SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART 48**

DJIMMY SAMSON,

INDEX NO.: 007384/06

Plaintiff,

MOTION DATE: 4-2-08
SUBMIT DATE: 4-30-08
SEQ. NUMBER: 003

-against-

UNIONDALE FREE SCHOOL DISTRICT,

Defendants

----------x

The following papers have been read:

Notice of Motion, dated 2-29-08.....1
Memorandum of Law, dated 2-29-08.....2
Affirmation in Opposition, dated 4-13-08.....3
Reply Affirmation, dated 4-22-08.....4

This motion by the defendant pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted and the complaint is dismissed.

This action concerns an injury allegedly suffered by the plaintiff on November 22, 2005 when he was a student at defendant Uniondale Union Free School District ("District")'s High School.

Plaintiff, then an 11th grade student bumped into another student, Shannon Price, a female, at the entranceway to the school cafeteria. Price began arguing with plaintiff, who

argued back but according to plaintiff's testimony, Price acted as if preparing to fight and was more argumentative than he. Both were taken into the office of the Dean of Students, Cecilia Hamilton, spoken to together and separately and apologizing to the other. This led the Dean to believe that the matter had been resolved amicably and that no further action was to be taken. There were no threats, no claim of fear of reprisal and no requests from plaintiff.

Later that day, as plaintiff was on his way to a class, Price and another girl approached and asked him again to apologize, which he did, he turned to continue to his class when he was attacked from the rear by two boys, one of whom as Price's cousin. A security guard was in the vicinity of the location of the assault and broke up the attack. Dean Hamilton did not know that Price and one of the attackers, Cody McCallum, were cousins.

McCallum had at the time a history of disciplinary actions including a prior physical abuse of a fellow student, fighting, punching, harassment and disorderly conduct and the other student, Profitt, had a similar prior record of assaultive behavior. In the four years prior to the subject incident, plaintiff cites to 579 incidents of fighting at the Uniondale High School.

In his complaint and bill of particulars, the plaintiff alleges that the District is liable under the theory that there was inadequate supervision. Defendant contends that the attack on plaintiff was by persons other than Price, that they had no cause to believe that the two boys who attacked plaintiff were connected to the incident between plaintiff and Price.

The law on summary judgment is well settled. Summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue

of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief. *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are

insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton,* 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.,* 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC,* 27 AD3d 684 (2d Dept. 2006).

Based on the record before it, the Court finds that the defendant has made a *prima facie* showing of entitlement to judgment as a matter of law. It has demonstrated that the attack was the result not of inadequate or poor supervision, but rather of a sudden action of others who were not even involved in the original incident. Therefore, any temporary inattention of the adult supervisors on duty – even assuming that this was the case – was not a cause of such accident. *Reardon v Carle Place Union Free School Dist.*, 27 AD3d 635 (2d Dept. 2006); *Botti v Seaford Harbor Elementary School Dist. 6,* 24 AD3d 486 (2d Dept. 2005); *Cerrato v Carapella,* 22 AD3d 701 (2d Dept. 2005); *see generally, Mirand v City of New York,* 84 NY2d 44 (1994). The District has demonstrated that the supervision was adequate in any event.

There is nothing offered that would place in issue the showing that the alleged lack of adequate supervision was a proximate cause of the attack. Accordingly, under the authority cited above the claim based on negligent supervision must be dismissed.

Schools are not insurers of safety as they cannot reasonably be expected to continuously supervise and control all movements and activities of students. *Doe v Orange-Ulster Board of Cooperative Educational Services*, 4 AD3d 387 (2d Dept. 2004). Although schools are not insurers of safety, they are obligated to exercise such care of their students as a parent of ordinary prudence would observe in comparable circumstances. *David v County of Suffolk*, 1 NY3d 525 (2003).

In discharging this obligation, however, schools cannot reasonably be expected to continuously supervise and control all movements and activities of students (*Mirand v City*

of New York, supra; *Doe v Orange-Ulster Board of Cooperative Educational Services, supra*) and are not to be held liable for every thoughtless or even intentional act by which one pupil may attack another. *Johnsen v Cold Spring Harbor Central School District*, 251 AD2d 548 (2d Dept. 1998).

Further, a school is not liable if there is no indication that more intense supervision could have diverted the incident. *Navarra v Lynbrook Public Schools*, 289 AD2d 211 (2d Dept. 2001); *Ancewicz v Western Suffolk BOCES*, 282 AD2d 632 (2d Dept. 2001).

Here, the level of supervision provided for the plaintiff was at least that which a prudent parent would have provided, and the incident happened so suddenly that no reasonable amount of supervision could have prevented it. *Cranston v Nyack Public Schools*, 303 AD2d 441 (2d Dept. 2003). There simply is no indication that more intense supervision could have diverted the incident. *Navarra v Lynbrook Public Schools, supra; Ancewicz v Western Suffolk BOCES, supra.*

It certainly is true that 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. *Mirand v City of New York, supra*. However, for a school to breach this duty so as to be liable for foreseeable injuries proximately related to the absence of adequate supervision, the school must have sufficiently specific knowledge or notice of the dangerous condition which caused the injury, that is, that the third-party acts could reasonably have been anticipated. *Whitfield v Board of Educ. of City of Mount*

Vernon, 14 AD3d 552 (2d De pt. 2005); *In-HoYu v Korean Central Presbyterian Church of Queens*, 303 AD2d 369 (2d Dept. 2003); *Smith v East Ramapo Central School District*, 293 AD2d 521 (2d Dept. 2002); *Velez v Freeport Union Free School District*, 292 AD2d 595 (2d Dept. 2002).

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 District*, 294 AD2d 388 (2d Dept. 2002). In this case the record clearly reflects that the defendant did not have actual or constructive notice – as required for finding of liability to an injured student on the theory of inadequate supervision – of McCallum and Profitt's relationship to Price. The Dean had not been told about it, by the plaintiff or Price, and without such knowledge could not reasonably have known that as a result of the earlier altercation between the latter two students the plaintiff might be a target of the retaliation that allegedly occurred.

The fact that McCallum had a lengthy disciplinary record, including fighting, and that there were numerous fights at the school generally, does not mean that the defendant was on such notice it should have taken action to protect this particular plaintiff. Fastening liability on the defendant under these circumstances would effectively open the door to liability for every single physical altercation that takes place within its boundaries, a result that would be contrary to the well-established authority set forth above.

The Court therefore concludes that the defendant is not liable in negligence for injuries allegedly sustained by the infant plaintiff. *Calabrese v Baldwin Union Free School District, supra.*

This shall constitute the Decision and Order of this Court.

ENTER

DATED: May 13, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: Gregory James Volpe, Esq.
Attorney for Plaintiff
300 Old Country Road, Ste. 311
Mineola, NY 11501

Congdon, Flaherty, O'Callaghan, Reid, Donlon,
Travis & Fishlinger, Esqs.
Attorneys for Defendant
The Omni
333 Earle Ovington Boulevard, Ste. 502
Uniondale, NY 11553