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SHORT FORM ORDER

INDEX No. 11-33269
CAL. No. 13-00601OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 9-6-13
ADJ. DATE 10-22-13
Mot. Seq. # 001 - MG; CASEDISP

ASIA RESZEL, an infant by her parent and natural guardian, THOMAS LINARDOS, and THOMAS LINARDOS, Individually,

Plaintiffs,

- against -

COPIAGUE SCHOOL DISTRICT,

Defendant.

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Upon the following papers numbered 1 to 21 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 14 - 19 ; Replying Affidavits and supporting papers 20 - 21 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Copiague Union Free School District for summary judgment dismissing the complaint is granted.

Plaintiff Thomas Linardos commenced this action to recover damages, personally and derivatively, for injuries allegedly sustained by his daughter, infant plaintiff Asia Reszel, on February 28, 2011, when she tore her anterior cruciate ligament and meniscus after attempting to perform a split leap in the aisle of the school's auditorium following the end of a rehearsal of the school's production for the Phantom of the Opera. At the time of the alleged accident, infant plaintiff, who was seventeen years old, was a student of the Copiague High School, which is owned and operated by defendant Copiague Union Free School District. By their bill of particulars, plaintiffs assert, inter alia, that infant plaintiff was urged and permitted to perform a dangerous running split leap under the direction or supervision of a teacher, Sylvia Walsh. It further asserts that Mrs. Walsh negligently supervised infant plaintiff and her fellow students by permitting or directing such conduct without giving them appropriate training or ascertaining their ability to perform the leap.

12-4-14

Defendant now moves for summary judgment dismissing the complaint on the grounds it provided adequate supervision to the infant plaintiff, that the accident occurred in such a short span of time that it could not have been reasonably prevented, and that infant plaintiff assumed the risks of her injuries when she decided to attempt the split leap. Plaintiffs oppose the motion, arguing that the doctrine of assumption of the risk is inapplicable under the circumstances of this case, as infant plaintiff was not participating in an athletic or recreational activity. Plaintiffs further assert that even if the doctrine was applicable, triable issues exist as to whether infant plaintiff was inherently compelled to attempt a split leap by the teacher and her fellow students, and, if so, whether the risk was unreasonably increased because infant plaintiff was encouraged to engage in an activity beyond her physical capability and experience. Additionally, plaintiffs aver that the teacher provided inadequate supervision, as she failed to act like a prudent parent would in preventing infant plaintiff, who was morbidly obese at the time of the accident and lacked training, from attempting the ballet step.

At her 50-h hearing, infant plaintiff testified that the accident occurred approximately ten minutes after rehearsal for the school's production of the Phantom of the Opera ended. She testified that she and other members of the cast stayed back to help clean up and replace items used during the rehearsal before they went to the room where madrigal chorus practice was held. Infant plaintiff testified that a student spontaneously ran down the left aisle of the auditorium and performed a split leap after they finished cleaning up, and that Mrs. Walsh, who had been standing in the seating section of the auditorium, asked the student to perform the leap again because she missed the student's first attempt. She testified that a number of the students who were also present at that time voluntarily started to perform split leaps while running down the aisle, as Mrs. Walsh observed them. Infant plaintiff explained that none of the students were instructed to perform the leaps, and that they were playing around, since such leaps were not required for the school's performance. According to infant plaintiff, a number of students who had already completed the maneuver spontaneously began chanting her name and encouraging her to attempt a split leap. Although she indicated that it was the first time, infant plaintiff testified that she felt comfortable attempting the maneuver. She testified that she took between six and eight steps before she leaped, and that upon landing, her left knee twisted and made a popping sound causing her to fall to a sitting position on the ground. Infant plaintiff further explained that the accident occurred less than a minute after the last time she observed Mrs. Walsh standing in the seating section of the auditorium. In addition, infant plaintiff testified that Mrs. Walsh told her, following the accident, that the whole thing could have been avoided if she had insisted in the beginning that the students stop leaping.

During her examination before trial, infant plaintiff testified that the students began the split leaps immediately after they finished cleaning up and putting away stage props. She testified that Mrs. Walsh did not instruct the students to perform the leaps, but that she encouraged them, asking at least one student to repeat the leap. Infant plaintiff testified that the students chanted her name for approximately fifteen seconds before she attempted her leap, and that Mrs. Walsh, who was watching, did not say anything before she began running down the aisle to perform the leap. She testified that no one, including Mrs. Walsh, attempted to stop her before she began running toward the end of the aisle. Plaintiff testified that Mrs. Walsh and her friends came over immediately and asked if she was hurt after the accident, and that, shortly afterwards, Mrs. Walsh told her that it was a mistake for her to encourage the students to perform the leaps.

At her examination before trial, Mrs. Walsh testified that she was the choreographer of the school's production of the Phantom of the Opera at the time of the accident, and that infant plaintiff's part in the opera involved minor ballet moves such as turns and small split leaps. Mrs. Walsh explained that infant plaintiff was casted as a member of the orchestra's ensemble, and that she successfully performed the ballet moves, including small split leaps, during auditions. She testified that she did not recall infant plaintiff having difficulties with the maneuvers during auditions, and that she performed them on several occasions prior to the accident. Mrs. Walsh testified that she never received any complaints from infant plaintiff regarding her inability to perform the dance maneuvers, and that she did not personally observe anything that would indicate that performance of the leaps would endanger infant plaintiff. She further explained that the accident occurred as rehearsal was coming to an end, and that during that time some students were practicing dance moves, including leaps, in different areas throughout the auditorium. Mrs. Walsh testified that she was walking throughout the auditorium helping a number of students, when she noticed a group of them congregating in the right aisle of the auditorium practicing split leap leaps. She testified that she commended one student and asked that she perform the maneuver again, and that other students who were standing nearby began to perform their own leaps. According to Mrs. Walsh, the students, who were lined up near the end of the aisle, were chanting each others names when it was their turn to perform the leap, and that following a number other students, they began chanting infant plaintiff's name when it was her turn to leap. Mrs. Walsh testified that infant plaintiff took four to five steps before leaping, and that her leg appeared to buckle when she landed in a sitting position in the aisle. Mrs. Walsh testified that she did not say anything to infant plaintiff, but she made eye contact with the student and smiled before she attempted the leap. She further explained that the accident was over in a matter of seconds, and that she believed that it was safe for infant plaintiff to perform the leap because she did not consider it to be a dangerous move and had observed plaintiff complete similar leaps during auditions. Mrs. Walsh testified that she did not instruct the students to perform the leaps, and that it was an activity the students started on their own. Additionally, Mrs. Walsh testified that she never chanted infant plaintiff's name prior to the leap, and that she never told infant plaintiff that her failure to stop the students from leaping was the cause of the accident.

Although schools are under a duty to adequately supervise students in their charge and will be held liable for foreseeable injuries proximately related to inadequate supervision (*see* ***Hauser v North Rockland Cent. School Dist. No. 1***, 166 AD2d 553, 560 NYS2d 835 [2d Dept 1990]), they are not insurers of the safety of their students and will not be found liable absent a showing that alleged negligent supervision was the proximate cause of the student's injury (*see* ***Mirand v City of New York***, 84 NY2d 44, 614 NYS2d 372 [1994]; ***Convey v City of Rye School Dist.***, 271 AD2d 154, 710 NYS2d 641 [2d Dept 2000]). Thus, where an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, the school's lack of supervision cannot be the proximate cause of injury, and summary judgment must be granted in its favor (*see* ***Zachary G. v Young Israel of Woodmere***, 95 AD3d 946, 944 NYS2d 203 [2d Dept 2012]; ***Navarro v City of New York***, 87 AD3d 877, 929 NYS2d 236 [1st Dept 2011]; ***Wuest v Board of Educ. of Middle Country Cent. School Dist.***, 298 AD2d 578, 749 NYS2d 64 [2d Dept 2002]; ***Convey v City of Rye School Dist.***, *supra*).

Moreover, students voluntarily participating in sporting or recreational activities are deemed to have assumed the risks of those injuries that are known, apparent or reasonably foreseeable as a consequence of their participation (*see* ***Trupia v Lake George Cent. School Dist.***, 14 NY3d 392, 395,

901 NYS2d 127 [2010]; ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]). While participants are not deemed to have assumed the risk of reckless or intentional conduct or concealed increased risks (*see* ***Morgan v State of New York***, 90 NY2d 471, 662 NYS2d 421 [1997]), if the risks of the activity are fully comprehended or perfectly obvious, the plaintiff has consented to them and the defendant has performed its duty by making the conditions as safe as they appear to be (*see* ***Turcotte v Fell***, *supra*; ***Musante v Oceanside Union Fee School Dist.***, 63 AD3d 806, 881 NYS2d 446 [2d Dept 2009]; ***Restaino v Yonkers Bd. of Educ.***, 13 AD3d 432, 785 NYS2d 711 [2d Dept 2004]; ***Vecchione v Middle Country School Dist.***, 300 AD2d 471, 752 NYS2d 82 [2d Dept 2002]). Indeed, "athletic and recreative activities possess enormous social value, even while they involve significantly heightened risks. . . and these risks may be voluntarily assumed to preserve these beneficial pursuits as against the prohibitive liability to which they would otherwise give rise" (***Trupia v Lake George Cent. School Dist.***, *supra* at 394).

Here, the School District established its prima facie entitlement to summary judgment dismissing the complaint based upon the doctrine of primary assumption of the risk by demonstrating that plaintiff voluntarily performed the split leap, and that the inherent risk of injury during the activity was obvious and not made more dangerous by the school's conduct (*see* ***Turcotte v Fell***, *supra*; ***Musante v Oceanside Union Fee School Dist.***, *supra*; ***Marucheau v Suffolk County Community Coll.***, 23 AD3d 445, 808 NYS2d 119 [2d Dept 2005]; *cf* ***Trupia v Lake George Cent. School Dist.***, *supra*). Significantly, infant plaintiff testified that she voluntarily performed the split leap, and that the activity was initiated by her fellow students rather than a member of the school's staff. Further, infant plaintiff testified that she watched several students before her perform the same move safely, and that she felt comfortable attempting the leap at the time of the accident.

In opposition, plaintiffs failed to raise a triable issue warranting denial of the motion (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). Contrary to plaintiffs' assertion, the doctrine of inherent compulsion is inapplicable under the circumstances of this case, as the activity occurred after the rehearsal ended, and no proof has been adduced that any conduct by Mrs. Walsh caused infant plaintiff or her fellow students to believe they were obligated to perform the split leaps (*see* ***Benitez v New York City Bd. of Educ.***, 73 NY2d 650, 543 NYS2d 29 [1989]; ***Musante v Oceanside Union Fee School Dist.***, *supra*; ***Marucheau v Suffolk County Community Coll.***, *supra*). The instant action also is distinguishable from the cases of ***Smith v J.H. W. Elementary School***, 52 AD3d 684, 861 NYS2d 690 (2d Dept 2008) and ***Pike v Gouverneur Cent. School Dist.***, 249 AD2d 820, 671 NYS2d 872 (3d Dept 1998), since both actions involved activities that occurred during designated school hours, and conduct by the school officials involved caused the infant plaintiffs to believe they were obligated to perform the activities in compliance with instructions from school officials or out of fear of getting a poor grade due to lack of class participation. Further, Mrs. Walsh's alleged statement that the accident could have been avoided if she immediately demanded that the students stop performing the leaps can hardly be regarded as an admission of negligence, as there is no proof that the activity was more dangerous than it appeared to be, or that it was prohibited by existing school rules. Finally, plaintiffs' assertion that the activity was made more dangerous than it appeared to be due to the infant plaintiff's weight is based on mere speculation, and no evidence, expert or otherwise, was offered to substantiate such an assertion.

Accordingly, the motion by the School District for summary judgment dismissing the complaint is granted.

Dated: July 15, 2014

W. Gerard Asher
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION