Unreported Disposition
2013 WL 3880130
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Supreme Court, Richmond County, New York.

Anthony MORALES, Individually and as Father And Natural Guardian of Anthony Morales, Jr., An infant under 14 years of age, Plaintiff(s),
v.
LONGVIEW ACADEMY OF EXTREME MARTIAL ARTS, INC., and Saul "DOE' and George "ROE", Both names "DOE" and "ROE" being Fictitious because The actual names are unknown to Plaintiff, Defendant(s).

No. 101999/11. | July 29, 2013.

Attorneys and Law Firms

Law Office of Alan C. Glassman, for Plaintiffs.

Law firm of Callahan & Fusco, LLP, for Defendant.

Opinion

JOSEPH J. MALTESE, J.

***1** The defendants Longview Academy of Extreme Martial Arts, Inc., Saul Doe, and George Roe, move for summary judgment dismissing plaintiff's complaint pursuant to CPLR 3212. The defendants' motion for summary judgment is granted.

Plaintiff Anthony Morales (Morales, Sr.), individually and as father and natural guardian of Anthony Morales, Jr. (Morales, Jr.), an 11 year old, alleged that his son sustained personal injuries while participating in a judo class. Specifically, plaintiffs contend that on August 19, 2010, Morales, Jr. was training with Sensei Sal (Salvatore Della Croce), the instructor, who is a second degree black belt in judo. When Sensei Sal saw Morales, Sr. over by the side of the judo mat he went over to speak with him while watching the class. At that time, a senior judo student that was older, heavier, and taller than Morales, Jr. paired up to train with him. The senior student attempted what Morales, Jr. called a round kick, which he attempted to block, injuring his ankle and sustaining a left distal tibia Salter II fracture. (Defendant Exhibit C, ¶ 5, 11.) From the description provided and the location of the injury, the attempted technique described was apparently a foot sweep to the side of the foot which struck the ankle because there is no kicking in Judo as there is in Karate.

Nonetheless, plaintiffs assert that defendants owed Morales, Jr., an eleven year old at the time, a duty of care requiring proper supervision by qualified personnel trained in the procedures and traditions of the martial arts. Plaintiffs claim that the judo school was to furnish Morales, Jr. with competent instruction and suitable facilities for his teaching lessons. Plaintiffs further allege that Morales, Jr.'s injuries resulted solely from the negligence of the Defendants and without any negligence on his part.

In a motion for summary judgment, the burden is on the movant "to establish its prima facie entitlement to judgment as a matter of law" (*Post v. County of Suffolk*, 80 AD3d 682, 685 [2d Dept.2011]). The burden shifts to the opponent "[to] demonstrate the existence of a triable issue of fact only as to the elements on which the [movant] has met his or her initial burden" (*Swanson v. Raju*, 95 AD3d 1105, 1106 [2d Dept.2012]). Furthermore, the court accepts the facts of the non-moving party as true and "[the opponent] must submit evidentiary facts or materials to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact." (*Stukas v. Streiter* 83 AD3d 18, 24 [2d Dept.2011] quoting *Deutsch v. Chaglassian*, 71 AD3d 718, 719 [2d Dept.2010]). However, "summary judgment should only be granted where there are no material and triable issues of fact" (*Paulin v. Needham*, 28 AD3d 531, 531 [2d Dept.2006]).

In a sports related personal injury case, assumption of the risk dictates the amount of duty owed by the owner. Judge Joseph Bellacosa of the New York Court of Appeals in 1997 wrote in *Morgan v. State* (90 N.Y.2d 471, 484 [1997]) that an owner or operator of a sporting venue can be relieved of liability "when a consenting participant is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks" (*Id.* at 484). A premises owner continues to owe "a duty to exercise care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty." (*Id.)* By engaging in a sport or recreational activity, "a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport that generally flow

from such participation." (*Id.*) Additionally, "the applicable standard should include whether the conditions caused by the defendant's negligence are unique and created a dangerous condition over and above the usual dangers that are inherent in the sport' " (*Id.* at 487 *quoting Owen v. R.J.S. Safety Equipment, Inc.*, 79 N.Y.2d 967, 970 [1992]).

***2** The plaintiff's theory of negligence rests on the fact that there was improper supervision of the judo class and that there was a "mismatch" between Morales, Jr. and the older and physically larger partner. The defendant has submitted the affidavit of George Pasiuk who has over fifty years' experience in the field of judo. In his affidavit, he stated that "in the martial art of judo, it is not against any accepted practice, standard of care, rule, or regulation to pair an adult student with a minor student for the purposes of engaging in judo drills." He further stated that "in the martial art of judo, there is no requirement, accepted practice, standard of care, rule, or regulation which mandates that participants be paired on the basis of height, weight, age, or experience for the purposes of engaging in drills." The expert's affidavit demonstrates that the defendant was not negligent in pairing Morales, Jr. with an adult for purposes of training drills. However, this court takes judicial notice that during Regional, National or International Judo Competitions the contestants are matched as Juniors (under 17 years old) or Seniors (17 years old and older), and by Dan ranks (Black Belt) or Kyu ranks (less than Black Belt), by weight class and by sex. But in a training class it is not the custom, nor is it required that students be matched by size, rank or sex.

As to the allegation of lack of supervision, the plaintiff has not made out a case by the facts. While the instructor, Sensei Sal and Morales, Sr. were talking to each other on the side of the judo mat, they both observed Morales, Jr. fall after contact with the older, larger student. Sensei Sal Della Croce, who was described as a second degree black belt and a Master Champion, has more than sufficient training to run a judo class. He was not absent from the training by standing with Morales, Sr. on the side of the mat. Even if he were on the mat, he could not have prevented the injury, which occurred in the normal course of training.

Judo is a contact sport. Morales, Jr. has been engaging in the sport of judo since he was five years old. He acknowledges that he has also participated in mixed martial arts, such as karate, kickboxing and grappling (TR p. 20, l. 14–25) (TR p. 16 l. 21 p. 17, l. 11).

Anthony Morales, Sr. should have known of the possibility that his son could be injured while playing a contact sport. Whenever a person participates in any sporting event, there is always a chance that the participant could be injured. The chance that the participant could be injured is a risk he or she must be aware of before engaging in any sporting activity, especially the martial arts.

Accordingly, it is hereby:

ORDERED, that the defendant's motion for summary judgment to dismiss the plaintiff's complaint is granted, and the clerk is directed to enter judgment for the defendant.

Parallel Citations

2013 N.Y. Slip Op. 51220(U)

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