SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 18

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DOMINIC CALANDRELLA, an infant under the age of Fourteen, by his father and natural guardian, DOMINIC CALANDRELLA,

Plaintiff,

-against-

HEWLETT-WOODMERE SUMMER PLAY SCHOOL, HEWLETT-WOODMERE PUBLIC SCHOOLS UFSD & GW HEWLETT-WOODMERE PUBLIC SCHOOLS DISTRICT 14,

Defendants.

Index No.: 018630/09
Motion Sequence...01
Motion Date... 12/16/10

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Papers Submitted:
Notice of Motion.....x
Affirmation in Opposition.....x
Reply Affirmation.....x

Upon the foregoing papers, the motion by the Defendants seeking an order, pursuant to CPLR § 3212, granting it summary judgment, is determined as hereinafter provided.

This action arises out of an incident that occurred on July 10, 2008, at Hewlett High School which is part of the Defendant, HEWLETT-WOODMERE UNION FREE

SCHOOL DISTRICT ("DISTRICT"). At the time of the incident, the infant Plaintiff, DOMINIC CALANDRELLA ("DOMINIC"), was approximately seven years of age. During the Summer of 2008, the infant Plaintiff was attending the Hewlett-Woodmere Summer Play School, located at 60 Everit Avenue, Hewlett, County of Nassau. On July 10, 2008, the infant Plaintiff was injured when he ran into a chain linked metal fence while running in a race with four or five other children.

Factual Background:

The infant Plaintiff testified at a Municipal Hearing pursuant to section 50-h of the General Municipal Law on November 20, 2008 and at an Examination Before Trial on April 22, 2010. The infant Plaintiff testified at the 50-h hearing that on the day of the occurrence, he obtained permission from a female counselor to race on the tennis court located at the summer camp. He testified that he was running parallel to the net at the time of the race. The net, ordinarily used for playing tennis, was tied to a metal fence and the children raced from one end of the net to the other. The infant Plaintiff testified that the race ended where the net ended, but the race did not go all the way to the fence. Before starting the race, the infant Plaintiff testified that one of the two female counselors that was present stated, "ready, set, go." *See* Municipal Hearing, dated November 20, 2008, attached to the Defendant's Notice of Motion as Exhibit "F". He further testified that he ran into the fence because he was running too fast and could not stop in time. *Id.*

The infant Plaintiff struck the right side of his face against the chain link fence.

Thereafter, the female counselor came to him and brought him to the nurse. After seeing the nurse, the infant Plaintiff was brought to the doctor. The claimed injuries in the Plaintiff's Verified Bill of Particulars include a eurythmatous vertical flat scar on the right side of his face, a linear break of the skin on the right side of his face with a lesion approximately 4-5 centimeters in length with a crusted impetiginized surface. *See* Plaintiff's Verified Bill of Particulars, dated October 27, 2009, attached to the Defendants' Notice of Motion as Exhibit "E".

Kelly Dowling, a recreational instructor for the Hewlett High School Summer Program, testified on behalf of the Defendants. At her Examination Before Trial on July 13, 2010, she testified that on the date of the incident, there were two counselors working with her. Ms. Dowling testified that she was watching the children. The class had been working in an organized activity held by herself and the other instructor. Ms. Dowling testified that she did not give the boys permission to race. According to Ms. Dowling, when she saw the children run one race she walked over to them to tell them to stop racing. Before she got there, the children ran a second time and it was at the end of the second race that the infant Plaintiff was injured.

Ms. Dowling testified that there was a running track located on the property as well as open field areas where the children could race. Ms. Dowling testified that she did not notice the condition of the fence prior to the children racing. The fence was scheduled for reconstruction later that Summer. However, none of the counselors were told not to use

the tennis courts prior to the reconstruction of the fence. The tennis courts went under reconstruction the week following the infant Plaintiff's accident.

The Defendants also submit, in support of the motion for summary judgment, a sworn affidavit of Mary Ellen Sullivan, the secretary to the Executive Director of School Facilities/Operations of the Defendant School District. Ms. Sullivan states in her affidavit that she conducted a thorough search of the records maintained by the School District regarding the reconstruction of the tennis courts at Hewlett High School. As a result of her search, Ms. Sullivan found no records, documents or reports which commented on the condition of the perimeter fence surrounding the tennis courts as they existed prior to the reconstruction. *See* Affidavit of Mary Ellen Sullivan, dated July 1, 2010, attached to the Defendants' Notice of Motion as Exhibit "N".

Legal Analysis:

Schools have a duty to adequately supervise the students in their charge and are subject to liability for foreseeable injuries proximately related to the absence of adequate supervision. *Mirand v. City of New York*, 84 N.Y.2d 44 (1994). It is fundamental that to recover in a negligence action a plaintiff must establish that the defendant owed him a duty to use reasonable care, and that it breached that duty. *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325, 333 (1981); *Pulka v. Edelman*, 40 N.Y.2d 781, 782 (1976); *Kimbar v. Estis*, 1 N.Y.2d 399, 405 (1956).

The Defendants argue, by citing to several inapplicable cases, that summary

judgment should be granted as the Plaintiff will be unable to show that the lack of supervision was the proximate cause of the Plaintiff's injuries. In so arguing, the Defendants cite to *Doyle v. Binghamton City School District*, 60 A.D.3d 1127 (3rd Dept. 2009), where a student was injured by another student accidently knocking him to the ground. In that case, the plaintiff could not establish proximate cause as the injury was due to a sudden and spontaneous act of another student that any amount of supervision could not have prevented. *Id.* Similarly, several of the cases cited by the Defendants primarily deal with student on student injuries. *See Pitner v. Brentwood U.F.S.D.*, 254 A.D.2d 340 (2nd Dept. 1998) (plaintiff injured in a fight with fellow student); *Brown v. City of New York*, 130 A.D.2d 701 (2nd Dept. 1987) (plaintiff stabbed by fellow student).

In the instant matter, to warrant summary dismissal of the Plaintiff's claims, the Defendants must demonstrate, prima facie, their entitlement to summary judgment as a matter of law, by showing that there was adequate playground/camp supervision and that the level of supervision was not the proximate cause of the incident. *See, Tessier v New York City Health & Hosps. Corp.*, 177 A.D.2d 626 (2nd Dept. 1991). The burden then shifts to the Plaintiff to produce evidentiary proof in admissible form sufficient to show the existence of a triable question of fact. *Taylor-Warner Corp. v. Minskoff*, 167 A.D.2d 382 (2nd Dept. 1990).

The Defendants herein established, through admissible evidence, that the number of counselors present was sufficient for the number of students being supervised on

the date of the incident. The Defendants have also established their prima facie entitlement to summary judgment by showing that the tennis court is made for running and that lack of supervision was not the proximate cause for the infant Plaintiff's injury.

In opposition, however, the Plaintiff raised an issue of fact as to whether the Defendants were negligent in their supervision of the infant Plaintiff on the date of the incident. In direct contention is the issue of whether the infant Plaintiff raced with the other children on his own volition, or whether he obtained permission to race and was lead in the race by the counselor stating, "ready, set, go". The infant Plaintiff testified as to the counselors' awareness that the children were about to race on the tennis court from one end of the net to the other end of the net which was tied to the fence. To the contrary, the witness on behalf of the Defendants, Kelly Dowling, testified that she saw the children race once and could not reach the children in time to tell them to stop racing. This factual issue is not for the Court to resolve.

Further, the Defendants' repetitious argument that the infant Plaintiff knew that the race was to end at the "foul line" as opposed to the fence is disingenuous. No where in the transcript of the hearing cited by the Defendants does it state that the race was to end at the "foul line". The Defendants' counsel did not even inquire as to whether a "foul line" was located on the tennis court. As such, an issue of fact exists as to the location the race was intended to finish and the area needed to stop running.

Moreover, it is conceded by the Defendants' witness that there were other

designated areas for racing, to wit, the track or an open field. There is a fact issue as to whether the counselor's decision to allow the seven-year-old infant Plaintiff to race on a tennis court, which is in close proximity of a chain linked fence, was the proximate cause of the infant Plaintiff's injuries.

The Defendants failed to raise the assumption of risk doctrine in their original motion papers, and, as such, that defense will not be addressed herein.

Accordingly, the Defendants' motion to dismiss the Plaintiff's negligent supervision claim is **DENIED**.

The Defendants also argue that the Plaintiff's claim that the fence was in a defective, dangerous condition at the time of the incident should be dismissed as a matter of law. The Court agrees. The Defendants established their entitlement to summary judgment as a matter of law by showing that there was no notice, actual or constructive, of the fence's condition prior to the accident. Specifically, the sworn affidavit of Mary Ellen Sullivan was adequate to show that there were no prior complaints or incidents with the fence.

The Plaintiff failed to rebut the Defendants' arguments with respect to the defective condition of the fence. Accordingly, the Defendants' motion to dismiss the Plaintiff's claim that the fence was in a defective and dangerous condition at the time of the accident, is **GRANTED**.

Accordingly, it is hereby

ORDERED, that the Defendants' motion for summary judgment, pursuant to

CPLR § 3212, seeking dismissal of the Plaintiff's negligent supervision claim, is DENIED; and it is further

ORDERED, that the Defendants' motion for summary judgment, pursuant to CPLR § 3212, seeking dismissal of the Plaintiff's premises liability claim of a defective and dangerous condition, is **GRANTED**.

This constitutes the decision and order of the court.

Dated: Mineola, New York
March 24, 2011

Hon. Randy Sue Marber, J.S.C.