[* 1]

SHORT FORM ORDER

INDEX No. 02-25140
CAL. No. 09-00066-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 12-11-09
ADJ. DATE 6-3-10
Mot. Seq. # 002 - MotD

----------X

JAMES MERRILL, an infant under the age of 14 years, by his mother and natural guardian, DONNA MERRILL, DONNA MERRILL,

Plaintiff,

- against -

FARMINGDALE UNION FREE SCHOOL DISTRICT and FARMINGDALE YOUTH COUNCIL, INC.,

Defendants.

----------X

STEVEN BLYER, ESQ.
Attorney for Plaintiff
3000 Marcus Avenue, Suite 287
New Hyde Park, New York 11042

GOLD, STEWART, KRAVATZ, BENES, LLP
Attorney for Defendants
1025 Old Country Road, Suite 301
Westbury, New York 11590

Upon the following papers numbered 1 to 31 read on this motion for leave to renew and ,upon renewal, for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 21 - 29 ; Replying Affidavits and supporting papers 30 - 31 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants for leave to renew their prior motion for summary judgment is granted and, upon renewal, the motion is granted to the extent that summary judgment dismissing the complaint is granted to the Farmingdale Union Free School District, and is otherwise denied.

This is an action to recover damages for personal injuries sustained by the infant plaintiff on July 19, 2001 while he was attending a summer program operated by the defendant Farmingdale Youth Council, Inc. (hereinafter the Youth Council) at the East Saltzman Memorial School in Farmingdale, New York. The Youth Council was granted permission to operate its summer program on the school grounds by the defendant Farmingdale Union Free School District (hereinafter the District). The nine year-old infant plaintiff was purportedly injured while he was playing a game on the playground and was pushed into a pole by another camper. The complaint alleges that the defendant Youth Council and District are liable for the infant plaintiff's injuries based on their negligence in, *inter alia*, failing to properly and adequately supervise the children; failing to find and utilize a safe area for the children's activities; permitting and allowing the

children to be, become and/or remain in an area that was unsafe and dangerous for the activity they were engaging in to take place; having inadequate, unskilled, and untrained employees; failing to properly and adequately instruct the children with respect to the activity they were engaging in; causing, allowing, and/or permitting the children to play a particular game in an area that was unfit for such activity; and in failing to provide adequate supervision of a disruptive child known to be disruptive and dangerous.

In a prior motion the defendants sought summary judgment dismissing the complaint on the grounds that they were not liable for the infant plaintiff's injuries. By order dated October 1, 2009, this Court denied the motion based on the defendants' failure to include a complete copy of the pleadings filed in the action. The defendants now move for leave to renew their prior motion and, upon renewal, for an order granting them summary judgment dismissing the complaint.

On this motion the defendants seek to cure the defect in their prior papers and submit a complete copy of the pleadings. Because renewal is appropriate to correct a procedural error, as here, involving the failure to submit copies of pleadings as required by CPLR 3212 (b) (*cf.*, ***Gillis v Toll Land XIII Ltd. P'ship***, 309 AD2d 734, 765 NYS2d 265 [2003]; ***S & D Petroleum Co. v Tamsett***, 144 AD2d 849, 534 NYS2d 800 [1988]), leave to renew is granted.

Turning to the branch of the defendants' motion seeking summary judgment dismissing the complaint, the defendants contend that the action should be dismissed insofar as asserted against the Youth Council as, *inter alia*, the level of supervision provided to the infant plaintiff was adequate and, in any event, was not the proximate cause of the accident, the injury involved a spontaneous incident which could not have been anticipated, and the infant plaintiff assumed the risk of his injuries. They also contend that the action should be dismissed insofar as asserted against the District as the District had leased the premises to the Youth Council for the purposes of the summer program, was not under a duty to supervise the campers, and the infant plaintiff's injury did not occur as the result of a defect on the premises.

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 demonstrate the absence of any material issues of fact (*see*, ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In support of their motion for summary judgment the defendants submit, *inter alia*, the affidavit of Debbie Milani, the applications made by the Youth Council, and approved by the District, for use of the District's buildings and grounds for purposes of the Youth Council's summer program, copies of Board of Education Policy 1500 and 1500-R, a purported Youth Council incident report regarding the infant plaintiff's accident, a purported daily attendance roster for the Youth Council's summer program, a letter to parents with respect to the Youth Council's summer recreation program, the 50-h testimony of the infant

plaintiff, the deposition testimony of the infant plaintiff, the deposition testimony of the infant plaintiff's mother, Donna Merrill, the deposition testimony of Todd Teeter on behalf of the Youth Council, and the affidavit of Kevin Levasseur.

