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SHORT FORM ORDER

INDEX No. 07-26288
CAL. NO. 11-00033OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY



***PRESENT:***

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 7-7-11
ADJ. DATE 9-14-11
Mot. Seq. # 003 - MotD; CASEDISP

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| RACHAEL STOFKO, an Infant by her mother and natural guardian, DONNA LONKOUSKI and DONNA LONkOUSKI, Individually,<br><br>Plaintiff,<br><br>- against -<br><br>WILLIAM FLOYD UNION FREE SCHOOL DISTRICT,<br><br>Defendant. | FERRO, KUBA, BLOOM, MANGANO & LAKE, PC<br>Attorneys for Plaintiff<br>825 Veterans Highway<br>Hauppauge, New York 11788<br><br>CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS &FISHLINGER<br>Attorneys for Defendant<br>333 Earle Ovington Boulevard, Suite 502<br>Uniondale, New York 11553-3625 |

Upon the following papers numbered 1 to ____ read on this motion RRRR; Notice of Motion/ Order to Show Cause and supporting papers (003) 1-30 ; Notice of Cross Motion and supporting papers____; Answering Affidavits and supporting papers 31-32 ; Replying Affidavits and supporting papers __; Other___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that motion (003) by the defendant, William Floyd Union Free School District, pursuant to CPLR 2221 for an order granting renewal or reargument of motion (002), which motion was brought pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's action, and which was denied, is granted as to reargument, and upon reargument, summary judgment is granted and the complaint is dismissed.

Motion (002) was previously denied as all of the supporting depositions were unsigned and were not in admissible form pursuant to CPLR 3212. The defendant now seeks an order granting renewal or reargument of motion (002).

CPLR 2221 (d) (2) provides a motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion. It is a basic principle that a movant on reargument must show that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision (***Bolos v Staten Island Hosp.,*** 217 AD2d 643, 629 NYS2d 809 [2d Dept 1995]). A motion to reargue is not to be used as a means by which an unsuccessful party is permitted to argue again

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the same issues previously decided (***Pahl Equipment Corp. v Kassis,*** 182 AD2d 22, 588 NYS2d 8 [1st Dept 1984]). Nor does it provide an unsuccessful party with a second opportunity to present new or different arguments from those originally asserted (***Giovanniello v Carolona Wholesale Office Machine Co., Inc.***, 29 AD3d 737, 815 NYS2d 248 [2d Dept 2006]). Here, the undersigned did not consider the unsigned deposition transcripts submitted by the defendant with motion (002), but could have considered the unsigned transcripts of Kelly Ann Delcasino, Carrie Tylee, and Joan Breindl, employees of the defendant on the basis that they were adopted as accurate pursuant to ***Ashif v Won Ok Lee,*** 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]. Therefore, reargument is granted.

In this negligence action, it is alleged that the infant plaintiff, Rachael Stofko, while swinging between two desks in her class at Tangier Smith Elementary School, on June 9, 2006, at 9:30 a.m. fell and struck her head on the floor, causing her to sustain injury. Plaintiff contends, *inter alia*, that the defendant school district failed to provide adequate and proper supervision of the infant plaintiff causing her to sustain injury.

In motion (002), the defendant sought summary judgment dismissing the complaint on the bases that there was adequate and proper supervision in the classroom and that the incident occurred in such a short period of time that there was no opportunity to intervene.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of this motion, the defendant has submitted an attorney's affirmation; a copy of the prior motion consisting of a copy of the notice of claim, summons and complaint, answer, verified bill of particulars; a photograph; and the unsigned transcript of the hearing pursuant to General Municipal Law 50-h of Rachael Stofko dated February 21, 2007, and the unsigned transcripts of the examinations before trial of Rachael Stofko dated January 12, 2009, Kelly Ann Delcasino dated June 8, 2009, Carrie Tylee dated May 1, 2009, and Joan Breindel dated October 12, 2010; plaintiff's opposition; and defendant's reply. The defendant has now submitted signed copies of the aforementioned deposition transcripts in admissible form and proof that the transcript of Carrie Tylee dated May 1, 2009, which remains unsigned, was served upon her.

At the hearing, conducted pursuant to General Municipal Law 50-h on February 21, 2007, Rachael Stofko testified that she was nine years of age on the date of the accident and a third-grade student at Tangier Smith Elementary School. Her teacher was Ms. Delcasino. Ms. Tylee was also present in the classroom. She was in the classroom with the other students and started swinging between two tables. She stated she did not know how long she was swinging and no one told her to stop. She had previously swung between the two desks, but did not know how many times, or if there was a teacher present when she did it. Once before, she saw a boy, Lanier, swing between the desks. While she was swinging, she fell onto the floor striking her face. She later testified at her examination before trial that she thought she swung too fast and went too far back and fell.

Kelly Ann Delcasino testified that she had been employed, first as a substitute teacher, then as a permanent substitute. Thereafter, she was hired as a special education teacher in 2006 at the Tangier Smith School in the William Floyd School District. In June, 2006, she was provisionally certified to teach general education and special education from ages birth to 21. She did not have permanent certification as she had not yet obtained a master's degree. In June, 2006, she had a special education class wherein she was the only teacher for fifteen students. There were two teachers aides, Carrie Tylee and Tina Hilton, working in her class assigned "one-to-one" to two students. She stated that Rachael had been placed in special education as she was speech/language impaired. Rachael had an IEP (Individualized Education Plan), which she followed. She stated that Rachael did not like to sit in her seat, wandered around the room, talked a lot and did not like to sit with other kids. On numerous occasions, she spoke to Rachael about this, and indicated on her report card that Rachael needed to find ways to get the wandering out of her system. When Rachael's mother was told of the problem, she advised that she had the same problem at home as Rachael was always moving. Ms. Delcasino and Rachael's mother drafted a behavior chart wherein Rachael would receive a sticker prize if she stayed in her seat a certain amount of time.

Ms. Delcasino testified that because Tina Hilton was not in, Joan Brendel was substituting as a regular substitute in her class. Both Carrie Tylee and Joan Brendel were present when the incident occurred. The children were in the classroom attending a morning meeting. They were seated in assigned seats on the carpet in front of the chalkboard. All the students had gone to their assigned spots on the carpet, except Rachael. She asked Rachael four or five times to come to the carpet. Ms. Delcasino testified that Rachael had started to swing on the desk, and she told Rachael to stop. She stated Rachael giggled, as she always did, and started to walk around. Rachael then went back by the desks. Ms. Tylee was sitting in back of Rachael by her student, and Ms. Brendel was trying to encourage Rachael to sit down. However, Rachael kept walking in a circle around the desk. Ms. Delcasino saw Rachael with her hands on the desks on either side of her, begin to lift herself up. She had been instructed not to do this previously. Ms. Brendel went over to stop her, telling Rachael to get on the carpet with everyone else. When Ms. Delcasino turned to the other students, she heard a noise. As she looked up, she saw Rachael on the floor, face down.

Carrie Tylee testified to the extent that in June 2006 she had been employed by the William Floyd School District for four years and worked at Tangier Smith Elementary School as a teaching assistant to assist special educations student on a one-to-one basis. She had the same student throughout the 2005 through 2006 school year. On the date of the accident, there were fifteen students in the classroom, as well as Kelly Delcasino, the teacher, and Joan Brendel, a substitute teacher's aide. At the time of the accident, Ms. Delcasino was sitting in the rocking chair reading a story, and she was seated next to her student at her

desk. Ms. Tylee stated that she happened to turn when she heard clanking and saw Rachael, whom she thought had been on the floor, swinging on the desks. When Rachael got off the floor and started to swing on the desks, with one hand on each of two desks, so she asked her to sit down; however, Rachael did not sit down and kept pacing around the classroom, giggling, and swinging on the desks. Ms. Delcasino spoke to Rachael, and she herself spoke to Rachael again, but Rachael did not sit down. Rachael then swung her feet forward and backward so high that her feet could reach the chairs from another desk and put her feet on top of them on the forward swing. This all occurred "within moments." She looked away, then she heard a noise and a cry. She did not actually see Rachael fall. Ms. Tylee stated that the behavior issues with Rachael during the school year included: not listening, drawing instead of writing, being unfocused, and walking around the classroom when she was supposed to be seated.

Joan Breindel testified to the effect that she had been employed by the William Floyd School District for about twenty and a half years. At the time of the deposition, she was working at the office and library. She worked in the special education class on multiple occasions with Ms. Delcasino when the other paraprofessional was out. She was present when Rachael was injured. Ms. Delcasino was sitting on the carpet with the students. Ms. Breindel testified that she was standing by Rachael's side when she fell, as Rachael was swinging on the desks front to back. She did not see Rachael fall as she had looked to the other students for a split second, but heard a bump when she fell. When Rachael fell, she had been swinging for just seconds. Ms. Delcasino had told Rachael to stop, and she did not, so Ms. Delcasino told Rachael again. Ms. Breindel testified that she went to the area where Rachael was because she was not sitting on the carpet and was not listening to Ms. Delcasino.

Based upon the adduced testimonies, it is determined that the defendant has established its prima facie entitlement to summary judgment dismissing the complaint. "The existence of a legal duty is an essential element of a negligence claim. It is a plaintiff's obligation also to establish a breach of that duty and that the injuries claimed were proximately caused by the breach" (***Shante v City of New York***, 190 AD2d 356, 598 NYS2d 475 [1st Dept 1993]). A teacher may be charged only with reasonable care such as a parent of ordinary prudence would exercise under comparable circumstances (***Ferraro v Board of Education of the City of New York***, 32 Misc2d 563, 212 NYS2d 615 [2d Dept 1961]). Schools will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (***Mirand v City of New York***, 84 NY2d 44, 614 NYS2d 372 [1994]). Where an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not the proximate cause of the injury, and summary judgment in favor of the defendant school is warranted (***Tanenbaum v Minnesauke Elementary School***, 73 AD3d 743, 901 NYS2d 102 [2d Dept 2010];***Link v Quogue Union Free School District***, 38 AD3d 719, 832 NYS2d 623 [2d Dept 2007];***Eberwein v Newburgh Enlarged City School Dist,*** 31 AD3d 492, 818 NYS2d 255 [2d Dept 2006];***Convey v Rye School Dist.***, 271 AD2d 154, 710 NYS2d 641 [2d Dept 2000]).

In this action, the teacher and teacher's aides had experienced the usual behavioral problem with Rachael walking around on the date of the accident. The staff was aware that Rachael did not like to sit. When Rachael started walking, giggling, and circling the desks, then started to swing on the desks, she was only swinging for seconds as the teacher's aides and Ms. Tylee told her to stop and sit down. Within seconds of starting to swing on the desks, Rachael fell. Thus, the defendants, who were intervening by directing Rachael to stop swinging and to sit down, did not have the opportunity to intervene on the infant plaintiff's behalf to prevent injury or to stop her within seconds of her engaging in the dangerous swinging conduct (*see*

***DeMunda v Niagara Wheatfield Board of Education***, 213 AD2d 975, 625 NYS2d 764 [4th Dept 1995]; *compare,* ***Blair v Board of Education of Sherburne Earlville Central School***, 86 AD2d 933, 449 NYS2d 566 [3d Dept 1982]). Here, the defendants have established entitlement to judgment as a matter of law by submitting evidence that the incident occurred in so short a period of time that any alleged lack of supervision was not the proximate cause of the infant plaintiff's injuries. The adduced testimonies establish that the teacher and school employees were attentive and acting with the prudence of ordinary parents. Rachael's mother experienced the same difficulty with Rachael not wanting to sit at home. Additionally, while walking around is not a dangerous activity, it has been demonstrated that it was not foreseeable that Rachael would suddenly start swinging on the desks. As soon as she did start swinging, Ms. Delcasino, and Ms. Tylee intervened by directing Rachael to stop and to sit down, and Ms. Breindel intervened by approaching the child. However, the infant plaintiff ignored the directions, failed to respond to the attempts to supervise her, and fell by swinging her legs too far. Thus, it has been established that the actions by the school and its employees did not proximately cause the infant plaintiff's injuries.

In opposition, the plaintiffs failed to meet their burden of raising a triable issue of fact. Although the plaintiffs assert that there are questions of fact concerning whether the defendant properly supervised the infant plaintiff, and whether the defendant followed the IEP, Ms. Delcasino testified that she did follow the IEP. The plaintiffs have not submitted evidentiary submissions to demonstrate otherwise. The allegation that Ms. Delcasino did not follow the IEP is pure conjecture and does not establish proximate cause between any alleged negligence by the defendants and the manner in which the infant plaintiff was injured. The plaintiffs have not submitted expert testimony to demonstrate that there were additional steps which should have been taken to curtain Rachael from wandering. Counsel's unsupported speculation does not make his argument the standard to be followed by educational specialists (***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 520 [2d Dept 1984]). Rachael was not injured while wandering, rather her injury was a result of her spontaneous act of swinging on the desks. Only seconds passed before she fell. As Rachael testified, she swung too high and fell. The act of swinging was the proximate cause of her injury. During the seconds which passed while Rachael was swinging, school personnel were in the process of directing her to stop and sit down. In that the incident occurred so spontaneously, and lasted so short a period of time, any alleged lack of supervision cannot as a matter of law be said to be the proximate cause of Rachael's injuries. There was no testimony or admissible evidence to raise a factual issue as to whether the defendant school employees could have intervened to prevent the incident in the seconds that ensued from when Rachael started swinging on the desks.

Accordingly, upon reargument, summary judgment is granted and the complaint is dismissed in its entirety.

Dated: NOV 28 2011

J.S.C.
HON. JEFFREY ARLEN SPINNER

__X__ FINAL DISPOSITION ___ NON-FINAL DISPOSITION