SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

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TRIAL TERM PART: 45

JOHN DILBERT, by his father and natural guardian, RON DILBERT, and RON DILBERT, Individually,

Plaintiffs,

-against-

INDEX NO.:20065/06

MOTION DATE:12-22-09
SUBMIT DATE:1-26-10
SEQ. NUMBER - 004

HEWLETT-WOODMERE UNION FREE SCHOOL DISTRICT, HEWLETT-WOODMERE UNION FREE SCHOOL DISTRICT 14, BOARD OF EDUCATION OF HEWLETT-WOODMERE UNION FREE SCHOOK DISTRICT, GEORGE W. HEWLETT HIGH SCHOOL and HEWLETT ELEMENTARY SCHOOL,

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 11-30-09.....1
Affirmation in Opposition, dated 1-19-10.....2
Reply Affirmation, dated 1-25-10.....3

This motion by the defendants 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 December 7, 2005, when he was a student at defendant Hewlett High School (the High School).

Plaintiff was in the senior class at the High School , a captain of the fencing team and highly ranked in the sport.

Plaintiff was injured after being assigned, with others, by the fencing coach to look for and gather fencing equipment required for practice. Fencing practice was held in the Hewlett Elementary school gymnasium and auditorium. The fencing equipment was customarily stored in a storage area underneath the stage in the gymnasium as well as the stairwells on either side of the stage. The gymnasium and storage rooms are not accessible to anyone other than school personnel, invited and authorized persons.

On the date of plaintiff's injury, prior to a regularly scheduled fencing practice, the coach sent plaintiff and two others to look for fencing masks that had not been found where the equipment was customarily stored in the storage area under the stage. Plaintiff went into a storage room next to the stage to look for the cardboard box in which the masks were generally kept, he saw a 2' x 2' x 2' square box that resembled a mask box on top of a closet and over hanging the top of the closet several inches. Plaintiff reached up, extended his arms and pulled the box off the closet top, found that it was too heavy to handle, lost control and as the box crashed to the floor, was injured.

Plaintiff alleges that the High School is liable under the theory that there was inadequate supervision and that there was a dangerous condition at the premises. Defendant contends that the supervision was adequate, that the condition was not dangerous and that if it was, there was no notice thereof.

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 High School has made a *prima facie* showing of entitlement to judgment as a matter of law. It has demonstrated that the

accident was the result not of inadequate or poor supervision, but rather of a voluntary sudden action of plaintiff. Therefore, any temporary inattention of the adult coach – 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 High School 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 injury. 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*).

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 unexpectedly 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 avoided 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 injury causing event could reasonably have been anticipated. *Ronan v. School Dist. Of City of New Rochelle*, 35 AD3d 429 (2d Dept. 2006); *Swan v. Town of Brookhaven*, 32 AD3d 1012 (2d Dept. 2006); *In-HoYu v Korean Central Presbyterian Church of Queens*, 303 AD2d 369 (2d Dept. 2003).

For an owner or possessor to be liable to a person injured on its property, it must be established that the defendant created the condition or had notice, either actual or constructive thereof. *Peralta v. Henriquez*, 100 NY2d 139 (2003). Of course, the condition complained of must be one which renders the premises as not reasonably safe. *Revill v. Boston Post Road Development Corp.*, 293 AD2d 138 (1st Dept. 2002). Finally, the dangerous condition of the premises must be a proximate cause of the injury. *Boltax v. Joy*

Day Camp, 67 NY2d 617 (1986); *Cangro v. Noah Builders, Inc.*, 52 AD3d 758 (2d Dept. 2008).

Here, there is no evidence to support a contention that the box on the cabinet constituted a dangerous condition, there is no evidence that the condition was created by the defendants or that they had active or constructive notice of its presence and it was the actions fo the plaintiff that caused the box to fall. Although plaintiff suggests that the box was "heavy" there is a lack of objective evidence as to its weight. Hence, defendants are not liable to plaintiff on a theory based on the manner in which the premises were maintained. *Marusevich v. Great Atlantic & Pacific Tea Co., Inc.* 309 AD2d 839 (2d Dept. 2003).

While it is regrettable that plaintiff was injured while engaged in an activity related to a sport in which he apparently excels, the fault or blame for the injury cannot, on the facts, be placed with the defendants.

The motion is granted and the action is dismissed.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: February 18, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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