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SHORT FORM ORDER

INDEX NO. 40202/2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

LOUIS AQUINO, an infant by his mother and natural guardian ELIZABETH AQUINO, and ELIZABETH AQUINO,

Plaintiffs,

-against-

CRESTWOOD COUNTRY DAY SCHOOL, INC.,

Defendant.

ORIG. RETURN DATE: JANUARY 13, 2010
FINAL SUBMISSION DATE: MARCH 11, 2010
MTN. SEQ. #: 001
MOTION: MG

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Upon the following papers numbered 1 to 7 read on this motion TO DISMISS OR FOR SUMMARY JUDGMENT; Notice of Motion and supporting papers 1-3; Memorandum of Law in Support 4; Affirmation in Opposition and supporting papers 5, 6; Reply Memorandum of Law in Support 7; it is,

ORDERED that this motion by defendant CRESTWOOD COUNTRY DAY SCHOOL, INC. ("defendant") for an Order, pursuant to CPLR 3211 (a) (7), dismissing plaintiffs' verified complaint for failure to state a cause of action, or in the alternative, for an Order, pursuant to CPLR 3211 (c), treating defendant's motion as a motion for summary judgment and granting summary judgment in favor of defendant dismissing plaintiffs' verified complaint, is hereby **GRANTED** as set forth hereinafter. The Court has received opposition hereto from plaintiffs.

Plaintiffs commenced this action on October 14, 2009 against defendant, which operates a summer school/camp and recreation program, seeking damages for personal injuries allegedly sustained by the infant plaintiff, LOUIS AQUINO, on August 3, 2009, when the infant plaintiff fell and another camper fell on top of him while they were playing an informal game called "jackpot." Plaintiff has asserted three causes of action, to wit: negligence/ negligent supervision; unjust enrichment seeking a proportionate refund of the tuition paid in the amount of $2,248 after the infant was unable to attend the summer camp after August 3, 2009; and loss of services on behalf of the infant plaintiff's mother, plaintiff ELIZABETH AQUINO.

Defendant has now filed the instant motion to dismiss for failure to state a cause of action, arguing that camps and schools are not insurers of children's safety and are not liable for injuries children sustain during games and normal play, in part because participants are held to have assumed the risk of being injured. In support of its motion, defendant has submitted, among other things, an affidavit of Jeffrey M. Deutsch, one of its directors, and an affidavit of Eric S. Gottesman, the group leader for the sixth-grade boys during the summer of 2009. Mr. Gottesman avers that the infant plaintiff was in a group of ten boys who were supervised by himself and another counselor. While the group was waiting for a soccer field to become available, some of the boys began playing "jackpot," wherein a player throws a tennis ball up in the air and the other players try to catch it. Mr. Gottesman indicates that he does not teach this game to the campers. After playing for five to ten minutes, Mr. Gottesman alleges that the infant plaintiff and another camper jumped for the ball and the other camper fell onto the infant plaintiff's left thigh when they landed. Mr. Gottesman further alleges that he was standing about twenty feet away from the boys and was watching them play when the incident happened; he did not observe anything dangerous about the game or the way the boys were playing it.

Defendant argues that camps and schools cannot supervise children continuously, that children assume the risks of injury inherent in the games they play, and to impose liability to injuries incurred during such games would undermine the enjoyment and experience of playing games. Thus, defendant seeks to dismiss this action for failure to state a cause of action, or in the alternative, for summary judgment in favor of defendant dismissing plaintiffs' complaint.

In opposition, plaintiffs allege that at the time of the incident, the game of "jackpot" was being played on a slope or hill. As such, plaintiffs argue that defendant enhanced the risk and increased the danger inherent in the game. Moreover, plaintiffs claim that permitting such a game to be payed on a slope or hill demonstrates a failure of the counselors to supervise campers or failure of the management to properly train the counselors. Plaintiffs have submitted an affidavit of the infant plaintiff who avers that one of the boys threw the ball up and as he was looking up and running up the slope, a boy "came barreling down the slope, knocked me over, and fell on me."

Plaintiffs have also submitted an affidavit of Carl J. Abraham, a licensed Professional Engineer specializing in safety engineering and design, who is an expert in sports accident reconstruction. Based upon his own personal observations of the accident site, Mr. Abraham opines that defendant was negligent in failing to meet the minimum standard of care in the industry by permitting a ball game activity to be played on a slope or a hill, and by failing to properly train staff to prohibit playing a ball game activity on a slope or a hill. Mr. Abraham alleges that reasonable exposure to risk is a part of the camp experience, but defendant enhanced the risk of injury by permitting the game to be played on a slope. Mr. Abraham indicates that there is no ball game activity that is played on an incline or hill, and any activity involving a ball that is played on a hill does not meet the minimum standard of care for any activity in a camp for children as provided by the American Camp Association's (ACA) National Standards Association (NSC). Plaintiffs argue that it was foreseeable that any child running down a hill would not have control when he impacts another child. Further, plaintiffs allege that permitting such activity constitutes a lack of supervision by the counselors and/or lack of training. Accordingly, plaintiffs contend that questions of fact exist for a jury.

In reply, defendant alleges that the slope was merely a "grassy knoll," which was a naturally occurring, obvious condition. Under these circumstances, defendant argues that courts have repeatedly held that such an obvious condition does not increase the risk of an otherwise safe activity. Moreover, defendant contends that for the assumption of risk doctrine to apply, it is not necessary that the injured plaintiff foresee the exact manner in which his injury occurred, and in any event, the manner in which the infant plaintiff was injured corresponded with the known risks of the game "jackpot."

Initially, the Court finds that both plaintiffs and defendant have submitted affidavits, expert opinion, and other evidence to support their respective positions as to whether summary judgment is appropriate herein. As such, the Court shall deem defendant's motion one for summary judgment, pursuant to CPLR 3211 (c), and analyze the application in that context.

It is undisputed herein that schools and camps are not insurers of safety for they cannot reasonably be expected to continuously supervise and control all movements and activities of students or campers; therefore, schools and camps are not to be held liable "for every thoughtless or careless act by which one pupil may injure another" (*Mirand v City of New York*, 84 NY2d 44 [1994], quoting *Lawes v Board of Educ.*, 16 NY2d 302 [1965]; *see Ohman v Board of Educ.*, 300 NY 306 [1949]; *Santos v New York City Dept. of Educ.*, 42 AD3d 422 [2007]). The nature of the duty owed was set forth in the seminal case of *Hoose v Drumm*, 281 NY 54 (1939), "a teacher owes it to his [or her] charges to exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances." However, schools and camps will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (*Santos v New York City Dept. of Educ.*, *supra*). In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students or campers, it must be established that school or camp 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 (*Santos v New York City Dept. of Educ.*, *supra*). An operator of a camp for boys cannot reasonably be made responsible in damages for the consequences of every possible hazard of play activity. It is required, rather, to guard against dangers which ought to be foreseen in the exercise of reasonable care (*Greaves v Bronx YMCA*, 87 AD2d 394 [1982]).

Moreover, as a general rule, a voluntary participant in an athletic activity is deemed to have consented to accept the risk of injuries that are "known, apparent or reasonably foreseeable consequences of the participation" (*Turcotte v Fell*, 68 NY2d 432, 438-439 [1986]; *Mauner v Feinstein*, 213 AD2d 383 [1995]; *see also Benitez v New York City Bd. of Educ.*, 73 NY2d 650 [1989]). By participating under such circumstances, a plaintiff assumes the risks inherent in the sport and the defendant's duty to make the conditions as safe as they appear to be is satisfied (*see Turcotte v Fell*, *supra*, at 439; *Cardoza v Village of Freeport*, 205 AD2d 571 [1994]). However, a participant does not assume risks that are unreasonably increased (*see Benitez v New York City Bd. of Educ.*,

supra). Further, the doctrine of primary assumption of risk has been extended to the condition of the playing surface. If an athlete is injured as a result of a defect in, or feature of, the field, court, track, or course upon which the sport is being played, the owner of the premises will be protected by the doctrine of primary assumption of risk as long as risk presented by the condition is inherent in the sport. If the playing surface is as safe as it appears to be, and the condition in question is not concealed such that it unreasonably increases risk assumed by the players, the doctrine applies (*Cotty v Town of Southampton*, 64 AD3d 251 [2009]).

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, 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 (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

In the case at bar, the Court finds that defendant has made an initial *prima facie* showing of entitlement to judgment as a matter of law (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Rodriguez v N.Y. City Transit Auth.*, 286 AD2d 680 [2001]). Defendant has demonstrated that the infant plaintiff assumed the risk of being injured by voluntarily participating in the game of "jackpot" (*see Turcotte v Fell*, *supra*); that the slope upon which the game was played was open and obvious (*see Bailey v Town of Oyster Bay*, 227 AD2d 427 [1996]; and that defendant did not unreasonably increase the risk of injury by permitting the game to be played on the slope (*see Benitez v New York City Bd. of Educ.*, *supra*). The burden then shifted to plaintiffs to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action *(Alvarez v*

Prospect Hosp., *supra*). Plaintiffs primarily argue that defendant enhanced the risk of injury to the infant plaintiff by permitting "jackpot" to be played on a slope or hill. However, after a review of the photographs submitted by plaintiffs, the Court finds that the slope was one of many gentle undulations dotting the idyllic camp grounds, and that merely allowing the children to play thereupon does not constitute negligent supervision (*see Fintzi v N.J. YMHA-YWHA Camps*, 97 NY2d 669 [2001]). Furthermore, there is no evidence that defendant increased the risk associated with the naturally occurring undulation. The Court notes that the two camp counselors supervising the infant plaintiff's group did not participate with the campers in the game (*cf. Mauner v Feinstein*, 213 AD2d 383 [1995]). Thus, to hold defendant liable in this situation would "so sterilize camping . . . as to render it sedentary" (*Sauer v Hebrew Institute of Long Island, Inc.*, 17 AD2d 245 [1962]).

Finally, the Court finds that plaintiffs' expert's conclusory assertions that defendant did not meet the standard of care in the industry do not raise a triable issue of fact, as the expert does not cite a specific regulation that defendant violated with respect to the subject incident. In addition, the expert's speculative opinion that defendant had unreasonably increased the risks to the infant plaintiff by permitting the game to be played on an open and obvious slope similarly does not raise a triable issue of fact (*see e.g. Williams v Clinton Cent. School Dist.*, 59 AD3d 938 [2009]; *Roberts v Boys & Girls Republic, Inc.*, 51 AD3d 246 [2008]). In contrast, the affidavit of Mr. Gottesman, based upon personal observation of the incident, indicates that the infant plaintiff and another boy jumped for the ball and the other boy landed on the infant plaintiff's left thigh, without mention of the undulation contributing to or causing the injury.

Accordingly, for the foregoing reasons, this motion by defendant for summary judgment dismissing plaintiffs' complaint is **GRANTED**.

The foregoing constitutes the decision and Order of the Court.

Dated: October 8, 2010

HON. JOSEPH FARNETI
Acting Justice Supreme Court

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**