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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE J.S.C. Justice PART 5

Index Number : 115407/2005
DUME, AXELL
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
DISM ACTION/INCONVENIENT FORUM
CAL #37

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
JUL 23 2010
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/20/10
JUL 20 2010

BJ
BARBARA JAFFE
J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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AXELL DUME, an infant by his mother and natural guardian, SANTA ORTIZ, and SANTA ORTIZ Individually,

Plaintiffs,

-against-

CITY OF NEW YORK and BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants.

----------x

Index No.	115407/05
Motion Date:	05/19/10
Motion Seq. No.:	003
Calendar No.:	37

DECISION & ORDER

BARBARA JAFFE, JSC:

For plaintiff:
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For defendant City:
Peter A. Lucas/ACC
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Corporation Counsel
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By notice of motion dated March 24, 2010, defendants City of New York (City) and Board of Education of the City of New York (BOE) (collectively, defendants) move pursuant to CPLR 3211(a)(7) and 3212 for an order summarily dismissing plaintiff's claims against them. Having failed, however, to include any factual or legal basis for a dismissal pursuant to CPLR 3211(a)(7), only the motion pursuant to CPLR 3212 is addressed. (*See Kane v City of New York*, Sup Ct, New York County, May 14, 2010, Jaffe, J., Index No. 103963/07).

Plaintiff opposes the motion as to BOE and concedes that City is not liable. For the reasons that follow, defendants' motion is granted.

I. UNDISPUTED FACTUAL BACKGROUND

On December 10, 2004, plaintiff, then 13 years old and an eighth grade student at Wade

Academies, a New York City public school located in the Bronx, was injured while playing a game of kickball in the school gym. (Affirmation of Peter C. Lucas, Esq., dated Mar. 24, 2010 [Lucas Aff.], Exh. B).

Plaintiff had previously played kickball in the gym and at the beginning of the school year, two physical education teachers instructed him on how to play. (Lucas Aff., Exh. G at 9-11). Approximately three months later, the same two teachers supervised a gym session of approximately 65 students and participated with them in a game of kickball. (*Id.* at 7-8). Plaintiff played third base; one teacher stood beside him. (*Id.* at 11). From the pitcher's mound, the other teacher pitched a ball to a student who kicked it. Plaintiff caught the ball and then threw it in an attempt to score an out against the student on second base. (*Id.*). The ball bounced off the student's arm and hit plaintiff's right hand, fracturing his fourth finger. (*Id.* Exh. E).

II. PERTINENT PROCEDURAL BACKGROUND

On March 24, 2005, plaintiff and his mother, Santa Ortiz, filed a notice of claim with City alleging that defendants were negligent. (Lucas Aff., Exh. B). On October 29, 2005, they commenced this action by serving defendants with a summons and complaint. (Lucas Aff., Exh. C). By decision and order dated May 26, 2009, another justice of this court dismissed plaintiff's mother's claim on the ground that she had not timely served the notice of claim. (Lucas Aff., Exh. A). Plaintiff filed his note of issue and certificate of readiness on February 2, 2010.

III. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. Contentions

City denies liability for plaintiff's injuries as it is a legal entity separate and distinct from BOE and is not responsible for torts arising from the conduct of BOE's agents, servants, and

employees. (Lucas Aff. ¶¶ 9-16). BOE argues that any failure to instruct or supervise could not have proximately caused plaintiff's injury which was incurred as a result of a spontaneous and unforeseeable act. (Lucas Aff. ¶¶ 21-29). In support, it submits plaintiff's deposition testimony and bill of particulars. (*Id.*, Exhs. E, F).

Plaintiff concedes that City is not a proper party, but contends that BOE failed to provide adequate supervision or timely instruction on how to play kickball safely, and that, as a result, the accident was foreseeable. It also maintains that the issue of proximate cause is peculiarly within the province of a jury. (Affirmation in Opposition of Verena C. Powell, Esq., dated Apr. 28, 2010).

In reply, defendants maintain that plaintiff was properly instructed and knowledgeable on how to play kickball properly. (Reply Affirmation of Peter C. Lucas, Esq., dated Mar. 25, 2010).

B. Discussion

The party seeking summary judgment must show prima facie entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the prima facie showing by submitting admissible evidence, demonstrating the existence of factual issues that requires a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, denial of the motion is required, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d at 853).

It is well-settled that "[s]chools 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." (*Brandy B. v Eden Cent. School Dist.*, NY3d , 2010 NY Slip Op 04873 [2010]; *Mirand v City of New* York, 84 NY2d 44, 49 [1994]; *Lawes v Bd. of Educ. of City of New York*, 16 NY2d 302, 306 [1965]; *Paragas v Comsewogue Union Free School Dist.*, 65 AD3d 1111 [2d Dept 2009]; *Speigh v City of New York*, 309 AD2d 501, 501 [1st Dept 2003]). However, a school is not an insurer of students' safety. (*Mirand*, 84 NY2d at 49).

To establish a cause of action for negligent supervision, a plaintiff must establish that the defendant breached its duty to provide adequate supervision of its charges and that the breach was the proximate cause of the plaintiff's injuries. (*Spaulding v Chienago Valley Cent. School Dist.*, 68 AD3d 1227 [3d Dept 2009]; *Mayer v Mahopac Cent. School Dist.*, 29 AD3d 653, 654 [2d Dept 2006]). However, "when a spontaneous and unintentional accident happens in just a few moments . . . no amount of supervision, however intense, can prevent a resulting injury." (*Spaulding*, 68 AD3d 1227; *see also Odekirk v Bellmore-Merrick Cent. School Dist.*, 70 AD3d 910 [2d Dept 2010]; *Bellinger v Ballston Spa Cent. School Dist.*, 57 AD3d 1296, 1298 [3d Dept 2008]; *Mayer*, 29 AD3d at 654; *Siegell v Herricks Union Free School Dist.*, 7 AD3d 607 [2d Dept 2004]).

Here, BOE offers sufficient admissible evidence demonstrating that plaintiff's injury was the product of a spontaneous and unintentional act which cannot be attributed to a lack of supervision or instruction. (*See, eg, Odekirk*, 70 AD3d at 910 [infant plaintiff hit by opposing player's hockey stick]; *Mayer*, 29 AD3d at 654 [plaintiff tripped over hockey stick]; *Wuest v Board of Ed. of Middle Country Cent.*, 298 AD2d 578 [2d Dept 2002] [plaintiff collided with another student during soccer game]). No amount of supervision or instruction could have prevented it. Consequently, BOE has met its burden of establishing, *prima facie*, that any alleged

failure to supervise did not proximately cause plaintiff's injuries. (*Mayer*, 29 AD3d at 654).

Absent any contention that plaintiff and the other students played kickball that day in an unsafe manner or contrary to any governing rule, and although proximate cause is ordinarily a matter for the jury, there was no reason for the supervising teachers to have even attempted to prevent plaintiff from tagging out an opponent by throwing the ball at him. That the ball ricocheted and hit plaintiff does not constitute evidence of an absence of supervision or adequate instruction. Consequently, plaintiff has failed to offer any legal or factual basis for denying defendants' motion.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: July 20, 2010
New York, New York

JUL 20 2010

FILED
JUL 23 2010
COUNTY CLERK'S OFFICE
NEW YORK