SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 2
NASSAU COUNTY

STEVEN PEREZ, an infant under the age of fourteen (14) years, by his mother and natural guardian, MONICA MOLINA, and MONICA MOLINA, individually,

Plaintiff(s),

-against-

JOHN F. NASSOUR, DANA R. NASSOUR, ANDREW OSKOWSKY, an infant under the age of fourteen (14) years, by his father and natural Guardian, LAWRENCE OSKOWSKY, and OCEANSIDE AMERICAN LITTLE LEAGUE, INC.,

Defendant(s).

ORIGINAL RETURN DATE:06/30/11
SUBMISSION DATE: 08/22/11
INDEX No.: 13758/09

MOTION SEQUENCE #2, 3, 4

The following papers read on this motion:

Notice of Motion.....	1, 2
Cross-Motion.....	3
Answering Papers.....	4, 5
Defendants' Memorandum of Law.....	6,7,8,9

Motion by defendants, John F. Nassour and Dana R. Nassour, for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint against them is denied.

The unopposed cross-motion by defendant, Andrew Oskowsky, an infant under the age of fourteen (14) years, by his father and natural guardian, Lawrence Oskowsky, for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint against him is granted.

Motion by defendant, Oceanside American Little League, Inc. ("Little League"), for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint against it is denied.

Plaintiffs in this action seek to recover damages for personal injuries that the infant plaintiff sustained during Little League baseball practice on April 25, 2007, when a ball thrown by his teammate defendant Andrew Oskowsky hit him in the head. Defendants seek dismissal of the action against them based upon, *inter alia*, the infant plaintiff's assumption of the risk.

The infant plaintiff was ten years old and in fifth grade when the accident happened. It was his first season playing organized baseball; in fact, it was his first season playing any kind of organized sport at all. However, he had played pick-up baseball games with friends and owned his own mitt and bat. While his team had already had approximately ten practices and a game, this was the first time the infant plaintiff practiced in his coach's, the defendant John F. Nassour's, backyard.

Nassour's yard was approximately 71 feet by 88 feet. The players were instructed to store their equipment right outside the batting cage by a cinder block wall. There wasn't any barricade protecting that area. In contrast, with one exception, at the Little League's fields, the equipment was kept behind a backstop or dugout fence to enable players to retrieve their equipment safely. After placing their equipment near the batting cage in Nassour's yard, the players did calisthenic exercises to warm up and then did throwing and fielding drills while two players at a time took turns in the batting circle and the batting cage. One of the fielding drills, the Golden Glove drill, was a rapid fire drill where the players lined up and took turns fielding a ball thrown by Coach Nassour and quickly throwing it back to him. If successful, the player went to the end of the line; if not, they were out. The last player remaining won the Golden Glove drill. During this drill, Coach Nassour was positioned in between the participating players and the batting cage and equipment bags. While in the batting circle and the batting cage, the players wore helmets. When finished there, the players would place their helmet back in their equipment

bag, retrieve their glove and return to the area where the other players were engaged in the Golden Glove drill.

The infant plaintiff was hit when he was placing his helmet in his equipment bag having just finished his turn in the batting cage. He was hit by an errant ball thrown by defendant Oskowsky who was participating in the Golden Glove drill with Coach Nassour and his teammates. Although Coach Nassour observed the misthrow and shouted "heads up," it was to no avail. At his examination before trial, defendant Oskowsky testified that the fact that it was raining and the ball was fast and slippery may have contributed to his wild throw. The infant plaintiff admitted at his examination before trial that even before he was hit, balls were being thrown wildly during the Golden Glove drill and that Coach Nassour often had to jump up in order to field them.

Coach Nassour maintains that he was holding the practice in his yard as he had done regularly for a number of years on account of a shortage of practice fields. In fact, Coach Nassour acknowledged that he had simply scheduled the practice at his house to avoid the hassle involved in trying to locate a field. Chris DeMarzo, who was involved with the Little League from 2002 through 2010, has attested: "[i]t was common knowledge throughout the League that Nassour had a batting cage in his backyard, and would regularly conduct practices there. In addition, Nassour allowed me to conduct practices for my team in his backyard." While Nassour alleges that the Little League long knew that he held practices in his backyard, the Little League denies it.

At his examination before trial, the Little League President Michael Lease admitted that there were only three fields available for league practices and that they were not adequate. He testified that the Little League was not involved in scheduling practices and that the fields were available on a first-come, first-serve basis. In addition, he admitted that despite complaints regarding the shortage of fields, the Little League essentially told coaches to find a "patch of grass" to practice where backstops, dugout fences and baseline fences were not available.

When the accident occurred, both the Little League and the nation's rules known as the Williamsport Rules essentially provided that no games or practice should be held when weather or field conditions are not good, particularly when lighting is inadequate; dugouts and bat racks should be positioned behind screens; and, that

during warm-up drills, players should be spaced so that no one is endangered by errant balls. Furthermore, the Little League's rules provided that baseball should only be played on fields where the League had permits. Oceanside Little League's President Lease in fact admitted at his examination before trial that fences and screens were used to protect the players and that coaches were responsible for making sure that equipment was stored behind a fence and that if no fence was available, drills were to be done further away from the equipment. He also admitted that it was the League's responsibility to take action if practices were held in unauthorized locations.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Sheppard-Mobley v King*, 10 AD3d 70, 74 [2d Dept. 2004], aff'd. as mod., 4 NY3d 627 (2005), citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]. "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (*Sheppard-Mobley v King*, 10 AD3d at 74; *Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*.) Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d at 324.) The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. (See, *Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521 [2d Dept. 2006], citing *Secof v Greens Condominium*, 158 AD2d 591 [2d Dept. 1990]).

"[A]thletic and recreative activities possess enormous social value, even while they involve significantly heightened risks . . . these risks may be voluntarily assumed to preserve these beneficial pursuits as against the prohibitive liability to which they would otherwise give rise." (*Trupia ex rel. v Lake George Cent. School Dist.*, 14 NY3d 392, 395 [2010]). "The doctrine of assumption of the risk is a form of measurement of a defendant's duty to a voluntary participant in a sporting activity." (*Manoly v City of New York*, 29 AD3d 649 [2d Dept. 2006], citing *Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 659 [1989].) "A plaintiff is barred from recovery for injuries which occur during voluntary sporting or recreational activities if it is determined that he or she assumed the risk as a matter of law (citations omitted)." *Leslie v Splish Splash at Adventureland*, 1 AD3d 320, 321 [2d Dept.

2003]; see also, *Morgan v State*, 90 NY2d 471 [1997], rearg den., 90 NY2d 936 (1997). "A voluntary participant in a [sporting or] recreational activity consents to those commonly-appreciated risks which are inherent in and arise out of the nature of such activity generally, and which flow from the participation." *(Reidy v Raman*, 85 AD3d 892 [2d Dept. 2011], citing *Morgan v State*, 90 NY2d at 484; *Leslie v Splish Splash at Adventureland*, 1 AD3d at 321; see also *Miskanic v Roller Jam USA, Inc.*, 71 AD3d 1101 [2d Dept. 2010].) "The doctrine of primary assumption of the risk, however, will not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased." (*Miskanic v Roller Jam USA, Inc.* 71 AD3d at 1103, citing *Morgan v State*, 90 NY2d at 484; *Ribuado v La Salle Inst.*, 45 AD3d 556, 557 [2d Dept. 2007], lv den., 10 NY3d 717 [2008]; see also, *Benitez v New York City Bd. of Educ.*, 73 NY2d at 659, quoting *McGee v Board of Educ.*, 16 AD2d 99 [1st Dept. 1962], lv den., 13 NY2d [1963]; *Morgan v State*, supra; *Morales v Beacon City School Dist.*, 44 AD3d 724 [2d Dept. 2007]; *Muniz v Warwick School Dist.*, 293 AD2d 724 [2d Dept. 2002]; *Stryker v Jericho Union Free School Dist.*, 244 AD2d 330 [2d Dept. 1997].)

To prevail on the doctrine of assumption of the risk, defendants must establish that the infant plaintiff was aware of, appreciated the nature of and voluntarily assumed all of the risks. (*Morgan v State*, 90 NY2d at 484.) "The plaintiff's awareness of the risk must be assessed against the background of his skill and experience." (*Hyde v North Collins Cent. School Dist.*, 83 AD3d 1557 [4th Dept. 2011], citing *Morgan v State*, 90 NY2d at 486.) "Although even a plaintiff who is a novice is expected to appreciate the obvious risks inherent in a sport, there are several factors that must be taken into account, including the age of the plaintiff and the plaintiff's skill and experience." (*Hyde v North Collins Central School Dist.*, 83 AD3d at 1557, citing, *Griffin v Lardo*, 247 AD2d 825 [4th Dept. 1998], lv den., 91 NY2d 814 [4th Dept. 1998]; *Kroll v Watt*, 309 AD2d 1265 [4th Dept. 2000]; *Rivera v Glen Oaks Village Owners, Inc.*, 41 AD3d 817, 820 [2d Dept. 2007], lv den., 9 NY3d 817 [2008].)

Furthermore, " '[i]n assessing whether a defendant has violated a duty of care in the context of an injury sustained during a sport or game, [it] must [be] determine[d] whether defendant created a unique condition "over and above the usual dangers inherent in the sport." ' " (*Gerry v Commack Union Free School Dist.*, 52 AD3d 467, 469 [2d Dept. 2008], quoting *Convey v City of Rye School Dist.*, 271 AD2d 154, 158 [2d Dept. 2000], quoting *Morgan v State*, 90 NY2d at 485.) A

defendant's failure to follow its own policy may give rise to an " 'unassumed, concealed or unreasonably increased risk.' " *Diagle v West Mountain*, 289 AD2d 838 [3d Dept. 2001] (failure to follow its own policy and close tubing run when it rained gave rise to issue of fact whether unassumed, concealed or unreasonably increased risk arose), quoting *Benitez v New York City Bd. of Educ.*, 73 NY2d at 658; see also, *Zmitrowitz ex rel. Zmitorwitz v Roman Catholic Diocese of Syracuse*, 274 AD2d 613 [3d Dept. 2000] (failure to have catcher use face mask during tryouts was violative of league policy and gave rise to issue of fact whether risk of injury was unreasonably increased); *Baker v Briarcliff School Dist.*, 205 AD2d 652 [2d Dept. 1994] (failure to compel use of mouthpiece during hockey practice violative of policy and gave rise to issue of fact whether risk of injury was unreasonably increased); *Parisi by Parisi v Harpursville Cent. School Dist.*, 160 AD2d 1079 [3d Dept. 1990] (failure to compel use of mask and helmet during practice violative of league policy and gave rise to issue of fact as to whether risk unreasonably increased).) Accordingly, while "being struck in the head by a baseball is a known risk inherent in the sport of baseball and thus establishe[s], *prima facie,* [a defendant's] entitlement to judgment as a matter of law" based upon the doctrine of assumption of the risk, a plaintiff may defeat summary judgment by establishing the existence of "a triable issue of fact as to whether the [defendant] unreasonably increased the risk of injury." (*Fithian v Sag Harbor Union Free School Dist.*, 54 AD3d 719 [2d Dept. 2008], citing *Sanchez v City of New York*, 25 AD3d 776 [2d Dept. 2006]; *Cuesta v Immaculate Conception Roman Catholic Church*, 168 AD2d 411 [2d Dept. 1990]; *Muniz v Warwick School Dist.*, supra; *Hubbard v East Meadow Union Free School Dist.*, 277 AD2d 353 [2d Dept. 2000]; *Baker v Briarcliff School Dist.*, supra.

Defendants have not established their entitlement to summary judgment. The infant plaintiff was only 10 years old and was participating in Little League and organized sports for the first time. When he got hurt, he was precisely where he was instructed to be doing exactly what he was instructed to do, per Coach Nassour's instructions. The practice location time and the equipment location was chosen by Coach Nassour as was the sequencing of events at the practice, all of which may have been violative of the applicable rules and may have exposed the infant-plaintiff to unassumed, concealed and increased risks. (See, *Merino ex rel. Encarnacion Board of Educ. of City of New York*, 59 AD3d 248 [1st Dept. 2009]; (issue of fact whether the nine year-old plaintiff assumed the risks of playing catcher without any protective gear); *Calouri v County of Suffolk*, 43 AD3d 456 [2d Dept. 2007] (issues

of fact whether her neophyte/complete novice plaintiff acted voluntarily in attempting strategy suggested by gym instructor); *Muniz v Warwick School Dist.*, *supra* (issue of fact whether risk of injury was unreasonably increased by failure of physical education teacher to issue helmets and direct players regarding a safe place to stand on a field lacking fences, on-deck circles or dugouts); *Karr v Brant Lake Camp, Inc.*, 261 AD2d 342 [1st Dept. 1999] (issue of fact whether active participation of a physically larger and more skillful adult enhanced the risks associated with the sport as played by 11 year-old boys); *Petretti v Jefferson Valley Racquet Club, Inc.*, 246 AD2d 583 [2d Dept. 1998] (issues of fact concerning the nature of the risks actually assumed by plaintiff and whether the risks to which she was subjected were among those that she reasonably could be said to have assumed); *Stryker v Jericho Union Free School Dist.*, *supra* (issue of fact as to whether supervising teacher's failure to direct children to utilize a protective fence unreasonably increased the risk of injury); *Cody v Massapequa Cent. School Dist.*, 227 AD2d 368 [2d Dept. 1996] (issue of fact whether teacher failed to provide proper supervision by permitting plaintiff cheerleader to perform without a spotter); *Maurer v Feinstein*, 213AD2d 383 [2d Dept. 1995] (issue of fact whether infant plaintiff's risk of injury was unreasonably increased by adult's active participation in rugby).)

In addition, there is clearly an issue of fact as to whether the Little League had knowledge of Nassour's use of his backyard for practices, for which it may also be held liable. (*Hernandez v Castle Hill Little League*, 256 AD2d 241 [1st Dept. 1998].) In addition, it may be held liable pursuant to the doctrine of respondeat superior. (*Robinson v Downs*, 39 AD3d 1250, 1252 [4th Dept. 2007], citing Restatement (Second) of Agency § 225.) Whether Nassour was acting within the scope of his duties as agreed to by the Little League by holding a practice in his backyard cannot be summarily resolved.

In any event, assuming, *arguendo*, that defendants established their entitlement to summary judgment based upon the infant plaintiff's assumption of the risk, plaintiffs in opposition have established the existence of a material issue of fact as to whether the risks were concealed or unreasonably increased so that the doctrine of primary assumption of the risk would not apply. (*Miskanic v Roller Jam USA, Inc.*, *supra*, citing *Morgan v State*, *supra*.)

In opposition to defendants' motions, plaintiffs have submitted the affidavit of Steve Benheim, President of Sports & Recreation Consultants, Inc. and a Board Certified Forensic Examiner and Certified Professional Consultant to Management. Acknowledging the risk in general of being hit by an errant throw when participating in Little League baseball, he opines that defendants' actions exacerbated the risk beyond what is normally encountered. In particular, he opines that by running simultaneous practice drills in wet and dangerous conditions in a field too small for them and by placing the equipment in an exposed area, defendant coach and defendant Little League placed the young and inexperienced plaintiff in a highly exposed situation where, by definition, he could not pay attention to the path of the ball because he needed to look at his equipment bag and not the field. This, he opines, is entirely different from the traditional risks of ordinary Little League practice in good weather on a regulation field. And, the infant plaintiff may not have been aware of the heightened risks that he undertook by following his coach's orders. Plaintiffs' expert notes that various Little League and Williamsport rules were violated: practice was held during bad weather; equipment was not stored in a protected area despite alternative options; spacing of drills and batters forced players to repeatedly go too close in unprotected areas; the field was not an authorized one; and the coaches received no training, all of which in his estimation raise safety flags. Mr. Benheim opines that unbeknownst to him, all of these things unreasonably enhanced the risk to the infant plaintiff.

This decision constitutes the order of the court.

Dated: 9-27-11

HON THOMAS P. PHELAN

J.S.C.

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