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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. ROY S. MAHON**

**Justice**

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| **FRANK PORCELLI, an infant under the age of fourteen (14) years, by his mother and natural guardian, DEBBIE PORCELLI, and DEBBI PORCELLI, Individually,** | **TRIAL/IAS PART 6** |
| **Plaintiff(s),** | **INDEX NO. 10103/09** |
| **- against -** | **MOTION SEQUENCE NO. 3** |
| **COUNTY OF NASSAU and CRESTWOOD COUNTRY DAY SCHOOL, INC.,** | **MOTION SUBMISSION DATE: October 31, 2011** |
| **Defendant(s).** | |

**The following papers read on this motion:**

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| **Notice of Motion** | **X** |
| **Affirmation in Opposition** | **X** |
| **Affirmation in Reply** | **X** |
| **Memorandum of Law** | **X** |

Upon the foregoing papers, the motion pursuant to CPLR 3212 by the defendants County of Nassau and the Crestwood County Day School, for summary judgment dismissing the complaint, or alternatively, for an order removing the action to the District Court, Nassau County.

In August of 2008, while attending Crestwood County Day School as a summer camper ["Crestwood"], then nine-year old Frank Porcelli, sustained personal injuries at Cantiague Park while playing tag with some 15 fellow campers (F. Porcelli Dep., 13-14; 20-29, 31; 67-70; Fleischman Dep., 90).

The campers were waiting to be picked up at the conclusion of the camp day and were playing tag, as they often did, in a dedicated playground area which also contained a large outdoor play system or "Jungle Gym" comprised of interconnected and elevated walkways, bridges, ramps and ladders (*see*, Pictures, Rosen Aff., Exh., "B," "I,"; F. Porcelli Dep., 15-16; 33-34, 39-40; Sherlock Dep., 29-30; Fleischman Dep., 47-51, 56; 79-80; Constantino Dep., 55-57).

According to Frank – who testified that the tag games was generally conducted on the Jungle Gym – after the game had been ongoing for some thirty minutes, another camper began to chase after him in order to tag him (F. Porcelli Dep., 16, 36-37, 43-44). In an effort to escape, Frank ran "really fast" towards

the Jungle Gym and then ran to an elevated bridge pathway on the equipment, bordered on both sides by a rail fence (F. Porcelli Dep., 36-37; 41-47; Sherlock Dep., 40-41, 51; 64-66; Fleischman Dep., 101). He then climbed onto and/or mounted the top of the fence, which was capped by a horizontal rail, and secured himself by gripping the rail with his hands, allowing his legs to dangle freely below (F. Porcelli Dep., 48-51; 53-54; 56; Sherlock Dep., 67; Marcik Dep., 9-10, 13).

Frank allegedly sat on the fence in this fashion, "for like ten minutes" because, as he explained, the camper who was attempting to tag him waited "a really long time" anticipating that he might jump (F. Porcelli Dep., 56-57; Sherlock Dep., 57, 74). Although the chasing camper ultimately departed and attempted to tag another person, Frank's hands eventually got "sweaty" and he lost his grip and fell, causing him to strike the ground several feet below and sustain personal injuries, including two fractured wrists (F. Porcelli Dep., 61-63, 67-70; Sherlock Dep., 64; Constantino Dep., 64-65).

By summons and verified complaint dated May, 2009, the infant plaintiff, by his mother, Debbie Porcelli, and Debbie Porcelli, individually, commenced the within action to recover damages for, *inter alia*, personal injuries. Among other things, the plaintiffs' verified complaint alleges that Crestwood "failed to properly and adequately supervise, control and manage the campers" at the Cantiague playground site (Cmplt., ¶¶ 44-45 [Gould Aff., Exh., "A"]).

The defendants have answered, denied the materials allegation of the complaint and interposed various affirmative defenses (Ans., [Gould Aff., Exh., "B"]). Discovery and depositions have been conducted and both the County and Crestwood now jointly move for summary judgment dismissing the complaint.

Significantly, the plaintiffs advise that they do no oppose that branch of the motion which is to dismiss the complaint with respect to Nassau County (Rosen Aff., ¶ 1). Accordingly, the complaint is dismissed insofar as interposed against the defendant County of Nassau.

However, the motion for summary judgment should be denied with respect to Crestwood.

While schools and camps are not insurers, and will liable only for foreseeable injuries proximately related to the absence of adequate supervision, they nevertheless "have a duty to adequately supervise their students" by exercising the same degree of care which would be exercised by a reasonably prudent parent (*see, Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010]; *Mirand v. City of New York*, 84 NY2d 44, 49, [1994]; *Buchholz v. Patchogue-Medford School Dist.*, ___ AD3d___, 931 NYS2d 113, 114-115 [2nd Dept. 2011]; *Rodriguez v. Riverhead Cent. School Dist.*, 85 AD3d 1147; *Hernandez v. Middle Country Cent. School Dist.*, 83 AD3d 781, 780; *Oliverio v. Lawrence Public Schools*, 23 AD3d 633, 634-635 *see also, Smith v City of New York*, 84 AD3d 631, 632; *Ragusa v. Town of Huntington*, 54 AD3d 743; *Johnson v City of New York*, 309 AD2d 671).

Notably, the scope and intensity of the supervision required in each case generally constitutes a question of fact, dependent "largely on the surrounding circumstances * * *"(*Phelps v Boy Scouts of Am.*, 305 AD2d 335, 336). Further, "although constant supervision in a camp setting is neither feasible nor desirable, it is plain that very young campers will in many situations require closer oversight than their older counterparts" (*Phelps v Boy Scouts of Am.*, supra, 305 AD2d at 336 *see, Douglas v. John Hus Moravian Church of Brooklyn, Inc.*, 8 AD3d 327, 328 *see also, Johnson v. Ken-Ton Union Free School Dist.*, 48 AD3d 1276, 1277; *Shoemaker v. Whitney Point Cent. School Dist.*, 299 AD2d 719, 720).

With these principles in mind, and viewing the evidence "in the light most favorable to * * * [the plaintiffs], as is appropriate in the context of * * * [a] motion for summary judgment" (*Fundamental Portfolio*

*Advisors, Inc. v. Tocqueville*, 7 NY3d 96, 106 [2006]; *Oliverio v. Lawrence Public Schools*, *supra*), the Court agrees that triable issues of fact exist with respect to the plaintiffs' allegations that Crestwood failed to discharge its duty to properly supervise the infant plaintiff (*see, Commisso v Greenleaf,* 82 AD3d 1684, 1685; *Doxtader v. Middle Country Cent. School Dist. at Centereach*, 81 AD3d 685, 686; *Shaw v Metro Missions, Inc.*, 47 AD3d 802; *Johnson v City of New York*, *supra*, 309 AD2d 671).

Although Crestwood contends, among other things, that it provided ample and competent on-site supervisory personnel and that Frank's accident occurred precipitously (*Weiner v. Jericho Union Free School Dist.*, ___ AD3d ___, 2011 WL 5222674 [2nd Dept. 2011]), the evidence before the Court has generated opposing inferences and credibility issues with respect to, *inter alia*, the precise manner in which – if at all – Frank was sitting on the fence, and the period of time which elapsed while he was allegedly seated there (*Vonungern v Morris Cent. School*, 240 AD2d 926, 927)(*e.g.*, Marcik Dep., 16, 19; Porcelli Dep., 36-37; 56-57; Sherlock Dep., 57-58, 61, 74; Constantino Dep., 9).

Significantly, the witnesses whose depositions are attached to the parties' submissions have provided materially conflicting accounts of Frank's conduct immediately prior to the accident. Among other things, Frank himself testified that he had been sitting atop the fence for ten minutes (Porcelli Dep., 35-37). A camper who witnessed the incident stated that she was "certain" that Frank was sitting on the fence for at least a minute (Sherlock Dep., 15, 57, 74), although she also claimed that he deliberately jumped in response to a "dare" issued by an unnamed camper (Sherlock Dep., 10, 13-15; 17-19; 27; 54-55; 64-65). Another camper claimed that he never observed Frank seated on the fence prior to falling and did not hear anyone dare him to jump off the Jungle Gym (Marcik Dep., 16-17).

Notably, neither of the two testifying counselors actually observed what Frank was doing immediately prior to the fall, even though Crestwood's program director and supervising counselor claimed to be only 15-20 feet from where Frank fell (Fleischman Dep., 91-93; 96-100; 117; Crestwood Reply Brief, at 4-5). Another counselor – who testified that climbing on the equipment had occurred previously during tag games (Constantino Dep., 62) – claimed to have seen Frank for the first time only as he was "in the air" while falling, but never noticed what he was doing just prior to the fall (Constantino Dep., 9, 64, 69). The record suggests, in fact, that none of the counselors who were assigned to supervise the children observed what Frank was doing immediately prior to the fall (Fleischman Dep., 105).

It bears noting in this respect that Crestwood's 2008 "Staff Manual" recognizes the potential for injury absent proper and vigilant playground supervision by stating that "[t]his is the area where the most serious injuries occur" (Rosen Aff., Exh., "J" [Staff Manual at 19]). Additionally, the manual provides that "[c]ounselor supervision must be totally active" and that "[y]our full attention must be on the children using the equipment," since "without proper supervision, this area can be the cause of needless accidents" (*cf., Dworzanski v. Niagara-Wheatfield Cent. School Dist.*, ___AD3d___, 2011 WL 5429462 [4th Dept. 2011]; *Vonungern v Morris Cent. School, supra,* 240 AD2d at 927).The program director also testified that allowing the children to run while playing tag on the playground equipment posed a safety risk to the children, but that they were not "allowed to run on there" (Fleischman Dep., 76, 113). However, another counselor who was present that day, testified that the tag games were a regular playground activity at Cantiague Park and that the children ran and chased each other as part of the game (Constantino Dep., 55-58 *see also*, Porcelli Dep., 16, 37).

"Given this proof and the fact that the accident occurred on a playground, 'a place where close supervision of the children is all but mandatory' (*Ohman v Board of Educ.,* 300 NY 306, 310 [1949]), the Court at bar "cannot find as a matter of law that " '[t]he presence or absence of supervision was not a contributory factor in the happening of the accident'" (*Vonungern v Morris Cent. School, supra,* 240 AD2d

at 927, *quoting from, Tomlinson v Board of Educ.*, 183 AD2d 1023, 1024 *see, Rodriguez v. Riverhead Cent. School Dist., supra,* 85 AD3d 1147; *Hernandez v Middle Country Cent. School Dist., supra*, 83 AD3d 781; *Oliverio v Lawrence Pub. Schools, supra,* 23 AD3d at 635 *see also, Dworzanski v. Niagara-Wheatfield Cent. School Dist., supra*).

Lastly, in light of the plaintiff's age and experience, it cannot determined as a matter of law at this juncture that he was fully aware of and appreciated the risks involved in the activity in which he was engaged (*see, Trupia v. Lake George Cent. School Dist.*, 14 NY3d 392, 396-397 [2010]; *Smith v City of New York, supra,* 84 AD3d 631, 632; *Sarnes v. City of New York*, 73 AD3d 1154, 1155; *Leonard v. County of Suffolk,* 21 AD3d 1065, 1066; *Rivera v Board of Educ. of City of Yonkers,* 19 AD3d 394, 395; *Douglas v John Hus Moravian Church of Brooklyn, Inc., supra*, 8 AD3d 327, 329).

Summary judgment is a drastic remedy which may be granted only where there is no clear triable issue of fact (*Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Mosheyev v. Pilevsky*, 283 AD2d 469). Indeed, "[e]ven the color of a triable issue forecloses the remedy" (*In re Cuttitto Family Trust*, 10 AD3d 656, 657; *Rudnitsky v. Robbins*, 191 AD2d 488, 489 *see also, Dorival v DePass*, 74 AD3d 729, 730). Issue finding, rather than issue determination, is the key to the remedy (*In re Cuttitto Family Trust, supra*), and the resolution of credibility issues is inappropriate (*see, S.J. Capelin Assoc v. Glode Mfg Corp.*, 34 NY2d 338, 341 [1974]).

The Court has considered Crestwood's remaining contentions and concludes that they are lacking in merit.

Accordingly, it is,

**ORDERED** that motion for summary judgment pursuant to CPLR 3212 by the defendants the County of Nassau and the Crestwood County Day School, is granted to the extent that the complaint is dismissed insofar as interposed against the County of Nassau, and the motion is otherwise denied.

SO ORDERED.

DATED: 11/21/2011

.....Roy S. Mahon.....
J.S.C.

ENTERED
NOV 23 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE