SHORT FORM ORDER

INDEX No. 05-13090
CAL. No. 06-02293-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 3-9-07
ADJ. DATE 3-30-07
Mot. Seq. # 001 - MG; CASEDISP

GAIL DARROW, as parent and natural guardian of TARA LYNN DARROW, an infant and GAIL DARROW, individually,	KUSHNICK & ASSOCIATES, P.C. Attorney for Plaintiffs 445 Broadhollow Road, Suite 124 Melville, New York 11747
Plaintiffs,	
- against -	DEVITT SPELLMAN BARRETT, LLP Attorneys for Defendants 50 Route 111 Smithtown, New York 11787
SOUTH HUNTINGTON SCHOOL DISTRICT and WALT WHITMAN HIGH SCHOOL,	
Defendants.	

Upon the following papers numbered 1 to 21 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 14 - 18 ; Replying Affidavits and supporting papers 19 - 20 ; Other 21 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion for summary judgment by defendant South Huntington School District and Walt Whitman High School ("the District") is granted.

This action arises out of a negligent supervision claim against the District by plaintiff Gail Darrow on behalf of her minor daughter Tara Lynn Darrow who sustained personal injuries on October 12, 2004 during her voluntary participation in a homecoming event known as the "Powder Puff" football game. Plaintiffs allege that the District was negligent in failing to properly and safely supervise the Powder Puff girl's football event and in failing to provide adequate personnel and equipment to insure the safety of the participants. The plaintiff's mother, plaintiff Gail Darrow, also brings a claim for loss of services.

Defendant now moves for summary judgment on the grounds the District did not breach its duty to provide adequate supervision, plaintiff's injuries were not proximately related to any alleged lack of

supervision by the defendant district, and notwithstanding any alleged lack of supervision, the defendant is entitled to dismissal under the assumption of risk doctrine. In support, defendant submits, *inter alia*, the pleadings, the municipal hearing deposition testimony of plaintiff, of defendant's representatives, Eric Caballero, AnnMarie Bunce, and Jonathan Varlamos.

Plaintiff testified at a 50(h) municipal hearing on March 1, 2005. She was deposed on January 10, 2006. Her testimony was essentially the same at both proceedings and can be summarized as follows: Plaintiff was born on March 31, 1987, and was a senior and member of the varsity tennis team at Walt Whitman high School on the date of the accident. She testified that the accident occurred during the powder puff football game traditionally held in connection with homecoming weekend. She had participated in this event the previous year. Plaintiff explained it was a "two hand touch" game; the different positions included a "hiker", a quarterback, a running back, receivers, and blockers. Offensive players were allowed to impede the progress of defensive players, but intentional shoving or pushing was prohibited. Each team had a captain and the girls would decide amongst themselves who would play each position. Additionally, each team had a member of the faculty who served as the coach. Assistant principal Jonathan Varlamos was assigned to the senior team. Plaintiff testified the coach would "supervise and hype the team up and keep everyone off the field". Two referees were present on the field and other school officials were present to supervise. Plaintiff attended a voluntary practice a few days prior to the game.

On the date of the accident, plaintiff testified the game began around 7:00- 7:30 p.m. The weather was sunny, a little cool, and not raining. She testified the football field was somewhat dewy as it usually gets at night. Some people had slipped, without injury, prior to plaintiff's accident. Plaintiff testified that her accident happened very quickly and she could only recall very little. She testified that she attempted to avoid the block of an opposing player, but that player pushed her shoulder into plaintiff and she fell to the ground. Neither plaintiff, or any of the other players, were wearing cleats.

The school's physical education teacher, Eric Caballero, who was a referee, testified he had been employed by the school as a physical education teacher for the District for two years prior to plaintiff's accident. He was also employed by the District as the junior varsity soccer coach and was currently the assistant men's basketball coach at SUNY Farmingdale. He had been asked by Ms. AnnMarie Bunce, the director of the general student organization ("GSO") at Walt Whitman High School to referee. Cabellero testified that this was the second year he served as a referee for the game. He noted he was not aware of any injuries the previous year.

According to Caballero, his responsibilities as referee included counting the number of players on the field, placing the ball, and ensuring safe play. He testified he had discussed the rules of the game and scoring system with Bunce prior to the game. Caballero testified the event was to be a "one hand touch" game, meaning that if the ball carrier was touched by a player on the other team with one hand, the play would be ruled dead. As a result of that rule, the game was intended to be essentially "non-contact". However, if the referee(s) determined that a player used unauthorized contact, a penalty would be assessed. In addition to the two referees, Caballero testified the school's administrative staff, the athletic trainer, and other personnel acting as chaperones were present during the game. According to Caballero, the football field was lit, the grass itself was slightly damp, but the playing surface was level. He did not recall anyone getting hurt during the game, including plaintiff, or calling any penalties for

illegal contact.

The school's GSO adviser/teacher, AnnMarie Bunce testified that she was responsible for running the 2004 homecoming activities, including the powder puff football game. She has been a teacher in the District for nineteen years and adviser to the GSO for three. Prior to the game, she had a mandatory meeting for all girls who wished to play during which the game was explained, rules distributed, and captains were selected. If a player could not attend the meeting, she was required to meet with her individually. She testified that she, assistant principals Jonathan Varlamos and Jerry Lesperance, school principal Mr. Polansky, the deans of discipline, and other teachers and security were all present at the game. Bunce did not witness the accident. She testified the game was stopped because a girl was "down", presumably plaintiff.

Assistant principal Jonathan Varlamos acted as an honorary coach for the game. Prior to the game, Varlamos was provided with the rules by Ms. Bunce and the two of them discussed some of the specifics the day before. Although Ms. Bunce requested that ten teachers serve as chaperones for the game, Varlamos secured twelve. He testified it was a beautiful fall evening and no penalties were called on either team. Although he did not see the actual play where plaintiff was injured, Varlamos recalled seeing a young lady (now known to him as the plaintiff) sitting on the bench with the trainer during the third quarter. The trainer indicated she would be "okay".

The proponent of a summary judgment motion must make out a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues 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 failure of the moving party to make such a prima facie showing requires denial of the motion regardless of the insufficiency of the opposing papers (***Sheppard- Mobley v King***, 10 AD3d 70, 778 NYS2d 98 [2004]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v New York*** , 49 NYS2d 557, 427 NYS2d 595 [1980]).

Although schools are under a duty to adequately supervise the students in their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (***Hauser v North Rockland Cent. School Dist. No. 1***, 166 AD2d 553, 560 NYS2d 835 [1990]), they are not insurers of the safety of their students, for they cannot be reasonably expected to continuously supervise and control all of the students' movements and activities (***Mirand v City of New York***, 84 NY2d 44, 614 NYS2d 372[1994]; ***Convey v City of Rye Sch. Dist.***, 271 AD2d 154, 710 NYS2d 641 [2000]). To find that a school breached its duty to provide adequate supervision in the context of injuries caused by the acts of fellow students, a plaintiff must show that the school 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 (***Mirand v City of New York***, *supra*). 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 (***Mirand v City of New York***, *supra*; ***Capotosto v Roman Catholic Diocese***, 2 AD3d 384, 767 NYS2d 857 [2003]; ***Valez v Free Port Union Free Sch. Dist.***, 292 AD2d 595, 740 NYS2d 364 [2002]; ***Lynch v City of Yonkers,*** 292 AD2d 572, 739 NYS2d 441 [2002]). Moreover, where an

accident occurs in so short a span of time that even the most intense supervision could not have prevented it, the school's lack of supervision cannot be the proximate cause of the injury, and summary judgment must be granted in its favor (***Siegell v Herricks Union Free Sch. Dist.***, 7 AD3d 607, 777NYS2d 148 [2004]; ***Canales v Finley Middle Sch.***, 3 AD3d 515, 770 NYS2d 746 [2004]; ***Calabrese v Baldwin Union Free School Dist.***, 294 AD2d 388, 741 NYS2d 569 [2002]; ***O'Neal v Archdioceses of NY,*** 286 AD2d 757, 730 NYS2d 524 [2001]; ***Convey v City of Rye Sch. Dist.***, *supra*).

Further, while students voluntarily participating in an interscholastic sport are deemed to have assumed the risks of those injuries that are known, apparent or reasonably foreseeable consequences of their participation (***Turcotte v Fell***, 68 NY2D 432, 510 NYS2d 49 [1986]; ***De Massi v Rogers***, 34 AD3d 720, 826 NYS2d 106 [2006]), assumption of the risk is not an absolute defense as schools are still obligated to exercise ordinary reasonable care to protect students from unassumed, concealed or unreasonably increased risks (***Morgan v State***, 90 NY2d 471, 662 NYS2d 421 [1997]; ***Benitez v New York City Bd. of Educ.***, 73 NY2d 650, 543 NYS2d 29 [1989]). Likewise, participants in interscholastic sport may not be held to have consented to injurious acts from other athletes which are reckless or intentional (***Benitez v New York City Bd. of Educ.***, *supra*; ***Turcotte v Fell***, *supra*).

Defendant School District has demonstrated its entitlement to summary judgment as a matter of law by demonstrating that it neither had sufficient specific knowledge of the dangerous conduct which caused plaintiff's injuries or that its actions were the proximate cause of those injuries (***Mirand v City of New York***, *supra*; ***Capotosto v Roman Catholic Diocese***, *supra*; ***Siegell v Herricks Union Free Sch. Dist.***, *supra*: ***Canales v Finley Middle Sch.***, *supra; see also*, ***Francisquini v N. City Bd. of Educ.***, 305 AD2d 455, 759 NYS2d 535 [2003]). The accident occurred when there was sudden and spontaneous contact between plaintiff and a fellow student, not because of inadequate supervision by any of the District personnel present. Clearly, there were numerous teachers, chaperones and supervisory personnel present at the game including two experienced staff members serving as referees, and two serving as coaches. A meeting was held with the participants prior to the game explaining the rules of the game. The playing field was properly lit and maintained. Furthermore, even assuming arguendo that the school did breach its supervisory duty, the conduct that caused plaintiff's injuries was so sudden and spontaneous, and occurred in so short a span of time, that even the most intense supervision could not have prevented it. The evidence establishes a sudden and unfortunate contact in the middle of the field during one play by two competing students. Each student essentially tried to get around the other and came into contact. Therefore, the school's alleged lack of supervision cannot be said to be the proximate cause of the injury and defendant has established its entitlement summary judgment (***Siegell v Herricks Union Free Sch. Dist.,*** *supra*; ***Swan v Town of Brookhaven,*** 2006 NY Slip Op 6845; ***Mayer v Mahopac Cent. Sch. Dist.,*** 2006 NY Slip Op 3741).

In opposition, plaintiffs argue that it was not a lack of supervision during the game that led to the injury, but a lack of proper oversight before the game and lack of proper attention to setting safety parameters; specifically, defendants refusal to allow students to wear cleats during the game given the damp field conditions and failing to properly instruct the students on proper techniques.

It is well settled that conclusory allegations or unsubstantiated assertions may not defeat a motion for summary judgment (***Carleton Studio, Ltd. v Mony Life Insurance Company***, 18 AD3d 491, 793 NYS 2d 919 [2005]). Plaintiff has never claimed she fell because she lost her footing or that cleats

would have prevented her fall. Speculation, grounded in theory rather than fact, is insufficient to defeat a motion for summary judgment (***Leggio v Gearheart***, 294 AD2d 543, 743 NYS 2d 135 [2002]). The plaintiff, in the exercise of her discretion, participated in a voluntary sporting event, aware of the risks inherent in the game having participated the year before. The game was meticulously planned, organized and supervised by the District. The occurrence of an accident during the normal course of an extra-curricular "one-hand touch" football game is not probative of negligence (***Ancewicz v Western BOCES***, 282 AD2d 632, 730 NYS2d 113 [2001]).

Accordingly, defendant School District's motion for summary judgment dismissing plaintiffs' complaint is granted.

Dated: MAY 14 2007

J.S.C.

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