

Goldman v Young Israel of Woodmere

2010 NY Slip Op 33115(U)

October 26, 2010

Supreme Court, Nassau County

Docket Number: 15712/08

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ZACHARY GOLDMAN, an infant by her mother and
natural guardian, SHEILA GOLDMAN and
SHEILA GOLDMAN, individually,

Plaintiffs,

- against -

YOUNG ISRAEL OF WOODMERE,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 15712/08
Motion Seq. No.: 01
Motion Date: 06/30/10
XXX

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion for Summary Judgment, Affirmation and Exhibits</u>	1
<u>Affirmation in Opposition and Exhibit</u>	2
<u>Reply Affirmation</u>	3

The motion by defendant, Young Israel of Woodmere ("Young Israel"), for an order, pursuant to CPLR § 3212, granting it summary judgment as to plaintiffs' complaint is granted for the reasons set forth herein.

Plaintiffs commenced this action for damages allegedly due to injuries sustained by the infant plaintiff Zachary Goldman (the "infant plaintiff") during a kickball game in Young Israel's gym. The incident occurred on May 8, 2007. The infant plaintiff was participating in a youth program held at Young Israel. The infant plaintiff had been a participant in the program for two years. The infant plaintiff, almost ten (10) at the time of the "incident (his birthday is

June 23, 1997), had played kickball at the youth program at least five times previously. *See* Defendant's Affirmation in Opposition Exhibit D, p. 22.

Plaintiffs allege negligence in the placing of home plate too close (2 - 3') to unpadded gym doors. Plaintiffs also allege Young Israel did not provide enough supervision for the activity.

Young Israel contends it provided adequate supervision and the infant plaintiff assumed the risk of playing kickball.

In his deposition (*see* Defendant's Affirmation in Opposition Exhibit D), the infant plaintiff stated he had reached third base during the game (*see* Defendant's Affirmation in Opposition Exhibit D, pp. 21, 22). The next player kicked the ball, and the infant player began to run to home plate with home plate two to three feet from the gym doors (*see* Defendant's Affirmation in Opposition Exhibit D, p. 23). The infant plaintiff ran past home plate into the gym door. *See* Defendant's Affirmation in Opposition Exhibit D, p.28.

Young Israel notes Mrs. Sheila Goldman, plaintiff and mother of the infant plaintiff, had no prior complaint with the gym to anyone, and she was not aware of any prior complaints about any part of the gym by anyone to Young Israel. *See* Defendant's Affirmation in Opposition Exhibit C, p. 25.

Paul Silverstein, the youth director of Young Israel stated he never received complaints from anyone regarding the placement of home plate for the kickball game. *See* Defendant's Affirmation in Opposition Exhibit E, p. 53.

Joshua Tilton, an employee of the youth program at Young Israel stated the infant plaintiff unnecessarily hit the door on purpose based on the expression on the infant plaintiff's

face; Tilton, present during the incident, stated kids run home and do not hit the wall or door after they cross home plate (*see* Defendant’s Affirmation in Opposition Exhibit G, p. 41).

Tilton also stated he received no complaints as to the placement of home plate (*see* Defendant’s Affirmation in Opposition Exhibit G, p. 52). Tilton stated the infant plaintiff thought it would be fun to run into the wall after crossing home plate. *See* Defendant’s Affirmation in Opposition Exhibit G, pp. 11, 12.

The plaintiffs have offered the expert Bruce Gamsey. *See* Plaintiffs’ Affirmation in Opposition Exhibit A. Gamsey stated according to WAKA or World Adult Kickball Association, a space of 10' from home plate is needed to allow a base runner to run through the bases. Gamsey also noted there was no padding on the door by home plate. Gamsey also stated Young Israel should have provided more staff and the staff should have provided warnings or conditions to the children playing kickball.

The expert’s affidavit relied upon alleged violation of guidelines promulgated by the World Adult Kickball Association and the American Society for Testing and Materials Standard (as to padding on the walls, doors, etc.) are neither mandatory nor intended to be the exclusive standards for indoor children’s kickball game. *See Troiani v. White Plains City School District*, 64 A.D.3d 701, 882 N.Y.S.2d 519 (2d Dept. 2009); *Miller v. Kings Park Central School District*, 54 A.D.3d 314, 863 N.Y.S.2d 232 (2d Dept. 2008).

Here, plaintiffs’ expert affidavit failed to identify the violation of any specific safety standard which was applicable to a children’s kickball game at night in a gym. *See Musante v. Oceanside Union Free School Dist.*, 63 A.D.3d 806, 881 N.Y.S.2d 446 (2d Dept. 2009).

Plaintiffs failed to raise an issue of fact as to whether the failure to pad the door created a

risk beyond those inherent in the sport of kickball. There is no evidence in the herein record that the position of the door or the lack of padding violated any applicable standards resulting to indoor kickball fields set up in gyms for children.

Non-mandatory guidelines submitted by the plaintiffs herein were insufficient to raise a triable issue of fact as to whether lack of or inadequate cover/padding on the doors or the placing of home plate on the day of the incident proximately caused the infant plaintiff's injuries. *See Swan v. Town of Brookhaven*, 32 A.D.3d 1012, 821 N.Y.S.2d 265 (2d Dept. 2006).

Where an incident 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. *See Lowe v. Meacham Child Care & Learning Center, Inc.*, 74 A.D.3d 1029, 904 N.Y.S.2d 463 (2d Dept. 2010); *Mayer v. Mahopac Central School District*, 29 A.D.3d 653, 815 N.Y.S.2d 189 (2d Dept. 2006).

That is the case here.

Here, there is no indication that the supervisor by Young Israel of the infant plaintiff was, from an objective evaluation of the record herein, inadequate, and it is clear a reasonably prudent parent could not have stopped the infant plaintiff from participating in the kickball activity as set up in the gym. *See Santana v. City of New York*, 282 A.D.2d 208, 722 N.Y.S.2d 545 (1st Dept. 2001).

Of course, the subjective standard of the parents of the allegedly injured child would require supervisory personnel at every foot of the gym with extensive padding covering every surface – wall, door, etc.

The Court cannot adhere to or apply such a subjective standard of supervision or protective padding to the situation herein.

The expert affidavit plaintiffs offered in response failed to establish a proven foundation or the source of the standards underlying the conclusion that Young Israel's supervision of the program was inadequate. *See David v. County of Suffolk*, 1 N.Y.3d 525, 775 N.Y.S.2d 229 (2003).

Also, the expert affidavit was speculative, unsubstantiated and conclusory. *See Koenig v. Town of Huntington*, 10 A.D.3d 632, 782 N.Y.S.2d 92 (2d Dept. 2004); *Mestric v. Martinez Cleaning Co., Inc.*, 306 A.D.2d 449, 761 N.Y.S.2d 504 (2d Dept. 2003), *lv to app den.* 2 N.Y.3d 706, 780 N.Y.S.2d 311 (2004).

Voluntary participants in a sport or recreational activity consent to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation. *See Fithian v. Sag Harbor Union Free School Dist.*, 54 A.D.3d 719, 864 N.Y.S.2d 456 (2d Dept. 2008).

A participant in a recreational activity is held to have consented to those injury-causing events which are known apparent, or reasonably foreseeable consequences of participation (*see Turcotte v. Fell*, 68 N.Y.2d 432, 510 N.Y.S.2d 49 (1986) including those risks associated with the construction of the playing surface and any open and obvious condition on it. *See Brown v. City of New York*, 69 A.D.3d 893, 895 N.Y.S.2d (2d Dept. 2010); *Brookstone v. State*, 64 A.D.3d 1023, 883 N.Y.S.2d 347 (3d Dept. 2009).

Where a plaintiff was playing basketball in a gym when he tried to keep a ball from going out of bounds and ran full speed into a concrete wall, the Appellate Division, Second Dept. held that based on the doctrine of the primary assumption of risk that the risk of colliding with the wall was inherent in the sport and the condition of the wall was open and obvious. *See Ribaldo v. La Salle Institute*, 45 A.D.3d 556, 846 N.Y.S.2d 209 (2d Dept. 2007), *lv to app den.*

10 N.Y.3d 717, 862 N.Y.S.2d (2008).

A defendant demonstrated its *prima facie* entitlement to judgment as a motion of law by establishing that the plaintiff assumed the risk of injury by voluntarily participating in a football game despite his knowledge that doing so could bring him into contact with the open and obvious cement strip in the out-of- bounds area of the field. *See Brown v. City of New York*, 69 A.D.3d 893, 895 N.Y.S.2d 442 (2d Dept. 2010).

Where the alleged injured party had previously participated in a particular sports activity on numerous occasions, it is not unreasonable to conclude that he or she assumed the obvious risk of injury in participating in that sport. *See Regan v. State of New York*, 237 A.D.2d 851, 654 N.Y.S.2d 488 (3d Dept. 1997), *lv den.*, 91 N.Y.2d 802, 667 N.Y.S.2d 682 (1997).

Here, the infant plaintiff was aware from his two years experience in the Young Israel youth program and his many times (he states he played kickball five times) playing kickball in the same area, plaintiff assumed the risk of his injuries. *See Ziegelmeier v. U.S. Olympic Committee*, 7 N.Y.3d 893, 826 N.Y.S.2d 598 (2006).

Here, the defendant made a *prima facie* showing of entitlement to judgment based on the doctrine of proving assumption of risk by demonstrating that the risk of colliding with the door or wall was inherent in the activity and the condition of the door was open and obvious. *See Musante v. Oceanside Union Free School Dist.*, *supra*.


The Court finds plaintiffs rely on *Trupia ex rel Trupia v. Lake George Central School Dist.*, 14 N.Y.3d 392, 901 N.Y.S.2d 127 (2010), unavailing. The Court of Appeals in *Trupia ex rel Trupia v. Lake George Central School Dist.*, *supra*, found the summer students “horseplay” of sliding over a stairway banister was not an activity that lends itself to the protection usually reserved for participation in athletic and recreation activities. It is not dispositive of the

situation herein.

Accordingly, defendant's motion, pursuant to CPLR § 3212, for an order granting summary judgment and dismissing plaintiffs' complaint is hereby granted.

This constitutes the decision and order of this Court.

ENTER:



DENISE L. SHER
A.J.S.C.
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Dated: Mineola, New York
October 26, 2010

ENTERED
NOV 01 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE