Chynna A. v City of New York

2016 NY Slip Op 06985

Decided on October 25, 2016

Appellate Division, First Department

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Decided on October 25, 2016
Acosta, J.P., Renwick, Saxe, Feinman, Kahn, JJ.

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[*1]Chynna A., an infant under the age of fourteen years, by her mother and Natural Guardian, Nitoscha A., etc., Plaintiff-Respondent,

v

The City of New York, et al., Defendants-Appellants.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for appellants.

Belovin & Franzblau, LLP, Bronx (Jeffrey J. Belovin of counsel), for respondent.

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered May 19, 2015, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

There is no dispute that dismissal of the complaint as against defendant City of New York is warranted since it is not a proper party to the action (*see Kamara v City of New York*, 93 AD3d 449 [1st Dept 2012]; *Perez v City of New York*, 41 AD3d 378 [1st Dept 2007], *lv denied* 10 NY3d 708 [2008]).

The remaining defendants established their entitlement to judgment as a matter of law by submitting evidence showing that infant plaintiff's thumb injury was proximately caused by a sudden and unexpected collision with a fellow student during a regularly played game of tag that was held during the seventh-grade students' gym class. No amount of supervision could have guarded against the injurious event, and as such, the alleged inadequacy of the gym teacher's supervision of the students playing the tag game was not a substantial factor in the cause of the injury (*see e.g. Kamara v City of New York*, 93 AD3d at 450; *Kovalenko v New York City Dept. of Educ.*, 135 AD3d 710 [2d Dept 2016]).

In opposition, plaintiffs failed to raise a triable issue of fact. Apart from their speculative theories, plaintiffs failed to offer an expert opinion, or competent facts from which a reasonable inference could be drawn, to substantiate their contention that the tag game was a hazardous activity for infant plaintiff's gym class (*see Luis S. v City of New York*, 130 AD3d 485 [1st Dept 2015]). There was no evidence indicating that infant plaintiff was injured due to crowded conditions, or due to the gym's size, or because of any unchecked, unruly student activity. Furthermore, there was no evidence of any prior injuries sustained during the tag game that was regularly played in the school gym (*see id.* at 485-486).

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED:

CLERK

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