SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KELLY O'NEILL LEVY **PART** 19
Justice

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DAWN LERMAN as parent and natural guardian of D.V., and DAWN LERMAN, individually,

Plaintiffs,

- v -

LITTLE LEAGUE COUNCIL OF NEW YORK CITY INC., individually, and d/b/a WEST SIDE LITTLE LEAGUE, and JEFF NEUMAN

Defendants.

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INDEX NO. 150006/2014

MOTION DATE 05/25/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

KELLY O'NEILL LEVY, J.:

This is an action arising from an accident where a baseball struck and injured a 10-year old child in the face while he was participating in a Little League baseball practice.

Defendants Little League Council of New York City, Inc., individually, and d/b/a West Side Little League (hereinafter, WSLL), and Jeff Neuman (hereinafter, Neuman) (together, Defendants) move, pursuant to CPLR § 3212, for summary judgment dismissing the complaint. Plaintiffs oppose.

BACKGROUND

On the date of the accident, April 9, 2010, at or around 5:30 P.M., the plaintiff, age ten, attended his first Little League baseball practice. His father had previously registered him to play baseball through WSLL and had signed a waiver, agreeing that as his father he had reviewed and consented to the waiver by signing his child up to play Little League baseball with

WSLL [Waiver (ex. I to the Brown aff)]. The plaintiff had previously watched baseball on television and was generally familiar with the game [D.V. tr. (ex. D to the Brown aff.) at 20-22]. He had previously played catch with his father using a baseball mitt (*id.* at 14-16) and with friends (*id.* at 17-18).

When the plaintiff arrived at his first baseball practice, the coach, Neuman, instructed the players to take various positions on the baseball field [Neuman tr. (ex. F to the Brown aff.) at 22-23]. Lerman spoke with Neuman and told him that his son had no prior experience and that he should be careful [D.V. tr. (ex. D to the Brown aff.) at 33; Lerman tr. (ex. E to the Brown aff.) at 27]. Neuman told the plaintiff to take the shortstop position while Neuman pitched balls to other players to hit into the field and allow the others to practice fielding the balls [Neuman tr. (ex. F to the Brown aff.) at 22-23; D.V. tr. (ex. D to the Brown aff.) at 40-42]. The players were using an aluminum bat and standard Little League baseballs [Neuman tr. (ex. F to the Brown aff.) at 25, 28-29]. There were two pitches before the accident [D.V. tr. (ex. D to the Brown aff.) at 45-46]. On the third pitch, the batter hit a line drive towards the plaintiff. He tried to catch the ball, and the ball struck him in the mouth, inflicting dental injuries (*id.* at 43, 50; [Neuman tr. (ex. F to the Brown aff.) at 24]).

Plaintiffs argue that defendants' motion should be denied because a triable issue of fact exists as to whether defendants breached their duties owed to the plaintiff, and were negligent in their breach of reasonable care, supervision, control, training, instruction, direction, safety, and general coaching of the plaintiff. They further assert that the child had never participated in any actual baseball activity on a baseball field before, and that Neuman placed him at the "highly skilled" shortstop position, despite being warned by Lerman that her son had never played baseball before. They also argue that defendants failed to test his skill set before placing him on

the field and they also failed to teach and give him basic instructions on how to field a ball. They assert that the child did not assume the risk, but rather that defendants created a dangerous condition that caused his injuries by their indifference as to his skill and experience level.

Defendants contend that they are entitled to summary judgment in their favor and the action should be dismissed because there is no triable issue of fact. The plaintiff voluntarily assumed the inherent risks involved in playing baseball and plaintiffs cannot properly assert a negligent supervision claim where the injury is due to an inherent and obvious risk associated with the game.

DISCUSSION

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

"[B]y engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation." *Morgan v. State of New York*, 90 N.Y.2d 471, 484 (1997). "[I]n assessing whether a defendant has violated a duty of care within the genre of tort-

sports activities and their inherent risks, the applicable standard should include whether the conditions caused by the defendants' negligence are 'unique and created a dangerous condition over and above the usual dangers that are inherent in the sport'." *Id.* at 485 (quoting *Owen v. R.J.S. Safety Equip.*, 79 N.Y.2d 967, 970 [1992]). "'If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty.' *Id.* at 484 (quoting *Turcotte v. Fell*, 68 N.Y.2d 432, 439 [1986]). Related risks which are commonly encountered or 'inherent' in a sport, such as being struck by a ball or bat in baseball, are 'risks [for] which various participants are legally deemed to have accepted personal responsibility.'" *Bukowski v. Clarkson Univ.*, 19 N.Y.3d 353, 356 (2012) (quoting *Morgan*, 90 N.Y.2d at 484).

"Logically, once a plaintiff has assumed a risk, recovery premised on injury attributable to the risk assumed is barred. Recovery may not, in such a circumstance, be had on a theory of negligent supervision. Negligent supervision remains a viable theory only insofar as the risk upon which the action is based has not been assumed." *Roberts v. Boys & Girls Republic, Inc.*, 51 A.D.3d 246, 251 (1st Dep't 2008).

Here, the plaintiff engaged and participated in a baseball practice, and his parents consented to the risks inherent and associated with playing baseball. The plaintiff's parents made a voluntary choice to join WSLL and permit their son to play baseball. Common and obvious risks of the game include being struck and injured by baseballs. Prior to the accident, the plaintiff had a basic understanding of how the game was played [D.V. tr. (ex. D to the Brown aff.) at 22] and had briefly practiced throwing and catching a ball with his father using a baseball mitt (*id.* at 17). Thus, while the plaintiff participated in a baseball practice, he consented, through his parents, to the possibility of being struck and injured by a baseball. Neuman's

decision to place the plaintiff in the shortstop position is immaterial, as the risk of being struck by a batted baseball was present at any position on the field. Also, plaintiffs' theory of Neuman's negligent supervision fails because the risk of injury was assumed by his voluntary participation in the practice.

There is no triable issue of fact present, and therefore defendants are entitled to summary judgment on plaintiffs' negligence claim and dismissal of the action.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendants Little League Council of New York City, Inc., individually, and d/b/a West Side Little League, and Jeff Neuman's motion, pursuant to CPLR § 3212, for summary judgment in their favor is granted; and it is further

ORDERED that the complaint is dismissed.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

2-15-18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

KELLY O'NEILL LEVY
JSC

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	DO NOT POST			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE