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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

JEAN RENAUD JOSEPH-FELIX,

Plaintiff,

- against -

UNIONDALE UNION FREE SCHOOL DISTRICT, FRANCIS AJAVON and MARIE JOHELLE FAUSTIN, parents and natural guardians of KASSI AJAVON, an Infant Under the Age of 14, and KASSI AJAVON, Individually,

Defendants.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 8240/11

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1
Answering Affidavits 2
Replying Affidavits .....
Briefs: Plaintiff's / Petitioner's .....
Defendant's / Respondent's 3

The defendant Uniondale Union Free School District moves pursuant to CPLR 3211(a)(1), (7) to dismiss the verified complaint or cause of action against it. The School District contends the plaintiff fails to state a cause of action because the plaintiff is barred by the Workers' Compensation Law §§ 10, 11 and 29 from bringing such action against his employer. The School District also asserts the plaintiff cannot maintain this action against his employer because of irrefutable documentary evidence showing he elected to

receive Workers' Compensation benefits, so the plaintiff is barred by the Workers' Compensation Law §§ 10, 11 and 29 from bringing a negligence action against his employer.

The plaintiff opposes this motion. The plaintiff contends there is a special relationship between him and the School District. The plaintiff claims the security personnel of the School District owed him a special duty, and the School District was negligent with security. The plaintiff asserts the School District was careless in its supervision and enforcement of disciplinary measures.

The School District replies the plaintiff fails to state facts showing the plaintiff's justifiable reliance upon a special relationship. The School District avers its proffer and the verified complaint show the School District has immunity. The School District maintains the plaintiff fails to allege any deliberate or intentional acts by the School District that allegedly resulted in the plaintiff's injuries.

> As a quid pro quo for the swift and secure payment of benefits for injuries sustained in the course of their employment, without regard to fault (***see*** Workers' Compensation Law, § 10), the Workers' Compensation Law generally requires employees to forfeit their right to maintain a common-law tort action against their employers and coemployees for work-related injuries (***see Billy v Consolidated Mach. Tool Corp.***, 51 NY2d 152, 159; ***O'Rourke v Long***, 41 NY2d 219, 222). Thus, section 11 of the Workers' Compensation Law specifically provides: "The liability of an employer prescribed by the last preceding section shall be exclusive and in place of *any other liability whatsoever*" to the injured employee or his personal representative on account of such injury or death, except in those cases in which the employer has failed to secure workers' compensation (***emphasis supplied***). In addition, subdivision 6 of section 29 of the Workers' Compensation Law provides: "The right to compensation or

> benefits under this chapter, shall be the exclusive remedy to an employee, or in case of death his dependents, *when such employee is injured or killed by the negligence or wrong of another in the same employ*" (***emphasis supplied***)

Orzechowski v Warner-Lambert Co., 92 A.D.2d 110, 111-112, 460 N.Y.S.2d 64 [2d Dept, 1983].

> Workers' Compensation Law § 29(6) does not bar intentional tort actions against coemployees or the employer (***see, Hirsch v. Mastroianni***, 80 A.D.2d 633, 436 N.Y.S.2d 87)...To warrant an exception from the exclusive remedy provided by Workers' Compensation Law § 29(6), the plaintiff "must allege an intentional or deliberate act by the employer directed at causing harm to" the plaintiff (***Mylroie v. GAF Corp.***, 81 A.D.2d 994, 995, 440 N.Y.S.2d 67, affd. 55 N.Y.2d 893, 449 N.Y.S.2d 21, 433 N.E.2d 1269; ***see also, Orzechowski v. Warner-Lambert Co.***, 92 A.D.2d 110, 113, 460 N.Y.S.2d 64). In addition, allegations that the employer exposed the employee to a substantial risk of injury have been held insufficient to circumvent the exclusivity of the Workers' Compensation Law (***see, Orzechowski v. Warner-Lambert Co., supra; Mylroie v. GAF Corp., supra; Crespi v. Ihrig***, 99 A.D.2d 717, 718, 472 N.Y.S.2d 324 ***affd.*** 63 N.Y.2d 716, 480 N.Y.S.2d 205, 469 N.E.2d 526)

Nash v. Oberman, 117 A.D.2d 724, 725, 498 N.Y.S.2d 449 2d Dept, 1986].

This Court determines plaintiff's allegations here do not rise to the level required to fall outside the ambit of Workers' Compensation Law § 29(6). This Court considered the plaintiff's allegations in the light favored to the plaintiff, however, the conduct of the School District an does not amount to intentional or deliberate acts by the School District directed at causing harm to the plaintiff.

> " 'In order to constitute an intentional tort, the conduct must be engaged in with the desire to bring about the consequences of the act. A mere knowledge and appreciation of a risk is not the same as the intent to cause injury' " (***Acevedo v. Consolidated Edison Co. of N.Y.***, 189 A.D.2d 497, 501, 596 N.Y.S.2d 68, ***quoting Finch v. Swingly***, 42 A.D.2d 1035, 348 N.Y.S.2d 266). Allegations that an employer negligently exposed an

employee to a substantial risk of injury have therefore been held insufficient to circumvent the exclusivity of the remedy provided by the Workers' Compensation Law (***see Gagliardi v. Trapp***, 221 A.D.2d 315, 316, 633 N.Y.S.2d 387; ***Nash v. Oberman***, 117 A.D.2d 724, 725, 498 N.Y.S.2d 449) ***Miller v. Huntington Hosp.***, 15 A.D.3d 548, 549-550, 792 N.Y.S.2d 88 [2d Dept, 2005].

The plaintiff has not plead the School District directed or instigated the alleged assault, nor participated in the assault in any manner. Hence, the plaintiff's sole remedy for such alleged wrong is furnished in the Workers' Compensation Law (***see Doe v. State***, 89 A.D.3d 787, 933 N.Y.S.2d 688 [2d Dept, 2011]; ***see also Pereira v. St. Joseph's Cemetery***, 54 A.D.3d 835, 864 N.Y.S.2d 491 [2d Dept, 2008].

Accordingly, the motion is granted.

So ordered.

Dated: **May 7, 2012**

ENTER:

J. S. C.

NON FINAL DISPOSITION