SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4

NASSAU COUNTY

MICHAEL ZABALA, an infant by parent and natural guardian, YOLANDA LOPEZ and YOLANDA LOPEZ, individually,

Plaintiffs,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY BOARD OF EDUCATION AND THE BOARD OF THE LAWRENCE UNION FREE SCHOOL DISTRICT 15,

Defendants.

MOTION SEQ. NO.: 001

MOTION DATE: 2/8/11

INDEX NO.: 676/09

The following papers read on the motion (numbered 1-3):

Notice of Motion.....1
Affirmation in Opposition.....2
Attorney Affirmation in Reply and in Further Support.....3

Motion by defendant THE BOARD OF EDUCATION OF THE LAWRENCE UNION FREE SCHOOL DISTRICT 15 ("BOARD") for summary judgment pursuant to **CPLR §3212** is determined as follows.

This is an action for personal injuries arising out of an incident occurring on October 22, 2007, when infant plaintiff MICHAEL ZABALA ("ZABALA") was allegedly assaulted by three students on the playground of Nassau County School #6 Lawrence Public School, located at 523 Church Avenue, Woodmere. Plaintiffs essentially allege causes of action against defendants for negligent supervision, and negligent hiring and training of district employees. By Stipulation, dated May 27, 2009, the action including all cross claims, was discontinued against defendants THE CITY OF NEW YORK and THE NEW YORK CITY BOARD OF EDUCATION. Defendant BOARD now moves for summary judgment dismissing the complaint as to it.

In support of its motion for summary judgment, the Board proffers (1) ZABALA's and plaintiff YOLANDA LOPEZ's ("LOPEZ") testimony at a hearing conducted

pursuant to **General Municipal Law §50-(h)** on January 20, 2009 ("50-(h) Hearing"); (2) the testimony of ZABALA and LOPEZ at a deposition conducted on June 29, 2010; and (3) the testimony of Dawn Sarro, a lunch monitor on the date of the incident, conducted on June 29, 2010. ZABALA testified at the 50-(h) Hearing that the incident occurred at school when he was in fifth grade during a recess period. ZABALA was outside playing baseball for approximately ten minutes, and while at bat, three fellow students approached him. One of the students kicked him in the left leg causing him to fall to the ground where he remained for a few seconds after which time he got up "right away." When on the ground, another of the students allegedly punched ZABALA in the stomach once and somebody stepped on his hand. ZABALA testified that he had not seen his assailants prior to the incident and nothing was said by them before the incident occurred. ZABALA had also never made any complaints about these boys prior to the incident. ZABALA testified that prior to the incident, he sat at the same lunch table with them, and in fact had been friends "a little" with one of these boys. ZABALA stated that he did not know why the boys assaulted him.

Portions of ZABALA's deposition testimony contradicted his 50-(h) Hearing testimony. At his deposition, ZABALA testified that prior to the incident he was friends with two of the boys (instead of one) and that one of the boys punched him more than five times in a row while he was on the ground (instead of once). ZABALA also testified that the altercation from the time he was tripped until the boys ran away, was "pretty quick" which he estimated to be twenty-nine seconds. At no point prior to the incident did any of the boys say anything to ZABALA that they wanted to fight him, nor did he have any kind of warning. ZABALA further testified that prior to the incident he had never made any complaints about these boys and had never seen them engage in similar behavior with anyone else.

At the 50-(h) Hearing, plaintiff LOPEZ testified that prior to the incident, she had never made any complaints to the district about the alleged assailants or about how her son was supervised at school. At her deposition, she testified that prior to the incident, ZABALA had never had a fight or altercation with these boys, she had never previously made any complaints to the lunch monitors and was not aware of any fights occurring between ZABALA and these boys.

Ms. Sarro testified at her deposition that on the day of the incident, the gym teacher and ten lunch room monitors supervised approximately 160 fourth and fifth grade children at recess. The staff is assigned by the gym teacher to specific stations to monitor the children. On the day of the incident, Ms. Sarro was assigned to monitor the playground and the baseball field where the incident took place. Ms. Sarro testified that she first became aware of the incident when she saw the alleged assailants on top of

ZABALA whereupon she immediately screamed for them to stop. She was located within twenty feet of where the altercation occurred. Ms. Sarro testified that once she screamed, the boys immediately stopped and told her they were "playing around." Ms. Sarro also testified that there were no other physical fights in the playground during the 2007 school year and that she was not aware of any complaints having been made to the school about the alleged assailants.

At the outset, the BOARD argues that the action by plaintiff LOPEZ is time barred as not being commenced "within one year and ninety days after the happening of the event upon which the claim is based." **General Municipal Law §50-i**. While plaintiffs commenced action against defendants THE CITY OF NEW YORK and THE NEW YORK CITY BOARD OF EDUCATION (the "City Defendants") on January 14, 2009, plaintiffs did not file an amended summons and complaint adding the BOARD as a defendant until February 5, 2009, more than one year and ninety days after the date of the incident. The BOARD contends that as LOPEZ is not an infant and there is no unity of interest between the BOARD and the City Defendants, plaintiffs' action against LOPEZ is time barred. The Court agrees with the BOARD that the claim of LOPEZ is time barred. The Court further notes that the infant plaintiff ZABALA is entitled to the infancy toll and, accordingly, his claims against the BOARD may continue. **Henry v. City of New York**, 94 NY2d 275.

The BOARD argues further that plaintiffs' claim of negligent supervision must be dismissed on grounds that there was no notice of a need for greater supervision and, in any event, a lack of supervision was not the proximate cause of the incident. The BOARD also argues that there is no basis in the record for plaintiffs' claim against defendants for negligent hiring and training of district employees.

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**, 84 NY2d 44, 49. They have a duty to exercise the same degree of care toward students as a reasonably prudent parent. **Hernandez v. Middle Country Central School District**, 2011 WL 1445058; **Paragas v. Comsewogue Union Free School District,** 65 AD3d 1111. School officials cannot, however, be expected to anticipate each and every spontaneous interaction between students. *See* **De Los Santos v. New York City Dept. of Educ.**, 42 AD3d 422. They are not an insurer of the safety of students for they cannot reasonably be expected to continuously supervise and control all the students' movements and activities. **Mirand v. City of New York**, *supra*; **Paca v. City of New York**, 51 AD3d 991; **Ungaro v. Patchogue-Medford, New York School District.,** 19 AD3d 480, 481.

"In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of a fellow student, 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 have reasonably been anticipated." **Mirand v. City of New York**, *supra* at 49. *See* **Paca v. City of New York**, *supra*; **De Los Santos v. New York City Dept. of Education**, *supra*; **Hernandez v. Christopher Robin Academy,** 276 AD2d 592. An injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury causing act. *See* **Moody v. New York City Bd. of Educ.**, 8 AD3d 639, 640.

The Court finds that defendant BOARD has made a *prima facie* showing of entitlement to summary judgment dismissing this action insofar as asserted against it. The Board has established that it had no actual or constructive knowledge of any prior similar conduct by the alleged assailant boys and there was no advance notice that there was a problem between ZABALA and his assailants. The spontaneous and unanticipated act of kicking and/or punching ZABALA while he was playing baseball at recess could not have been reasonably anticipated. The incident occurred in a short span of time, and accordingly, there is no evidence that it could not have been prevented even with the most intense supervision. *See* **Schleef v. Riverhead Central School District**, 80 AD3d 743; **Paragas v. Comsewogue Union Free School District**, *supra*; **Convey v. City of Rye School District.**, 271 AD2d 154, 160. The record is devoid of any evidence of a propensity on the part of the assailant boys to engage in violent conduct prior to the incident at issue. The Court finds that plaintiffs' assertion in opposition, that the BOARD through an employee of the District should have taken "energetic steps to intervene" is speculative and fails in the context of this action to raise an issue of fact. Plaintiffs have failed to raise a factual issue as to whether an alleged absence of adequate supervision was the proximate cause of the injury rather than, as defendant BOARD contends, the spontaneous/unanticipated act of fellow students. Liability for negligent supervision does not lie absent a showing that it constitutes a proximate cause of the injury sustained. Likewise, the Court finds there is no basis in the record for plaintiffs' claim of negligent hiring and training of school district employees. The BOARD has also demonstrated that plaintiff LOPEZ's action is time barred.

Based on the foregoing, it is

ORDERED, that the motion by defendant THE BOARD OF EDUCATION OF THE LAWRENCE UNION FREE SCHOOL DISTRICT 15 for summary judgment pursuant to **CPLR §3212** dismissing the action against it is **granted.**

This constitutes the Order of the Court.

Dated: April 28, 2011

ENTERED
MAY 09 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Donald Kinsella
J.S.C.