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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

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TYREIQ MCMURRAY an infant under the age of 18 years, by his mother and natural guardian, SHERBI MCMURRAY, and SHERBI MCMURRAY, Individually,

Index No. 8178/10

Motion Submitted: 5/2/12
Motion Sequence: 001

Plaintiff(s),

-against-

THE UNIONDALE UNION FREE SCHOOL DISTRICT,

Defendant(s).

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The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....X

Defendant school district moves this Court for an Order granting summary judgment in its favor and dismissing the complaint. Plaintiffs oppose the requested relief.

Plaintiffs commenced this action as a result of the infant plaintiff (hereinafter "Tyreiq") sustaining a fractured wrist and knee sprain during a school-day recess period. Plaintiffs claim that defendant's negligent supervision was the proximate cause of Tyreiq's injury. According to plaintiffs, four boys pushed and pulled Tyreiq on a playground slide while Tyreiq's right arm was between bars at the top of the slide, causing his injuries. One or two of the four boys had previously engaged in verbal exchanges with Tyreiq.

Defendant asserts that there was adequate supervision on the playground, and no known history of prior similar conduct between Tyreiq and the boys, who were his fellow students. According to defendant, the incident giving rise to this action, which occurred on June 4, 2009, was sudden, spontaneous and unanticipated such that no level of supervision could have prevented its occurrence.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiffs. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

Specifically with respect to the liability of schools in the care and supervision of the children attending, it is well-settled that schools are obligated to exercise such care of their students as a parent of ordinary prudence would observe in comparable circumstances (***David v. County of Suffolk***, 1 N.Y.3d 525, 526, 807 N.E.2d 278, 775 N.Y.S.2d 229 [2003]). A school is not, however, an insurer of safety, and cannot be expected to continuously supervise and control all of the students' movements and activities (***Mirand v. City of New York***, 84 N.Y.2d 44, 48, 637 N.E.2d 263, 614 N.Y.S.2d 372 [1994]).

In other words, in order to find that a school has breached its duty to provide adequate supervision resulting in injuries caused by the acts of fellow students, it must be shown that the school had actual or constructive, and sufficiently specific knowledge or notice of the dangerous conduct which caused the injury such that the school could have anticipated the acts of the third party. Actual or constructive notice is required because school personnel cannot guard against sudden, impulsive and spontaneous acts that take place among students (***Mirand, supra*** at 49; ***Brandy B. v. Eden Central School District***, 15 N.Y.3d 297, 934 N.E.2d 304, 907 N.Y.S.2d 735 (2010); ***Nocilla v. Middle Country Central School District***, 302 A.D.2d 573, 757 N.Y.S.2d 300 [2d Dept., 2003]), and "[a] school is not liable for every thoughtless or careless act by which one pupil may injure another" (***Lawes v. Board of Education of the City of New York***, 16 N.Y.2d 302, 305, 213 N.E.2d 667, 266 N.Y.S.2d 364 [1965]).

Furthermore, even if it is shown that a school breached its duty of supervision, absent showing that the alleged negligent supervision was a proximate cause of the injury sustained, there is no liability to be imposed upon a school or school district (*See* ***Mirand, supra***;

Benitez v. New York City Bd. of Educ., 73 N.Y.2d 650, 658, 541 N.E.2d 29, 543 N.Y.S.2d 29 [1989]). When an incident giving rise to injury occurs in so short a span of time that the most intense level of supervision could not have prevented it, negligent supervision is not the proximate cause of the injury (***Soldano v. Bayport-Blue Point Union Free School District***, 29 A.D.3d 891, 815 N.Y.S.2d 712 [2d Dept., 2006]).

In support of its motion for summary judgment, defendant has submitted, *inter alia*, Tyreiq's testimony taken at the General Municipal Law § 50-h hearing ("50-h hearing"), and his deposition testimony. Defendant has also submitted Sherbi McMurray's 50-h hearing testimony, deposition testimony, and the deposition testimony of Tyreiq's fifth grade teacher and the playground/lunch aide employed by defendant.

At the time of the incident, Tyreiq was in the fifth grade and was eleven years old. The other boys involved in this incident were fellow fifth graders.

According to his 50-h hearing testimony taken eight months after the incident, Tyreiq was not playing with anyone prior to the incident; he ascended the slide's ladder by himself, with no one in front of him, or behind him. There were approximately five aides on the playground at the time of the luncheon recess when the incident occurred.

As Tyreiq was seated on top of the slide, preparing to slide down, he was "attacked." According to Tyreiq's testimony, one boy put his arm around Tyreiq's neck, another grabbed his arm, one was pushing Tyreiq, and another pulled on Tyreiq's left leg. In order to prevent himself from going down the slide, and in the course of resisting, Tyreiq placed his right hand through a "hole," or bars, at the top of the slide. Tyreiq eventually went down the slide, but his right hand was still in the apparatus. Before Tyreiq could get his hand completely loose, his hand "snapped" and made a "cracking noise."

Two playground aides intervened, and the boys scattered. Tyreiq slid down and sat down on a nearby bench holding his arm. Thereafter, Tyreiq was seen by the school nurse, who gave him an ice pack for his wrist. Tyreiq also reported the incident to the two assistant principals of the school where the incident occurred. Tyreiq went to school the next day. Tyreiq testified that he told his mother about the incident the day after it occurred because the pain in his wrist increased upon using his right hand to write.

Further according to his 50-h hearing testimony, "a couple of months before" the incident Tyreiq had a verbal argument in class with one of the boys (Dylan), when it was at or close to dismissal time. According to Tyreiq, the "argument" consisted of Dylan "talking about [Tyreiq] and [his] family," causing Tyreiq to become upset. Tyreiq testified that the classroom teacher spoke to them both and called their respective parents. Aside from this

prior verbal disagreement, Tyreiq had no other issues or incidents with Dylan, or with any of the other boys who pushed and pulled him on the slide on June 4, 2009.

At his deposition, which occurred on June 9, 2011, Tyreiq testified that none of the boys said anything to him prior to the incident, and that he had never been in a physical altercation with any of them prior to June 4, 2009.

According to his own testimony, Tyreiq sometimes just sits at the top of the slide for a couple of minutes before sliding down. Apparently, his arm was between the bars before the incident occurred. Before he could get his hand out, he was being pushed, and "decided to use that as a device to keep [him] from them pushing [him] down."

Tyreiq further testified that, twice before the date of incident, Dylan and another of the boys had made fun of him, called him names, and said things about his family members. Tyreiq was unsure of when the name-calling incidents occurred in relation to June 4, 2009, but it was earlier in the school year. Tyreiq acknowledged that those boys did not utter any threats of physical harm during the aforementioned verbal exchanges preceding the date of incident.

Plaintiff Sherbi McMurray testified both at the 50-h hearing, and at deposition, that Tyreiq had not had any physical fights with any of the boys prior to June 4, 2009. According to her testimony, she was aware that Tyreiq and Dylan "were having verbal arguments during class," and that she had spoken to the classroom teacher about those arguments. According to Sherbi McMurray, the classroom teacher told her that he "would take care of it."

At her deposition, Sherbi McMurray testified that she spoke to the classroom teacher approximately two times regarding Tyreiq's relationship with Dylan. According to her testimony, the classroom teacher stated, in sum and substance, that he would keep an eye on Dylan, and that he had separated them in the classroom.

The classroom teacher testified at deposition that he normally rearranges his classroom two or three times per year, but did not recall specifically rearranging the classroom for the purpose of separating Tyreiq from Dylan. The teacher did not discuss with the principal anything specific concerning Tyreiq. The teacher also did not recall any specific conversations with Sherbi McMurray concerning Tyreiq and/or Dylan, but stated that he speaks to all of the parents throughout the school year. The classroom teacher also testified that he did not recall there being any problems in the classroom between Tyreiq, Dylan and one of the other boys involved in the incident.

Lunch aide Rosemarie Busketta testified that she was assigned as an aide to the fifth graders in the 2008-2009 school year. She knew of Tyreiq by name, having seen him in school on a daily basis, but she did not know the boys involved in the incident by name. She also testified that there were three or four other aides on duty that day.

From approximately ten feet away, the aide first saw Tyreiq when he was almost down the slide. According to the aide, Tyreiq had his arm extended as he was sliding down. When Tyreiq reached the bottom of the slide, the aide saw another boy grab Tyreiq's arm. At first, she thought they were playing, but when she saw the boy grabbing Tyreiq's arm, she and another aide blew their whistles and intervened. The aide does not know the name of the boy who she saw grabbing Tyreiq's arm, but she testified that, afterward, Tyreiq was holding his arm and crying. The aide did not hear any screaming prior to the occurrence she described, and only saw the one boy around the slide at the time of the incident. Furthermore, the aide testified that she never saw Tyreiq being verbally attacked on the playground prior to the incident.

Defendant's submissions establish that there were no prior violent altercations between Tyreiq and his classmates involved in the incident, or even that threats of violence were directed toward Tyreiq prior to the incident giving rise to this action. Moreover, there is no evidence that any of the individuals involved in the incident had been disciplined for any type of aggressive or violent behavior prior to June 4, 2009. Thus, even assuming, arguendo, that the classroom teacher changed the seating arrangement based on verbal arguments between Tyreiq and Dylan during class, defendant had no reason to anticipate the playground assault.

Moreover, defendant's testimony establishes that the alleged attack was not preceded by any verbal warning/threat made by the other boys. Tyreiq was apparently just sitting at the top of the slide when he was initially pushed from the back. Tyreiq testified that he did not know why he was being attacked. Thus, it appears to the Court that the attack was sudden, and of a surprise nature.

Furthermore, Tyreiq testified that when he yelled for help, an aide came over and told the boys to stop. When they did not respond to her commands to stop, a second aide came over to the slide area and told them to stop, which they did.[1] Tyreiq also testified that no lunch aide witnessed the incident, and that he was not being chased by anyone, or even talking to anyone, prior to the incident.

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[1]The two aides named by plaintiff (Jean Michel and "Miss Anna") were either not deposed, or their testimony has not been submitted by any of the parties to this action.

Tyreiq's deposition testimony that the incident lasted for fifteen (15) minutes out of the entire twenty-five (25) minute lunch period, and that no teacher or lunch aide intervened or blew a whistle during the attack is belied by Tyreiq's own 50-h hearing testimony that, as he was being grabbed by the boys, he was yelling for help, and "then. . . one lunch aide came over and told them to stop." Further according to his 50-h testimony, when the boys disobeyed the first aide, the second aide came to the slide area and also commanded the boys to stop, which they did.

Based on the foregoing, it is the determination of this Court that defendant has established that it had no actual or constructive notice of any prior similar conduct by the students who allegedly attacked plaintiff Tyreiq such that it should have anticipated an impending assault (***Buchholz v. Patchogue-Medford School District***, 88 A.D.3d 843, 931 N.Y.S.2d 113 (2dDept., 2011) (school district did not have actual or constructive notice of dangerous conduct by assailants in view of fact that assailants had never previously been in violent altercation with plaintiff, and that none of assailants' prior disciplinary infractions involved violent behavior); ***Taylor v. Dunkirk City School District***, 12 A.D.3d 1114, 785 N.Y.S.2d 623 (4th Dept., 2004) (complaint dismissed; no reason to anticipate hallway assault although assailant was previously disruptive and defiant toward classroom teacher and verbally aggressive toward plaintiff during class, as there was no history of physically aggressive behavior or threat thereof); (***Sanzo v. Solvay Union Free School District***, 299 A.D.2d 878, 750 N.Y.S.2d 252 (4th Dept., 2002) (complaint dismissed; verbal taunting between plaintiff and assailant without proof that either student previously engaged in violent or threatening behavior, did not serve to forewarn district); (***Morman v. Ossining Union Free School District***, 297 A.D.2d 788, 747 N.Y.S.2d 586 (2d Dept., 2002) [extensive disciplinary record of assailant involving mostly insubordinate and disruptive behavior of a nonviolent nature, plus a prior disciplinary incident involving fighting over eight months prior to the physical altercation with plaintiff, insufficient to charge school district with actual or constructive notice of prior similar conduct]).

Moreover, the sudden, surprise nature of the incident leads this Court to the conclusion that even the most intense amount of supervision could not have prevented it, and once observed by the lunch aides, it also appears to the Court that "energetic steps to intervene" were taken by the aides to stop the incident (***Lawes v. Board of Education***, 16 N.Y.2d 302, 305, 213 N.E.2d 667, 266 N.Y.S.2d 364 [1965]).

Thus, the district has established its *prima facie* entitlement to summary judgment as a matter of law.

In opposition to the instant motion, plaintiffs have failed to raise a triable issue of fact. Plaintiff Sherbi McMurray's "Affidavit of Merit" essentially summarizes her testimony,

which was submitted by defendant in support of the instant motion. Tyreiq's "Affidavit of Merit" likewise summarizes his testimony. The fact that the attackers did not respond to the first aide's command to stop, necessitating a second aide to intervene, actually serves to establish the fact that there was ample supervision to put an end to the incident.

Aside from their own affidavits, plaintiffs have failed to submit any other evidence, such as prior disciplinary records of the assailants, if they exist, and/or the testimony of any other playground/lunch aides.

Thus, plaintiffs have failed to raise a triable issues of fact as to defendant's actual or constructive notice of the alleged attackers' violent propensities, or that the lunch aides failed to intervene appropriately in order to prevent Tyreiq's injuries, sufficient to defeat defendant's summary judgment motion.

Accordingly, defendant's summary judgment motion is granted, and the complaint is dismissed.

The foregoing constitutes the Order of this Court.

Dated: June 13, 2012
Mineola, N.Y.

Karen V. Murphy
J. S. C.
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