

Lomonico v Massapequa Pub. Schools

2010 NY Slip Op 32333(U)

August 17, 2010

Supreme Court, Nassau County

Docket Number: 007574/06

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 20

_____ X

CARIN LOMONICO, a Minor, by CAMILLE LOMONICO, As Parent and Natural Guardian,

Plaintiff,

Index No.: 007574/06
Motion Sequence...02
Motion Date... 06/07/10

-against-

MASSAPEQUA PUBLIC SCHOOLS,

Defendant.

_____ X

Papers Submitted:

- Notice of Motion.....X
- Memorandum of Law.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Upon the foregoing papers, the motion by the Defendant for an order pursuant to CPLR § 3212 granting it summary judgment is determined as hereinafter provided.

This action arises out of an accident that occurred on February 15, 2005 at the Birch Lane Elementary School in Massapequa, New York. The Plaintiff, CAMILLE LOMONICO, on behalf of her minor child, CARIN LOMONICO (hereinafter referred to as "CARIN"), alleges in her complaint that while practicing a cheerleading stunt at a varsity

cheerleading practice, CARIN sustained injuries when she was struck in the head by another student and caused to fall to the gymnasium floor. The Plaintiff claims that the Defendant was negligent in that it failed to adequately supervise the cheerleading practice, failed to adequately instruct the students how to perform the cheerleading stunt and failed to provide protective matting and/or other padded covering on the hardwood floor of the gymnasium where the accident occurred.

As a result of the accident, the Plaintiff alleges that her daughter suffered personal injuries including herniated discs, desiccated discs, post concussion syndrome, severe headaches, cervical headaches, cervical radiculopathy and cervical spine cord compression. The Defendant now moves for summary judgment alleging that the Plaintiff cannot maintain any causes of action against the Defendant because (i) CARIN assumed the risk of participating in the interscholastic athletic event; (ii) negligent supervision was not a proximate cause of CARIN's injuries; and (iii) the Plaintiff failed to set forth any evidence that the failure to have a mat at the area of the accident created a defective condition or had anything to do with the accident.

Relevant Factual Background

On February 15, 2005, CARIN was an 11th grade high school student at Massapequa High School, located in Massapequa, New York. She testified at a 50 (h) hearing on November 25, 2005, that she began cheerleading while in the 9th grade. *See* Transcript of 50 (h) hearing, dated November 29, 2005, attached to the Defendant's

Affirmation in Support as Exhibit "D". Prior to trying out for the cheerleading squad, CARIN was required to submit a permission slip signed by a parent or guardian. In the 10th grade, CARIN participated in the junior varsity cheerleading team and she then became a member of the varsity cheerleading team in the 11th grade. CARIN practiced cheerleading from August, 2004 through February 15, 2005, the date of the accident. The cheerleading team practiced every day for approximately two (2) hours per day.

The stunt that CARIN and other students were attempting to perform on the date of the accident was called a "LIB". The LIB is a cheerleading stunt where two people act as the "base", one person acts as the "back" and one person acts as the "flyer". When performing a LIB, the "back" and the two "bases" lift the "flyer" on one foot and then catch her in a cradle. When asked at the 50 (h) hearing whether the LIB was performed prior to the date of the accident, CARIN testified that she had performed the LIB on more than one hundred (100) occasions. She further testified that she was instructed how to perform the LIB by the cheerleading coach, Lisa Rose n/k/a Lisa Battistoni ("Ms. Battistoni"). The LIB was performed by CARIN between one (1) and five (5) times during football and basketball games. There was no testimony at the 50 (h) hearing regarding different variations of the LIB.

At CARIN's Examination Before Trial on August 19, 2009, she testified for the first time that on the date of the accident, she was learning a new stunt with the LIB. See Transcript of EBT of CARIN, dated August 19, 2009, attached to Defendant's Affirmation

in Support as Exhibit "E". The new variation of the LIB is where the "flyer" is tossed into the air by the "base" girls with the "flyer" doing a 360 degree spin and then landing in the "base" girls cradled arms. CARIN testified that she and the other "base" girl and "back" girl were in the position of the LIB. However, with this new variation, the "flyer" is performing a different maneuver while tossed up in the air. Prior to performing the new version of the LIB, the captains demonstrated the maneuver. CARIN, the other "base", the "back" and the "flyer" performed the LIB two times without the 360 spin and then attempted to perform the LIB with the 360 degree spin. During that attempt, the "flyer" was tossed into the air and when CARIN attempted to cradle the "flyer", her butt struck CARIN's head causing her to fall to the floor. CARIN testified that her nose hit the gymnasium floor.

The cheerleading coach, Ms. Battistoni, testified at her Examination Before Trial on September 23, 2009, that on the day of the accident, she was present in the gymnasium with the junior varsity and varsity cheerleading squads. *See* Transcript of EBT of Lisa Battistoni, dated September 23, 2009, attached to the Plaintiff's Affirmation in Opposition as Exhibit "D". The junior varsity and varsity squads were practicing in the gymnasium at the same time but in separate areas of the gym. The area of the gym where Ms. Battistoni was standing at the time of the accident is a fact in dispute.

At her Examination Before Trial, CARIN testified that the stunts were not practiced on mats. However, Ms. Battistoni testified that there was a mat being used at the time of the accident.

The Defendant contends, in support of its motion for summary judgment, that where there is a primary assumption of the risk of the sporting activity, the defendant has no legal duty to the plaintiff and a complaint brought in such a case should be dismissed as a matter of law. The Defendant further contends that it did not have a duty to protect the Plaintiff's daughter as there was no unassumed, concealed or unreasonably increased risk involved. In opposition to the Defendant's motion, the Plaintiff argues that while it is true that infant students who voluntarily participate in extracurricular activities, such as cheerleading, are ordinarily understood to have assumed the risks to which their roles expose them, such students do not assume those risks that have been unreasonably increased.

Legal Analysis

It is fundamental that to recover in a negligence action a plaintiff must establish that the defendant owed him a duty to use reasonable care, and that it breached that duty. *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325, 333 (1981); *Pulka v. Edelman*, 40 N.Y.2d 781, 782 (1976); *Kimbar v. Estis*, 1 N.Y.2d 399, 405 (1956). Where there is primary assumption of risk of a sporting activity, generally, the defendant has no legal duty to the plaintiff. However, while it is true that by voluntarily participating in a sporting event or extracurricular activity, such as cheerleading, the plaintiff is deemed to have assumed those commonly appreciated risks which are inherent in and arise out of the nature of the sport, the plaintiff's assumption of those risks is not an absolute defense but a measure of the defendant's duty of care. *Morgan v. State*, 90 N.Y.2d 471 (1997), quoting *Turcotte v. Fell*

68 N.Y.2d 432 (1986).

In assessing whether the plaintiff assumed the risks associated with the activity in which he or she participated, the court should consider the following factors: (a) the defendant's breach of duty to provide adequate supervision and equipment; (b) the plaintiff's ability, agility, amateur status, and mental training in light of the difficulty of the exercise, adequacy of supervision, and lack of informed consent; and (c) whether hazards were those to which [cheerleading] students must be normally exposed. *Morgan v. State*, 90 N.Y.2d at 476. Schools are required to exercise reasonable care to protect student athletes from unassumed, concealed or unreasonable increased risks. *Benitez v. New York City Board of Education*, 73 N.Y.2d 650, 658 (1989).

Here, the Defendant argues that CARIN was an experienced cheerleader as she was well into her third year of cheerleading. In addition, the Defendant states that prior to CARIN's participation in the activity, she and her mother signed a consent permission form. The Defendant also contends that Ms. Battistoni, the cheerleading coach and advisor, was certified by the Long Island Cheerleading Coaches Association and had previously attained a safety certification from the National Cheerleading Association. She also had her cheerleading coaches accreditation since 2003/04 through the Nassau Cheerleading Association. In support of its contention that there was adequate supervision, the Defendant states that Ms. Battistoni was less than 10 feet away from where the accident occurred. With respect to whether or not there was adequate equipment provided to the students for the

practice, the Defendant contends that there were in fact mats on the gymnasium floor. The Defendant states, however, that despite this factual dispute, whether or not mats were utilized is a trivial issue as CARIN was injured by being struck in the head by the “flyer’s” body. In addition, the Defendant contends that CARIN’s contradictory testimony with regard to the “new variation” of the LIB entitles it to summary judgment.

In light of the above, the Defendant has met its threshold burden of establishing its entitlement to judgment as a matter of law by offering proof of the Plaintiff’s prior experience, together with the testimony of Ms. Battistoni, the coach. The burden then shifts to the Plaintiff to establish the existence of triable issues of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

The Plaintiff submits that the cheerleading practice was inadequately supervised as there were as many as thirty-five (35) girls, consisting of both the junior varsity and varsity squads, in the gym with only one (1) supervising coach. The Plaintiff further contends that the students were not properly instructed on how to perform this particular variation of the LIB prior to permitting the students to perform it on their own and that there were no mats on the floor during the practice. The Plaintiff argues that these facts establish the existence of material issues of fact sufficient to defeat the Defendant’s motion for summary judgment. The Court agrees.

Viewing the totality of the evidence in the light most favorable to the Plaintiff, and affording the Plaintiff the benefit of every reasonable inference, the Court finds that the

Plaintiff raised a genuine issue of fact as to whether the Defendant's supervision was inadequate and resulted in the failure to exercise reasonable care to protect the Plaintiff's daughter from an unreasonably increased risk. The question of whether there was adequate supervision in the gymnasium on February 15, 2005, where two (2) cheerleading squads were practicing at the same time, is a question for the trier of fact to determine. Moreover, the presence or lack thereof of mats or other protective padding during the cheerleading practice is a material issue of fact that must be determined. The Court disagrees with the Defendant's contention that the question is trivial in nature because CARIN was struck in the head by another student's butt. CARIN undoubtedly testified that her nose hit the floor as a result of the accident. In her Bill of Particulars, the Plaintiff alleges that her daughter sustained a head injury as a result of the accident, an injury a trier of fact may determine could have been prevented had there been mats or other protective padding on the gymnasium floor.


The Court notes that CARIN first raised the fact that she was performing a new variation of the LIB at her Examination Before Trial on August 19, 2009. Testifying to a new fact, however, does not in and of itself entitle the Defendant to summary judgment. The inconsistency between the testimony at CARIN's 50 (h) and her deposition raises a question of credibility that must also be assessed by the trier of fact. The Court will not, nor should it, engage in determining the credibility of CARIN.

Accordingly, based on the foregoing, it is hereby

ORDERED, that the Defendant's motion for summary judgment is **DENIED**.

This constitutes the decision and order of the court.

Dated: Mineola, New York
August 17, 2010



Hon. Randy Sue Marber, J.S.C.

ENTERED
AUG 19 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE