SHORT FORM ORDER

INDEX No. 07-23829
CAL. No. 11-01160OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

***PRESENT:***

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 10-18-11
MOTION DATE 11-10-11
ADJ. DATE 12-1-11
Mot. Seq. # 003 - MD
# 004 - Mot D

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BRETT LISTL, an infant by his parents and natural guardians, LUANN LENO and MARTIN LISTL, and LUANN LENO and MARTIN LISTL,

Plaintiffs,

- against -

TUCKAHOE COMMON SCHOOL DISTRICT,

Defendant.

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Upon the following papers numbered 1 to 34 read on the motion and cross motion respectively for summary judgment and to dismiss the affirmative defenses; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers 16 - 25; Answering Affidavits and supporting papers_____; Replying Affidavits and supporting papers 26 -27; 28 - 29; 30 - 34; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that this motion by defendant Tuckahoe Common School District for an order granting summary judgment dismissing the complaint is denied; and it is further

***ORDERED*** that plaintiffs' cross motion for summary judgment dismissing defendant's affirmative defenses is granted to the extent set forth herein and is otherwise denied.

This is an action to recover damages for injuries allegedly sustained by the then 11 year old, Brett Listl on May 24, 2006 at Tuckahoe Elementary School when a fellow student, Donovan Trent (Trent), pushed and tripped the infant plaintiff, fracturing both his wrists. Luann Leno and Martin Listl, the infant plaintiff's parents have interposed a derivative claim. By their complaint, plaintiffs assert causes of action against the defendant Tuckahoe Common School District (the District) sounding in negligent supervision, and negligent hiring. Plaintiffs allege that school monitors failed to manage, control and protect students in the playground area by permitting too many students to congregate and play on the playground and allowing students to become unruly.

The defendant District now moves for summary judgment dismissing the complaint on the basis that it provided sufficient monitors to supervise 120 students at recess, a ratio of one adult monitor for every 30 students. Defendant argues that there was no prior indication of any animosity between Trent and the infant plaintiff and that Trent was involved in only one prior incident involving physical contact. Thus, movant argues that it was not on notice that a greater level of supervision was required. Rather, defendant argues that plaintiff's injuries resulted from a sudden and spontaneous act of a fellow student, without warning or sufficient time for intervention. Defendant contends that plaintiff was a voluntary participant in horseplay. In support of the motion, defendant submits copies of the pleadings, the bill of particulars, and the deposition transcripts of infant plaintiff, plaintiff Luann Leno, teacher Arlette Sicari, and monitor Marianne Cherest.

In opposition, plaintiffs contend that the District breached its duty to provide adequate supervision of its students by allowing horseplay to escalate into aggressive behavior, without intervention by school monitors. In addition, plaintiffs contend that Trent had a history of physical aggression and misconduct, and thus, the District was on notice that he posed a risk of harm to other students. Plaintiffs contend that the incident consisted of a series of events that escalated, and had a school official intervened at an earlier stage, further harm would have been prevented.

Plaintiffs oppose the motion and cross-move for an order denying defendant's motion for summary judgment and dismissing defendant's first, second, fourth, fifth, sixth, and seventh affirmative defenses as legally insufficient. In support thereof, plaintiff submits inter alia, transcripts of the deposition testimony of infant plaintiff Listl, six grade teacher Arlette Sicari, monitor Marianne Cherest, Assistant Principal Robert Ricca, and the disciplinary record of Trent Donovan.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]).

Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (*see* ***Torres v City of New York***, 90 AD3d 1029, 934 NYS2d 871[2d Dept 2011], ***Mirand v City of New York***, 84 NY2d 44, 614 NYS2d 372 [1994]; ***Ronan v School Dist. of City of New Rochelle***, 35 AD3d 429, 825 NYS2d 249 [2d Dept 2006]). Even assuming there is a question of fact as to the adequacy of supervision, liability for any such negligent supervision does not lie absent a showing that it constitutes a proximate cause of the injury sustained (*see* ***Odekirk v Bellmore-Merrick Central School District***, 70 AD3d 910, 895 NYS2d 184 [2d Dept 2010], ***Mayer v Mahopac Cent. School Dist.***, 29 AD3d 653, 815 NYS2d 189 [2d Dept 2006]; ***Capotosto v Roman Catholic Diocese of Rockville Ctr.***, 2 AD3d 384, 767 NYS2d 857 [2d Dept 2003]; ***Lopez v Freeport Union Free School Dist.***, 288 AD2d 355, 734 NYS2d 97 [2d Dept 2001]). Moreover, where 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 defendant school is warranted (*see* ***Odekirk v Bellmore-Merrick Central School District,*** *supra,* ***Ronan v School Dist. of City of New Rochelle***, *supra*; ***Mayer v Mahopac Cent. School Dist.***, *supra*; ***Reardon v Carle Place Union Free School Dist.***, 27 AD3d 635, 813 NYS2d 150 [2d Dept 2006].

In order establish that a defendant school district has breached its duty to provide adequate supervision to a student vis-a-vis the acts of fellow students, it must be shown that the school 'had sufficiently specific knowledge or notice of the dangerous conduct which caused injury, that is, that the third party acts could reasonably have been anticipated' (***Janukajtis v Fallon***, 284 AD2d 428, 726 NYS2d 451 [2d Dept 2001], *quoting* ***Mirand v City of New York***, 84 NY2d 44, at 49, 614 NYS2d 372 [2d Dept 1994]). A school district's motion for summary dismissal in an action alleging inadequate supervision will be granted upon a demonstration that it did not breach its duty of supervision, either by failing to provide a sufficient number of monitors or to adequately supervise plaintiff (see ***Davidson v. Sachem Cent. School Dist.***, 300 AD2d 276, 751 NYS2d 300 [2d Dept 2002], ***David v County of Suffolk***, supra, ***Navarra v Lynbrook Pub. Schools, Lynbrook Union Free School Dist.***, 289 AD2d 211, 733 NYS2d 730 [2d Dept 2001], ***Berdecia v City of New York***, 289 AD2d 354, 355, 735 NYS2d 554 [2d Dept 2001].

Marianne Cherest testified that she was given a District handbook at the beginning of each academic year. Although she was a monitor at three recesses on the playground at Tuckahoe Elementary School on the day of the incident, she did not recall the circumstances or the total number of students at each recess. Her responsibilities included monitoring the children's activities and behaviors, keeping them safe, and assisting them if injured. She did not remember infant plaintiff, but did recall that Donovan Trent was often in trouble for being loud, boisterous, and hard to control. She did not remember ever documenting an incident involving his behavior. She testified generally, describing the recess area as including a soccer/baseball field/basketball area, and a playground. She testified that there were three monitors assigned to recess. One monitor would be stationed at the soccer field, another at the handball/baseball area, and the third on the playground. She testified that it was commonplace for children to trip one another, and the protocol was to direct them to stop, but they did not document the behavior.

Arlette Sacari testified that she had been employed as a teacher for the District for 16 years. She stated that the principal reviews playground rules and regulations with monitors and teachers annually. Her classes averaged 23 students. Plaintiff was a student of hers when the incident occurred. At one time, she was Trent's teacher on a part-time basis for math support. She stated that students have recess at 11:30 a.m. for 20 minutes. She described the field as "L" shaped, and students walk through the soccer field to get to the playground. Monitors are stationed sporadically, and Mrs. Cherest supervised the soccer field on the day of the incident. Ms. Sicari witnessed the incident on the soccer field through a window in the faculty lounge, as she ate her lunch. She observed Trent lift plaintiff up and slam him down to the ground. She was not able to call out to or reach any of the monitors, as she tried to open the windows, but they would not budge. She saw the boys continue walking, the two students remained on the playground throughout recess. She was very upset over the incident and went directly to the assistant principal's office after lunch and filed a report of the incident. She testified that 120 students were outside during recess at the time of the incident, and 4 or 5 monitors were supervising them. None of the

monitors approached plaintiff or Trent. She had never witnessed prior incidents involving Trent and other students. Later that day, when she asked Trent why he behaved in that manner he conceded that they had been fooling around, but he did not realize that plaintiff was injured. Sacari spoke with the monitor, who stated that although she was aware of the incident, she did not know anyone had been hurt.

Infant plaintiff Brett Listl testified he was a sixth grade student when the incident occurred. He was walking towards the soccer field when he tripped a fellow student, Vincent Guli who had tripped him the day before. Another student Donovan Trent then tripped plaintiff. He immediately stood up and went to play soccer. Within a short period of time, Trent tripped him again. When plaintiff got up, he pulled Trent's hood over his face, and Trent tripped plaintiff again. Plaintiff testified that after he had been tripped three times, he stayed on the ground for a minute or two. Trent jumped on him pushing an elbow into each of his wrists, a wrestling move which Trent called the "people's elbow". He felt pain in his right wrist. The entire incident took place over the course of seven minutes. Plaintiff did not observe any monitors in the area, and no one intervened or assisted him. He stood around waiting for recess to end, but he did not report to the monitors that he was in pain. Upon his return to class, he told his teacher that his wrist was painful, and he was unable to write. After he was given ice at the nurse's office, he told the principal that Trent had tripped him and used a wrestling maneuver, injuring both of his wrists. The next day, a physician confirmed that both wrists were broken. He stated that there were about three monitors on the playground the day of the incident. Plaintiff testified that tripping was common place at the school, and he had never been reprimanded for tripping. He had never reported that any students had tripped or threatened him, and prior to the incident, he had never been in a fight with Trent.

Plaintiff, Luann Leno, testified that prior to the incident her son had never complained about problems at school. Her son's teacher, Mrs. Sicari, advised her, that she had watched the incident from the teachers' lunchroom window for 10 minutes, questioning why a monitor was not intervening. Mrs. Leno testified that Assistant Principal Ricca admitted to her that he had spoken to the monitor, and that a note had been placed in her permanent file for failing to intercede. After questioning her son further, he told her of other incidences of tripping.

The assistant principal, Robert Ricca, testified that his responsibilities included supervision of staff and students, and the day-to-day operations of the Tuckahoe Elementary School. There were four monitors assigned during recess on the day of the incident, two on the field and two on the playground. One monitor told him that she did not see anything. Another monitor admitted to him that she saw students roughhousing, that both students were part of a group that had been spoken to on several occasions, and that the group had been tripping students by placing a knee down behind them and toppling them backwards.

The disciplinary record of Donovan Trent reveals that he had been disciplined for fighting and wrestling, and disruptive and disrespectful behaviors.

Here, plaintiffs raise material issues of fact as to whether the injuries sustained by the infant plaintiff were foreseeable based on the acknowledgment by the District's personnel, specifically the assistant principal and the recess monitor, of prior incidences of tripping and roughhousing on the

playground and on Trent Donovan's disciplinary record (*see* ***Torres v City of New York,*** *supra,* ***Mirand v City of New York***, *supra*). A further issue exists as to whether the altercation between the students was so sudden that even the most intense supervision could not have prevented it ***Odekirk v Bellmore-Merrick Central School District***, 70 AD3d 910, 895 NYS2d 184 [2d Dept 2010]. Moreover, a material issue of fact exists as to whether inadequate supervision was the proximate cause of plaintiff's injuries in view of the testimony of a monitor and teacher who admittedly failed to intervene during the altercation (*see* ***Odekirk v Bellmore-Merrick Central School District, Ronan v School Dist. of City of New Rochelle***, *supra*).

Accordingly, defendant's motion (003) for an order granting summary judgment in its favor is denied.

Turning to the cross motion, plaintiffs seek an order pursuant to CPLR 3211 (b) dismissing the defendant's affirmative defenses. Plaintiff has withdrawn that branch of the motion which sought dismissal of the first and second affirmative defenses.

To the extent that the cross motion seeks dismissal of the third, fourth and fifth affirmative defenses, which allege contributory negligence, assumption of the risk on the part of the infant plaintiff and a sudden, unforseen and spontaneous action on the part of a third party, such defenses are to be determined at trial and accordingly, the branches of the cross motion which seek dismissal thereof are denied.

Defendant's sixth affirmative defense is premised upon CPLR §§ 4111(f), 4213(b), 4545(c), 5036, 5041, 5046 and 5501 (c). To the extent that there is no provision in the CPLR enumerated 4111 (f) or 4545 (c), the cross motion is granted. In addition, insofar as the sixth affirmative defense refers to CPLR §§ 4231 (b), 5036, 5041, 5046 and 5501 (c), various provisions for post trial and post judgment procedure, it is dismissed without prejudice.

Defendant's seventh affirmative defense is dismissed as superfluous. Even if the court were to determine that a joint tort feasor were implicated herein, CPLR 1600 need not be plead as an affirmative defense (*see* ***Marsala v Weinraub,*** 208 AD2d 689, 617 NYS2d 809 [2d Dept 1994]).

In view of the foregoing, the cross motion is granted to the limited extent that the first and second affirmative defenses are permitted to be withdrawn and the sixth and seventh affirmative defenses are dismissed without prejudice.

Dated: 9/5/12

J.S.C.

**____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION**