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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

SHIRLEY WERNER KORNREICH J.S.C.

PART 54

Index Number : 104826/2005

CASTRO, NICOLAS

VS.

DEPARTMENT OF EDUCATION

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is denied in accordance with the annexed Decision and Order.

FILED
APR 13 2007
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
APR 13 2007
IAS MOTION SUPPORT OFFICE

Dated: 4/11/2007

SHIRLEY WERNER KORNREICH J.S.C.

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

MDP

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

NICOLAS CASTRO, a minor, by his Mother and Natural Guardian, LINDA VINUEZA and LINDA VINUEZA, Individually,

Index No.: 104826/05

Plaintiffs,

-against-

DECISION and ORDER

THE CITY OF NEW YORK DEPARTMENT OF EDUCATION, HERBERT G. BIRCH SERVICES, INC.,

Defendants.

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KORNREICH, SHIRLEY WERNER, J.:

This negligence action arises from personal injuries, suffered by infant plaintiff Nicolas Castro ("Nicolas") while he was a student at the Herbert G. Birch Early Childhood Center (the "School"). Defendants The City of New York Department of Education (the "Department") and Herbert G. Birch Services, Inc. now move for summary judgment dismissing the complaint against them; plaintiffs have opposed.

I. ***Statement of Facts***

Linda Vinueza, Nicolas' mother, testified to the following at her deposition. Nicolas was born on August 3, 1999 and began attending the School in September 2002, after being referred there by his Early Intervention program. Nicolas, then three years old, was involved in Early Intervention as a result of a speech delay. Prior to starting school, in May 2002, Nicolas had had three fever-induced febrile seizures.

Ayala Zoltan was Nicolas' teacher at the School, and Ada and Marily were her two assistants. In October 2002, Nicolas arrived home from school with scratches on the right side

of his face that appeared to be infected. When Ms. Vinueza asked Nicolas what happened, he replied "Joseph boo-boo," and there was a note in his book bag indicating that he had been hurt at school and had seen the nurse. Joseph was another student in Nicolas' class at the School. Additionally, Ms. Zoltan called Ms. Vinueza, informing her that while the kids were in line, Joseph had approached Nicolas and scratched him, and that Joseph's parents had been contacted as well. Later that week, Ms. Vinueza went to the School to speak with Ms. Zoltan about the scratching incident, and Ms. Zoltan further reassured her that she had spoken with Joseph's parents who would talk to Joseph about how to behave in class.

In December 2002, Nicolas suffered another injury, arriving home from School with "two huge bumps on his head." Again, when asked how he was injured, Nicolas indicated that Joseph had done it. Ms. Vinueza went to the School again to address this matter and spoke with Ms. Zoltan, who did not know how Nicolas' injury occurred. Ms. Vinueza also spoke with the two assistants who "believed it had something to do with Joseph but they weren't too sure" and they assured Ms. Vinueza that they would monitor the situation. Ms. Vinueza also went to see Diana, the vice-principal, since it was the second time Nicolas had been injured by Joseph and she felt that Nicolas "was being picked on by that little boy." Diana informed Ms. Vinueza that Joseph's behavior in the classroom would be monitored so that Nicolas would not be hurt again. Though Ms. Vinueza inquired about switching Nicolas into another class, she was told that there was no space for him there.

On February 14, 2003, Ms. Vinueza received a call from the School's nurse, informing her that Nicolas' "knee gave out and that he was taken to Columbia Presbyterian [Hospital.]" When Ms. Vinueza arrived at the hospital with Nicolas' father, Nicolas was crying and his leg

appeared out of place. Ms. Zoltan was present and explained that Nicolas had been in the School's gym, walking around the tricycle area, when his knee gave out and he fell. A female hospital doctor, also present, challenged Ms. Zoltan's explanation, threatening to call Social Services if she was not told what actually had happened. Another doctor explained to Ms. Vinueza that the femur, which was broken, is one of the strongest bones in the body and that the injury had occurred from "traumatic impact on that leg."

After having surgery and being put in a cast from the chest down, Nicolas remained in the hospital for five days. During that time, one of Ms. Zoltan's classroom assistants came to visit Nicolas and admitted that "it was Joseph, but she can't tell [Ms. Vinueza] anything because she was gonna [sic] lose her job." The assistant did not specify what Joseph had done to cause Nicolas' injury.

Ms. Zoltan testified that she had worked at the School for two school years, from 2001 to 2003, after graduating college in 2000 and receiving an MA in early childhood special education in 2001. At the School, Ms. Zoltan was employed as a fulltime head teacher, working with preschool children with developmental delays. The class would have "gym time" two or three times a week. There was no separate gym teacher the classroom teachers themselves were responsible for supervising the students during gym time. Ms. Zoltan claimed that none of the children in her classroom displayed aggressive behavior.

Ms. Zoltan did not recall any incident in which another student harmed Nicolas, but testified that if such an incident occurred, she would "call up a mother and tell her about it, or write a note about it." She would not keep any record when students were sent to the nurse's office for any treatment.

On the date of Nicolas' leg injury, Ms. Zoltan's class went to the gym and her two assistants were present, as well as the School's physical therapist, Roy Shourin. Initially, all of Ms. Zoltan's students participated in an obstacle course, which she and Mr. Shourin had set up. At some point, another class arrived, accompanied by its teacher, Evien Nunez, and her two assistants. The obstacle course was later put away and the students then were able to choose from three activities, one of which was riding tricycles. Ms. Zoltan testified that "five to seven" tricycles were generally put out for the children's use and the tricycles were to be used in a specific area, though Ms. Zoltan did not recall the dimensions of that area.

Ms. Zoltan was assigned to supervise the tricycle area, and the physical therapist was with her. She was standing in the tricycle area, facing the children on tricycles, when she first observed that Nicolas was injured. She heard a cry and saw Nicolas falling to the floor, but did not recall if there were any other students in his vicinity. Nicolas was neither on a tricycle nor getting off one when he fell, and Ms. Zoltan had not previously seen him on a tricycle that day. Students were only allowed to walk in the tricycle area if they were going to get a tricycle to use. Ms. Zoltan and Marily, her assistant, went over to Nicolas, but neither of them knew what had caused his injury. Ms. Zoltan stated that she saw Nicolas' "leg buckled under him and that is why he fell" and she observed his leg buckling at the same moment she heard him cry out.

At her deposition, Marily Candelario testified that she has been a teacher's assistant at the School for the last five years. In the 2002 school year, she was assigned to Ms. Zoltan's classroom, along with Ada Gil. At the time of Nicolas' accident, the children were participating in "free play" and Ms. Candelario first realized Nicolas was injured when she heard him crying and saw him on the floor in the bicycle area. She did not remember if any children were next to

him, but Joseph was among the children playing with the tricycles. Prior to his injury, Ms. Candelario had seen Nicolas running toward the bicycle area. She did not recall if Nicolas had suffered any prior injuries that school year.

Ada Gil, Ms. Zoltan's other assistant, testified to the following at her deposition. She began working at the School in March 1999 and was Ms. Zoltan's teacher's assistant during the 2002-2003 school year. On the day of Nicolas' injury, the class was in the gym and the children were allowed to do an activity of their choosing. One of the activities was riding five to seven tricycles available tricycles. Ms. Gil first realized Nicolas was injured when she heard Ms. Candelario call out and heard Nicolas crying. There were other children in the tricycle area riding tricycles. Ms. Gil had no recollection of prior injuries that Nicolas had suffered.

Roy Shourin, the School's physical therapist, was deposed and testified that he worked at the School from 1998 through 2003. On the day of Nicolas' injury, Mr. Shourin stated that he was performing physical therapy on another student in the gym; Mr. Shourin had never performed physical therapy on Nicolas. He was working with the student in an alcove next to the tricycle area and talking with Ms. Zoltan who was standing ten to twelve feet from him, on the other side of the tricycle area. Marily and Ada were also in the tricycle area at that time. Mr. Shourin realized Nicolas was injured when he saw him on the floor. He did not see Nicolas fall nor did he know what caused him to fall. Other children were riding tricycles in the area of Nicolas' fall, but Mr. Shourin did not recall their names.

A "Child Accident/Incident Report" was completed by Karen Hazel, the School's principal. The report stated that no School personnel had witnessed Nicolas' accident. A second "Incident Report Form," also prepared by Ms. Hazel, indicated that during the free play time,

Ms. Candelario "positioned herself near the tricycle area and was intervening regarding a student conflict over tricycles." The form also noted that Ms. Zoltan, who was in the middle of the tricycle area, had observed Nicolas walking in front of her and "then turned her gaze toward the other students. Within seconds, the next thing she heard, was Nicolas crying on the floor." Once Nicolas arrived at the hospital, the form stated that:

> Concerns were raised by the hospital staff about the nature of the accident. [The School] staff was informed that a break of this nature is usually associated with blunt trauma from a very heavy object or a torquing [sic]/twisting of the body. [The hospital] reported that [Nicolas] would not have been able to walk after such an injury. Hospital officials considered calling in a report to ACS against the school, since none of [the School's] staff were [sic] able to adequately explain how such a serious injury could occur.

The "Ambulance Call Report" provided that a teacher "stated [Nicolas] was walking not fast[,] not playing, suddenly sat on the floor and was crying[.]"

II. ***Conclusions of Law***

To prevail on a motion for summary judgment, the movant must establish a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to demonstrate the absence of any material issue of fact. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003). Once a prima facie showing is made, the burden then shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues that require a trial. *Zuckerman v. New York*, 49 N.Y.2d 557, 560 (1980).

A school has a duty to adequately supervise the students under its charge and "will be held liable for foreseeable injuries proximately related to the absence of adequate supervision." *Mirand v. City of New York*, 84 N.Y.2d 44, 49 (1994) (internal citations omitted). However, "schools are not to be held liable for every thoughtless or careless act by which one pupil may injure another[,]" since they are not insurers. *Id.* (internal punctuation omitted). In *Mirand*, the

Court of Appeals set forth the following standard, applicable to negligent supervision claims when injuries are caused by the actions of another student:

> In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated. Actual or constructive notice to the school of prior similar conduct is generally required because, obviously, school personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place among students daily; 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.
>
> Even if a breach of the duty of supervision is established, the inquiry is not ended; the question arises whether such negligence was the proximate cause of the injuries sustained. In some cases, the wrongful conduct of a fellow pupil may be considered extraordinary and intervening, thus breaking the causal nexus between a defendant's negligent act or omission and a plaintiff's injury. The test to be applied is whether under all the circumstances the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the school's negligence.

Id. at 49-50 (internal citations omitted). The determination of "what is foreseeable and what is reasonable conduct under the circumstances are generally for the fact finder and not for the court to resolve[.]" *Gordon v. New York*, 70 N.Y.2d 839, 846 (1987) (negligent supervision action) citing *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 315 (1980). *See also Cruz v. City of New York*, 218 A.D.2d 546, 548 (1st Dept. 1995).

Here, there is a clear question of fact as to whether the School had notice of Joseph's prior actions that allegedly injured Nicolas. Ms. Vinueza has testified that Nicolas' teacher, two classroom assistants and the School's assistant principal all were aware of Joseph's prior aggression toward Nicolas and of the resulting injuries and had even told her that Joseph had caused such injuries. *See People v Vanterpool*, 214 A.D.2d 429 (1st Dept. 1995), *lv denied* 86 N.Y.2d 875 (1995); *Henriques v. Kindercare Learning Ctr., Inc.*, 6 A.D.3d 220, 221 (1st Dept.

2004) (prompt outcry hearsay exception applied to child's description of assault to mother). While the School denies such knowledge, this question of fact must be determined by the trier of fact. Upon a review of the evidence, a jury could arguably find that the School had "sufficiently specific knowledge or notice of the dangerous conduct which caused injury" to Nicolas, *viz.*, Joseph's prior violent acts against Nicolas. Indeed, a question is raised as to whether the School ought to have anticipated that Joseph would again injure Nicolas, as he did on two occasions in the past.

The next question, then, is whether the School's negligence was the proximate cause of Nicolas' injury. "While an extraordinary and unforeseeable act will sever the causal connection between a defendant's actions and a plaintiff's injuries, the issue of *whether such an act was foreseeable is typically a question for the trier-of-fact to resolve*[.]" *Dennis by Dennis v. City of New York*, 205 A.D.2d 577, 578 (1st Dept. 1994) (emphasis supplied). Defendants' argument that Nicolas' injury was a "sudden and unforeseen act" that could not have been otherwise prevented is entirely dependant on their contention that Joseph had not injured Nicolas in the past and did not cause Nicolas' broken femur. *Cf. Canales v. Finley Middle Sch.*, 3 A.D.3d 515, 515-516 (2d Dept. 2004). However, plaintiffs have submitted evidence sufficient to raise an issue of fact as to whether Joseph indeed injured Nicolas while both were, undisputedly, in the tricycle area at the same time. Further, Ms. Vinueza has testified that Ada Gil told her that Joseph caused Nicolas' leg injury---a statement that defendants do not dispute in their reply memorandum. *See Guzman v. L.M.P. Realty Corp.*, 262 A.D.2d 99, 100 (1st Dept. 1999) ("in opposing a motion for summary judgment, hearsay evidence may be utilized as long as it is not the only evidence submitted"). Thus, plaintiffs have raised a question as to the proximate cause

of Nicolas' leg fracture. If the trier of fact finds Ms. Vinueza's testimony credible, it can determine that (1) the School had notice as to Joseph's violent behavior toward Nicolas; (2) the School did nothing to prevent Nicolas from suffering further injuries by Joseph; (3) the subject injury may have been caused by an act of aggression by Joseph; and (4) the injury might have been prevented if the School had been more diligent in supervising the interactions of Joseph and Nicolas. *See Schneider v. Kings Highway Hospital Center, Inc.*, 67 N.Y.2d 743, 745 (1986) (liability may be found where "logic of common experience itself, as applied to the circumstances shown by the evidence, led to the conclusion that defendant's negligence was the cause of plaintiff's injury"); *Brito v. Manhattan & Bronx Surface Transit Operating Auth.*, 188 A.D.2d 253, 254 (1st Dept. 1992) ("[i]t is enough that [plaintiff] shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred").

The court is not persuaded by defendants' argument that they are not liable because the number of teachers in the gym was sufficient to supervise the students. *See Oliverio v. Lawrence Pub. Schools*, 23 A.D.3d 633, 634-635 (3d Dept. 2005) (adequacy of ratio of supervisors to pupils is not issue; "issues of fact exist as to *whether more appropriate supervision* would have ended" activity that allegedly caused infant plaintiff's injury") (emphasis supplied). Moreover, defendants admit the two prior incidents are relevant if "it can be established that the student or person that caused those [prior] injuries was the same student or person that injured plaintiff's leg." As discussed above, an issue of fact exists as to whether Joseph was the perpetrator of the two prior injuries. Finally, although defendants attempt to introduce school records regarding Nicolas' motor skills and behavior more than a year after the

accident, this evidence is irrelevant and will not be considered. Even were the court to consider such evidence, at most it raises an issue as to Nicolas' possible contribution to his own injury, but certainly does not establish that his injury was caused by his own negligence, as defendants suggest. Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied in its entirety; and it is further

ORDERED that all parties are to appear for a pretrial conference before the court at 9:30 AM on April 26, 2007 at 111 Centre Street, Room 1227, New York, N.Y. 10013.

ENTER:

Dated: April 11, 2007

J.S.C.