SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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JAMES THORPE,

Plaintiff,

-against-

CITY OF NEW YORK, and THE DEPARTMENT OF EDUCATION, and YPIS OF STATEN ISLAND d/b/a NEW YORK CENTER FOR INTERPERSONAL DEVELOPMENT, s/h/a NEW BEGINNINGS SCHOOL,

Defendant.

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Part C-2
Present:
Hon. Thomas P. Aliotta

DECISION AND ORDER

Index No. 101666/06
Motion No. 2990-005
3497-006

The following papers numbered 1 to 3 were fully submitted on the 3rd day of November, 2010:

	Pages Numbered
Notice of Motion to Dismiss by Defendant New York Center for Interpersonal Development, with Supporting Papers, Exhibits and Memorandum of Law (dated August 30, 2010)	1
Notice of Cross Motion and Affirmation in Opposition by Plaintiff James Thorpe, with Supporting Papers and Exhibits (dated October 21, 2010)	2
Reply Affirmation and Memoranda of Law (dated November 1, 2010)	3

The motion (No. 2990) to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7) by defendant YPIS of Staten Island, d/b/a New York Center for Interpersonal Development, s/h/a New Beginnings School (hereinafter, "YPIS") is granted; plaintiff's cross motion (No. 3497) for an order reinstating the default judgment against YPIS and setting the matter down for an inquest and assessment of damages is denied.

YPIS is a non-profit New York City agency that provides the city with youth support

services. Pursuant to contract with the City of New York, YPIS established the "New Beginnings" program on Staten Island to provide an alternative learning experience for troubled high school students. According to the complaint, on April 15, 2005, plaintiff was a "pupil and student duly enrolled at the New Beginnings School" when he was allegedly assaulted by a fellow student. In the complaint, dated May 15, 2006, plaintiff alleges negligent supervision on the part of the City of New York, its Department of Education (hereinafter, the "City"), and the New Beginnings School.

On April 9, 2007, this Court granted plaintiff's motion for a default judgment against the "New Beginnings School", which had failed to appear or answer (*see* Defendant's Exhibit "D"). However, YPIS claims that it first learned of plaintiff's allegations against it when named by the City it as a third-party defendant in an action for indemnification on June 22, 2007. When YPIS subsequently moved to vacate its default, the matter was referred for a traverse hearing to the Hon. Vincent Pizzuto as a Judicial Hearing Officer to hear and report on the issue of service. Justice Pizzuto determined that service upon YPIS was proper and recommended that the motion to vacate the default judgment should be denied (*see* Defendant's Exhibit "F"). However, on May 24, 2010, this Court declined to confirm the determination of Justice Pizzuto and, based on the credible evidence adduced at the traverse hearing, determined that defendant YPIS (s/h/a New Beginnings School) had not been properly served pursuant to CPLR 311(a) (1). As a result, an order was entered (1) granting YPIS's motion to vacate the default judgment, (2) extending its time to answer for 20

days, (3) directing that the caption be amended to reflect the true status of the parties and (4) converting the third-party complaint into a cross claim.

On a defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a) (7), it is axiomatic that the complaint must be liberally construed, the allegations contained therein accepted as true and plaintiff be accorded "the benefit of every possible favorable inference". In such cases, the court is enjoined to determine only whether the facts as alleged fit within any cognizable legal theory (Leon v. Martinez, 84 NY2d 83, 87). However, where, as here, the plaintiff has submitted affidavits of a factual nature in support of the complaint, the issue to be determined becomes that of "whether the proponent of the pleading *has* a cause of action, not whether he has stated one" (Guggenheimer v. Ginzburg, 43 NY2d 268, 275 [*emphasis added*]).

As previously stated, a cause of action for negligent supervision against a school requires the plaintiff to demonstrate that (1) defendant breached its duty to provide adequate supervision of its charges and (2) said breach was the proximate cause of plaintiff's injuries (Spaulding v. Chenango Valley Cent. School Dist., 68 AD3d 1227; Mayer v. Mahopac Cent. School Dist., 29 AD3d 653). Nevertheless, it is well established that the unanticipated actions of fellow students resulting in injury generally will not give rise to liability in the absence of actual or constructive notice of the offender's prior similar conduct. Accordingly, in order to be successful, a plaintiff must establish 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" (*see* Mirand v. City of New York, 84 NY2d 44, 49).

Here, even accepting the facts alleged in the complaint as true and granting plaintiff the benefit of every possible favorable inference (Leon v. Martinez, 84 NY2d at 87), the allegations of fact contained therein are legally insufficient to support the conclusion that the third-party attack by a fellow student reasonably could have been anticipated (*see* Filiberto v. City of New Rochelle, 35 AD3d 654). Hence, plaintiff cannot show that "negligent supervision"was a proximate cause of his injuries (*see* Spauding v. Chenango Valley Cent. School Dist., 68 AD3d at 1228; *cf.* Lemp v. Lewis, 226 AD2d 907). While "schools have a duty to adequately supervise their students, and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (Brandy B. v. Eden Cent. School Dist., 15 NY3d 297, 302 [internal quotation markes omitted]; Mirand City of New York, 84 NY2d 44, 49), a school is not an insurer of student safety and "cannot reasonably be expected to continuously supervise and control all [of the] movements and activities of [its] students" (Mirand v. City of New York. 84 NY2d at 49).

In Mirand v. City of New York, the Court of Appeals found that the relevant school authorities possessed "sufficiently specific knowledge or notice of the dangerous conduct" resulting in plaintiff's injury to impose liability (*id.* at 49). Contrariwise, the case at bar is devoid of even a single allegation of fact sufficient to raise the issue of notice of the injury-causing event. Thus, plaintiff's generalized claim that the "entire population of the school was composed of teenagers who had serious problems" is wholly insufficient in this context *i.e.*, a high school dedicated to the needs of troubled teens, to raise any issue of fact relevant to the claim of negligent supervision (*see* Strnad v. Floral Park-Bellerose Union Free School Dist., 50 AD3d 774). Neither is plaintiff's alternate

argument that negligent supervision may be found in the school's policy of allowing students "to transfer from building to building without proper supervision" . Here, plaintiff's deposition testimony indicated that he was feeling ill and had received his mother's (and the principal's) permission to return home. In addition, it is undisputed that the injury occurred while plaintiff was heading towards the train which would take him home rather than going to another building (*see* Plaintiff's Exhibit "J" pp. 8-9, 12-13). As a result, the cited failing, even if true, is irrelevant to the determination of proximate cause.

Accordingly it is hereby

ORDERED, that the motion to dismiss the complaint as against defendant YPIS of Staten Island, d/b/a New York Center for Interpersonal Development, s/h/a New Beginnings School is granted, and the complaint as to said defendant is severed and dismissed; and it is further

ORDERED, that plaintiff's cross motion, *inter alia*, to reinstate the default judgment is denied; and it is further

ORDERED that the Clerk enter judgment accordingly.

ENTER,

/s/
Hon. Thomas P. Aliotta
J.S.C.

DATED: January 14, 2011