SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

----------x

EDDY LIRIANO, by his mother and legal guardian FLOR ESTEVEZ LIRIANO and FLOR ESTEVEZ LIRIANO individually,

Plaintiffs, Index No. 150213/12

-against- **DECISION AND ORDER**
Motion Sequence No. 001

ALIANZA DOMINICANA INC.,

Defendant.

----------x

DEBRA A. JAMES, J.:

Defendant Alianza Dominicana Inc. (Alianza) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint against it.

BACKGROUND

This action arises from an incident that occurred on October 29, 2010 at a junior high school, IS 143, located at 515 West 182nd Street in Manhattan (the School).

By affidavit, Alianza's former director of youth programs, states that Alianza is a not-for-profit organization that offered after-school programs and youth services as well as facilitated various programs involving youth, families and public and private institutions in an effort to revitalize economically distressed neighborhoods in New York City. At the time of the accident, Alianza "offered an annual haunted house/Halloween program" (Halloween program), to students of the School, as well as to all

program participants and guests.

Plaintiff Eddy Liriano (Eddy) began volunteering for Alianza in January 2010.

At the Halloween program, participants watched a Halloween show followed by walking a haunted house tour, which tour consisted of "Halloween-themed settings which ran down the hallway and auditorium on the basement floor" of the School. Eddy, who was 19 at the time, and another employee of Alianza "were playing the role of ghosts within the haunted house".

According to Alianza's former youth programs director, Eddy "decided on his own volition to wear a scream mask and to apparently jump out and frighten the guests" touring the haunted house setting. Alianza's former youth programs director states that in one instance, Eddy "jumped out to scare a guest of the haunted house," and the guest, a 16-year-old boy, "suddenly and unexpectedly punched [Eddy] right in the mouth" (the Incident).

Eddy alleges that, as a result of the Incident, he suffered dental injuries, requiring a tooth implant and resulting in partial disfigurement of his face.

In the first cause of action, Eddy alleges that the Incident occurred as a result of Alianza's and its agents' negligence "in the ownership, operation, management, maintenance, supervision,

and control of the aforesaid premises [i.e., the School] and the activity thereat [the haunted house tour]". In the second cause of action, Eddy's mother, plaintiff Flor Estevez Liriano (Ms. Estevez Liriano)[1] alleges that, as a result of the Incident, she "has been deprived of the services, society, affection and companionship of her ... child and has been caused to expend sums of money for his medical care and treatment".

Alianza now moves for summary judgment dismissing the complaint.

DISCUSSION

> "[T]he 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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. 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"

(Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [citations omitted]; see also Dallas-Stephenson v Waisman, 39 AD3d 303, 306 [1st Dept 2007]).

---

[1] Eddy and Ms. Estevez Liriano are together referred to as plaintiffs.

First Cause of Action

The first issue is the nature of duty of care that Alianza owed to Eddy.

Plaintiffs allege that Alianza's "agents, employees and/or servants had the duty to oversee the safety of [Eddy] . . . at [the haunted house activity that took place at the School]". In the bill of particulars, plaintiffs state that Alianza and "its agents, servants and employees[] had a duty to properly maintain the safety, health and welfare of the children in their care custody and control, and to keep said premises in a reasonably safe condition" (underscoring added]). Further, Alianza's "agents, servants and employees breached their duty to maintain said safety, health and welfare of the children in their care custody and control and more particularly, plaintiff E[ddy]" (id. [underscoring added]). Defendant's "negligence and carelessness consisted of improper supervision".

Hence, plaintiffs allege that, at the time of the Incident, Eddy was in Alianza's custody and control, and that Alianza had a duty to properly supervise Eddy and to oversee his safety. Plaintiffs' allegations amount to a cause of action for negligent supervision.

"[S]chools have a duty to adequately supervise their

students, and 'will be held liable for foreseeable injuries proximately related to the absence of adequate supervision'" (Brandy B. v Eden Cent. School Dist., 15 NY3d 297, 302 [2010] [quoting Mirand v City of New York, 84 NY2d 44, 49 (1994)]). "[U]nanticipated third-party acts causing injury upon a fellow student will generally not give rise to a school's liability in negligence absent actual or constructive notice of prior similar conduct" (id.; see also Morning v Riverhead Cent. School Dist., 27 AD3d 435, 436 [2d Dept 2006] ["[i]n order to impose liability for negligent supervision, a school must have sufficiently specific knowledge or notice of a particular danger at a particular time, so that the injurious act could reasonably have been anticipated"]).

In his affidavit, Alianza's former youth program director states that, at the time of the Incident, Alianza's youth services and programs were "offered at various schools located in the New York City area," which Alianza "did not own, occupy, control or lease". He emphasizes that, on the day of the Incident, Eddy was a volunteer for Alianza, a fact that plaintiffs do not dispute.

With respect to a cause of action for negligent supervision, "[a] school's duty to its students is co-extensive with the

school's physical custody and control over them" (Morning, 27 AD3d at 436). "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, 84 NY2d at 49). Even if Alianza's after-school and youth programs may be equated to that of a school or a school district, Alianza's youth programs director states unequivocally that Eddy was not a student or participant in Alianza's programs. Rather, Eddy was a volunteer for Alianza, and there is no dispute that Eddy was not a student in the School. Thus, Alianza did not assume physical custody and control over Eddy, and did not owe Eddy a duty to supervise him, unlike a school, which must supervise its students.

Even if Alianza owed a duty of care to Eddy, Alianza's youth programs director states that the Incident was unanticipated, because: (1) there were no prior "problems, conflicts or issues between Eddy and the alleged perpetrator"; (2) no prior "problems, conflicts or issues involving the alleged perpetrator and any employee or volunteer of Alianza"; and (3) prior to the Incident, there were never "any prior incidents whereby someone was assaulted or injured by the intentional act of someone else" at Alianza's "annual haunted house/Halloween program" at the

School.

Hence, Alianza has made a prima facie showing that it: (1) did not assume physical custody and control over Eddy; and (2) did not have "actual or constructive notice of prior similar conduct" so that the Incident "could reasonably have been anticipated" (see Brandy B., 15 NY3d at 302 [internal quotation marks and citation omitted]; see also Morning, 27 AD3d at 437 [a defendant school district did not breach its duty to supervise a student, where there was no "evidence that the incident should reasonably have been anticipated"]). In opposition, Eddy has failed to produce evidentiary proof that would create an issue of fact. Hence, summary judgment in favor of Alianza with respect to the first cause of action is warranted.

Second Cause of Action

Although Alianza moves to dismiss the Complaint, it makes no arguments with respect to the second cause of action that Ms. Estevez Liriano brings for loss of services and medical expenses. However, as a matter of law, Ms. Estevez Liriano may recover from Alianza only if Eddy's injuries were due to actionable fault of Alianza (see e.g., Gilbert v Stanton Brewery, Inc., 295 NY 270, 273 [1946]; see also Mordecai v Hollis, 50 Misc 2d 248, 248 [Sup Ct, Queens County 1966] ["[t]he theory underlying a parent's loss

of service action is that the parent has suffered an invasion of the right to the services of the minor child as a direct result of a third party's negligent act"]). Given that the court has held that Eddy's injuries were not a result of Alianza's negligent act, Ms. Estevez Liriano may not recover from Alianza for damages flowing from the Incident. Hence, upon searching the record, summary judgment is warranted in favor of Alianza with respect to the second cause of action as well.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 6, 2015 ENTER:

J.S.C.
DEBRA A. JAMES