SHORT FORM ORDER

COPY

INDEX No. 14-663
CAL. No. 17-00410OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 9-5-17
ADJ. DATE 10-3-17
Mot. Seq. # 002 MotD

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BRIANNA CRISTIANO,

Plaintiff,

- against -

CONNETQUOT CENTRAL SCHOOL DISTRICT OF ISLIP, CONNETQUOT CENTRAL SCHOOL DISTRICT OF ISLIP BOARD OF EDUCATION, SECTION XI OF THE NEW YORK STATE PUBLIC HIGH SCHOOL ATHLETIC ASSOCIATION, SUFFOLK COUNTY TRACK AND FIELD OFFICIALS' ASSOCIATION, GLENN OLSZEWSKI, Individually and as President, MARY JANE BARTHOLOMEW, DONNA KAUFMANN, NORMAN HOLDEN, KENNETH KNAPPE, PATRICIA KNAPPE, ROBERT ROTHSCHILD, WILLIAM GRIEK, RICHARD ERARIO, STEVEN CUOMO, MATTHEW GROBE and GERARD MCCARTHY,

Defendants.

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CONNETQUOT CENTRAL SCHOOL DISTRICT OF ISLIP,

Second Third-Party Plaintiff,

- against -

SUFFOLK COUNTY TRACK AND FIELD OFFICIALS' ASSOCIATION, GLENN OLSZEWSKI, Individually and as President MARY JANE BARTHOLOMEW, DONNA KAUFMANN, NORMAN HOLDEN, KENNETH KNAPPE, PATRICIA KNAPPE, ROBERT ROTHSCHILD, WILLIAM GRIEK, RICHARD ERARIO, STEVEN CUOMO, MATTHEW GROBE and GERARD MCCARTHY,

Second Third-Party Defendants.

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Upon the following papers numbered 1 to 48 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 27; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 28 - 46; Replying Affidavits and supporting papers 47 - 48; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion of defendants Connetquot Central School District of Islip and Connetquot Central School District of Islip Board of Education for summary judgment is granted as set forth herein, and is otherwise denied.

The plaintiff, Brianna Cristiano, commenced this action for personal injuries allegedly sustained at a track and field event conducted at Connetquot High School within the Connetquot Central School District. The plaintiff allegedly injured her left foot after she performed a vault then landed on mats placed on the ground to break her fall. The landing mats were held together by a covering, and a gap allegedly developed between the mats during the event. The plaintiff's foot allegedly went through the gap and connected with the concrete floor underneath. As relevant to the application before the Court, the plaintiff alleges, *inter alia*, that defendants Connetquot Central School District of Islip and the Connetquot Central School District of Islip Board of Education (the "District") were negligent in the manner in which they supervised the pole vault event at the track meet. She further alleges that her injury was due to a defective condition, namely

a gap in the landing mats, that the District created the defective condition, and had actual or constructive notice of the defect.

The District now moves for summary judgment dismissing the claims against it, arguing that the plaintiff (1) cannot establish negligent supervision; (2) assumed the risk by voluntarily participating in the vaulting activity; (3) failed to establish that the equipment was defective; and (4) failed to establish that the District had notice of any defective condition. In support of its motion, the District submits the pleadings, the transcript of the plaintiff's testimony pursuant to General Municipal Law § 50-h ("50-h hearing"), and the deposition testimony of various parties involved in the action. The plaintiff opposes the motion, as does the Suffolk County Track and Field Officials' Association ("SCTFA") and related defendants ("Association defendants").

The plaintiff's 50-h hearing testimony and her deposition testimony was essentially the same. At the time of the accident, the plaintiff was a student at Connetquot High School, and was a member of the track team. In April 2011, a track meet, specifically the Joe Brandi Relay competition, was held at the high school where the plaintiff's team and 15 other schools participated. There were 80 students on the plaintiff's team at the track meet, and the plaintiff participated in pole vaulting, an activity in which she had actively participated in for more than two years. Before the track meet started, the plaintiff and some of her teammates set up the mats used for the pole vaulting event. There were five "big mats" and four "small mats" used for the event, and two "cover mats" were placed on the top of the big mats and small mats to "keep them all together." The cover mats were then tied to the handles of the base mats so that the cover mats remained in place.

During the warm-up period, the plaintiff practiced vaulting and landed on the mats, and she completed two vaults during the competition without incident. After she vaulted the third time, the plaintiff landed feet first on the mats and injured her left foot. The plaintiff testified that her foot went into a"gap" between the mats and touched the concrete surface underneath. The gap was caused by "everybody landing on [the mats] over and over again." According to the plaintiff, her coaches had instructed her to land on her buttocks or her back; however, it was not always possible to execute the landing as instructed, and she had completed approximately 40% of her vaults by landing on her feet. The plaintiff had not noticed the gap prior to the incident; however, the mats would sometimes separate during track practice requiring the plaintiff and her teammates to push them back together. The plaintiff complained to her coach that the mats were "bad" on three or four occasions prior to the subject track meet. The plaintiff further testified that there were approximately 10 officials overseeing the Joe Brandi competition, and one official was assigned to the pole vaulting event. The plaintiff could not recall whether her coach was in the area of the vaulting event when her accident occurred.

Robert Lehnert testified that he was a physical education teacher and coach at the plaintiff's high school. Although he did not have experience in pole vaulting, he and other coaches demonstrated proper pole vaulting techniques and procedures to the students. In April 2011, he was one of three of the plaintiff's coaches at the Joe Brandi Relay competition. There were approximately four to six students from the plaintiff's school participating in the pole vaulting event. At least one Suffolk County track and field official was posted at the vault event, along with volunteer clerks and chaperones who were assigned by the District

for "security purposes." The Suffolk County official was "in charge," and instructed the athletes regarding the event in which they were participating. When the plaintiff performed her final vault, Lehnert was approximately 50 to 75 feet away from the pole vaulting area, and was watching the plaintiff. He recalled that the plaintiff did not complete her landing and she landed in a "standing position." Vaulters were taught to land on their back to prevent injury. According to Lehnert, the plaintiff's injury was common amongst vaulters who landed in a standing position. In his years of coaching, he had never observed a vaulter "go through the mat," and it was his perception that the plaintiff "rolled" her ankle upon landing in a standing position. Lehnert could not recall whether he or another coach had inspected the landing mats prior to the plaintiff's final vault, and he testified that the covers on the mats were a "tight fit." Lehnert had not received any complaints concerning the condition of the mats while he coached the track team.

Donna Kaufman testified that she was a track and field official in Suffolk County. In 2011, she worked for SCTFA officiating sporting events for high school students. As part of her duties, Kaufman was responsible for inspecting the event venues to verify that the facilities were safe. Specific to pole vaulting, Kaufman would, among other things, inspect the mats to verify that they had a "common cover" and that the common cover was attached to the mats. If Kaufman's inspection revealed that the vaulting area was not safe, she would request that it be corrected or the event would be cancelled. It was not typical for mats to move during the event because the common cover was generally placed on top of the mat, and if the common cover became "wrinkle[d]," a volunteer would straighten the wrinkle. Kaufman inspected the pole vault mats at the Joe Brandi Relay and found that the mats were fine. Because of the common cover, she could not see whether the mats separated; however, she recalled that the mats were "latched together." Two volunteers were assigned to the event by the District, and whenever the covering on the mats became wrinkled Kaufman instructed the volunteers to correct the wrinkles. Kaufman observed the event from approximately six feet away from the mats. The coaches were not permitted to be in the area; however, a coach from Connetquot High School would "stop by" the event throughout the day.

William Waring testified that he was an assistant track coach at Connetquot High School. The pole vaulting mats had clips that kept them together. The students put the mats together along with the coaches, and the officials inspected the mats prior to an event. Waring watched students participate in events at the Joe Brandi Relay, and spoke to the plaintiff "at times during the day." Waring was "all over" while at the track meet, and he was not aware whether another coach was assigned to oversee the pole vaulting event.

James Crowley testified that he was the coach of the track team, and that the school's track team generally participated in the pole vaulting events during the 37 years that he was a coach. The mats that the school used were replaced approximately every five years. The clips that connected the mats were metal, and Crowley did not know whether those clips were damaged at the time of the Joe Brandi Relay. Wrinkling of the cover on the mats could occur "several times a day" during vaulting events. On the day of the plaintiff's injuries, Crowley did not coach; he was acting as the meet director, announcing scores and pointing athletes to their events. He did not see the plaintiff perform her vault but he observed some the event from his location approximately 50 feet away.

It is well established that 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]). The burden then shifts to the party opposing the motion, which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, *supra*; ***O'Neill v Town of Fishkill***, *supra*). A defendant moving for summary judgment cannot satisfy its initial burden of establishing his or her entitlement thereto merely by pointing to gaps in the plaintiff's case (*see* ***Coastal Sheet Metal Corp. v Martin Assoc., Inc.***, 63 AD3d 617, 881 NYS2d 424 [1st Dept 2009]; *see also* ***Tsekhanovskaya v Starrett City, Inc.***, 90 AD3d 909, 935 NYS2d 128 [2d Dept 2011]).

With respect to the plaintiff's claim for negligent supervision, although schools are under a duty to adequately supervise the students under their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision, schools are not insurers of the safety of their students, for they cannot reasonably be expected to continuously supervise and control all of the students' movements and activities (*see* ***Rosborough v Pine Plains Cent. Sch. Dist.***, 97 AD3d 648, 948 NYS2d 373 [2d Dept 2012]; ***Keaveny v Mahopac Cent. School Dist.***, 71 AD3d 955, 955, 897 NYS2d 222 [2d Dept 2010]; ***Legette v City of New York***, 38 AD3d 853, 854, 832 NYS2d 669 [2d Dept 2007]). 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* ***Gomez v Our Lady of Fatima Church***, 117 AD3d 987, 986 NYS2d 550 [2d Dept 2014]; ***Mayer v Mahopac Cent. Sch. Dist.***, 29 AD3d 653, 815 NYS2d 189 [2d Dept 2006]; ***Lopez v Freeport Union Free Sch. 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 the defendant school is warranted (*see* ***Gomez v Our Lady of Fatima Church***, *supra*; ***Weiner v Jericho Union Free Sch. Dist.***, 89 AD3d 728, 932 NYS2d 138 [2d Dept 2011]; ***Ronan v School Dist. of City of New Rochelle***, 35 AD3d 429, 825 NYS2d 249 [2d Dept 2006]; ***Mayer v Mahopac Cent. Sch. Dist.***, *supra*; ***Convey v City of Rye Sch. Dist.***, 271 AD2d 154, 710 NYS2d 641 [2d Dept 2000]).

The District established its prima facie entitlement to judgment as a matter of law dismissing the plaintiff's claim for negligent supervision. The evidence established that three of the plaintiff's coaches were at the relay competition and one Suffolk County official was posted at the plaintiff's event along with event volunteers assigned by the District. The official testified that she was approximately five to six feet from the plaintiff when her accident occurred, and one of the plaintiff's coaches testified that he was watching her perform from approximately 50 to 75 feet away (*see* ***Justin F. v Yelded V'Yalda Early Childhood Ctr., Inc.***, 115 AD3d 789, 982 NYS2d 349 [2d Dept 2014]; ***Troiani v White Plains City School Dist.***, 64 AD3d 701, 882 NYS2d 519 [2d Dept 2009]; ***Mata v Huntington Union Free School Dist.***, 57 AD3d 738, 871 NYS2d 194 [2d Dept 2008]). Thus, the District met its prima facie burden of demonstrating that the alleged inadequate supervision was not the proximate cause of the injured plaintiff's accident (*see* ***Gomez v Our Lady of Fatima Church***, 117 AD3d 987, 987, 986 NYS2d 550, 551 [2d Dept 2014]; ***Odekirk***

v Bellmore-Merrick Cent. School Dist., 70 AD3d 910, 895 NYS2d 184 [2d Dept 2010]; ***Reardon v Carle Place Union Free School Dist.***, 27 AD3d 635, 636, 813 NYS2d 150, 151 [2d Dept 2006) and that the accident could not have been prevented by any reasonable degree of supervision (*see* ***Calcagno v John F. Kennedy Intermediate School***, 61 AD3d 911, 877 NYS2d 455 [2d Dept 2009]). Neither the plaintiff nor the Association defendants raise an issue of fact in opposition (*see* ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]). Accordingly, the District's motion with respect to the plaintiff's claim for negligent supervision is granted.

The District also moves for summary judgment dismissing the complaint on the ground that the plaintiff assumed the risk of injury by participating in the pole vaulting event. Generally, by 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 NY2d 471, 662 NYS2d 421 [1997]; *see* ***Joseph v New York Racing Assn.***, 28 AD3d 105, NYS2d 526 [2d Dept 2006]; ***Leslie v Splish Splash at Adventureland***, 1 AD3d 320, 766 NYS2d 599 [2d Dept 2003]). Under the assumption of risk doctrine, a plaintiff is barred from recovering for injuries which occurred during voluntary sporting or recreational activities if it is determined that he or she assumed the risk as a matter of law (*see* ***Morgan v State of New York***, *supra*; ***Leslie v Splish Splash at Adventureland***, *supra*). A negligence claim, however, will not be dismissed if the defendant's negligent action or inaction "created a dangerous condition over and above the usual dangers" inherent in the sport or activity (***Owen v R.J.S. Safety Equip.***, 79 NY2d 967, 970 582 NYS2d 998 [1992]; *see* ***Morgan v State of New York***, *supra*; ***Rosenbaum v Bayis Ne'Emon, Inc.***, 32 AD3d 534, 820 NYS2d 326 [2d Dept 2006]). Thus, the doctrine of assumption of risk will not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased (*see* ***Ribaudo v La Salle Inst.***, 45 AD3d 556, 846 NYS2d 209 [2nd Dept 2007]). In assessing the risks assumed by a plaintiff when he or she elected to participate in the activity and the duty of care owed by the owner or operator of the recreational facility, a court must consider the skill and experience of the particular plaintiff (***Morgan v State of New York***, *supra*, at 486; ***Maddox v City of New York***, 66 NY2d 270, 278, 496 NYS2d 726 [1985]), as well as the nature of the defendant's conduct (*see*, *e.g.* ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986] [plaintiff does not assume risk of reckless or intentional conduct]; ***Benitez v New York City Bd. of Educ.***, 73 NY2d 650, 543 NYS2d 29 [1989] [plaintiff does not assume concealed or unreasonably increased risks]).

The District has failed to establish, prima facie, that the action was barred by the doctrine of primary assumption of risk. The plaintiff testified that although she was taught to land on her back after completing her vault, she landed feet first 40% of the time. Furthermore, prior to the event, she complained to her coach that the mats were "bad." Although Lehnert testified that mat covering was a "tight fit," Kaufman and Crowley testified that the covers, which were in place to keep the mats together, sometimes wrinkled requiring that they be straightened and pulled taut. The plaintiff also testified that the mats often separated during her practices, and that she and her teammates had to push them back together. In considering "the evidence that h[er] injury occurred when the landing mats failed to provide the protection they were intended to provide,[the Court] conclude[s] that questions of fact have been raised as to whether [the District's] negligence, if any, created a dangerous condition over and above the usual dangers that are inherent in the sport of pole vaulting and, if so, whether [the plaitniff] assumed the additional risk" (***Laboy vWallkill Cent. School Dist.***, 201 AD2d 780, 781, 607 NYS2d 746, 748 [3d Dept 1994]; *see also* ***Pierre v Ramapo Cent.***

School Dist., 124 AD3d 614, 616, 2 NYS3d 510, 512 [2d Dept 2015]; ***Wright v Shapiro***, 16 AD3d 1042, 791 NYS2d 799 [2005]). Thus, viewing the evidence in the light most favorable to the non-moving plaintiff (*see* ***Negri v Stop & Shop***, 65 NYS2d 625, 491 NYS2d 151 [1985]), the branch of the motion for summary judgment based upon the doctrine of primary assumption of risk is denied.

Dated: March 22, 2018

Martha L. Luft
A.J.S.C.

HON. MARTHA L. LUFT

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