SHORT FORM ORDER

INDEX No. 05-25345
CAL. No. 06-02886-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 3-21-07
ADJ. DATE 4-4-07
Mot. Seq. # 001 - MG; CASEDISP

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JOHN P. GONZALEZ, SR., individually and as a parent and natural guardian of JOHN P. GONZALEZ, JR.,

Plaintiffs,

- against -

CONNETQUOT CENTRAL SCHOOL DISTRICT OF ISLIP and CHRISTOPHER D'ANDREA,

Defendants.

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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 - 14 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 15 - 18 ; Replying Affidavits and supporting papers 19 - 21 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion by defendants Connetquot Central School District of Islip and Christopher D'Andrea ("the District") for summary judgment dismissing the complaint against it, is granted.

This action arises out of a negligent supervision claim against the District by plaintiff John P. Gonzalez, Sr. on behalf of his minor son John P. Gonzalez, Jr. who sustained personal injuries on November 24, 2004, during an incident occurring during gym class in Ronkonkoma Middle School. Plaintiffs allege the District was negligent in failing to properly and safely supervise plaintiff and in failing to provide adequate instructions regarding the use of a scooter.

Defendant now moves for summary judgment on the grounds the District did not breach its duty to provide adequate supervision and instruction, and, in any event, plaintiff's injuries were not proximately related to any alleged negligence on the part of the defendant District. In support, defendant submits, *inter alia*, the pleadings, the municipal hearing deposition testimony of plaintiff, of defendant's representative, Christopher D'Andrea.

Initially, it should be noted that defendants' expert's affidavit was not considered as defendants not only failed to identify the expert in pre-trial disclosure but served the affidavit for the first time within their opposition papers after filing the note of issue on November 28, 2006. (***Safrin v DTS Russian & Turkish Bath Inc.,*** 16 AD3d 656, 791 NYS2d 443 [2005]; ***Dawson v Cafiero***, 292 AD2d 488, 739 NYS2d 190 [2002]; ***Ortega v New York City Tr. Auth.***, 262 AD2d 470, 692 NYS2d 131 [1999]; ***Mankowski v Two Park Co.***, 225 AD2d 673, 629 NYS2d 847 [1996]; *see also,* CPLR 3101 [d] [1]). For the same reasons noted above, plaintiff's expert's affidavit was not considered.

On April 11, 2005, both plaintiffs appeared and testified at a 50-h Municipal hearing. On June 19, 2006, the infant plaintiff testified at an examination before trial. Plaintiff's testimony at both proceedings was essentially the same and can be summarized as follows: John Gonzalez, Jr. testified he was in sixth grade when he was injured while playing a game called "Mission Impossible" in gym class. There were two teams and the object of the game was for each team to make it across the gym before the other team. The students used scooters and other gym equipment. Plaintiff testified he had been using similar scooters in gym class since he was in fourth grade and that he had played the game the day before. He testified he was kneeling on the scooter when it flipped out from underneath him causing him to strike the floor with his face.

Christopher D'Andrea testified that on the date of the accident, he was employed by the District as a health and physical education teacher in the Ronkonkoma Middle School where he had worked for the past five years. At the time of plaintiff's accident, the class had just started to play a game called "Mission Impossible". The game involves two teams and the object was for each team to get to the other side of the gym before the opposing team. Each team used gym equipment to accomplish this goal, including two scooters per team. He testified the warning on the scooter provided "... [n]o weight over 250 pounds, no downward slopes, protect fingers from casters, proper supervision, and use in a way that scooter ...will not tip, or something like that...". Prior to the game, the students were given safety rules and instructions on how to play the game, including being instructed, "... No standing on the scooters, no diving on the scooters, no throwing the jump ropes, and no pushing, shoving". This was D'Andrea's second year of playing "Mission Impossible" with his physical education classes. Prior to plaintiff's accident, D'Andrea had never learned of any student being injured on scooters in any gym class, nor had any parents, students, or teachers complained about the game. Plaintiff was injured within seconds of the start of the game.

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 prevail on a negligent supervision claim, the plaintiff must demonstrate not only that the school was negligent in its supervision but also that such lack of supervision was the proximate cause of the injury (*see*, ***Mirand v City of New York***, *supra*; ***Lopez v Freeport Union Free School District,*** 734 NYS2d 97 [2d Dept 2001]; ***Schlecker v Connetquot Cent. School Dist of Islip,*** 150 AD2d 548 [2d Dept 1989]). 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 judgement in favor of the school defendants is warranted" (***Janukajtis v Fallon,*** 248 AD2d 428, 726 NYS2d 451 at 454, *quoting* ***Convey v Rye School District*** 271 AD2d 154).

Defendants have demonstrated their entitlement to summary judgment. The duty owed to students by their schools as been defined as "... such care as a parent of ordinary prudence would observe in comparable circumstances" (***Hoose v Drumm***, 281 NY 54). Here, the evidence establishes that the students were engaged in an age appropriate activity, were utilizing age appropriate equipment and were adequately under the supervision of an experienced gym teacher. The evidence establishes that the plaintiff had participated in "Mission Impossible" before the incident occurred and that he had used gym scooters prior to his accident. Additionally, D'Andrea gave the students instructions on how to play the game, as well as safety rules regarding the equipment. Even *assuming arguendo* that defendants did breach a duty owed to plaintiff, the plaintiff's injuries were not proximately caused by such breach. The evidence demonstrates that there was adequate supervision in the gym at the time of the accident, and that the level of supervision or any alleged lack of instruction was not the proximate cause of the accident. Rather, the injury suffered by plaintiff resulted from the sudden, spontaneous and unforseeable movement of the scooter and no amount of supervision however vigilant, could have prevented its occurrence (***Fraioli v City of New Rochelle***, 6 Ad3d 657, 775 NYS2d 559 [2004]).

In opposition, plaintiffs have failed to establish that a triable issue of fact existed to overcome the admissible evidence submitted by the defendant School District (*see*, ***Alvarez v Prospect Hosp.,*** 68 NY2d 320, 508 NYS2d 923 [1985]; ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]).

Accordingly, the motion for summary judgment by defendants Connetquot Central School District of Islip and Christopher D'Andrea is granted.

Dated: MAY 14 2007

JSC.

**X FINAL DISPOSITION ____ NON-FINAL DISPOSITION**