SHORT FORM ORDER

INDEX No. 07-19473
CAL. No. 08-02372-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 4-13-09
ADJ. DATE 5-29-09
Mot. Seq. # 002 - MG; CASEDISP

BRANDON PARADISO, an infant under the age of 14, by his father and natural guardian, JOSEPH PARADISO, and BRANDON PARADISO, individually,

Plaintiffs,

- against -

THE PATCHOGUE-MEDFORD UNION FREE SCHOOL DISTRICT,

Defendant.

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Upon the following papers numbered 1 to 39 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 16 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 17-35 ; Replying Affidavits and supporting papers 36-38 ; Other 39-Plaintiff's Mem/Law ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (002) by the defendant, Patchogue-Medford Union Free School District, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the issue of liability is granted and the complaint is dismissed with prejudice .

This is an action sounding in negligence for damages personally for personal injury allegedly sustained by the infant plaintiff, Brandon Paradiso, arising out of an incident which occurred on April 7, 2006, at the Tremont Elementary School, located at 143 Tremont Avenue, Medford, New York in the Patchogue-Medford Union Free School District (School) when the infant plaintiff, while waiting in line for a hot lunch, was pushed by another student who had been pushed by another student, causing him to lose his balance, and causing his middle finger and index finger of his right hand to be closed in the open, unlocked stage door when another student closed the door. The plaintiff claims the school was negligent in their supervision of the students and negligently maintained the premises and failed to keep the stage door closed and locked during lunchtime. A Notice of Claim had been duly served on May 15, 2006.

The defendant seeks an order granting summary judgment on the issue of liability on the basis it bears no liability for the accident as it claims there was adequate supervision and adequate child/supervisor ratio at the time of the accident; that school personnel cannot reasonably be expected to guard against an injury caused by the impulsive, unanticipated act of a fellow student; that no evidence exists regarding the identified child who allegedly opened and closed the door; and that the stage door was not a dangerous instrumentality.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v N.Y.U. Medical Center, supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499 [2nd Dept 1989]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (Castro v Liberty Bus Co., 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]).

In support of this motion the defendant has submitted, inter alia, an attorney's affirmation; the affidavits of Joey J. Cohen dated March 6, 2009, Chrisann Denigris dated March 6, 2009, Gordon Hayes dated March 6, 2009; a copy of the summons and complaint; defendant's verified answer; plaintiff's verified bill of particulars with the demand; a copy of the transcript of the hearing conducted pursuant to GML 50-h of Brandon Paradiso conducted October 27, 2006; and copies of the transcripts of the examinations before trial of Brandon Paradiso conducted on April 18, 2008, Joseph Paradiso conducted on April 18, 2008, Chris Paradiso conducted on July 18, 2008, Brittany Paradiso conducted on July 18, 2008, and Catherine Hallstein conducted on May 6, 2008.

The plaintiff opposes this motion with, inter alia, an attorney's affirmation; the affidavits of Brandon Paradiso dated April 20, 2009, Brittany Paradiso dated April 20, 2009, Chris Paradiso dated April 20, 2009; copies of various discovery demands and photographs, medical records, copies of Notices to Admit; and copies of the transcripts of the examinations before trial of Scott Napodano conducted on January 16, 2008 and Sumona Roy, a non-party witness, conducted on June 10, 2008.

Schools are under a duty to adequately supervise students and can be liable for foreseeable injuries proximately related to the lack of adequate supervision, see, Mirand v City of New York, 190 AD2d 282, aff'd 84 NY2d 44 [1994]. The school's standard of duty to a student is what a reasonable prudent parent would have done under the same circumstances (NY PJI 2:227). "The standard for determining whether a school was negligent in executing its supervisory responsibility is, [w]hether a

parent of ordinary prudence, placed in the identical situation and armed with the same information, would invariably have provided greater supervision," Mirand v City of New York,, supra; see, In the Matter of the Claim of Jane Doe v Board of Education of Penfield School District, et al, 2006 NY Slip Op 51615U, 12 Misc3d 1197A, [Sup. Ct. of New York, Monroe County 2006]). "Where injuries are caused by the intentional acts of fellow students, imposition of liability upon the school under a theory of negligent supervision is justified when a plaintiff can show, usually by virtue of the school's prior knowledge of notice of the dangerous conduct which caused the injury, that the acts of the fellow student could reasonably be expected to guard against...an injury caused by the impulsive, unanticipated act of a fellow student," *citations omitted,* Shrader v Board of Education of the Taconic Hills Central School District, 249 AD2d 741[3rd Dept 1998].

As set forth in Bowles v The Board of Education of the City of New York and the City of New York, 2007 NY Slip op 50573U [Supreme Court of New York, Kings County 2007], "Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision.... To find that a school district has breached its duty to provide adequate supervision, a plaintiff must show that the district had sufficient specific knowledge or notice of the dangerous conduct and that the alleged breach was the proximate cause of the injuries sustained.... Moreover, when an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not the proximate cause of the injury and summary judgment in favor of the [defendant school district] is warranted," citing Ronan v School District of the City of New Rocelle, citations omitted, quoting Mirand v City of New York, citations omitted, Nocilla v Middle Country School Dist., citations omitted. The court further set forth that the articulated standard of care is that exercised by a "parent of ordinary prudence" in comparable situations. It also stated that "New York Courts have not hesitated to grant summary judgment to school districts in cases where the district makes a prima facie showing of lack of notice and/or proximate cause and the plaintiff fails to come forward with factual evidence to the contrary.... Although the question of notice and the proper standard of care are two different questions..., most of the decisions turn on lack of notice and/or proximate cause without distinct application of the standard of care...."

Joey J. Cohen set forth in his/her affidavit that he/she is the principal of the Tremont Elementary School and based upon a review of the records maintained in the principal's office, there were four kindergarten classes, one additional self-contained class and five first grade classes in the cafeteria at the time of the accident. Assuming complete attendance, there would have been a total of 215 students in the cafeteria who were supervised by three full-time lunch monitor aides, and four kindergarten aids assigned to each of the four kindergarten classes. As of April 7, 2006, the procedure at Tremont Elementary School provided for the permanent assignment of three lunch monitor aides in the cafeteria at any given time and a kindergarten aide for each and every kindergarten class present.

Brandon Paradiso testified at his 50-h hearing and deposition and set forth a statement in his supporting affidavit. He stated his teacher would bring the class to the lunch room where there were lunch ladies. After lunch they would go outside for recess. On the date of the accident, he was buying a hot lunch and when his class was called, he got in line. He was in the middle of the line when one of his friends standing behind him, Tyler, was pushed into him by another student. Brandon's fingers then got caught in the door because someone else (a boy or a girl) opened and closed the door. Prior to the date

of the accident he had heard the lunch lady say "don't play with the door." He saw the door was closed, then it opened, but he did not see it close again before the accident. He did not know how far open the door was just before his fingers got caught. He put his foot by the door to stop it from closing all the way. After his fingers got caught he just screamed and a teacher's helper came to him to help. He also testified they were given rules at the beginning of the year when the teacher said they had to sit and not run around and not to push. But, he stated, still people pushed. At his deposition he stated that just before the accident he saw a lunch aide standing up near the class's table.

Joseph Paradiso, Jr., Brandon's father, and Chris Paradiso, Brandon's mother, were not present when the accident happened. Brittany Paradiso, Brandon's sister, testified that after Brandon returned home from the hospital that he told her that his finger got shut in the stage door by the hinge because some kid shut the door, and that the kids behind him on line were pushing. She testified that kids close the door a lot, once a week, and that she has heard the monitors tell students not to push and not to open the door.

Catherine Hallstein testified at her examination before trial that she is employed at Tremont Elementary School as a monitor aide for ten years and watches over the kids when they are in the cafeteria. She stated they were trained by Kelly Barthmeuw. On the date of the accident there were three aides working in the cafeteria, Michelle, Patty and herself: that one monitor would line the kids up, on would sell snacks and the other would walk around the cafeteria watching the kids. She stated that they make sure the kids are not fooling around on the line, that no one is getting hurt, and that there is no pushing. She, however, did witness students fooling, hitting, pushing, cutting in line, while they were on line for the hot lunch on occasion, maybe one to five times but not often. When they were asked to "Please stop" they did. On April 7, 2006 she was lining up the kids and was in the door where the kids go into the kitchen. The students who were in the cafeteria for the purpose of having lunch had no reason to go through the stage door during their lunch period. She had never witnessed children who were standing on the hot lunch line opening and closing the stage door, and did not see it prior to Brandon's accident. Sometimes if a student leaned on the stage door it would open. She had seen this less than five times and when she saw it she would tell them to stop and the door just closed by itself. She did not see Brandon's accident when it occurred and did not know of anyone who did witness it. She did not see any students pushing or fooling around by the stage door and did not hear any other monitors or staff tell the students not to fool around.

Based upon the testimonies and the evidence submitted, it is determined that Patchogue Medford School has demonstrated prima facie that it did not negligently supervise the infant plaintiff and other students in the cafeteria and that its supervision or conduct was not the proximate cause of the injury. The plaintiff has submitted only conclusory assertions that the supervision provided by the school district was negligent and caused the injury.

