SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

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TAYLOR BENTZE, an infant under the age of 14, by her mother and natural guardian, TAMMY BENTZE, and TAMMY BENTZE, individually,

Plaintiff,

-against-

ISLAND TREES UNION FREE SCHOOL DISTRICT, THE BOARD OF EDUCATION, MICHAEL F. STOKES ELEMENTARY SCHOOL and "JOHN DOE" (1-10, identity currently unknown),

Defendants.

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TRIAL/IAS PART 17

INDEX # 5594/10

Motion Seq. 3
Motion Date 1.16.12
Submit Date 3.2.12

The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit 2
Reply Affidavit..... 3

Defendant Island Trees Union Free School District s/h/a Island Trees School District (hereinafter " School District"), moves by order to show cause for the following relief: an order pursuant to CPLR 3212, dismissing plaintiffs' complaint.

This action arises from an incident which occurred on June 8, 2009 during a lunch period in the cafeteria of Michael F. Stokes Elementary School. Infant plaintiff, Taylor Bentze, (hereinafter "Taylor") alleges that she sustained injuries while opening a container of hot soup which spilled onto her lap. At the time of the incident, Taylor was six years old and in the first grade.

During her lunch period on the date of the incident, Taylor bought a foam container of chicken noodle soup in the kitchen cafeteria, placed it on her tray, paid for it at the cashier and proceeded out of the kitchen into the lunchroom where she sat at a table with her friends. It is undisputed that outside the kitchen was a table which contained utensils, straws, napkins and a pitcher of cold water used to cool down the temperature of the hot soup. Taylor's deposition testimony is inconsistent with respect to whether she sought help of a lunch monitor to help her put cold water in her soup to cool it down. Upon arriving at the table, Taylor attempted to open the lid on the soup container at which time the container tipped and the soup fell into Taylor's lap causing the alleged injuries.

The lunch monitor, Terry Dietz, testified at a deposition in this matter. She was hired by the School District approximately four years prior to the incident and received no formal training. She was not provided with any written guidelines setting forth her duties as a lunch monitor. However, another lunch monitor provided her with a typed description of her duties. The peer guidelines do not address the cooling of soup in the cafeteria.

Ms. Dietz was the only lunch monitor for 120 students on the date of the incident. She testified that none of the kitchen staff helped to monitor the children in the lunchroom. Only the lunch monitor was allowed to cool the children's soup with the pitcher of water, however, she was not located near the cold water pitcher in the lunchroom to assist the children. She usually stood near the microphone at the opposite end of the room to make announcements during the period. Another aide, Ms. Mercer, assisted a special needs child one-on-one but would assist Ms. Dietz if needed. Ms. Dietz was located at the microphone when she heard Taylor scream at which time she came to Taylor's aid.

Ms. Dietz testified that the use and presence of a pitcher of cold water was in place for at least four years before this incident when she started working as a lunch monitor. However, she does not know what policy decisions led to the use of cold water.

The school cook, Donna Moore, testified at a deposition in this matter. She has been employed by the School District for over 20 years and has been "cook in charge" for 11 years. She is certified by the Nassau County Board of Health. Ms. Moore testified that she serves chicken noodle soup everyday. She uses a thermometer to make sure the soup reaches a temperature of 140 degrees as required by regulations codified by the New York State Department of Health. Once the soup reaches the required temperature, Ms. Moors maintains the temperature of the soup. She testified that the soup generally sits on the tray for 5-10 minutes before it is served to the students.

Ms. Moore testified that she believed there was a procedure that the lunch monitors implemented to serve the soup to the children. She testified that they used a pitcher of cold water to cool the soup and that the lunch monitors suggested the use of the pitcher of water. Knowing that the lunch monitors use cold water to cool the soup, Ms. Moore testified that she only fills the container three quarters full to allow room. She testified that she was not aware of any

complaints made regarding the temperature of the soup, nor the container the soup was served in, nor any injuries resulting from the soup.

The School District argues it is entitled to summary judgment as a matter of law as discovery has adduced no evidence that it did nothing more than comply with the law and prepare the soup in accordance with the applicable health and safety requirements. Furthermore, assuming that the court determines that the soup served to Taylor was unreasonably hot, and as such, constituted a dangerous or defective condition, the School District argues that plaintiff still must prove that the School District created the alleged condition or that it had notice the soup was unreasonably hot.

The School District additionally argues that it provided adequate supervision on the day of the accident. It contends that it is not imprudent or unreasonable to require one or two adults to supervise 120 students during the lunch period. The School District alleges that the monitor, Ms. Dietz, acted appropriately and consistent with the standard of a reasonably prudent parent when she attended to Taylor after the accident. The School District asserts that the pitcher of water was an *optional* addition to a child's soup as there were no internal guidelines mandating lunch monitors to always add cold water to the children's soup.

Finally, the School District argues that it cannot be held liable for negligent supervision since Taylor's injuries were not proximately related to any purported breach of supervision and that Taylor's injuries were not a substantial result of any act, conduct or omission by the School District.

Plaintiffs argue that summary judgment is not warranted as defendants have failed to shift the burden regarding the methods and procedures in place at the school; and that issues of fact exist regarding the level of supervision provided during Taylor's lunch period. Plaintiffs point out that defendant has not offered any affidavit from any school administrator or individual from the School District with respect to school policies. Any argument that defendants received no prior notice regarding the dangerous temperature of the soup is without merit as no testimony or affidavit is offered explaining what, if any, search was conducted. Significantly, defendants fail to explain why a protocol was implemented to reduce the temperature of the soup. Therefore, it can be assumed that the School District was on notice of a dangerous condition. Plaintiffs argue that the testimony of a lunch monitor and a cook is insufficient to shift the burden to the plaintiff. Plaintiffs additionally argue that in defendant's application in chief, they fail to address Taylor's testimony that she wanted her soup cooled and that no adult was available to assist her with the water pitcher.

Based on the foregoing, the decision of the court is as follows:

A request for summary judgment must be granted if the proponent makes a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact and the opponent fails to rebut the showing.

Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]. In this regard, the evidence must be viewed in a light most favorable to the party opposing the motion who must be given the benefit of every favorable inference. (*see Cortale v Educational Testing Service,* 251 AD2d 528, 531 [2nd Dept. 1998]).

Although schools are under a duty to adequately supervise the students in their charge, and will be held liable for foreseeable injuries proximately related to the absence of supervision (*see Brandy B. v. Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010]; *Mirand v City of New York*, 84 NY2d 44, 49 [1994]), they are not the insurers of safety as they cannot be expected to continuously supervise and control all of the students' movements and activities. (*see Keaveny v Mahopec Cent. School Dist.*, 71 AD3d 955 [2nd Dept. 2020]; *Troiani v White Plains City School Dist.*, 64 AD3d 701, 702 [2nd Dept. 2009]; *Macalino v Elmont Union Free School District*, 18 AD3d 625 [2nd Dept. 2005]). There is no liability absent a showing that the negligent supervision was a proximate cause of the injury sustained. (*see Harris v Five Point Mission Camp Olmstedt*, 73 AD3d 1127, 1128 [2nd Dept. 2010]; *Tanenbaum v Minnesauke Elementary School*, 73 AD3d 743, 744 [2nd Dept. 2010]). A school's duty is to supervise its students with the same degree of care as a parent of ordinary prudence would exercise in comparable circumstances. (see *David v County of Suffolk*, 1 NY3d 525, 526 [2003]). The test to be applied is whether under all the circumstances the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the school's negligence (*Mirand v. City of New York*, 84 N.Y.2d 44; *Derdiarian v. Felix Contr. Corp.*, 51 N.Y.2d 308, 315, 434 N.Y.S.2d 166; *Parvi v. City of Kingston*, 41 N.Y.2d 553, 560, 394 N.Y.S.2d 161; *Dunn v. State of New York*, 29 N.Y.2d 313, 318, 327 N.Y.S.2d 622).

In support of its motion for summary judgment dismissing the complaint, the School District failed to establish, as a matter of law, that it lacked sufficiently specific knowledge or notice of the dangerous conduct which caused the injury (see generally, *Hernandez v City of New York,* 24 AD3d 723, 808 NYS2d 714 [2005]). Viewed in a light most favorable to the plaintiff, there exists a question of fact whether the School District had actual or constructive notice of the dangerous condition given the fact that it provided a pitcher of cold water for the monitors to use to cool off the children's soup.

The court finds that summary judgment is not warranted where a jury could reasonably conclude that the School District's conduct in allowing children to handle hot soup constituted a dangerous and defective condition and was the proximate cause of the infant plaintiff's injuries (see, *Castillo v. Melmarkets, Inc.*, 227 AD2d 1001). The court also finds that there exist material questions of fact regarding whether there was adequate supervision by the School District which led to Taylor's injuries, given the fact that there was one lunch monitor assigned to 120 students. On the date of the incident such monitor was not stationed at the table where the water pitcher was located to assist the children in cooling off their soup. The fact that there was another adult in the room who was there to aid a special needs child is of no moment. There is no evidence that she was responsible for aiding the children with the water pitcher.

Accordingly, it is

ORDERED, that the application for summary judgment on behalf of defendant Island Trees Union Free School District is **DENIED.**

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
March 22, 2012

ENTER:

HON. JEFFREY S. BROWN, JSC

ENTERED
MAR 26 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Attorney for Plaintiff
Steven C. Rauchberg, PC
Empire State Building
350 Fifth Avenue, Ste. 2310
New York, NY 10118

Attorney for Defendant Island Trees UFSD
Ahmuty Demers & McManus, Esqs.
200 I.U. Willets Road
Albertson, NY 11507