SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X **TRIAL/IAS PART 21**

JAKE FARACI, an infant over the age of 14 years by his father and natural guardian, MARK FARACI, and MARK FARACI, individually,

Plaintiffs,

- against -

PLAINVIEW-OLD BETHPAGE S.D.and ERIC LEE, an infant under the age of 18 years by his mother and/or Guardian "JANE LEE", said name being fictitious as presently unknown,

Defendants.

Index No. 8406/09
Mot. Seq. # 05
Mot. Date 12-3-10
Submit Date 1-20-11

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The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit 2

Defendant PLAINVIEW-OLD BETHPAGE S.D (hereinafter referred to as "POB")moves by notice of motion for an order pursuant to CPLR §3212, granting summary judgment and dismissing plaintiff's complaint in its entirety.

It is undisputed that the incident arose on October 15, 2008 within the confines of John F. Kennedy High School, adjacent to the school's softball dugout, less than 100 feet from the school building, during 9th period, at or about 2:20 p.m.

POB states that on the date of the incident, the school day officially began at approximately 7:30 a.m. and dismissal was at 1:37 p.m. after 8th period. Extra help sessions were held during 9th period as well as research labs, health class, or physical education. Infant plaintiff (hereinafter referred to as "plaintiff") did not have a scheduled class during 9th period, nor did he attend extra help during 9th period on that date. However, he remained on school property after his 8th period class ended to be with his friends.

After 8th period, plaintiff and his friends went to the dugout at the softball field where he was assaulted by defendant ERIC LEE (hereinafter referred to as "Lee"), and sustained injuries. As a result of the incident, POB suspended Lee for a period of five (5) days. Plaintiff had no prior contact with Lee prior to the incident, nor was he ever involved in any prior altercations with Lee.

POB argues according to their class schedules, both plaintiff and Lee were dismissed from school after 8th period at 1:37 p.m. Since the incident didn't occur until 2:20 p.m., both the plaintiff and Lee were released from the custody and control of the school at the time the incident occurred wherein their parents were free to resume control over them. As such, POB did not have a duty of care to the plaintiff at the time of the incident, despite the fact that the incident occurred on school property.

POB acknowledges that Lee was involved in one physical altercation which occurred one year and ten months prior to the date of the incident, not involving the plaintiff. Lee was disciplined by the school as a result of the prior altercation and did not have any physical altercations or similar disciplinary issues until the this incident. As such, POB contends it is not liable for the incident as it was the result of a sudden and unanticipated act of a third person and POB was not on notice of the complained behavior since the prior incident was remote and involved another student. Therefore, POB requests that this court grant summary judgment in its favor.

Plaintiff opposes the application stating that there are at least three factual issues which defeat the motion: 1) whether POB owed a duty of care to the plaintiff; 2) whether POB breached its duty of care to the plaintiff; 3) whether POB's conduct was the proximate cause of the plaintiff's injuries.

Plaintiff argues that POB owed him a duty of care at the time of the incident in that the assault occurred while school was in session, during 9th period, and while plaintiff was in defendant's charge. Since the assault occurred on school property, approximately one-half hour after 8th period class ended, the plaintiff was still within POB's "orbit of authority" and its custodial duty ceases once the student has passed out of such orbit (see, *Pistolese v. William Floyd Union Free Sch. Dist.*, 69 AD3d 825, 826). In essence, POB had not relinquished physical custody over plaintiff prior to the time of the assault.

Moreover, plaintiff avers that POB's position is contradicted by its actions, in that POB suspended Lee for five (5) days after the incident occurred. Because the assault occurred on school grounds while school was in session and while POB had custody over plaintiff and Lee, POB had an obligation to investigate the incident and discipline Lee for violating school policies and procedures, which they did. Plaintiff additionally points out that the school subsequently conducted a Superintendent's hearing during which resulted in Lee being suspended for the rest of the school year. Thus, plaintiff argues that POB's claim that it has no liability is illogical and inconsistent with its prior actions of disciplining Lee for the very same incident.

Plaintiff additionally argues that POB breached its duty because it failed to act like a reasonably prudent parent would have under the same circumstances. According to the deposition testimony of POB's witnesses, POB allowed students to remain in the school building or on its property during 9th period; POB was aware that students gravitated towards the softball field and handball court during 9th period; POB knew that unauthorized behavior could occur in those locations because it previously happened; POB knew that defendant Lee had committed a previous violent act at school and was a member of a group who were engaging in gang activity on school premises.

Furthermore, POB, through its witness, Associate Principal Thomas V. Sena, admitted Lee's violent behavior necessitated extra supervision. However, POB did not have security watching the rear grounds of the school where the assault occurred. Thus, there is a genuine issue of fact as to whether POB had knowledge of Lee's violent propensities which warrant denial of the motion.

Plaintiff further argues that there is a question of fact whether there was proper supervision on the fields behind the school, during school hours, when POB was aware that the students congregated and engaged in wrongdoing in that area. Although POB's witness testified that the side of the building was checked periodically for loitering, no school personnel were assigned to check the area during 9th period during the time when students were known to congregate

Finally, plaintiff states that there is a material issue of fact whether the actions of POB were the proximate cause of plaintiff's injuries. He argues that POB left the students unsupervised and free to roam the grounds behind the school where wrongdoing had been known to occur which resulted in plaintiff being assaulted by Lee, a student with a history of violent behavior and disorderly conduct, a member of a gang who were engaged in gang activity on school grounds, and whose open campus privilege had been revoked.

Based on the foregoing, the decision of the court is as follows:

"Schools 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" (*Mirand v City of New York*, 84 NY2d 44, 49, 637 NE2d 263, 614 NYS2d 372 [1994]; see *Shante D. v City of New York,* 83 NY2d 948, 950, 638 NE2d 962, 615 NYS2d 317 [1994]; *Siller v Mahopac Cent. School Dist.*, 18 AD3d 532, 533, 795 NYS2d 605 [2005]). "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 the injury; that is, that the third-party acts could reasonably have been anticipated" (*Mirand v City of New York,* supra at 49; see *Wood v Watervliet City School Dist.*, 30 AD3d 663, 815 NYS2d 360 [2006]; *McElrath v Lakeland Cent. School Dist.*, 18 AD3d 831, 832, 796 NYS2d 121 [2005]).

In support of its motion for summary judgment dismissing the complaint, the POB failed to establish, as a matter of law, that it lacked sufficiently specific knowledge or notice of the dangerous conduct which caused the injury (see *Hernandez v City of New York*, 24 AD3d 723, 808 NYS2d 714 [2005]).

Viewed in a light most favorable to the plaintiff, there exists a question of fact whether POB had duty of care over plaintiff at 2:20 p.m., during 9th period while he was still on school property (see, *Doe v. Department of Educ. of City of New York*, 54 A.D.3d 352; *Shante D. v. City of New York,* 190 AD2d 356); whether POB breached a duty of care in not adequately supervising an area of the school where wrongdoing is known to occur (see, *Doe v. Department of Educ. of City of New York*, supra at 353); whether POB had actual or constructive notice of defendant's Lee violent behavior (see, *Smith v. Poughkeepsie City School Dist.*, 41 A.D.3d 579); and whether POB was negligent in supervising defendant Lee while he remained on school property. *Id.*

Once the school disciplined defendant Lee for a prior violent incident, a reasonable fact finder could determine that the school personnel should have envisioned the need for closer supervision of the students near the softball dugout at the time the altercation occurred.

Further, the POB failed to meet its prima facie burden of showing that its alleged failure to supervise was not the proximate cause of the plaintiff's injuries. A reasonable fact finder could determine that the injuries could have been avoided had defendant Lee been better supervised or the area where the incident occurred could have been better supervised. Proximate cause is a question of fact for the jury where varying inferences are possible (*Mirand*, supra, 84 N.Y.2d at 51).

Under the totality of the circumstances, triable issues of fact exist warranting the denial of summary judgment as to liability (see *Smith v. Poughkeepsie City School Dist,* supra; *McLeod v City of New York,* 32 AD3d 907, 909, 822 NYS2d 562 [2006]; *Hernandez v City of New York*, supra at 723).

Accordingly, it is hereby

ORDERED, that the defendant PLAINVIEW OLD BETHPAGE S.D.'s motion for summary judgment, pursuant to CPLR § 3212, is **DENIED**.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
January 28, 2011

ENTER:

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J.S.C.

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