The branch of the motion seeking summary judgment dismissing the complaint as asserted against the Youth Council is denied. The evidence submitted by the defendants fails to demonstrate that the Youth Council is entitled to judgment, as a matter of law, dismissing the complaint as asserted against it. Although schools and camps are not insurers of the safety of their students or campers (***Harris v Five Point Mission Camp Olmstedt***, 73 AD3d 1127, 901 NYS2d 678 [2010]) they owe a duty to supervise their charges and will be held liable for foreseeable injuries proximately caused by the absence of adequate supervision (***Harris v Five Point Mission Camp Olmstedt***, *supra*; ***Rivera v Bd. of Educ.***, 19 AD3d 394, 796 NYS2d 182 [2005]). The duty of care owed by persons supervising children in a school or summer camp setting is that which a reasonably prudent parent would observe under comparable circumstances (***Mirand v City of New York***, 84 NY2d 44, 49, 614 NYS2d 372 [1994]; ***Swan v Town of Brookhaven***, 32 AD3d 1012, 821 NYS2d 265 [2006]; *cf.* ***Gibbud v Camp Shane, Inc.***, 30 AD3d 865, 817 NYS2d 435 [2006]). Even if an issue of fact exists as to negligent supervision, liability does not lie absent a showing that such negligence proximately caused the injuries sustained. Thus, where 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 is warranted (*see*, ***Harris v Five Point Mission Camp Olmstedt***, *supra*).

Contrary to the defendants' contention, the evidence submitted does not establish, as a matter of law, that the Youth Council was not negligent in failing to adequately supervise the infant plaintiff and that such negligence was not the proximate cause of his injuries (*see*, ***Douglas v John Hus Moravian Church of Brooklyn, Inc.***, 8 AD3d 327, 778 NYS2d 77 [2004]; *cf.*, ***Rivera v Board of Educ.***, 19 AD3d 394, 796 NYS2d 182 [2005]; *compare*, ***Lowe v Meacham Child Care & Learning Ctr.***, __AD3d__, 2010 NY Slip Op 5368 [2d Dept June 15, 2010]; ***Harris v Five Point Mission Camp Olmstedt***, 73 AD3d 1127, 901 NYS2d 678 [2010]; ***Benson v Union Free School Dist. #23***, 37 AD3d 748, 830 NYS2d 757 [2007]). Rather, the evidence submitted raises issues of fact as to whether the infant plaintiff was engaging in a prohibited and/or dangerous activity for an extended period of time and whether more intense supervision may have prevented the accident (*see*, ***Rivera v Board of Educ.***, *supra*; ***Douglas v John Hus Moravian Church of Brooklyn, Inc.***, *supra*).

In this regard, the evidence submitted includes the infant plaintiff's testimony that he was playing a game known as "capture the flag" on the playground at the time that he got hurt. Approximately 30 children were participating in the game. At the time of the incident, they had already played two games and had been playing for at least forty-to forty-five minutes. The incident occurred when he bent down to pick up the item representing the "flag," which was located in the vicinity of the slide, and was pushed by fellow camper, Nathan McDaniel. He fell forward into a pole and struck his nose and head. The counselors were observing them from the playground area as they played the game, and did not say anything to the group prior to his accident. The evidence submitted also included the affidavit of Kevin Levasseaur, a fellow camper who was present at the time of the accident. Levasseaur confirmed that, at the time of the accident, the infant plaintiff was playing "capture the flag" in the playground area of the camp. Moreover, and significantly, the evidence submitted included the deposition testimony of Todd Teeter, Supervisor of the

Youth Council, wherein he stated that he was familiar with the game known as "capture the flag" which involved capturing the other team's "flag" and putting it on your side of the field. According to Teeter, the game was "absolutely not allowed" to be played in the playground. Teeter testified that the game was not allowed in the playground area because there was hard pavement and playground equipment present and the children would "definitely" get hurt.

In addition, the evidence submitted fails to establish, as a matter of law, that the Youth Council could not be held liable for failing to provide adequate supervision of a child known to be disruptive and dangerous. 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 which caused injury; that is, that the third-party acts could reasonably have been anticipated (*see*, ***Santos v New York City Dept. of Educ.***, 42 AD3d 422, 840 NYS2d 91 [2d Dept 2007]). The evidence submitted was insufficient to demonstrate, as a matter of law, that the Youth Council did not have sufficiently specific knowledge or notice of the dangerous behavior of a camper, known as Nathan McDaniel, so as to anticipate his actions of pushing the infant plaintiff into the pole.

In this regard, the defendants fail to submit any information from a party with first hand knowledge of the camper known as Nathan McDaniel and his behavior. Nor do they submit any evidence from a person with first hand knowledge of the supervision provided to the campers at the time of the incident. Although the Youth Council claims to have no record of a camper named Nathan McDaniel, Teeter admits that the counselors told him that the accident occurred when the infant plaintiff was pushed by Nathan McDaniel. Moreover, the infant plaintiff, the infant plaintiff's mother, and Levasseaur, all assert that they either observed prior incidents involving Nathan McDaniel fighting with other campers, which took place in front of the counselors, or heard that Nathan McDaniel was a disciplinary problem and was fighting. Teeter could "not remember" if any of the counselors complained to him about the behavior of Nathan McDaniel. He testified that, if a complaint was made to him, it would not have been reduced to writing. Although he kept a book of what transpired for his own purposes, such book had been destroyed. Teeter also did "not remember" whether there were incidents concerning Nathan McDaniel. He testified that, where complaints were made about a camper fighting and unruly behavior, it was the policy to contact the parents and remove the camper from the program.

Further, contrary to the Youth Council's contention, in light of the infant plaintiff's age and experience, it cannot currently be determined as a matter of law that he was fully aware of and appreciated the risks involved in the activity in which he was engaged (*see*, ***Rivera v Board. of Educ.***, *supra*; ***Douglas v John Hus Moravian Church of Brooklyn, Inc.***, *supra*).

The failure to make a prima facie showing of entitlement to judgment as a matter of law requires denial of this branch of the defendants' motion, regardless of the sufficiency of the opposition papers (*see*, ***Alvarez v Prospect Hosp.***, *supra*).

The branch of the defendants' motion seeking summary judgment dismissing the complaint as asserted against the District is granted. The evidence submitted establishes the District's *prima facie* entitlement to judgment, as a matter of law, dismissing the complaint as asserted against it. Schools and

camps have a duty to adequately supervise students in their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (*see*, ***Hansen v Bath & Tennis Mar. Corp.***, 73 AD3d 699, 900 NYS2d 365 [2010]). This duty stems from the school's physical custody over students and is based on the rationale that, by exercising such custody, the school has deprived the students of the protection of their parents or guardians (*see*, ***Hansen v Bath & Tennis Mar. Corp.***, *supra*). It follows, then, that the school's duty to protect its students from negligence is "coextensive with and concomitant to its physical custody and control over the child." Therefore, once students leave their school's "orbit of authority in such a way that the parent is perfectly free to reassume control over the child's protection, the school's custodial duty ceases" (***Pratt v Robinson***, 39 NY2d 554, 384 NYS2d 749 [1976]; *see*, ***Pistolese v William Floyd Union Free Dist***, 69 AD3d 825, 895 NYS2d 125 [2010]; ***Ferraro v North Babylon Union Free School Dist.***, 69 AD3d 559, 892 NYS2d 507 [2010]; ***Hansen v Bath & Tennis Mar. Corp.***, *supra*). The evidence submitted establishes that the infant plaintiff was not within the District's "orbit of authority" at the time of the incident, and that the district has not breached any duty owed to the infant plaintiff (*see*, ***Nicholson v Freeport Union Free School Dist.***, __AD3d__, 902 NYS2d 192 [2010]; ***Pistolese v William Floyd Union Free Dist***, *supra*). The plaintiffs have not submitted any evidence to raise a triable issue of fact as to the liability of the District.

The claims against the defendant Farmingdale Union Free School District, dismissed herein, are severed and the remaining claims shall continue.

Dated: August 17, 2010

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION