SHORT FORM ORDER

INDEX No. 12-13721
CAL. No. 16-01756OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 2-24-17
ADJ. DATE 6-2-17
Mot. Seq. # 005 - MG
006 - MD

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KENNETH KNECHTEL, an Infant over the Age of Fourteen (14), by his Mother and Natural Guardian MAUREEN KNECHTEL, and MAUREEN KNECHTEL, Individually,

Plaintiffs,

- against -

TYLER GILDERSLEEVE, CHRISTOPHER SWOPE, JOSE ARGUETA MALDONADO, all Infants Over the age of Fourteen (14), by their Parents and PATCHOGUE-MEDFORD SCHOOL DISTRICT,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by defendant Patchogue-Medford School District dated January 25, 2017, and defendant Terry Gildersleeve dated January 27, 2017, and supporting papers (including Memorandum of Law dated ____); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmations in Opposition by plaintiff dated May 15, 2017 and May 16, 2017, and supporting papers; (4) Reply Affirmations by defendant Patchogue-Medford School District dated May 16, 2017, and by defendant Terry Gildersleeve dated

May 31, 2017, and supporting papers; (5) Other __ ~~(and after hearing counsels' oral arguments in support of and opposed to the motion)~~; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendant Patchogue-Medford School District for summary judgment dismissing plaintiffs' complaint and the cross claims against it is granted; and it is

ORDERED that the motion by defendant Tyler Gildersleeve for summary judgment dismissing the complaint and cross claims against him is denied.

Plaintiff Maureen Knechtel commenced this action against the Patchogue-Medford School District individually and on behalf of her son, plaintiff Kenneth Knechtel, who sustained personal injuries on May 4, 2011, when he allegedly was assaulted by fellow students Tyler Gildersleeve, Christopher Swope, and Jose Maldonado. The assault allegedly occurred inside a school locker room shortly before the commencement of the students' physical educational class. By his complaint, plaintiff alleges, inter alia, that the School District was negligent in failing to properly train the teachers and staff as to the methods of supervision over their students, and in failing to provide proper and sufficient security measures, including the failure to place security personnel in or near the locker room where the alleged altercation occurred. The School District and co-defendants Gildersleeve and Maldonado joined issue denying plaintiff's claims and asserting cross claims against each other. Defendant Swope failed to appear in the action. The note of issue was filed September 30, 2016.

The School District now moves for summary judgment dismissing plaintiff's complaint on the grounds it lacked prior notice of prior similar conduct by the individual defendants, and that its alleged lack of adequate supervision was not the proximate cause of plaintiff's injuries, as the attack happened so quickly, and without warning, that not even intense supervision could have prevented it. Alternatively, the School District argues that plaintiffs may not recover under the theory of negligent supervision where, as in this case, plaintiff Kenneth Knechtel was a voluntary participant in the altercation. As to plaintiffs' claims based on inadequate training and the failure to adopt preventative security measures, the School District avers that the locker room was not known as a high risk area for fights or other misbehavior, and that it should not be expected to continuously supervise and control all the movements and activities of high school students such as plaintiff and the co-defendants. By way of a separate motion, defendant Gildersleeve moves for summary judgment dismissing the complaint and cross claims against him on the ground plaintiff's claims for assault and battery are inactionable, since Kenneth voluntarily participated in the alleged altercation, and he did not sustain harmful or offensive contact as a result of Gildersleeve's conduct.

Plaintiffs oppose both motions, arguing that a triable issue exists as to whether the students' science teacher overheard Gildersleeve challenge Kenneth to a fight during class. Plaintiffs also assert that a triable issue exists as to whether teachers sitting in an office next to the locker room knew, or should have known, of the impending altercation, as no less than 20 students gathered in the locker room to watch and began shouting "fight! fight!" prior to the incident. Plaintiffs further contend a triable issue exist as to whether Kenneth was a voluntary participant in the fight, as the records show that he was

goaded into the fight for two weeks before he agreed to meet Gildersleeve in the locker room, and that Gildersleeve struck him in the face twice before he placed him a bear hug and asked that they stop the fight. Additionally, plaintiffs argue that Kenneth could not have voluntarily participated in the altercation with the other defendants, as they unexpectedly assaulted him after he attempted to stop the initial fight between himself and Gildersleeve. Plaintiffs oppose the motion by Gildersleeve on a similar basis, arguing that triable issues exists as to whether Kenneth reasonably expected Gildersleeve to fight him when he agreed to meet him in the locker room since Gildersleeve failed to follow through on the threat of a fight for two weeks prior to the altercation, whether plaintiff really told Gildersleeve to strike him in the face at the beginning of the fight, and whether the blow to plaintiff sustained to his face was offensive.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist, not to resolve issues of fact or determine matters of credibility (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see* ***O'Neill v Town of Fishkill***, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). 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 eliminate any material issue of fact (*see* ***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]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues remain which preclude summary judgment (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Although schools are under a duty to adequately supervise students in their charge and will be held liable for foreseeable injuries proximately related to the absence of such supervision, schools cannot reasonably be expected to continuously supervise and control all the movements and activities of their students, especially high school students (*see* ***Mirand v City of New York***, 84 NY2d 44, 49, 614 NYS2d 372 [1994]; ***Maldari v Mount Pleasant Cent. Sch. Dist.***, 131 AD3d 1019, 17 NYS3d 48 [2d Dist 2015]). Thus, an injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act (*see* ***Mirand v City of New York***, *supra*; ***Calabrese v Baldwin Union Free School Dist.***, 294 AD2d 388, 741 NYS2d 569 [2002]; ***Lynch v City of Yonkers,*** 292 AD2d 572, 739 NYS2d 441 [2d Dept 2002]). Moreover, "liability for injuries resulting from a fight between two students cannot be predicated on negligent supervision if the plaintiff was a voluntary participant in the fight" (***Williams v Board of Educ. of City School Dist. of City of Mount Vernon***, 277 AD2d 373, 717 NYS2d 190 [2d Dept 2000]; *see* ***Janukajtis v Fallon***, 284 AD2d 428, 430, 726 NYS2d 451 [2d Dept 2001]). Indeed, a student's voluntary participation in a fight has been held to preclude claims for liability predicated upon both negligent supervision and the failure to provide adequate security (*see* ***Williams v Board of Educ. of City School Dist. of City of Mount Vernon***, *supra*; ***Carreras v Morrisania Towers Hous. Co. Ltd. Partnership***, 107 AD3d 618, 968 NYS2d 66 [2d Dept 2013]). Schools will likewise be absolved of liability for injuries which result from the act of an

intervening third-party which could hardly have been anticipated in the reasonable exercise of the duty to provide adequate supervision to the children in its charge (*see* ***Pitner v Brentwood Union Free Sch. Dist.***, 254 AD2d 340, 678 NYS2d 665 [2d Dept 1998]; *see also* ***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***MacNiven v East Hampton Union Free School Dist.***, 62 AD3d 760, 878 NYS2d 449 [2d Dept 2009]).

Here, the School District established its prima facie entitlement to dismissal of the negligent supervision claim against it by submitting evidence that it did not have notice of any prior similar conduct by the students involved in the altercation (*see* ***Fernandez v City of Yonkers***, 139 AD3d 895, 31 NYS3d 595 [2d Dept 2016]; ***Brown v South Country Cent. Sch. Dist.***, 137 AD3d 732, 25 NYS3d 675[2d Dept 2016]), that plaintiff was a voluntary participant in the fight (*see* ***MacNiven v East Hampton Union Free School Dist.***, *supra*; ***Legette v City of New York***, 38 AD3d 853, 832 NYS2d 669 [2d Dept 2007]; ***Carreras v Morrisania Towers Hous. Co. Ltd. Partnership***, *supra*), and that it was unforseeable that the co-defendants, who had no prior threatening interaction with Kenneth, would have intervened in the fight (*see* ***Derdiarian v Felix Contractor Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***Pitner v Brentwood Union Free Sch. Dist.***, *supra*; ***MacNiven v East Hampton Union Free School Dist.***, *supra*). Significantly, testimony by the school's principal, a physical education teacher, and the students involved in the altercation indicates that none of the boys had a reputation for engaging in violent conduct, that no complaints were made to school personnel that would have put them on notice of an impending fight, and that Kenneth, who urged Gildersleeve to throw a punch after they met in the locker room, voluntarily participated in the fight. Additionally, Maldonado testified he went to locker room in order to pick up class notes from another student, but that he spontaneously decided to intervene in the fight because Kenneth was much bigger than Gildersleeve, and he wanted to end what he considered an unfair fight. As to the adequacy of the response of the school's School District's security personnel to the altercation, Kenneth's voluntary participation in the fight not only negates liability based on such a claim (*see* ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986];***Vega v Ramirez***, 57 AD3d 299, 871 NYS2d 6 [1st Dept 2008]; ***Williams v Board of Educ. of City School Dist. of City of Mount Vernon***, *supra*; ***Carreras v Morrisania Towers Hous. Co. Ltd. Partnership***, *supra*), but the individual defendants both testified that a school security guard came into the locker room and stopped the fight immediately after he was notified of the incident (*see* ***Mirand v City of New York***, *supra*; *cf* ***Buchholz v Patchogue-Medford School Dist.***, 88 AD3d 843, 931 NYS2d 113 [2d Dept 2011]).

In opposition, plaintiffs failed to raise a triable issue warranting denial of the motion (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Zuckerman v City of New York***, *supra*). Inasmuch as Kenneth failed to alert school personnel of the escalating tensions between himself and Gildersleeve and voluntarily participated in the fight, his bald assertion that he was goaded into the fight is insufficient to raise a triable issue as to whether he was merely defending himself (*see* ***Ambroise v City of New York***, 44 AD3d 805, 843 NYS2d 685 [2d Dept 2007]). Plaintiffs' speculatory assertion that a teacher may have overheard Gildersleeve challenge Kenneth to a fight during class is likewise insufficient to raise a triable issue as to the School District's alleged negligent supervision (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*). Additionally, plaintiffs failed to adduce any evidence that the School District was negligent in failing to anticipate the conduct of the co-defendants who spontaneously intervened in the fight (*see* ***Derdiarian v Felix Contr. Corp.***, *supra*; ***Pitner v Brentwood***

Union Free Sch. Dist., *supra*). Therefore, the motion by the School District for summary judgment dismissing the complaint and cross claims against it is granted.

The motion by Gildersleeve for summary judgment dismissing the assault and battery claims against him based on Kenneth's alleged voluntary participation in the fight is denied, as Gildersleeve failed to meet his prima facie burden on the motion (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Gildersleeve has failed to cite to a single case where a student's purported voluntary participation in fight was recognized as a defense in the context of an intentional tort claim based assault and battery. Indeed, the single case of ***Pitner v Brentwood Union Free Sch. Dist.***, 254 AD340, 678 NYS2d 665 (2d Dept 1998), cited by Gildersleeve is distinguishable from the instant case, as it recognized a student's voluntary participation in a fight as a defense only for the purposes of determining a school's liability based upon a claim for negligent supervision rather than on an intentional tort claim based upon an alleged assault and battery by a fellow student. Furthermore, while justification by way of self defense has been recognized as a defense to battery and assault claims, such a defense is not available to initial aggressors in the context of a fight (*see* ***People v Petty***, 7 NY3d 277, 819 NYS2d 684 [2006]; ***Killon v Parrotta***, 125 AD3d 1220, 6 NYS3d 153 [3d Dept 2015]; ***Van Vooren v Cook***, 273 AD 88, 75 NYS2d 362 [4th Dept 1947]). Moreover, a defense predicated upon Kenneth's alleged consent to the fight is equally unavailing for the purposes of establishing Gildersleeve's prima facie entitlement to summary judgment, as it merely raises a triable issue of fact as to whether the physical attack in question exceeded the purported consent given by plaintiff (*see* ***Van Vooren v Cook***, *supra*).

Dated: December 1, 2017

PETER H. MAYER, J.S.C.