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SHORT FORM ORDER

COPY

INDEX No. 08-31203
CAL No. 10-01207OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

***PRESENT:***

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 10-27-10
ADJ. DATE 1-3-11
Mot. Seq. # 002 - MG

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JAMES LERNER, and MELISA LERNER his mother and natural guardian, and MELISA LERNER individually,

Plaintiffs,

- against -

COLD SPRING HARBOR HIGH SCHOOL and COLD SPRING HARBOR S.D. #2,

Defendants.

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Upon the following papers numbered 1 to 23 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 17 - 21; Replying Affidavits and supporting papers 22 - 23; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that this motion by the defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted.

This action was commenced by the plaintiff James Lerner (James) to recover damages for personal injuries sustained on April 11, 2008. James was injured while playing a game of European handball in his seventh period gym class at Cold Spring Harbor High School. On the date of his accident, James was an 18 year-old "super senior, who was near the end of his second senior year in high school. He was participating in a general education gym class although he was classified as a special education student due to his having been diagnosed with Asperger's, a mild form of autism.

The complaint sets forth allegations that defendant Cold Spring Harbor High School and defendant Cold Spring Harbor School District # 2 (collectively, the District) were negligent in failing to properly supervise the handball game, and in allowing James to participate in a general education gym class with students who were superior athletes. Plaintiff Melisa Lerner, James' mother, alleges a derivative cause of action for, *inter alia*, medical costs associated with James' injuries.

James testified at a 50-h municipal hearing on August 8, 2008, and he was deposed on October 8, 2009. His testimony was essentially the same at both proceedings, and can be summarized as follows: He was in his gym class at Cold Spring Harbor High School on April 11, 2008 playing an organized game of handball. Ms. Thorn was his gym teacher, and there were 13 or 14 junior and senior students in the class. The object of the game is to throw a ball into a goal. The ball is advanced towards the opponents' goal by running until you are tagged or passing the ball to teammates. Once you are tagged, you cannot shoot the ball into the goal, but must pass it. Other than tagging an opponent, there is no other physical contact allowed. The players did not have set positions, and the teams were chosen by the student captains. James further testified that, although he normally wears glasses to correct his ability to see at a distance, he was not wearing them during the class. James indicated that the accident happened when Pat Carey (Pat), a student on the opposing team, ran down the court near James and a player threw a pass to Pat and "... he bumped into me, or we both ran into each other." He stated that he did not know if Pat jumped before the accident, that he did not know whether the ball or Pat's hand, or both, hit him in the face, and that he did not know where Ms. Thorn was at the time of the accident. James indicated that he had been taught how to play handball by the District, that he had been playing since he was in junior high school, and that he had played handball more than 20 times before the date of his accident. He further testified that he had never had a problem with Pat, and that he was not aware of Pat having any discipline problems at the high school. He stated that he had been diagnosed with autism, and that he had special education assistants assigned to him in academic classes.

At her deposition, Melisa Lerner testified that she did not know how James' accident occurred, that she did not speak with anyone at the District about the accident, and that James told her he did not know how the accident happened. She stated that James was diagnosed with Asperger's, a mild form of autism, at an early age. Due to James' condition, she met with the District "... all the time. We met every year. Sometimes, especially, when we were having difficulties." She indicated that a 2007/2008 Individualized Education Plan (IEP) was completed for James, and that she assumed that he was in a special gym class. Ms. Lerner further testified that she made no complaint about James' supervision, that she did not discuss the type of gym class James was scheduled to take with the District, and that she was not aware that James' gym class included varsity athletes.

Rebecca Marie Thorn (Thorn), James' physical education teacher, was deposed on March 25, 2010. She testified that James was in her gym class on the date of his accident, and that the co-educational class had a total of 13 or 14 students. She indicated that the rules of the handball game being played that day required all tags to be made with open hands on the torso of an opponent, not above the shoulders or below the waist. She stated that she reiterated the rules before the game began. Thorn further testified that James was capable of participating in her gym class, that he was always

involved and tried his hardest, and that he never appeared inattentive in her class. She stated that she assessed James' athletic ability as capable, but at the lower half of ability, and that Pat, the other student, was a varsity athlete in three sports. She indicated that she witnessed the accident, which occurred with about ten minutes left in the class period. Pat caught the ball with his back towards the goal being defended by James' team and turned to shoot the ball into the net. James approached to tag Pat and Pat's follow through, including Pat's hand and the ball, made contact with James. Thorn stated that Pat was never a problem in her class, and that the District did not have a policy forbidding varsity athletes from being in a gym class with special education students. In a supplementary affidavit, Thorn swears that she was ten feet away from James when the accident occurred. She also stated that she was aware that James had an IEP, that he was highly functional and fully participated in gym activities, and that there were no behavior issues in her gym class that year.

The District submits an affidavit by Diane Walsh, Chairperson of its Subcommittee on Special Education (CSE), in which she swears that there are no state or federal regulations governing the participation of students with an IEP in a general education gym class, and that the Individual with Disabilities Education Act (IDEA) requires that disabled students be placed in the "least restrictive" environment. She states that James came to junior high school and high school with IEPs in place, that an IEP for 2007/2008 was discussed with James' mother before and after the meeting of CSE, and that the completed IEP was mailed to her. She indicates that James' placement in general education gym class was recommended and adopted based on his enrollment in general education gym since seventh grade, its least restrictive nature, and James' abilities and enjoyment of sports. Ms. Walsh attaches a copy of James' 2007/2008 IEP to her affidavit which sets forth his participation in the general education physical education program and assesses his physical development as "... within age appropriate expectations except for a delay in speed of grapho-motoring functioning."

The defendants have moved for summary judgment on the grounds that there was reasonable and adequate supervision of James and the students in the subject gym class, that James was properly instructed in the rules of the game, and that the alleged lack of supervision was not the proximate cause of James' accident. In addition, the defendants contend that they were not negligent in placing James in a general education gym class.

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 eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see*,

***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]; ***Rebecchi v Whitmore,*** *supra*).

The standard for determining whether a school was negligent in executing its supervisory responsibility is whether a parent of ordinary prudence, placed in the same situation and armed with the same information, would have provided greater supervision (***Mirand v City of New York***, 84 NY2d 44, 614 NYS2d 372 [1994]). Schools are under a duty to adequately supervise the students in their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (***Mirand v City of New York***, *id.*). Schools are not, however, the insurers of their students' safety, and there is no duty to provide constant supervision, as the level and degree thereof is measured by the reasonableness thereof under the circumstances (*see* ***MacNiven v East Hampton Union Free School Dist.***, 62 AD3d 760, 878 NYS2d 449 [2d Dept 2009]; ***Legette v City of New York***, 38 AD3d 853, 832 NYS2d 669 [2d Dept 2007]).

Further, the plaintiffs must demonstrate not only that the school was negligent in its supervision, but also that such lack of supervision was the proximate cause of the injury (*see* ***Mirand v City of New York***, *supra*; ***Lopez v Freeport Union Free School Dist.***, 288 AD2d 355, 734 NYS2d 97 [2d Dept 2001]; ***Schlecker v Connetquot Cent. School Dist. of Islip***, 150 AD2d 548, 541 NYS2d 127 [2d Dept 1989]). Where, as here, an incident occurs in "so short a span of time that 'even the most intense supervision could not have prevented it,' lack of supervision is not the proximate cause of the injury and summary judgment in favor of the school defendants is warranted" (***Janukajtis v Fallon,*** 248 AD2d 428, 726 NYS2d 451 [2d Dept 2001], *quoting* ***Convey v Rye School District*** 271 AD2d 154, 710 NYS2d 641[2d Dept 2000]).

The District has demonstrated its entitlement to summary judgment on the plaintiffs' cause of action for negligent supervision. The evidence demonstrates that there was adequate supervision at the time of the accident and that the level of supervision was not the proximate cause of the accident. Rather, the injury suffered by plaintiff was sudden, spontaneous, and unforeseeable and no amount of supervision, however vigilant, could have prevented its occurrence (***Fraioli v City of New Rochelle***, 6 Ad3d 657, 775 NYS2d 559 [2d Dept 2004]). It is undisputed that the gym teacher was officiating the subject handball game and that she was approximately ten feet away from James when the accident occurred. In addition, it is undisputed that the contact between Pat and James was accidental and part of the anticipated risks associated with the sport of handball.

The District, likewise, has demonstrated its entitlement to summary judgment on the plaintiffs' allegation that it was negligent in placing James in a general education gym class which included varsity athletes. In opposition thereto, the plaintiffs submit the affidavit of James' mother and an affidavit from Carol Alberts, a professor in the Health and Human Performance Department at Hofstra University. In her affidavit, Ms. Lerner swears that she never discussed her son's placement in a general education gym class with the District, that James' "motor planning deficits" required that he have special accommodations for his gym classes, and that the District did not abide by its own consultants. In addition, she swears that she prevented James from participating in extracurricular

team sports "... as his inability could cause him to be frustrated and embarrassed." However, the subject affidavit does not dispute that James had been placed in a general education gym classes since seventh grade, that Ms. Lerner was mailed a copy of the 2007/2008 IEP which placed James in just such a class, or that James' physical abilities were assessed in the subject IEP. In addition, the affidavit does not contain admissible evidence as to the effect of James' alleged motor planning deficits on his ability to participate in general education gym classes. Thus, it is concluded that Ms. Lerner's affidavit fails to raise a triable issues of fact requiring a trial of this action.

In her affidavit, Carol Alberts swears that she teaches courses in graduate and undergraduate programs at Hofstra University that prepare pre-professionals to become K-12 physical education teachers. She indicates that she reviewed all of the documents submitted by the defendants in support of their motion, including James' 2007/2008 IEP. However, she acknowledges that she did not evaluate James' motor abilities, allegedly because the subject IEP did not contain the necessary documentation. Ms. Albert opines that it was improper supervision and poor professional judgment for the District to allow an autistic student to play handball, to conduct a unit teaching handball in a class with a wide range of athletic abilities, and to issue an IEP without the input of a physical education teacher.

It is well settled that the opinion testimony of an expert "must be based on facts in the record or personally known to the witness" (*see* ***Hambsch v New York City Tr. Auth.***, 63 NY2d 723, 480 NYS2d 195 [1984] *citing* ***Cassano v Hagstrom***, 5 NY2d 643, 187 NYS2d 1 [1959]; ***Shi Pei Fang v Heng Sang Realty Corp.***, 38 AD3d 520, 835 NYS2d 194 [2d Dept 2007]; ***Santoni v Bertelsmann Property, Inc.***, 21 AD3d 712, 800 NYS2d 676 [1st Dept 2005]). An expert "may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion" (*see* ***Shi Pei Fang v Heng Sang Realty Corp.*** *supra*). "Speculation, grounded in theory rather than fact, is insufficient to defeat a motion for summary judgment" (*see* ***Zuckerman v City of New York*** *supra*; ***Leggis v Gearhart***, 294 AD2d 543, 743 NYS2d 135 [2d Dept 2002]; ***Levitt v County of Suffolk***, 145 AD2d 414, 535 NYS2d 618 [2d Dept 1988]). Here, the expert opinion of Ms. Alberts consisted primarily of theoretical allegations with no independent factual basis and it was therefore speculative, unsubstantiated and conclusory (*see* ***Mestric v Martinez Cleaning Co.***, 306 AD2d 449, 761 NYS2d 504 [2d Dept 2003]). Therefore, her expert opinion failed to raise a triable issue of fact to defeat summary judgment.

Accordingly, the defendants motion for summary judgment dismissing the complaint is granted.

Dated: 3/3/14

THOMAS F. WHELAN, J.S.C.