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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** _____
Justice

Index Number : 110092/2009
MCGOWAN, NICHOLAS
vs.
ST.ADALBERT PAROCHIAL
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/16/12

_____, **J.S.C.**

1. **CHECK ONE:** ..... ☑ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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NICHOLAS MCGOWAN, an infant under the age of 18 by his mother and natural guardian ANN KIRDAHY and ANN KIRDAHY, individually,

Plaintiffs,

-against-

ST. ADALBERT PAROCHIAL ELEMENTARY SCHOOL, ARCHDIOCESE OF NEW YORK and "JANE" SEAMEN, said name "Jane" being fictitious and unknown,

Defendants.

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Index No. 110092/09

DECISION/ORDER

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	
Answering Affidavits to Cross-Motion.....	
Replying Affidavits.....	
Exhibits.....	3

Plaintiff commenced the instant action to recover damages for personal injuries he allegedly sustained when he was injured while participating in an organized running activity during physical education class at St. Adalbert Parochial Elementary School ("St. Adalbert") on Staten Island on November 20 , 2008. Defendants St. Adalbert and gym teacher Maria Seamen now move for summary judgment on the grounds that they provided reasonable and adequate supervision of the gym class, that the accident was a spontaneous and unforeseeable occurrence

that happened too quickly to be prevented, that plaintiff assumed the risk of some injury and that they did not cause or have notice of a defective condition in the gym. Defendant the Archdiocese of New York moves for summary judgment on the ground that it did not own, operate, control or maintain the defendant school or any of its employees. For the reasons set forth below, the defendants' motions are granted.

The relevant facts are as follows. On November 20, 2008, plaintiff, an eight-grader, attended a gym class taught by Maria Seamen. She directed the students in a running exercise, whereby two students at a time would run back and forth from a starting point to various lines on the gym floor. After they reached each designated line, they turned around and ran back to the starting point, then turned and ran to the next line. When each student completed the exercise he tagged the next student in line, who then began running. At the time, floor mats which were used by the cheerleaders during their practice sessions were rolled up and standing against the gym wall. Plaintiff was running back toward the starting line when he fell, breaking his ankle. Accounts of how he fell differ. Plaintiff testified that a student or students tipped over one of the floor mats and rolled or dragged or pushed it toward him and that, as he tried to get out of the way, he fell. However, Ms. Seamen and another student, Francis Fundaro, testified that when plaintiff fell no one was moving or touching the floor mats and there were no obstacles in plaintiff's path. Mr. Fundaro specifically testified that the mats were still in their spots when plaintiff fell. Mr. Fundaro further testified that plaintiff has said that he was going to slide in the gym during the relay race. Mr. Fundaro testified that Ms. Seamen "generally" had trouble controlling the class, had trouble getting the students to do as she instructed, and that in general her class was "like, complete chaos, pretty much." However, he also testified that at the time of

plaintiff's accident he did not see any horseplay going on.

Plaintiff argues that the school and teacher exercised inadequate supervision over the gym class during which plaintiff was injured. He specifically states that "the argument here is not that the mats were stored improperly or positioned in the plaintiff's path for an extended period of time." Therefore, the court will address only the inadequate supervision argument.

While schools have a duty to supervise their students, they are not "insurer[s] of [their] students' safety." *Mirand v City of New York*, 190 A.D.2d 282 (1st Dept 1993). A school "will be held liable for a foreseeable injury proximately related to the absence of supervision." *Id.* (citation omitted). The standard for determining whether a school was negligent in exercising such supervision is whether a parent of ordinary prudence would have provided greater supervision. *See id.* However, "when an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not the proximate cause of the injury and summary judgment in favor of the [defendant school district] is warranted." *Esponda v City of New York*, 62 A.D.3d 458 (1st Dept 2009) (citations omitted). In *Esponda*, the First Department reversed the trial court's denial of defendants' motion for summary judgment, finding that plaintiff's injury during a fire drill, which occurred when two students bumped into her, causing her to fall, could not have been prevented with additional supervision. *See id.* Moreover, the courts have repeatedly found that injuries that resulted from the actions of other students in a physical education setting are the result of events that occur so quickly that additional supervision could not have prevented them. *See Knightner v William Floyd Union Free School District*, 51 A.D.3d 876 (2nd Dept 2008); *Paca v City of New York*, 51 A.D.3d 991 (2nd Dept 2008); *Mayer v Mahopac Central School Dist.*, 29 A.D.3d 653 (2nd Dept

2006).

In the instant case, assuming the plaintiff's version of the accident was correct, the accident occurred so quickly that "even the most intense supervision could not have prevented it." *See Esponda*, 62 A.D.3d 458. If students in fact pushed a floor mat into plaintiff's path while plaintiff was running, there would not have been time to move it out of plaintiff's way. Indeed, plaintiff himself barely had time to avoid colliding with the mat and, in doing so, fell. The proximate cause of plaintiff's injury was not the lack of supervision but the actions of the classmate or classmates who put the floor mat in his way. The testimony that Ms. Seamen "generally" had trouble controlling her class is irrelevant in light of the speed with which the incident took place.

Moreover, if the plaintiff slid on the gym floor voluntarily, the defendant school and teacher would also be entitled to summary judgment. Defendants are entitled to summary judgment because plaintiff assumed the risks inherent in sliding on the gym floor. It is well-settled that "one is deemed to have assumed, as a voluntary participant...'those commonly appreciated risks which are inherent in and arise out of the nature of the sport [or activity] generally...'" *Roberts v Boys and Girls Republic, Inc.*, 51 A.D.3d 246 (1st Dept 2008) (citation omitted). "[T]he scope of plaintiff's assumption... may vary depending upon a particular plaintiff's capacity to appreciate the risks of an activity..." *Id.* Where the risks are obvious, such as the risk of slipping off a diving board or the risks of ice skating, and conditions are "as safe as they appeared to be" courts have found that infant plaintiffs have assumed the risks inherent in such activities. *Cardoza v Village of Freeport*, 205 A.D.2d 571 (2nd Dept 1994); *see also Cook v Town of Oyster Bay*, 267 A.D.2d 192 (2nd Dept 1999). Here the gym floor was as safe as it

appeared to be. In choosing to slide on the gym floor, plaintiff voluntarily assumed the risks of doing so.

In addition, where plaintiff is the sole proximate cause of his own accident, defendants cannot be liable. *See Mastropolo v Goshen Central School Dist.*, 40 A.D.3d 1053 (2nd Dept 2007). In *Mastropolo*, the court found that the defendant school district was entitled to summary judgment because the sole proximate cause of plaintiff's injury was his own jumping up and swinging from the pipes supporting the basketball backboard, in knowing violation of school rules. Similarly, in *Osorio v Thomas Balsley Assoc.*, 69 A.D.3d 402 (1st Dept 2010), the court found that plaintiff was the sole proximate cause of his accident when he voluntarily chose to climb on a "stretching bar" at the adult fitness area at a park. In the instant case, if plaintiff fell because he chose to slide on the gym floor and disregard the gym teacher's instructions, he would be the sole proximate cause of his accident. Where plaintiff is the sole proximate cause of his accident, defendants are entitled to summary judgment. *See Mastropolo*, 40 A.D.3d 1053; *Osorio*, 69 A.D.3d 402.

Finally, the Archdiocese of New York's motion for summary judgment is also granted as it has no control over St. Adalbert or its employees. The affidavit of the pastor of St. Adalbert Parish, which maintains and operates the school, states that the Archdiocese of New York has no control over St. Adalbert and is uncontroverted.

Accordingly, defendants' motions are granted and plaintiff's complaint is dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 8/16/12

Enter: OK
J.S.C.