

**Palumbo v Drones**

2017 NY Slip Op 33426(U)

May 1, 2017

Supreme Court, Nassau County

Docket Number: Index No. 609856/2016

Judge: James P. McCormack

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack

Justice

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TRIAL/IAS, PART 27  
NASSAU COUNTY

MICHAEL PALUMBO,

Plaintiff(s),

Index No. 609856/16

-against-

WILLIE M. DRONES and FREEPORT UNION  
FREE SCHOOL DISTRICT,

Motion Seq. No.: 001  
Motion Submitted: 3/8/17

Defendant(s).

\_\_\_\_\_ x

The following papers read on this motion:

Notice of Motion/Memorandum of Law/Supporting Exhibits....X  
Affirmation in Opposition.....X  
Reply Affirmation.....X

Defendant, the Freeport Union Free School District (the District), moves this court for an order, pursuant to CPLR §3211(a)(7) and §3211(c) dismissing the complaint against it. Plaintiff, Michael Palumbo (Palumbo) opposes the motion. Defendant, Willie

M. Drones (Drones) neither submits papers in support of, nor opposition to the motion.

Palumbo commenced this action, sounding in negligence, by service of a summons and complaint dated December 14, 2016. The District brought the within motion in lieu of an answer.

Palumbo is high school basketball referee. On December 18, 2015, he was refereeing a game, with his partner Kenneth Apple, between Freeport and Massapequa, in Freeport. Toward the end of the game, two players, one from each team, collided during a play and the Freeport player fell down due to injury. The referees called a stop in the action due to the injury at which time Drones, the father of the injured player, came onto the court. According to Palumbo, Drones complained that a foul was not called on the player who collided with his son and eventually assaulted Palumbo as a result.

In reviewing a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court is to accept all facts alleged in the complaint as being true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (see *Delbene v. Estes*, 52 AD3d 647 [2nd Dept. 2008]; see also *511 W.232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2D 144 [2002]). Pursuant to CPLR § 3026, the complaint is to be liberally construed. *Leon v. Martinez*, 84 NY2d 83 [1994]. It is not the court's function to determine whether plaintiff will ultimately be successful in proving the allegations.

*Aberbach v. Biomedical Tissue Services*, 48 AD3d 716 [2nd Dept. 2008]; see also *EBCI, Inc. v. Goldman Sachs & Co.*, 5 NY3D 11 [2005].

The pleaded facts, and any submissions in opposition to the motion, are accepted as true and given every favorable inference (*see 511 W. 323rd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d at 151-152; *Dana v. Malco Realty, Inc.*, 51 AD3d 621 [2d Dept 2008]; *Gershon v. Goldberg*, 30 AD3d 372, 373 [2d Dept 2006]). However, a court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) (*see* CPLR § 3211[c]; *Sokol v. Leader*, 74 AD3d at 1181). “When evidentiary material is considered” on a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether they have properly stated one, and unless it has been shown that a material fact as claimed is not a fact at all or that no significant dispute exists, the dismissal should not be granted (*Guggenheimer v. Ginzburg*, 43 NY2d at 275; *see Sokol v. Leader*, 74 AD3d at 1182).

In support of their motion, the District claims it owed no duty to Palumbo. Schools owe a duty to protect students from one another, but not to adults in the school system for failure to supply proper supervision or security. (*Cuffy v. City of New York*, 69 N.Y.2d 255 [1987]). The only exception to this rule is where a “special relationship” exists. (*Dickerson v. City of New York*, 258 A.D.2d 433 [2<sup>nd</sup> Dept. 1999]). For a special

relationship to exist, the municipality must assume an affirmative duty to act on behalf of the injured party, the municipality must have some knowledge that inaction could lead to harm, there must be some contact between the municipality's agents and the injured person and the injured person must have justifiably relied upon the affirmative duty. *Id.*

The District argues that the special relationship exception does not apply to the facts of this case, and cite to Palumbo's deposition testimony as proof. According to the District, in his deposition, Palumbo denied speaking with Freeport personnel about security concerns, nor did he ask them provide him with security personnel. Further, Freeport did not offer to provide Palumbo with security.

In opposition, Palumbo argues the special relationship exception does apply. Palumbo points to the Officials Contract, annexed to his papers. The parties to the contract are the Athletic Council, the Executive Director of Interscholastic Athletics and Section VIII Officials' Coordinating Council. According to Palumbo's affidavit, also annexed to the opposition papers, Freeport is a member of the Athletic Council and he is a member of the Officials Coordinating Council. Article I, Section A(12) states: "The home school shall provide for the physical safety of officials..." with an emphasis on secure parking, a private dressing room and "reasonable and proper crowd control".

Palumbo argues this portion of the contract, along with others, establishes the District assumed the affirmative duty of protecting his physical safety. Further,

when Drones came onto the court and began arguing with him, Palumbo claims he twice asked Freeport officials to intervene and have Drones removed from the court. This interaction would satisfy the elements of the Freeport being aware that inaction could result in harm, and Palumbo having direct contact with Freeport officials. Finally, Palumbo argues he justifiably relied on the Freeport officials taking proper action once he complained about Drones. In light of the foregoing, Palumbo argues he has established a special relationship existed.

In reply, the District first tries to claim that the section of the contract that states the home school will ensure the physical safety of the officials does not apply to these facts. They base this assertion on the fact that this section has an emphasis on providing a safe parking lot, a locker room and safe passage to and from the court. The court finds this argument specious. While the contract may emphasize parking and other issues, and merely because it does not specifically emphasize a student's parent assaulting an official, it does not mean one can ignore the plain language that the home school is required to ensure the officials' "physical safety".

Next, the District argues the court should not consider Palumbo's affidavit because it contradicts his deposition testimony. Specifically, the District argues that Palumbo denied speaking with Freeport officials about security concerns in his deposition, yet he claims he did so twice in his affidavit. Palumbo counters that the manner in which the

question was asked at the deposition led him to believe the question referred to what occurred prior to the incident. The court finds merit to each side's argument. The two statements do seem to contradict each other, but the questioner did seem to condition the line of questioning on what had occurred prior to Drones walking onto the court. Regardless, the court need not resolve that issue herein. Also annexed to the opposition papers is the affidavit of Kenneth Apple, the second referee working the game with Palumbo. Mr. Apple confirms that after Drones walked onto the court and confronted Palumbo, Palumbo asked Freeport officials to have Drones removed which request was ignored. As there is no argument made that Mr. Apple's affidavit is in some way compromised, the court credits it as accurate.

Paragraph 36 of Palumbo's complaint asserts, *inter alia*, that the District: 1) failed to "exercise reasonable care" for Palumbo's safety, 2) failed to protect Palumbo from "certain danger", 3) failed to respond in a timely manner to avert the incident, and 4) ignored notice of a dangerous situation. The court finds, assuming all allegations in the complaint as true and giving the complaint every favorable inference, the complaint states a cause of action against the District. Based upon the evidence offered in support of, and opposition to, the motion the court finds Palumbo has established a special relationship exists, at least to the extent required to defeat the within motion.

Accordingly, it is hereby

**ORDERED**, that the District's motion to dismiss the complaint for failure to state

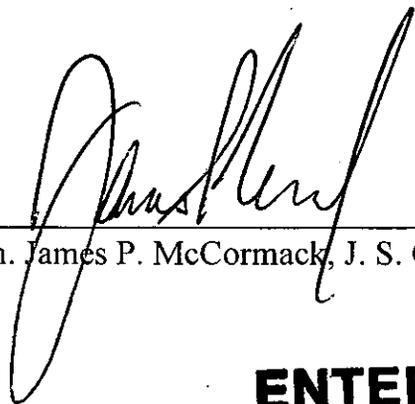
a cause of action is DENIED; and it is further

**ORDERED**, that the District's motion to treat the within motion as a summary judgment motion is DENIED as unsupported.

Any other arguments raised but not addressed are deemed to be without merit.

This constitutes the Decision and Order of the Court.

Dated: May 1, 2017  
Mineola, N.Y.



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Hon. James P. McCormack, J. S. C.

**ENTERED**  
MAY 02 2017  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE