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SHORT FORM ORDER

INDEX No. 15-1047
CAL. No. 18-01499OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. SANFORD NEIL BERLAND
Acting Justice of the Supreme Court

MOTION DATE 1-8-19
ADJ. DATE 6-18-19
Mot. Seq. # 004 -MD

RICKARDO CUMMINGS, an Infant by his Father and Natural Guardian, LESTER LAYNE and LESTER LAYNE, Individually,

Plaintiffs,

- against -

SOUTH COUNTRY CENTRAL SCHOOL DISTRICT and RAEKWON RUSSELL,

Defendants.

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Upon the following papers numbered 1 to 73 read on this motion for summary judgment: Notice of Motion and supporting papers 1-43; Answering Affidavits and supporting papers 44-66 ; and Replying Affidavits and supporting papers 67-73, it is

ORDERED that the motion for summary judgment by the defendant South Country School District dismissing the complaint against it is denied.

This action was commenced to recover damages, personally and derivatively, for personal injuries sustained by infant plaintiff Rickardo Cummings on March 17, 2014, when he allegedly was attacked by a fellow student, defendant Raekwon Russell (Russell), at Bellport High School, the high school of defendant South Country School District (School District). The complaint alleges that the School District is liable for infant plaintiff's injuries based on, inter alia, its negligence in supervising the students at the school that day. Russell appeared for a deposition, but has not appeared in the action.

The School District now moves for summary judgment dismissing the complaint on the ground that it adequately supervised infant plaintiff and Russell and was not a cause of infant plaintiffs' injuries. The School District argues further that Russell's actions were impulsive and unforeseeable, and that the incident could not have prevented by any degree of supervision. In support of the motion, it submits copies of the pleadings, the verified bill of particulars, the transcripts of infant plaintiff's testimony at his General Municipal § 50-h hearing and at his deposition, the transcript of the deposition testimony of Russell, and the transcripts of the deposition testimony of several witnesses for the School District. Plaintiffs oppose the motion, arguing that triable issues exist as to whether the school adequately supervised infant plaintiff and Russell.

Infant plaintiff testified at his General Municipal § 50-h hearing that the incident occurred in a hallway on March 17, 2014, just after school was dismissed for the day. He testified that Russell attacked him from behind as he was heading to his locker. Infant plaintiff testified that prior to the incident, Russell had been taking snacks from his locker, and that he told Assistant Principal Alicia Ulberg, one of his teachers - Mr. Valentine, and a security guard that Russell was taking snacks from his locker. He also claims he told a security guard named Darrell and Assistant Principal Ulberg that Russell wanted to fight him, and that Russell's friend told him that Russell wanted to fight him.

Infant plaintiff testified at his examination before trial that on March 17, 2014, Russell attacked him physically in the hallway on the second floor of the Bellport High School. He testified that he left his last class for the day and was walking towards his locker when he felt someone hit him from his left side. He testified that as a result of being struck his head hit a locker. He testified that he turned to his left and realized Russell had hit him and then Russell hit him again. Infant plaintiff testified he lost consciousness as a result of being punched by Russell a second time. He testified that at no point during the incident did he punch or strike Russell. Infant plaintiff further testified that he had a problem with Russell one week before the incident because he was taking snacks out of plaintiff's locker. He testified that he told Assistant Principal Della Rose, head security guard Darrell Simons, and Principal Hogan that Russell was taking snacks from his locker and wanted to "jump" him. Infant plaintiff testified that he met with all three school officials at the same time.

Russell testified that prior to the date of the incident, he threatened a teacher with physical violence at Bellport High School. He also testified that prior to the incident, he cursed out teachers on three or four occasions. He testified that about a week before the incident, a security guard named Darrell Simmons told him to stay away from infant plaintiff. Russell testified that plaintiff's locker was across the hall from his science class. He testified that prior to the incident, Principal Hogan also told him to stay away from infant plaintiff. Russell testified that he punched infant plaintiff in the face and as a result his head hit a door. He testified that he punched infant plaintiff twice more, with one of the punches hitting infant plaintiff's eye. He testified that the incident occurred across from his science classroom and that there were no security guards in the area. Russell testified that he got out of his science class, which was his last class of the day, and then the incident with infant plaintiff happened. He testified that there were six classrooms on the second floor, and that he did not see any teachers outside of their classrooms at dismissal that day. Russell also testified that he did not see any security guards on the second floor before or after the incident. He testified that after he punched infant plaintiff

several times, infant plaintiff ran away. He testified that after the incident, he walked out of the school, and that no school staff attempted to stop him.

Paul Pontieri testified at his examination before trial that he was an assistant principal at the Bellport High School on the date the incident. He testified that before the incident on March 17, 2014, he was aware that there was an issue between plaintiff and Russell. Pontieri testified that at approximately 7:30 a.m. on March 17, 2014, Assistant Principal Ulberg brought infant plaintiff and Russell to his office. He testified that earlier that morning there had been a verbal confrontation between infant plaintiff and Russell, because Russell had been taking snacks out of infant plaintiff's locker. Pontieri testified that at the meeting Russell became angry. He testified that Assistant Principal Ulberg expressed concern about the situation between infant plaintiff and Russell, because the two boys were in the hallway hollering at each other and Russell was quite large in stature.

Darrell Simmons testified at his examination before trial that he has been a security guard at Bellport High School for approximately eight years. He testified that prior to March 17, 2014, an assistant principal came to him and expressed that there was an issue between infant plaintiff and Russell. Simmons testified that as a result of this information he told the eleven other security guards that there was an issue between the two boys and to keep an eye out for them. Simmons then testified that on March 17, 2014, before the incident, he had a conversation with Pontieri and Principal Hogan that infant plaintiff and Russell "just had issues with each other, had words with each other." Simmons testified that Hogan and Pontieri stated to him that "they were concerned that there was going to be a fight between [the] two [boys]." He further testified that Hogan and Pontieri told him to "make sure [the] two [boys] stay away from each other." In addition, he testified that neither Hogan nor Pontieri discussed a plan to keep the boys separated from each other. As a result of this meeting, Simmons testified he went to the other eleven security guards individually and told them to "keep [their] eyes and ears open for Rickardo and Russell," and to "keep those two guys away from each other." He also testified that he gave the security guards the boys' classroom schedule. Simmons testified that he did not discuss with the other security guards a plan for escorting either of the boys from the school property after dismissal that day.

Alicia Ulberg testified that she has been employed by the School District as an assistant principal since 2007. Ulberg testified that she was familiar with both infant plaintiff and Russell prior to the date of the incident, but was more familiar with infant plaintiff because he was one of her assigned students. She testified that infant plaintiff only came to her one time complaining that Russell was stealing his snacks from his locker, the morning of the March 17, 2014 incident. Ulberg testified that she contacted Assistant Principal Pontieri, who was responsible for Russell, and as a result a meeting was held between infant plaintiff, Russell and the two assistant principals. She denied knowing of prior issues involving infant plaintiff and Russell. Ulberg conceded in her deposition that prior to March 17, 2014, Russell had eleven documented prior incidents of improper behavior, including two violent incidents.

The School District has moved for summary judgment in this matter on the ground that it cannot be found liable for failing properly to supervise the students at the high school. 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 (***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

A school has a common law duty adequately to supervise its students, as they have physical custody of the students, and stand in for their parents while in attendance (*see* ***Stephenson v City of New York***, 19 NY3d 1031, 954 NYS2d 782 [2012]). The standard for determining whether a school was negligent in executing its supervisory responsibility is whether a parent of ordinary prudence, placed in the same situation and armed with the same information, would have provided greater supervision (*see* ***Mirand v City of New York***, 84 NY2d 44, 614 NYS2d 372 [1994]). "Schools have a duty to adequately supervise the students in their charge and may be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (***Timothy Mc. v Beacon City Sch. Dist.***, 127 AD3d 826, 7 NYS3d 348 [2d Dept 2015]; *see* ***Mirand v City of New York***, *supra*). Schools are not, however, the insurers of their students' safety, and there is no duty to provide constant supervision, as the level and degree thereof is measured by the reasonableness thereof under the circumstances (*see* ***MacNiven v East Hampton Union Free School Dist.***, 62 AD3d 760, 878 NYS2d 449 [2d Dept 2009]; ***Legette v City of New York***, 38 AD3d 853, 832 NYS2d 669 [2d Dept 2007]).

"In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by fellow students, it must be established that school authorities had sufficient specific knowledge or notice of the dangerous conduct which caused the injury; that is, the third party acts could have been reasonably anticipated" (***Mirand v City of New York***, *supra* at 49; *see also* ***Gaston v East Ramapo Cent. Sch. Dist.***, 165 AD3d 761, 85 NYS3d 525 [2d Dept 2018]; ***RT v Three Village Cent. Sch. Dist.***, 153 AD3d 747, 59 NYS3d 483 [2d Dept 2017]). Sufficiently specific knowledge or notice generally requires actual or constructive notice to the school of prior similar conduct (*see* ***Calabrese v Baldwin Union Free School Dist.***, 294 AD2d 388, 741 NYS2d 560 [2d Dept 2002]). However, "an injury caused by impulsive, unanticipated act of a fellow student will not ordinarily 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" (***Convey v City of Rye School Dist.***, 271 AD2d 154, 159, 710 NYS2d 641 [2d Dept 2000]). "Where an incident occurs in so short a span of time that even the most intense supervision could not have prevented it, lack of supervision is not the proximate cause of the injury and summary judgment in favor of the school defendants is warranted" (***Convey v Rye School Dist.***, *supra* at 160, 710 NYS2d 646).

Furthermore, plaintiffs must demonstrate not only that the school was negligent in its supervision, but also that such lack of supervision was a proximate cause of the injury (*see* ***Mirand v City of New York***, *supra*; *see also* ***Guerriero v Sewnhaka Cent. High Sch. Dist.***, 150 AD3d 831, 55

NYS3d 85 [2d Dept 2017]; ***Lopez v Freeport Union Free School Dist.***, 288 AD2d 355, 734 NYS2d 97 [2d Dept 2001]; ***Schlecker v Connetquot Cent. School Dist. of Islip***, 150 AD2d 548, 541 NYS2d 127 [2d Dept 1989]). Whether such supervision was adequate and, if inadequate, whether it was a proximate cause of the injury, is generally a question for the trier of fact to resolve (*see* ***SM v Plainedge Union Free Sch. Dist.***, 162 AD3d 814, 79 NYS3d 215 [2d Dept 2018]; ***DiGiacomo v Town of Babylon***, 124 AD3d 828, 2 NYS3d 548 [2d Dept 2015]).

Here, the School District failed to demonstrate, prima facie, that Russell's violent assault against the infant plaintiff was not foreseeable or that its allegedly negligent supervision was not a proximate cause of infant plaintiff's injuries (*see* ***Mirand v City of New York***, *supra*; *see also* ***Guerriero v Sewnhaka Cent. High Sch. Dist.***, *supra*). That is, with respect to negligence, the School District failed to make a prima facie showing that it lacked sufficient knowledge of the extent of Russell's dangerous propensities - notwithstanding his prior violent altercations with another student and a teacher - and, therefore, that Russell's assault on infant plaintiff in the circumstances that existed was not foreseeable (*see* ***Gaston v East Ramapo Cent. Sch. Dist.***, *supra*; ***RT v Three Village Cent. Sch. Dist.***, *supra*), while with respect to proximate cause, it failed to to make a prima facie showing that the assault occurred so quickly and spontaneously "that even the most intense supervision could not have prevented it" (***Gaston v East Ramapo Cent. Sch. Dist.***, *supra* at 763, 85 NYS3d at 528). Notably, there was testimony from Simmons that Hogan instructed him to "make sure [the] two [boys] stay away from each other." In addition, Simmons testified that he informed the other security guards of Hogan's concerns and instructed them to keep the boys away from each other. The School District, however, failed to eliminate triable issues of fact as to what further steps, if any, the School District took to implement Principal Hogan's plan and whether its supervision was adequate or if a heightened supervision would have prevented the assault (*see* ***DiGiacomo v Town of Babylon***, *supra*). Accordingly, the motion by the School District for summary judgment dismissing the complaint against it is denied.

The foregoing constitutes the decision and order of the court.

Dated: January 16, 2020
Riverhead, New York

HON. SANFORD NEIL BERLAND, A.J.S.C.

____ FINAL DISPOSITION __XX__ NON-FINAL DISPOSITION