of the students in their charge (*Mirand* at 49; *Doe*, 4 AD3d at 388). Thus, the standard of care a school owes to its students - as it relates to supervision - is the supervision and protection which "a parent of ordinary prudence would observe in comparable circumstances" (*Doe*, 17 AD3d at 511; *Doe*, 4 AD3d at 388; *David v County of Suffolk*, 1 NY3d 525, 526 [2003]; *Mirand* at 49). Hence, schools are under a duty to adequately supervise their students and are liable for foreseeable injuries which are proximately caused by the absence of such supervision (*Garcia v City of New York*, 222 AD2d 192, 194 [1st Dept 1996]). Stated

differently, the duty to provide adequate supervision has been breached when "school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated" (*Mirand* at 49; *Brandy B. v. Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010]; *Conklin v Saugerties Cent. School Dist.*, 106 AD3d 1424, 1425 [3d Dept 2013]). Accordingly, the *sine qua non* to liability in any case alleging inadequate supervision is actual or constructive notice to the school of prior similar conduct (*Mirand* at 49). This of course, makes perfect sense insofar is it is beyond cavil that school personnel cannot reasonably be expected to guard against conduct, the likes of which, they were unaware and, therefore, likely to recur (*id.*). Once on notice of prior dangerous conduct, a school is liable if it fails to provide the requisite degree of supervision to reasonably prevent harm (*Garcia* at 196 ["In view of the foregoing, and by the use of plain common sense, we conclude that the school, acting in loco parentis, did not act with ordinary prudence in allowing the five-year-old plaintiff to proceed to the bathroom alone."]). Whether the steps taken by a school to protect a student from foreseeable harm are adequate is generally a question of fact for a jury (*Mirand* at 51; *Conklin* at 1426).

Because liability for a school's negligence to properly supervise students within its charge is premised on the

foreseeability of the injurious conduct alleged, it is well settled that a school cannot be liable for conduct which is so sudden and spontaneous that no amount of supervision could have prevented it (*Mirand v City of New York*, 84 NY2d 44, 49 [1994] ["Actual or constructive notice to the school of prior similar conduct is generally required because, obviously, school personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place among students daily; an injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act."]; *Ohman v Board of Educ. of City of N.Y.*, 300 NY 306, 310 [1949] [No liability for an event that could "occur equally as well in the presence of the teacher as during her absence."]; *Huertas v Our Lady of Refuge Parochial School*, 273 AD2d 79, 79 [1st Dept 2000] ["Moreover, the facts afford no reason to suppose that a higher level of supervision would have prevented plaintiff's injury. Indeed, the impulsive, careless act of the infant plaintiff's co-student in the course of ordinary recess play activities was not the sort of conduct foreseeably related to supervisory inadequacy that schools may be fairly charged with preventing."]; *Wilber v City of Binghamton*, 271 AD 402, 406 [3d Dept 1946]["There is nothing in the record to show that prior to the accident anything had occurred to

suggest that vigilance should have been taken to guard against the occurrence which took place."]). Accordingly, a teacher is generally not required to intervene in the absence of notice that students are engaged in the type of energetic play that could result in injury (*Gattyan v Scarsdale Union Free School Dist. No. 1*, 152 AD2d 650, 652 [2d Dept 1989]), and even when there is a clear violation of the duty to provide supervision, if the acts upon which the injury is premised are sudden, spontaneous, and, thus, unforeseeable, liability will not lie (*Mirand* at 50; *Siegell v Herricks Union Free School Dist.*, 7 AD3d 607, 608-609 [2d Dept 2004] ["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 School defendants is warranted."]; *Convey v City of Rye School Dist.*, 271 AD2d 154, 160 [2d Dept 2000] [same]; *Baker v Eastman Kodak Co.*, 34 AD2d 886, 886 [4th Dept 1970] ["The sudden and abrupt action of the unknown skater, which happened in a matter of seconds, could not have been anticipated or avoided by the most intensive supervision."], *affd* 28 NY2d 636 [1971]).

Here, defendants' evidence in support of their motion establishes prima facie entitlement to summary judgment insofar as it paints a version of the facts where Diaz-Herrera was the victim of the spontaneous unforeseen act by another student who suddenly

and without warning kicked him while he was on top of the Monkey Bars, knocking him to the ground. Specifically, defendants submit Diaz-Herrera's 50-h transcript wherein he testified that while in the schoolyard, in the presence of a teacher, Mrs. Maria, he was kicked by another boy while atop of the Monkey Bars. Defendants also submit Diaz' 50-h transcript, wherein he testified that on February 9, 2009, he received a call from PS 89, where his son, Diaz-Herrera, attended school informing him that Diaz-Herrera had been involved in an accident. He then learned that his son was injured when he was kicked and knocked off the Monkey Bars by another student. Diaz further testified that his son indicated that immediately prior to the accident, he had been pushed twice by the other student and that this same student then followed him to the Monkey Bars, kicking him while they were both thereon. Lastly, defendants submit the deposition testimony of Maria Ciacca (Ciacca), a school aid employed at PS 89 on the date of Diaz-Herrera's accident. Ciacca testified that she was in the playground with approximately three kindergarten classes on the date of the instant accident and with at least one other school aid. She further stated that she was first informed that plaintiff had been involved in an accident when he approached her and told her that he had fallen off the Monkey Bars located thereat. Ciacca did not see the accident and testified that if she had observed any rough play, pushing, or shoving amongst the students, she would

have intervened, telling them not to behave in that manner.

The foregoing evidence establishes that the instant accident was the kind of sudden and spontaneous accident for which a school cannot be held liable even if the school had been negligent in the level of supervision provided (*Mirand* at 50; *Siegell* at 608-609; *Convey* at 160; *Baker* at 886). While Diaz testified the accident herein was preceded by Diaz-Herrera being shoved by the same student who ultimately kicked him off the Monkey Bars, such testimony is inadmissible hearsay, which while certainly fatal if credited, presents no impediment to defendants' initial burden insofar as hearsay cannot be considered in support a motion for summary judgment (*Pichel v Dryden Mut. Ins. Co.*, 117 AD3d 1267, *273 [3d Dept 2014]; *Hernandez v Tepan*, 92 AD3d 721, 722 [2d Dept 2012]; *Wen Ying Ji v Rockrose Development Corp.*, 34 AD3d 253, 254 [1st Dept 2006]). Accordingly defendants establish prima facie entitlement to summary judgment.

Defendants' motion for summary judgment, however, must be denied insofar as plaintiffs' evidence in opposition raises a triable issue of fact as to whether this accident was spontaneous or whether it was in fact foreseeable and preventable. Saliently, plaintiff submits an affidavit from Diaz-Herrera wherein he states that immediately prior to being pushed kicked and knocked off the Monkey bars, the student who kicked him had just pushed him to the

ground as he stood in a group looking at Spiderman Cards. Thereafter, this same student followed Diaz-Herrera to the Monkey Bars, whereupon he proceeded to kick him from behind, knocking him to the ground. The foregoing controverts defendants evidence, which as discussed above, established that this accident was the kind which was so spontaneous in nature that no amount of supervision could have prevented it (*Huertas* at 79; *Wilber* at 406). On the contrary, crediting Diaz-Herrera's version of the events, the fact that he was shoved and knocked to the ground arguably should have led to intervention by Ciacca (*Gattyan* at 652 [In the absence of notice that students are engaged in the type of energetic play that could result in injury, a teacher is generally not required to intervene.]) Such intervention, a reasonable jury could conclude, would have prevented the instant accident. Accordingly, questions of fact as to the spontaneity of this accident and, thus, the adequacy of the supervision provided by defendants preclude summary judgment in their favor.

Contrary to defendants' assertion this case is inapposite to *De Los Santos v New York City Dept. of Educ.* (42 AD3d 422 [2d Dept 2007]), where the court granted defendant's motion for summary judgment on grounds that defendant established "that it was not on notice that the children were engaged in dangerous or inappropriate play so as to warrant closer supervision or intervention" (*id.* at 423). While in *De Los Santos*, plaintiff was injured while playing

a game, which was neither "dangerous" nor constituted "inappropriate play," thereby leading the court to hold that the degree of supervision was reasonable and adequate (*id.* at 423), here by Ciacca's own standard the event preceding the instant accident - the pushing of Diaz-Herrera to the ground by antoher student - was inappropriate and of the kind she would have stopped had she observed it. In fact, here, the events preceding the accident - the pushing and the following - as described by Diaz-Herrera - substantially diminish the spontaneity of the instant accident inasmuch as a jury could conclude that it was foreseeable that the pushing immediately preceding the accident would continue atop of the Monkey Bars. Stated differebntly, a jury could conclude that defendants "had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts [of the other student] could reasonably have been anticipated" (*Mirand* at 49). Defendants' motion for summary judgment must, therefore, be denied.

Defendants' motion seeking dismissal of this action against the City is hereby granted insofar as the complaint fails to state a cause of action because in cases alleging negligence within public schools the City is not a proper party.

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) all allegations in the complaint are deemed to be true (*Sokoloff v*

Harriman Estates Dev. Corp., 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). All reasonable inferences which can be drawn from the complaint and the allegations therein stated shall be resolved in favor of the plaintiff (*Cron* at 366. In opposition to such a motion a plaintiff may submit affidavits to remedy defects in the complaint (*id.*). If an affidavit is submitted for that purpose, it shall be given its most favorable intendment (*id.*) The court's role when analyzing the complaint in the context of a motion to dismiss, is to determine whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]). In fact, the law mandates that the court's inquiry be not limited solely to deciding whether plaintiff has pled the cause of action intended, but instead, the court must determine whether the plaintiff has pled any cognizable cause of action (*Leon v Martinez*, 84 NY2d 83, 88 [1994] ["(T)he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one."]).

CPLR § 3013, states that

> [s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

As such, a complaint must contain facts essential to give notice of a claim or defense (*DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 239 [2d Dept 1984]). Vague and conclusory allegations will not suffice (*id.*); *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113, 113 [1st Dept 2003]); *Shariff v Murray*, 33 AD3d 688 (2nd Dept. 2006); *Stoianoff v Gahona*, 248 AD2d 525, 526 [2d Dept 1998]). When the allegations in a complaint are vague or conclusory, dismissal for failure to state a cause of action is warranted (*Schuckman Realty, Inc. v Marine Midland Bank, N.A.*, 244 AD2d 400, 401 [2d Dept 1997]; *O'Riordan v Suffolk Chapter, Local No. 852, Civil Service Employees Association, Inc.*, 95 AD2d 800, 800 [2d Dept 1983]).

It is well settled that the City and the Board are separate legal entities (*Gold v City of New York*, 80 AD2d 138, 140 [1st Dept 1981]; *Perez v City of New York*, 41 AD3d 378, 379 [1st Dept 2007], *lv denied* 10 NY3d 708 [2008]; *Campbell v City of New York*, 203 AD2d 504, 505 [2d Dept 1994]), and, thus, in an action arising from injuries sustained on school grounds, the City is never a proper party (*Flores* at 506; *Corzino v City of New York*, 56 AD3d 370, 371 [2008]; *Bailey v City of New York*, 55 AD3d 426, 426 [1st Dept 2008]).

Here, taking the allegations in the complaint as true, it is nevertheless clear that this accident occurred at PS 89, a public

school under the auspices of the Board and that, thus, the City is an improper party to this action. Accordingly, the complaint fails to state a cause of action against the City and defendants' motion seeking dismissal of the action as against the City is granted. It is hereby

ORDERED that plaintiffs' complaint against the City be dismissed. It is further

ORDERED that defendants serve a copy of this Decision and Order with Notice of Entry upon plaintiffs within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : December 3, 2014
Bronx, New York

Mitchell J. Danziger, ASCJ