Venezia v Town of Huntington
2014 NY Slip Op 30507(U)
February 26, 2014
Supreme Court, Suffolk County
Docket Number: 10-42175
Judge: Peter H. Mayer
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[* 1]

SHORT FORM ORDER

INDEX No. 10-42175
CAL No. 13-01316OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 10-22-13
ADJ. DATE 11-12-13
Mot. Seq. # 001 - MD

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RYAN VENEZIA, Infant by his m/n/g ALLISON VENEZIA, and ALLISON VENEZIA, Individually,

Plaintiffs,

- against -

TOWN OF HUNTINGTON, PAUMANOK ELEMENTARY SCHOOL, COUNTY OF SUFFOLK and HALF HOLLOW HILLS CENTRAL SCHOOL DISTRICT,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated September 18, 2013, and supporting papers 1 - 17; (2) Affirmation in Opposition by the plaintiff, dated October 15, 2013, and supporting papers 18 - 19; (3) Reply Affirmation by the defendant, dated November 4, 2013, and supporting papers 20 - 22; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by the defendant Half Hollow Hills Central School District for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the Court, sua sponte, and for the reasons set forth below, amends the caption in this action as set forth below; and it is further

ORDERED that counsel for the plaintiff is directed to serve a copy of this order with notice of entry upon counsel for the defendant and the Clerk of the Court; and it is further

ORDERED that upon receipt of a copy of this order the Clerk of the Court shall amend the caption accordingly.

This action was commenced to recover damages, personally and derivatively, for personal injuries sustained by the infant plaintiff, Ryan Venezia (Ryan), on October 13, 2009, when a fellow student pushed him off of a balance beam during his recess period at Paumanok Elementary School. The plaintiffs allege that defendant Half Hollow Hills Central School District (the District)[1] is liable for the infant plaintiff's injuries based on its negligence in supervising the students on the playground that day, its negligence in creating and maintaining a "menace, nuisance and threat," and its negligence in the hiring and training of its personnel.

The District now moves for summary judgment dismissing the complaint against it on the grounds, *inter alia*, that it was not negligent in the supervision of its students, that Ryan's deposition testimony is self-contradictory and without evidentiary value, and that Ryan cannot recover as he was a "voluntary participant in an altercation." 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 issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [1991]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 735 NYS2d 197 [1990]).

Ryan testified at a 50-h municipal hearing on August 9, 2010, and he was deposed on March 6, 2013. His testimony at the municipal hearing held approximately 10 months after this incident can be summarized as follows: on the date of the incident, he was in fourth grade. Each fourth grade class, consisting of approximately 23 students, had an assigned lunch monitor who took the class out for recess after lunch. There were two areas for play, a "blacktop" area which included a balance beam, slides and monkey bars, and a larger "playground" area. On the day of this incident his class was directed to play in the blacktop area, and he was walking on the balance beam when "somebody pushed me off." Ryan stated that "[i]t was not on purpose. I guess I accidentally got pushed off the balance beam," that he had not had any problem with the student that pushed him, and that the student had not pushed him or any other student before this incident. He described the balance beam as blue and approximately one foot high off the ground. Ryan indicated that the incident happened approximately nine minutes into the 15 minutes allotted for recess, that he had been on the balance beam several times for five seconds each time before the incident, and that the lunch monitor for his class came to help him approximately 20 seconds after he fell. He stated that he had seen students pushing and shoving around the balance beam "[l]ike every day," and that the lunch monitors would blow their whistles and tell the students to stop, but the lunch monitors did nothing when the students continued to push each other. Ryan further

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[1] Despite the caption, the District is the sole defendant in this action, as explained below.

testified that "[t]he monitors were by the blacktop. The kids were on the other side, so you couldn't see them."

At his deposition more than three years after this incident, Ryan testified that the balance beam was green, that it was "[l]ike, about five inches off the ground" built on top of a platform that was approximately one foot "off the ground," and that he fell approximately three feet from the balance beam. He stated that, on the day of this incident, the students were playing "a game where people would try to push each other off" the balance beam, that he had been playing the game for approximately five minutes, and that he had not played the game before that day. He indicated that a number of students had been playing the game during the entire recess period, that they had lined up at opposite sides of the balance beam, and that the lunch monitors could not see the balance beam or the students because the monkey bars blocked the view. Ryan further testified that the whistle ending recess blew approximately ten seconds after he fell, and that an unknown lunch monitor came to help him approximately 30 seconds after he fell. He stated that no one told the students to stop what they were doing, and that the "school would probably tell us not to [play the game]."

The plaintiff Allison Venezia, Ryan's mother, testified at both her municipal hearing and her deposition, that she first learned of her son's injuries when she received a telephone call from the school nurse. She indicated that Ryan told her he had been pushed off the balance beam. She stated that Ryan had not had any previous problems on the playground, that she never voiced any complaints to the District regarding its supervision at recess, and that she did not know of anyone else making such a complaint.

At her deposition, Annmarie Valentin (Valentin), testified that she was a lunch monitor on duty on the day of Ryan's accident, that one lunch monitor is assigned to a single class for lunch and recess, and that the District employed 10 or 11 lunch monitors at Paumanok Elementary School in 2009. She described the school as having two recess areas, designated the playground and the blacktop. She stated that lunch period consists of 25 minutes in the cafeteria and 20 minutes of recess. On the day of this incident, she was with her class in the blacktop area when she saw students "playing a game on the balance beam." Valentin further testified that she "thought they were originally just walking across, and then I saw what they were doing, and then I said don't play like that," that she noticed this at the end of the recess period, and that she had been standing approximately five feet from the balance beam for ten minutes before this incident. She described the students as "standing face to face trying to see who could push one off the balance beam," and whoever stayed on the beam was the winner. She stated that she observed this activity "not even a minute," that she saw somebody get pushed only once, that Ryan was involved, and that she yelled over saying that is not how to play and they should walk across the balance beam. She indicated that she saw Ryan fall, but did not recall if he fell before or after she said something to the students. Valentin then testified that she said something to the students, including Ryan, that "then they did it again , and then Ryan fell," and that "maybe a minute or two" elapsed between her telling them to stop pushing and it happening again. She indicated that Ryan was not in her assigned class, that the game had been going on for "maybe one or two minutes" before she told the students to stop playing that way, and that she had never seen this game played before this day.

The standard for determining whether a school was negligent in executing its supervisory

responsibility is whether a parent of ordinary prudence, placed in the same situation and armed with the same information, would have provided greater supervision (***Mirand v City of New York***, 84 NY2d 44, 614 NYS2d 372 [1994]). Schools are under a duty to adequately supervise the students in their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (***Mirand v City of New York***, *id.*). Schools are not, however, the insurers of their students' safety and there is no duty to provide constant supervision as the level and degree thereof is measured by the reasonableness thereof under the circumstances (*see* ***MacNiven v East Hampton Union Free School Dist.***, 62 AD3d 760, 878 NYS2d 449 [2009]; ***Legette v City of New York***, 38 AD3d 853, 832 NYS2d 669 [2007]). Where an incident occurs in "so short a span of time that 'even the most intense supervision could not have prevented it,' lack of supervision is not the proximate cause of the injury and summary judgment in favor of the school defendants is warranted" (***Janukajtis v Fallon,*** 248 AD2d 428, 726 NYS2d 451 [2001], *quoting* ***Convey v Rye School District*** 271 AD2d 154, 710 NYS2d 641[2000]). In addition, it has been held that a school district satisfies its duty to provide adequate supervision when it admonishes a student to stop engaging in dangerous activity (*see* ***Schuyler v Board of Educ. of Union Free School Dist. No. 7***, 18 AD2d 406, 239 NYS2d 769 [3d Dept 1963], *affd* 15 NY2d 746, 257 NYS2d 174 [1965]; *see also* ***McAuliffe v Town of New Windsor***, 178 AD2d 905, 577 NYS2d 942 [3d Dept 1991]).

The District has failed to demonstrate its entitlement to summary judgment regarding the plaintiffs' claim for negligent supervision. There are issues of fact requiring a trial of this action including, but not limited to, how this accident happened, how long the "pushing game" was going on before it was noticed by the lunch monitors, and whether the students were instructed to stop the game before Ryan was pushed and fell. The District contends that the alleged discrepancies in Ryan's testimony at the municipal hearing and his deposition means that his later testimony has no evidentiary value, and that his testimony at the municipal hearing establishes how the accident happened and that it occurred suddenly and within a short span of time. It has been held that a jury must determine the weight to be given to allegedly contradictory testimony given by a witness and it is error for a court to hold that inconsistent statements are to be disregarded as a matter of law (***Cannon v Fargo***, 222 NY 321 [1918]; ***Williams v Delaware, Lackawanna & W. R.R. Co.***, 155 NY 158 [1898]; Keane v City of New York, 57 AD2d 789, 394 NYS2d 681 [1st Dept 1977]; *see also* ***Wadsworth v Delaware, Lackawanna & W. R.R. Co.***, 296 NY 206 [1947]; ***Tillman v Lincoln Warehouse Corp.***, 72 AD2d 40, 423 NYS2d 151 [1st Dept 1979]; ***Brudie v Renault-Freres Selling Branch, Inc.***, 153 AD 675, 138 NYS 657 [1st Dept 1912]). Moreover, there is a question whether Ryan's testimony is self-contradictory in light of Valentin's testimony that she observed the game which Ryan claimed in his deposition testimony was the cause of his fall.

Nonetheless, the District contends that Ryan cannot recover for his injuries as he was a "voluntary participant in an altercation." It is well settled that "liability for injuries resulting from a fight between two students cannot be predicated on negligent supervision if the plaintiff was a voluntary participant in the fight" (***Williams v Board of Educ. of City School Dist. of City of Mount Vernon***, 277 AD2d 373, 717 NYS2d 190 [2d Dept 2000]; *see also* ***Ruggerio v Board of Educ. of City of Jamestown***, 31 AD2d 884, 298 NYS2d 149 [4th Dept 1969], *affd* 26 NY2d 849, 309 NYS2d 596 [1970]. Here, the District has not submitted any evidence that there was any animus between Ryan and the student that pushed him off the balance beam, that the activity described by Ryan and Valentin was anything more

than a game, or that the activity could in any manner be described as a fight or altercation.

The failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hospital***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Accordingly, the motion for summary judgment dismissing the complaint is denied.

The Court now turns to the issue of the caption which appears on this order. Upon receipt of the motion papers from the District and the opposition submitted by the plaintiffs, it was noted that both parties indicated that the District was the sole defendant in this action. A review of the file maintained by the Clerk of the Court revealed that counsel for the plaintiff had filed an erroneously captioned request for judicial intervention and a similarly erroneous note of issue. Thus, the computerized records maintained by the Court reflected that error, and resulted in the caption set forth above. In order to correct that error going forward, and to avoid any confusion at the trial of this action, the Court sua sponte amends the caption as follows:

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RYAN VENEZIA, Infant by his m/n/g ALLISON VENEZIA, and ALLISON VENEZIA, Individually,

Plaintiffs,

- against -

HALF HOLLOW HILLS CENTRAL SCHOOL DISTRICT,

Defendant.

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Dated: 2/26/14

PETER H. MAYER, J.S.C.