At an IAS Term, Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20" day of June, 2003

PRESENT:

HON. LAWRENCE KNIPEL

Justice.

..... X

RAYMOND TAYLOR, A MINOR BY HIS GRANDMOTHER AND GUARDIAN, ELEANOR TAYLOR,

Plaintiffs,

- against - Index No. 33070/00

THE CITY OF NEW YORK BOARD OF EDUCATION, ET AL.,

Defendants.

..... X

The following papers number 1 to 7 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-5
Opposing Affidavits (Affirmations)	6, 7
Reply Affidavits (Affirmations)	
(Affirmations)	
Other Papers	

Upon the foregoing papers, plaintiff Raymond Taylor, a minor by his Grandmother and Guardian, Eleanor Taylor (plaintiff) moves, pursuant to CPLR **3126,** for an order compelling defendants the City of New York Board of Education (the Board) and Six Flags Theme Park, Inc., d/b/a Six Flags Great Adventure (Six Flags) to appear for depositions. In the alternative, plaintiff moves for an order striking the Board and Six Flag's answers and/or precluding them

from testifying at trial based upon their failure to appear for depositions. The Board cross-moves, pursuant to CPLR 3211(a)(7), for an order dismissing plaintiffs claims against it based upon his failure to state a cause of action. In the alternative, the Board cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's action against it.

Background

The instant action arises out of injuries sustained by plaintiff as a result of being assaulted by an unidentified individual during the course of an "end of the school year" outing to Six Flags Great Adventure Amusement Park in Jackson, New Jersey. At a hearing pursuant to General Municipal Law §50-h, plaintiff testified that the trip was sponsored by his school, MS 246 (also known as Walt Whitman Junior High School) located in Brooklyn, New York (the school). However, the Board, which runs the school, denies that it sponsored the trip. In any event, it is undisputed that on June 27, 1999, plaintiff and 30 to 45 of his classmates met in front of the school and boarded a bus, that was owned and operated by defendant Budget Tours Incorporated (Budget), which transported the children to the amusement park. It is also undisputed that the trip was chaperoned by "Susan", the school's PTA President as well as her husband.

According to plaintiff, when the bus arrived at the park that morning, he and his fellow students were advised that they could eat lunch in the park or meet back at the bus at 4:00 p.m. where a lunch would be provided to them. Accordingly, shortly before 4:00 p.m., plaintiff and approximately eight other students met back at the bus. However, neither the chaperones nor the bus driver were present when the students arrived at the bus. Thereafter, several

unidentified "older" boys boarded the bus and began fighting with one of plaintiff's classmates. When plaintiff attempted to exit the bus in order to avoid the fight, one of the unidentified boys struck him in the face and broke his jaw.

By summons and complaint dated September 20, 2000, plaintiff brought this action against the Board, Six Flags, and Budget alleging, ***inter*** *alia*, that the Board was responsible for his injuries in that it failed to provide adequate security for and supervision of the students on the outing.

In a preliminary conference order dated February 6, 2002, this court (Bruno, J.) directed all parties to appear for depositions on April 3, 2002. However, these depositions have yet to be held.

Plaintiff's Claims Against the Board

In cross moving to dismiss plaintiff's action against it, the Board maintains that it may not be held liable for plaintiff's injuries because he was not in the school's custody at the time of the assault. Specifically, the Board maintains that the trip to the amusement park was not a school-sponsored event. The Board also points out that the assault took place on a private bus. In the alternative, the Board argues that it may not be held liable for the assault because plaintiff has failed to allege or prove that the Board owed him a special duty to provide security against the attack.

In opposition to the Board's cross motion, plaintiff does not attempt to show or even argue that the school owed him a special duty to provide protection against the assault. Instead, plaintiff argues that he does not need to demonstrate that the Board owed him a special

duty inasmuch as his complaint alleges that the school failed to provide adequate supervision. In this regard, plaintiff points out that the chaperones failed to appear at the bus at 4:00 p.m. as they said they would. Accordingly, plaintiff reasons that there is a question of fact as to whether the assault was a foreseeable result of this failure to provide supervision.

The Board contends that it is entitled to summary judgment since the plaintiff was outside the physical custody of the school at the time of the alleged injury and therefore it owed no duty to plaintiff. In its papers, however, the Board has failed to submit an affidavit from the school principal or other Board official or any other admissible evidence which indicates that the trip to the amusement park was not a school-sponsored event. The conclusory statement by the Board's attorney is insufficient *(seeDemetri v Mallari*, 295 AD2d 395,396). Accordingly, the branch of the cross motion which is based on lack of custody over plaintiff at the time of the incident is denied with leave to renew upon proper papers.

Turning to plaintiffs inadequate security claim, "[i]t is well-settled that a school's provision of security against physical attacks by third parties . . . who are not students of the school who foreseeably pose a threat to other students. . .is a governmental function involving policymaking regarding the nature of the risks presented, and that no liability arises from the performance of such a function absent a special duty of protection'' *(Dickerson v City of New York,* 258 AD2d 433,434; *quoting Edwards v City of Mount Vernon*,230 AD2d 821). In order to establish a special duty, a plaintiff must demonstrate: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to

harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking (*Cuffy* v *City of New York,* 69 NY2d 255,260).

In the instant case, plaintiff's complaint fails to allege that the Board owed him a special duty to provide adequate security. Furthermore, the complaint fails to allege any of the four elements necessary to demonstrate such a special duty. Accordingly, plaintiff's inadequate security claim must be dismissed pursuant to CPLR 3211(a)(7).

In any event, in reviewing plaintiff's 50-h testimony, it is clear that the Board never made an affirmative promise of protection to plaintiff ***(see Dickerson, 258 AD2d*** at 434). Under the circumstances, the Board is entitled to summary judgment dismissing plaintiffs inadequate security claim against it inasmuch as the Board did not owe plaintiff a special duty to provide protection against the assault.

As noted above, plaintiff also alleged that the Board was negligent in failing to provide adequate supervision on the bus at the time of the assault. Unlike an inadequate security claim, a claimant alleging that a school failed to provide adequate supervision need not establish that the school owed him or her a special duty. In particular, schools "are under a duty to adequately supervise students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" ***(Smith*** v ***East Romapo Central School Dist.,*** 293 AD2d 521). At the same time, it is well-settled that schools are not insurers of students' safety and in order to find that a "school district has breached its duty to provide adequate supervision, a plaintiff must show that the district had sufficiently specific

knowledge or notice of the dangerous conduct and that the alleged breach was a proximate cause of the injuries sustained" (Nocilla v Middle Country Central *School Dist.*, __AD2d__, 757 NYS2d 300).

As a practical matter, given the unusual nature of the underlying assault, plaintiff will likely be hard-pressed to demonstrate that even if this were a school-sponsored event, the Board had specific knowledge or notice of the danger posed by plaintiff's assailant. Nevertheless, as the party moving for summary judgment, the Board has the initial burden of establishing "its prima *facie* entitlement to judgment as a matter of law by demonstrating that the attack upon the . . . plaintiff was unforeseeable'' (id.). Here, the Board's papers in support of its cross motion fail to address plaintiff's negligent supervision claim against it. Instead, the Board focuses exclusively on plaintiff's inadequate security claim and the lack of a special duty. Thus, the Board has failed to make a prima *facie* showing of its entitlement to summary judgment dismissing plaintiff's inadequate supervision claim against it. Accordingly, to the extent that he Board seeks to dismiss this claim, its cross motion is denied without prejudice to renewal upon proper papers and/or the completion of discovery.

Discovery Matters

Plaintiff moves for an order directing the Board and Six Flags to produce witnesses for deposition:. In the alternative, plaintiff moves for an order striking the Board and Six Flag's answers and/or precluding them from offering evidence at trial based upon their failure to produce witnesses for the depositions ordered pursuant to Justice Bruno's preliminary conference order.

In opposition to plaintiffs motion, the Board has submitted an affidavit by James Liptack, a Board employee assigned to the Division of Student Safety and Prevention Services, in which he avers that the Board has no records of the underlying incident. The Board further contends that it does not have a suitable witness to produce for a deposition. Finally, the Board argues that the drastic penalty of striking its answer or precluding it from producing evidence at trial is unwarranted inasmuch as its failure to appear for a deposition was not willful, contumacious, or in bad faith. For its part, Six Flags maintains that the reason it did not appear for a deposition is that plaintiff has failed to provide it with a copy of his 50-h hearing transcript.' In any event, Six Flags maintains that it is ready, willing, and able to proceed with depositions.

It is well-settled that striking a party's answer or precluding them from testifying at trial based upon a failure to comply with discovery are drastic remedies that are unwarranted absent a clear showing that the failure to comply was willful, contumacious or in bad faith (*Foncette* v LA ***Express,*** 295 AD2d 471). Here, plaintiff has failed to demonstrate that Six Flags and the Board's failure to produce deposition witnesses were wilful, contumacious, or in bad faith. Accordingly, plaintiffs motion for sanctions pursuant to CPLR 3126 is granted only to the extent that he parties are directed to appear for depositions within **45** days of service of a copy

---

'In its affidavit in opposition, Six Flags ostensibly cross-moves for an order directing plaintiff to provide it with a copy of his 50-h hearing testimony. However, a copy of this transcript is attached to the Board's papers in support of the cross motion which were served upon Six Flags.

of this order with notice of entry. Upon Six Flags and/or the Board's failure to comply with the court's directive in this regard, plaintiff may reapply for sanctions pursuant to CPLR 3126.

Summary

In summary, the court rules as follows: (1) that portion of the Board's cross motion which seeks to dismiss plaintiff's inadequate security claim based upon the lack of a special duty is granted pursuant to CPLR 3211(a)(7) and 3212; (2) that portion of the Board's cross motion which seeks to dismiss plaintiff's claim based on lack of physical custody is denied with leave to renew upon proper papers; and (3) plaintiffs motion for sanctions against the Board and Six Flags is granted only to the extent that these defendants are directed to appear for depositions within 45 days of service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

E N T E R ,