The pushing incident which occurred at the time of the accident was a spontaneous act, see, Ceglia v Portledge School, 187 AD2d 550 [2nd Dept 1992]; Bird v Port Byron Central School District, 286 AD2d 938 [4th Dept 2001]) and the plaintiffs have not raised a factual issue concerning that the conduct, namely the pushing incident, had been going on for more than moments before the accident occurred and that the school district failed to control the students. The school was on notice that children do push, but the testimony supported that it occurred on a very infrequent basis. The children

in the hot lunch line were first graders. Care was taken to have only one class in line at a time. A monitor was assigned to that line. There was no act of violence, just impulsive behavior of one child impulsively pushing another against which the children had been warned. There is no claim asserted that this child who did the pushing had pushed other students on prior occasions or demonstrated prior aggressive behavior to put the school on notice that his conduct could foreseeably cause injury to other students. Here it is determined that the injury at issue was caused by the sudden, impulsive, spontaneous act of another student, which even the most intense supervision could not have prevented. Therefore, prior notice is immaterial because negligent supervision was not the cause of the injury and no duty was breached by the defendant.

The infant plaintiff testified that he only saw the door open once before the incident. There has been no demonstration other than the conclusory and unsupported assertion that the door was being pushed open repeatedly at the time of the incident and that the school did nothing to stop the conduct of the student opening it. The defendant has demonstrated prima facie that there was sufficient staffing present in the cafeteria and that it acted in a reasonable and prudent manner and exercised ordinary prudence. The plaintiffs have not raised a factual issue with admissible evidence to establish that the staffing in the cafeteria was not sufficient or that the school was negligently supervising the students when the incident occurred.

Liability may be imposed where a landowner or lessee creates a dangerous condition on the property, Warren v Wilmorite, Inc., 211 AD2d 904 [3rd Dept 1995]). In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition, upon property, it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence, Jones v United Skates of America, Inc. et ano., 2008 NY Slip Op 50557U, 19 Misc 3d 1105A [Supreme Court of New York, Kings County 2008].

An inherently dangerous article is "one fraught with danger lying in the character and content of the article, albeit the disastrous consequences are caused immediately by an external force (Martinez v Kaufman-Kane Realty Co., Inc., 74 Misc2d 341[Sup. Ct. Bronx County 1973]). The phrase "inherently dangerous" means more than ordinarily dangerous (Tauraso v The Texas Company, 300 NY 567, 1949 LEXIS 1440 [1949], but that is not the standard upon which liability may be premised (see, Warren v Wilmorite, Inc. supra). Here it is determined that the subject door is not an inherently dangerous article. Instead, the evidence submitted has established that the plaintiff was pushed by another student, and that the infant plaintiff sustained an injury to his hand as a result of the subject door being closed by another, unidentified student and not as a result of the door being dangerous or defective, see, Fobbs v Rahimzada, et al, 39 AD3d 811 [2nd Dept 2007]. The door has a device to control the speed at which the door closes. Contrary to the plaintiff's contention, a defective condition is not established merely because the door closed with sufficient force to sever the tip of the plaintiff's finger, see, DeCarlo v Village of Dobbs Ferry et al, 36 AD3d 749 [2nd Dept 2007]; Lezama v 34-15 Parsons Blvd, LLC, 16 AD3d 560 [2nd Dept 2005].

Chrisann Denigris set forth in her supporting affidavit that she is the School Nurse for the Tremont Elementary School and has examined all her records and Accident Worksheets and stated there is no record of any other students having been injured by the door leading from the cafeteria to the stage since its installation.

Gordon Hayes set forth in his supporting affidavit that he is the Head Custodian at Tremont Elementary School and the subject door was replaced as part of a district wide bond issue upgrade and was installed in the fall of 2005. He states he inspected the door upon learning of Brandon Paradiso's accident and his inspection revealed that the door was equipped with a door closure mechanism which prevented the door from closing quickly as it slowed the closing rate of the door. He did not receive any complaints about the door or any requests for repair, which would be communicated directly to him. He is not aware of any students having been injured as a result of the subject door at any time during his employment at the school since January 2002.

Here, the defendants have established prima facie that the subject door was not defective, that it was in working order, had a device to control the speed at which the door closed, was no different from an ordinary door, and no other students had been injured by the door. It is determined as a matter of law that the door was not inherently dangerous.

The plaintiff has failed to raise a triable issue of fact to substantiate the conclusory assertions that the premises was unsafe, that the subject door was defective, somehow in a dangerous condition, or that it was an inherently dangerous article.

Accordingly, motion (002) by the defendant Patchogue-Medford School District for an order granting summary judgment dismissing the complaint is granted and the complaint is dismissed with prejudice.

Dated: June 30, 2009

Ralph J. Cornell
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION