SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present:
Hon. Thomas Feinman
Justice

TRIAL/IAS PART 15
NASSAU COUNTY

TYRUS HODGE, an infant, by his mother and natural guardian, SHEILA BAILEY, and SHEILA BAILEY, individually,

Plaintiffs,

- against -

THE TOWN OF HEMPSTEAD BOARD OF EDUCATION, HEMPSTEAD PUBLIC SCHOOLS, ELMONT MEMORIAL HIGH SCHOOL, SEWANHAKA CENTRAL HIGH SCHOOL DISTRICT and ANTHONY JONES - Student,

Defendants.

INDEX NO. 22061/07

MOTION SUBMISSION
DATE: 11/30/09

MOTION SEQUENCE
NO. 5

The following papers read on this motion:

Notice of Motion and Affidavits.....	X
Affirmation in Opposition.....	X
Reply Affirmation.....	X

The defendants, Elmont Memorial High School and Sewanhaka Central High School District, (hereinafter referred to as the "High School"), move for an order pursuant to CPLR §3212 granting summary judgment to the defendants dismissing plaintiff's action. The plaintiff submits opposition. The defendants submit a reply affirmation.

BACKGROUND

The infant plaintiff, Tyrus Hodge, a tenth-grader at the time of the incident, claims that he was caused to sustain serious injuries, including a fractured jaw that had to be wired shut for approximately six weeks, as a result of an incident that occurred on April 30, 2007 in the cafeteria of Elmont Memorial High School, at approximately 12:30 p.m. The plaintiff has provided that there were approximately three hundred students in the cafeteria at the time, and while there are normally two teachers assigned to the cafeteria, on April 30, 2007, one teacher was assigned to the cafeteria. The plaintiff provides and it has not been disputed herein, that as the bell rang, the lunch period

ended, the teacher left the cafeteria, and a fellow student, later identified as Anthony Jones, an eleventh-grader, approached the plaintiff from behind him and hit the plaintiff in his jaw. As per the school incident report, Anthony Jones admitted to hitting the plaintiff over an alleged threat against Anthony Jones' brother. The plaintiff testified that two days prior to the incident, the plaintiff and Anthony Jones had a conversation concerning whether the plaintiff looked at Anthony Jones' brother a "certain way". The Assistant Principal of the High School testified that the senior cafeteria seated two hundred Fifty students and two teachers are assigned to the senior cafeteria.

The defendants submit that the act committed by Anthony Jones, a fellow student, was a spontaneous, unanticipated, unforeseeable act, and that there was no prior conduct that would have put the High School on notice to protect against the action. The defendants acknowledge that Anthony Jones may have exhibited violence but "he had exhibited no violence for more than two years" prior to the incident.

The plaintiff refers to twenty-eight prior incidents contained in the defendants' record which exhibit twenty-eight prior incidents of fighting in the cafeteria within one year prior to subject incident at bar. These twenty-eight prior incidents that occurred in the cafeteria involve twenty-eight notices of suspensions which were issued to students regarding incidents including fighting, physical altercations, pushing, shoving, slap boxing, grabbing the neck of other students, kicking, and incidents of being hit in the head with a can of soda, or a handball.

The plaintiff also refers to eleven prior incidents regarding Anthony Jones contained in the defendants' records. These eleven prior incidents are eleven prior suspension notices ranging from March 24, 2004 through 2005 and up to May 19, 2006. The most recent, May 19, 2006, was for "excessive cutting" while the May 19, 2005 incident was for "putting another student in a choke hold until the student almost lost consciousness". Other incidents include telling "a teacher to 'shut-up'", January 14, 2004, "fighting with another student in class", March 24, 2004, "fist fighting", April 4, 2005, "disrupting class during test, rude and disrespectful to teacher", April 15, 2005, and "play fighting in the hallway", May 13, 2005.

APPLICABLE LAW

It is well settled that a school is 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. (*Miranda v. City of New York*, 84 NY2d 44, citing *Lawes v. Board of Education*, 16 NY2d 302; *Decker v. Dundee Cent. School Dis.*, 4 NY2d 462). The school is not an insurer of safety, however, and cannot be reasonably expected to continuously supervise and control all movements and activities of students, and therefore, are not to be held liable "for every thoughtless or careless act by which one pupil may injure another". (*Id*, citing *Lawes*, *supra*; *Ohman v. Board of Educ.*, 300 NY 306).

The nature of the duty owed was set forth in the seminal case of *Hoose v. Drumm*, 281 NY 54, whereby a teachers is charged to exercise such care of a student as a parent of ordinary prudence would observe in comparable circumstances. The duty owed derives from the simple fact that while a student is in school, the school is assuming physical custody and control over its students, effectively taking the place of the parent and guardian. (*Id*, citing *Pratt v. Robinson*, 39 NY2d 554). In determining whether a duty to provide adequate supervision has been breached by the school, it

must be established that the school authorities had "sufficient specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated." (*Id*). Actual or constructive notice to the school of prior similar conduct is generally required because school personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place on a daily basis among students. (*Id*). "Even if a breach of the duty of supervision is breached, the inquiry is not ended; the question arises whether such negligence was the proximate cause of the injuries sustained." (*Id*)

The Court of Appeals in *Miranda v. City of New York, supra*, has held that 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 that caused the injury". The test for proximate cause 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.*) The Court also stated that "[s]upervision of students is obviously needed at dismissal time, when the largest number of students congregate and fights are most likely to occur". (*Id.)*

DISCUSSION

Here, the high school "normally" had two teachers assigned to the cafeteria, however, on the date of the incident, one teacher was assigned to the cafeteria. Apparently, as soon as the bell rang and lunch period ended, the teacher left, as expected, leaving approximately three hundred students unsupervised. It was at this time that the incident occurred. While the assault happened "quickly", and arguably spontaneously, genuine issues of fact exist under the circumstances at bar regarding whether it was foreseeable that a fellow student would engage in assaultive conduct in the cafeteria based on the disciplinary record maintained by the High School. "While the actual assault happened quickly, the same could be said of nearly any case involving an assault. The issue is not the speed of the punch, but the circumstances leading up to and surrounding that conduct". (*Wood v. Watervliet City School*, 30 AD3d 663). The adequacy of supervision and proximate cause are generally factual questions for the jury. (*Id.*)

Where evidence established a pattern of undisciplined, disruptive and unruly behavior in a design and drawing class, such as daily "tape wars", (students throwing balls of waste masking tape), and two prior occasions of propelled pencils in the air, the Court found factual issues were raised as to whether the school defendant's lack of adequate supervision was a proximate cause of the infant plaintiff's injuries. (*Maynard v. Board of Education of Massena Central School District*, 244 AD2d 622). Additionally, evidence indicated that the fellow student, in the design and drawing class, who pulled a T-square or ruler back, and shot the pencil at the infant plaintiff, had a "terrible disciplinary record". (*Id.*) Under these circumstances, the Court found that the school defendants were on notice of the fellow student's dangerous conduct, and that they breached their duty to the infant plaintiff to provide adequate security. (*Id.*) Likewise, here, the record establishes a pattern of undisciplined and disruptive behavior in the cafeteria, and the record also indicates that Anthony Jones had a disciplinary record, which could support a finding that the defendants herein may have had notice of Anthony Jones' disruptive or dangerous behavior, coupled with notice that such behavior occurred in the cafeteria. Accordingly, issues of fact exist as to whether the defendants breached their duty to provide adequate supervision in the cafeteria.

The Second Department found that genuine issues of material fact precluded summary judgment when a seventh-grade student who was punched in the left eye three times by a fellow pupil brought an action against the school district for negligent supervision. (*Smith v. Poughkeepsie City School District*, 41 AD3d 579). The infant plaintiff was punched while in the second floor hallway after her last class in the middle school, whereby, allegedly, no teachers or security monitors were in the hallway. (*Id.*) The court found that the defendant failed to present any evidence that the hallway was being monitored at the time of the incident, despite the fact that the school record revealed that numerous assault and battery incidents took place during school hours, and stated that the "[c]ourts have consistently recognized in similar situations that dismissal is a time when supervision is necessary due to congestion of large numbers of students and the increased likelihood of fights". (*Id.*, citing *Miranda v. City of New York, supra*, and *Shoemaker v. Whitney Point Central School District*, 299 AD2d 719). Additionally, issues of fact existed as to whether the defendant has knowledge of the fellow student's dangerous propensities as a result of the fellow student's involvement in similar altercations with classmates in the past. (*Id.*) Likewise, here, lunchtime is a time when supervision is necessary due to the congestion of large numbers of students and the increased likelihood of fights. Moreover, the school record reveals that numerous incidents of fighting occurred in the cafeteria, and issues of fact exist as to whether the defendants had notice of the fellow student's dangerous propensities.

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 165 NYS2d 498). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 413 NYS2d 141). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 200 NYS2d 627. The role of the court is to determine if bonafide issues of fact exists, and not to resolve issues of credibility. (*Gaither v. Saga* Corp., 203 AD2d 239; *Black v. Chittenden*, 69 NY2d 665). Evidence must be viewed in the light most favorable to the nonmoving party. (*Gonzalez v. Metropolitan Life Insurance Company*, 269 AD2d 495). The nonmoving party's evidence must be accepted as true and the nonmoving party is entitled to every favorable inference which can reasonably be drawn from the evidence. (*Wong v. Tang*, 2 AD3d 840; *Farrukh v. Board of Education of the City of New York*, 227 AD2d 440).

CONCLUSION

Upon the record herein, while the actual assault may have happened rather quickly, the defendants' record reveals that within the year leading up to the assault, the defendant had notice of twenty-eight prior incidents, involving physical altercations, fighting, punching, shoving, and pushing, that occurred in the cafeteria, circumstances that lead up to and surrounded the conduct that caused injury to the infant plaintiff. The record herein also indicates that the fellow student had a record of disruptive conduct. Accordingly, evidence has been put forward raising triable issues of fact as to whether the assaultive conduct that occurred in the cafeteria was foreseeable, and whether the defendants breached their duty to the infant plaintiff to provide adequate supervision.

In light of the foregoing, the defendants' motion for summary judgment is denied.

ENTER:

J.S.C.

Dated: January 11, 2010

cc: Joseph T. Mullen, Jr. & Associates
McCabe, Collins, McGeough & Fowler, LLP
Anthony Jones