SHORT FORM ORDER

COPY

INDEX No. 09-26360
CAL. No. 11-00307OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 5-26-11 (#001)
MOTION DATE 7-14-11 (#002)
ADJ. DATE 8-4-11
Mot. Seq. # 001 - MD
002 - MD

REBECCA LINTHWAITE, Plaintiff, - against - MOUNT SINAI UNION FREE SCHOOL DISTRICT and SACHEM SCHOOL DISTRICT, Defendants.	GLYNN MERCEP & PURCELL, LLP Attorney for Plaintiff North Country Road, P.O. Box 712 Stony Brook, New York 11790-0712 CONGDON, FLAHERTY, O'CALLAGHAN, et al. Attorney for Defendant Mount Sinai UFSD 333 Earle Ovington Boulevard, Suite 502 Uniondale, New York 11553-3625 DONAHUE, MCGAHAN, CATALANO, et al. Attorney for Defendant Sachem SD 555 North Broadway, P.O. Box 350 Jericho, New York 11753

Upon the following papers numbered 1 to 46 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-14 ; Notice of Cross Motion and supporting papers (002) 15-34; Answering Affidavits and supporting papers 35-39 ; Replying Affidavits and supporting papers 40-41; 42-44 ; Other 45-46; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendant, Mount Sinai Union Free School District, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the issue of liability is denied; and it is further

ORDERED that motion (002) by the defendant, Sachem Central School, pursuant to CPLR 3212 for summary judgment dismissing the complaint and cross claims asserted against it on the issue of liability is denied.

In this action, the plaintiff asserts that the defendants, Sachem School District ("Sachem") and Mount Sinai Union Free School District ("Mount Sinai"), were negligent in failing to provide proper instruction and safety equipment, and in supervising the plaintiff while she was taking part in a Mount Sinai physical education trip to Sachem, on April 16, 2008, where she sustained personal injuries. The

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plaintiff, after having climbed to the top of a ten foot climbing wall in a "challenge by choice" event, tried to help another student over the wall, lost her balance, and fell backwards. The plaintiff asserts that the defendants had actual and constructive notice of the dangerous conditions which caused her to sustain injury.

In motion (001), the defendant, Mount Sinai, seeks summary judgment dismissing the complaint on the basis that it was not negligent in supervising the plaintiff or in failing to provide a safe and padded area and to warn students not to help others over the wall. It further asserts that the plaintiff assumed the risk of the extracurricular activity, that it exercised reasonable care, that the plaintiff's injuries were not the result of any breach of duty owed to the plaintiff, that the climbing wall was not located on the grounds of Mount Sinai, and that Mount Sinai did not maintain the wall.

In motion (002), Sachem seeks summary judgment dismissing the complaint and cross claims against it on the basis that it did not breach any duty to the plaintiff, and that its alleged negligence did not proximately cause the injuries claimed by the plaintiff.

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 motion (001), Mount Sinai has submitted, inter alia, an attorney's affirmation; copies of the notice of claim dated July 2, 2008, summons and complaint, its answer with a cross claim asserted against Sachem, discovery demands, and plaintiff's verified bill of particulars; a photograph of the wall; copy of the unsigned but certified transcript of the General Municipal Law 50-h hearing of Rebecca Linthwaite dated January 8, 2009; copies of the signed and certified transcript of the examination before trial of Rebecca Linthwaite dated September 21, 2010; the unsigned but certified transcript of Margaret Tuttle on behalf of Sachem dated November 29, 2010; the signed transcript of Karen Blumenthal on behalf of Mount Sinai dated November 29, 2010; and the affidavit of Kenneth R. Demas dated March 15, 2011,with attendant curriculum vitae.

In support of motion (002), Sachem has submitted, inter alia, two attorney's affirmations; copies of the notices of claim dated July 2, 2008 with a copy of a photograph of a wall; a copy of the summons and complaint, defendants' respective answers with cross claims, Mount Sinai's answer to the cross

claim, plaintiff's verified bills of particulars; photographs of the wall; a copy of the signed General Municipal Law 50-h transcript of Rebecca Linthwaite dated January 8, 2009; copies of the signed transcript of the examination before trial of Rebecca Linthwaite dated September 21, 2010; Mission Statement by Sachem; the signed and certified transcript of Margaret Tuttle on behalf of Sachem dated November 29, 2010; another copy of the Mission Statement of Sachem with annexed letter from Karen Blumenthal, undated, and a copy of the student accident report signed by Karen Blumenthal; the signed transcript of the examination before trial of Karen Blumenthal on behalf of Mount Sinai dated November 29, 2010; the affidavit of Kenneth R. Demas dated March 15, 2011 with attendant curriculum vitae; and a demand and response to the demand for discovery and inspection.

Schools are under a duty to adequately supervise the students in their charge and they 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]). The school's standard of duty to a student is what a reasonable prudent parent would have done under the same circumstances (NY PJI 2:227). "The standard for determining whether a school was negligent in executing its supervisory responsibility is, [w]hether a parent of ordinary prudence, placed in the identical situation and armed with the same information, would invariably have provided greater supervision" (***Mirand v City of New York,*** 190 AD2d 282, 598 NYS2d 464, aff'd 84 NY2d 44, 614 NYS2d 372 [1994]; *see*, ***In the Matter of the Claim of Jane Doe v Board of Education of Penfield School District, et al,*** 2006 NY Slip Op 51615U, 12 Misc3d 1197A, 824 NYS2d 768 [Sup. Ct. of New York, Monroe County 2006]).

As set forth in ***Bowles v The Board of Education of the City of New York and the City of New York***, 2007 NY Slip op 50573U [Supreme Court of New York, Kings County 2007], "Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision.... To find that a school district has breached its duty to provide adequate supervision, a plaintiff must show that the district had sufficient specific knowledge or notice of the dangerous conduct and that the alleged breach was the proximate cause of the injuries sustained.... Moreover, when 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 district] is warranted," citing, ***Ronan v School District of the City of New Rochelle***, citations omitted, quoting ***Mirand v City of New York***, citations omitted, ***Nocilla v Middle Country School Dist.***, citations omitted.

Based upon the evidentiary submissions, it is determined that neither Sachem nor Mount Sinai have established prima facie entitlement to summary judgement dismissing the complaint due to the existence of factual issues in the moving papers which preclude summary judgment.

Kenneth Demas set forth in his affidavit that he has been in the adventure education field since 1982 and has been certified as a national trainer for Project Adventure for 23 years. He set forth the transcripts and materials reviewed and states that the level of supervision was appropriate and in keeping with the nature of the activity. He stated that the Sachem teacher, Margaret Tuttle, was in a position which enabled her to move to either direction in front of or behind the wall, and permitted her to move to an appropriate position in the event that additional spotting was required. He states that both teachers were placed appropriately. He continues that both teachers responded to the loss of balance of Rebecca

in addition to other spotters being present. He continues that the instructions given by Ms. Tuttle was appropriate and in keeping with the accepted model for instruction on this activity. While explaining the challenge to the group, Ms. Tuttle walked the group to the front and rear of the wall and explained the responsibilities associated with each side. She was clear that students were spotters from beginning to end. Demas continues that instruction in any Adventure Education program never explains how to do a particular challenge, as students, while working together, are to utilize previously learned concepts and experiences to solve the problem. He continues that the wall is considered a low element, and that spotting is the accepted safety procedure for the activity. The use of helmets, matting, and the belay systems is not consistent with industry standards. Demas continues that level 2 certification, which both Karen Blumenthal of Mount Sinai and Tuttle have, involves both a written test and hands on application of skills, such as quality and clarity of instructions, as well as spotting technique, positioning, and practice.

The affidavit of Mr. Demas is not supported by admissible evidence. Expert testimony is limited to facts in evidence (*see* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]), which evidence has not been provided herein. Neither the expert or either party has submitted a copy of the industry standards for Project Adventure, the number and positioning of spotters for the specific activity, the student to adult ratio, the instructions given to spotters, or the instructions to be provided to students participating in the event pursuant to the industry standard. Although Demas avers that teacher training involves spotting technique, positioning and practice, he does not set forth the standards for the same or aver that such was utilized during the event in which the plaintiff sustained injury. The exact number of students participating has not been established, as Ms. Blumenthal stated she had about fifty students in her two classes and was unsure how many students attended the field trip, but thought it was about 40 students. There was only one teacher supervising the students until Ms. Blumenthal arrived at that particular event, immediately prior to the plaintiff's fall. Although the defendants claim that Project Adventure is an extracurricular activity and that the plaintiff assumed the risk of the activity, the plaintiff testified that this class was taken in place of the usual physical education class. Thus whether the class was for credit or was an extracurricular activity has not been established.

There was testimony by Ms. Blumenthal that the event in which the plaintiff was injured was "challenge by choice", meaning each student did not have to participate in the event. However, the plaintiff testified that her understanding of "challenge by choice" was that she could do the activity by her own free will and that no one was to be forced into an activity. However, when it came time for the wall activity, she and her friends were told they had to do it; they were not told that there would be repercussions if they did not do it. Thus, there are factual issues concerning the definition of "challenge by choice", if the students had a choice as to participating in the event, or whether there was pressure exerted on them to participate.

There are further factual issues concerning whether the students were properly instructed with regard to the presence and the use of the ropes on the back of the wall, and whether the ropes were suitable to stabilize the student and prevent the student from falling off the narrow platform. The

plaintiff testified that on the date of the incident, there were no mats or other safety precautions. The rope that was on the back wall was used for walking down the wall and was not there to stabilize when up on the platform. She never noticed loops on the ropes. Ms. Tuttle testified that she tells students there are ropes to put a hand in, if needed, and that there will be spotters to help them walk down. Additional factual issues exist as to whether the supervision and spotting was adequate, whether the spotters were properly trained and instructed, and whether a parent of ordinary prudence, placed in the identical situation and armed with the same information, would have provided greater supervision to the students including adequate placement and training of the appropriate number of spotters. Although Mr. Demas averred that the use of helmets, matting, or the belay system is not consistent with industry standards, he does not state what the industry standard is, and whether the failure to provide such safety equipment is inconsistent with industry standards. A further question exists as to whether the platform was constructed pursuant to industry standards.

Since defendants failed to establish their entitlement to judgment as a matter of law, the burden has not shifted to the plaintiff to raise a triable issue of fact (*see*, ***Krayn v Torella,*** 833 NYS2d 406, NY Slip Op 03885 [2d Dept 2007]***; Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, motions (001) and (002) by Sachem and Mount Sinai for summary judgment dismissing the complaint are denied.

Dated: Dec. 28, 2011

W. Gerard Asher
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION