SHORT FORM ORDER

INDEX No. 09-1706
CAL No. 10-02375OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 2-25-11 (#002)
MOTION DATE 3-25-11 (#003)
ADJ. DATE 4-25-11
Mot. Seq. # 002 - MG
003 - XMD

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JEFFREY MARSHALL, by his mother and natural guardian, MICHELLE MARSHALL, and MICHELLE MARSHALL, Individually,

Plaintiff,

- against -

THE BOOSTER CLUB OF SMITHTOWN, INC., SMITHTOWN COMMUNITY YOUTH FOOTBALL, INC., and SMITHTOWN CENTRAL SCHOOL DISTRICT,

Defendant.

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Attorney for Defendants Smithtown Booster Club and Smithtown Central School District
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants, dated 2/1/11, and supporting papers (including Memorandum of Law dated ___); (2) Notice of Cross Motion by the plaintiffs, dated 3/17/11, supporting papers; (3) Affirmation in Opposition by the defendants, dated 4/18/11, and supporting papers; (4) Reply Affirmation by the plaintiffs, dated 4/22/11, and supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that, after careful review of the court file and the affirmation and documents submitted by the parties, the Court, sua sponte, hereby recalls and vacates its prior order dated September 14, 2011; and it is further

ORDERED that the Court now issues the following order in its place and stead:

ORDERED that the motion by defendants Booster Club of Smithtown, Inc. and Smithtown Central School District for summary judgment dismissing plaintiffs' complaint is granted; and it is further

ORDERED that plaintiffs' cross motion for judgment in their favor pursuant to CPLR 3211 (b) dismissing the first, second, third and seventh affirmative defenses contained in moving defendants' answers is denied.

Plaintiff Michelle Marshall commenced this action on behalf of herself and her son, infant plaintiff Jeffrey Marshall, to recover damages for injuries he allegedly sustained on August 7, 2008 while participating in a summer football camp operated by defendants Booster Club of Smithtown, Inc. and Smithtown Community Youth Football, Inc. The football camp was conducted on the grounds of the Great Hollow Middle School, a school owned and operated by defendant Smithtown Central School District. Infant plaintiff allegedly was injured during a practice drill when another player participating in the drill, disregarding instructions given by the coach, struck infant plaintiff in the left knee with his shoulder pad, lifted him off his feet and threw him to the ground. By their bill of particulars, plaintiffs allege defendants were negligent in permitting infant plaintiff to engage in an excessively dangerous activity; in failing to provide infant plaintiff with adequate supervision by placing him in a scrimmage exercise with older, heavier and more experienced players; and in failing to warn infant plaintiff or guard against the foreseeable danger of participating in such an exercise.

Defendants Booster Club of Smithtown, Inc. and Smithtown Central School District now move for summary judgment dismissing plaintiffs' complaint on the grounds infant plaintiff assumed the risk of injury when he decided to participate in the football camp, and that their alleged lack of adequate supervision was not the proximate cause of his injuries. Plaintiffs oppose the motion and cross-move for judgment in their favor pursuant to CPLR 3211 (b) dismissing the first, second, third and seventh affirmative defenses contained in defendants' answer.

In an affidavit submitted in support of the motion, infant plaintiff states that at the time of the accident he was engaged in the bag/alley drill, which required two players, running parallel to each other, to turn and make contact using their shoulder pads. Infant plaintiff states that he was inadvertently paired up with a taller, stronger and more experienced player during the drill, as the coach merely told his group to form two lines and face each other. Infant plaintiff further states he observed players fooling around and pushing each other during the camp, and that he did not hear or see any coach trying to prevent the players' unruly behavior.

During his examination before trial, infant plaintiff testified he was placed in the ten-to-fourteen age group when he joined the camp, and that he was given safety equipment, including shoulder, thigh and knee pads, as well as a helmet. He testified neither he nor his parents made any complaints during the first three days of activities, and that he returned to the camp on the fourth day despite reservations about the way coaches paired up different sized players during some of the drills. Infant plaintiff testified he was wearing all of his safety gear on the day of the accident, that the coach gave the players instructions before commencing the drill, and that none of the players who went before him deviated from the coach's instructions. Infant plaintiff testified he was the defensive player during the drill and that he was unexpectedly lifted from his feet and dropped to the ground when the player holding the ball stooped and tackled his knees instead of touching shoulder pads as instructed by the coach. He testified that two other coaches came over to where he laid injured on the ground and escorted him to the parking lot from which he was eventually taken to the hospital via ambulance.

During his examination before trial, Timothy McManus, one of several alumni coaches at the football camp, testified all the children were divided into groups based on age and then sub-divided among alumni coaches to perform different types of drills. McManus testified that there were two senior coaches at the camp who supervised all the alumni coaches and oversaw all the drills to ensure they were conducted properly. He further testified that while he had no formal training as a coach, he played football for twelve years and had been an alumni coach at the camp during the previous year. McManus testified he was in charge of infant plaintiff's group at the time of the accident, and that the drill they were engaged in did not require the players to tackle each other.

During his examination before trial, James Saladino, one of two senior coaches overseeing the football camp, testified he chose alumni from Smithtown Central School District who excelled at football, played the sport at college level, and displayed a high level of responsibility to serve as alumni coaches at the camp. Saladino testified he obtained a degree in physical education from Hofstra University, and that he coached football within the Smithtown Central School District for many years prior to overseeing the football camp. He testified that while he was familiar with the state and federal high school sport associations, he was not sure which particular set of rules promulgated by those associations governed the activities of the football camp. Saladino further testified that while he did not know whether alumni coach McManus grouped players involved in the drill according to size or whether a senior coach was observing the drill prior to the accident, he did not receive any complaints from players, parents or staff regarding the type of drills or the conduct of participants prior to infant plaintiff's accident. He also testified that the bag/alley drill in which infant plaintiff was involved did not require the participants to tackle each other.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The proponent has the initial burden of proving entitlement to summary judgment (*see* ***Winegrad v New York Univ. Med. Ctr.***, 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 (*id.*). Once a prima facie showing is made, the burden shifts to the opponent of the motion who, in order to defeat summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact or demonstrate an acceptable excuse for his failure to do so (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2d Dept 1989]). The opponent must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleading are real and capable of being established at a trial (*see* ***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Summary judgment shall be granted when the cause of action or defense is established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party (CPLR 3212 [b]).

Students voluntarily engaging in sporting activities will not be deemed to have assumed the risk of reckless or intentional conduct, or concealed or unreasonably increased risks (*see* ***Morgan v State***, 90 NY2d 471, 662 NYS2d 421 [1997]). Although the organizers of a summer camp may be held liable for a coach's inadequate supervision which creates or fails to protect a student from unreasonably increased

risk of harm (*see e.g.* ***Bollou v Ravena-Coeymans-Selkirk School Dist.***, 72 AD3d 1323, 898 NYS2d 358 [3d Dept 2010]; ***Kane v North Colonie Cent. School Dist.***, 273 AD2d 526, 708 NYS2d 203 [3d Dept 2000]), camps, like schools, are not insurers of safety, and are not required to continuously supervise and control all the movements and activities of the children entrusted in their care (*see* ***Fintzi v New Jersey YMHA-YWHA Camps***, 97 NY2d 669, 739 NYS2d 85 [2001]; ***Harris v Five Point Mission–Camp Olmstedt***, 73 AD3d 1127, 901 NYS2d 678 [2d Dept 2010]). In the context of injuries caused by the acts of fellow players, because the camp "cannot be held liable for every thoughtless or careless act by which one student may injure another" (***Lawes v Board of Educ. of City of N.Y.***, 16 NY2d 302, 306, 266 NYS2d 364 [1965]), a plaintiff must establish that the authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused the injury such that the act of the third party could reasonably have been anticipated (*see* ***Mirand v City of New York***, 84 NY2d 44, 49, 614 NYS2d 372 [1994]). Moreover, where an incident occurs in so short a span of time that even the most intense supervision could not have prevented it, a defendant's alleged lack of supervision cannot be the proximate cause of the injury and it must be granted summary judgment (*see* ***Harris v Five Point Mission–Camp Olmstedt***, *supra*; ***Janukajtis v Fallon***, 284 AD2d 428, 726 NYS2d 451 [2d Dept 2001]; ***Convey v City of Rye School Dist.***, 271 AD2d 154, 710 NYS2d 641 [2d Dept 2000]).

Although infant plaintiff did not assume the risk of being tackled and thrown to the ground during a drill which did not require the participants to tackle each other (*see* ***Morgan v State***, *supra*), defendants demonstrated that the conduct of their coaches did not create, conceal or unreasonably increase the risk of infant plaintiff's injuries (*see* ***Harris v Five Point Mission–Camp Olmstedt***, 73 AD3d 1127, 901 NYS2d 678 [2d Dept 2010]; ***Ragusa v Town of Huntington***, 54 AD3d 743, 804 NYS2d 441 [2d Dept 2008]). Significantly, infant plaintiff testified he was wearing protective gear provided by the camp at the time of the incident and that coach McManus specifically instructed the players that the drill required they only touch shoulder pads rather than tackle each other. Infant plaintiff further testified that the players who went before him did not deviate from the coach's instructions, and that he was surprised when his counterpart suddenly stooped, tackled and threw him to the ground. The evidence adduced by defendants also demonstrate that they did not have sufficiently specific notice of the conduct which caused the infant plaintiff's injuries, as infant plaintiff testified that he never met or had any previous contact with the player prior to the drill (*see* ***Mayer v Mahopac Cent. School Dist.***, 29 AD3d 653, 815 NYS2d 189 [2d Dept 2006]; ***Convey v City of Rye Sch. Dist.***, *supra*). Additionally, no evidence exists, other than the player's alleged nick name of "Underarmor," to suggest that defendants had any previous knowledge of his aggressive tendencies such that his conduct could reasonably have been anticipated (*see* ***Mirand v City of New York***, *supra*; ***Lawes v Board of Educ. of City of N.Y.*** , *supra*). Moreover, defendants' alleged lack of adequate supervision could not have been the proximate cause of infant plaintiff's injuries, as the adduced evidence reveals that the conduct giving rise to the injuries occurred in so short a span of time that even intense supervision could not have prevented it (*see* ***Martinez v City of New York***, 85 AD3d 586, 925 NYS2d 490 [1st Dept 2011]; ***Mofatt v North Colonie Cent. School Dist.***, 82 AD3d 1311, 917 NYS2d 754 [3d Dept 2011]; ***Harris v Five Point Mission–Camp Olmstedt***, *supra*)

In opposition, even affording them the benefit of every favorable inference, plaintiffs failed to raise a triable issue warranting denial of the motion (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*). Although plaintiffs assert that Coach McManus unreasonably increased the

risk of injury to infant plaintiff by pairing him with a player who was taller and stronger, infant plaintiff's own testimony reveals the drill did not involve tackling, that he and the opposing player were within the ten-to-fourteen age group, and that it was the opposing player's spontaneous and impulsive conduct that caused his injuries (*see* ***Mirand v City of New York***, *supra*; ***Lawes v Board of Educ. of City of N.Y.*** , *supra*). Additionally, plaintiffs failed to demonstrate what specific safety standard or guidelines, if any, were broken when defendants paired the boys together in a non-tackling drill (*see* ***Merson v Syosset Cent. School Dist.***, 286 AD2d 668, 670, 730 NYS2d 132 [2d Dept 2001]; ***Dash v City of New York***, 236 AD2d 579, 580, 654 NYS2d 33 [2d Dept 1997]). Furthermore, the affidavit by plaintiff's expert, Steve Bernheim, fails to raise a triable issue of fact as it is nothing more than a statement directing the court to examine expert reports which were purportedly annexed to "Exhibit'D'" of plaintiffs' cross motion. A review of the exhibit reveals that no reports were included with the moving papers, and that Exhibit D consists of the expert's resume, expert witness disclosures prepared by plaintiffs' attorney, and two stories printed in the Journal of the Nassau County Bar Association describing Bernheim's expertise in the field of sport injury cases. In the absence of a substantive report by the expert addressing the circumstances of the accident and plaintiff's injuries, such documents are of no evidentiary value and are insufficient to warrant denial of the motion (*see* ***Zuckerman v City of New York***, *supra*; ***Columbia Ribbon & Carbon Mfg. Co. v A-1-A Cop.***, 42 NY2d 496, 398 NYS2d 1004 [1977]). As for infant plaintiff's assertion that he observed horseplay and rough-housing during the camp, plaintiffs submitted no evidence that the opposing player was engaged in horseplay any time prior to the accident, or that the infant plaintiff made any such complaint. Indeed, Saladino testified he did not receive any complaints from players, parents or staff regarding the type of drills or the conduct of participants prior to infant plaintiff's accident. Therefore, the motion by defendants for summary judgment dismissing plaintiffs' complaint is granted. Finally, in light of the above, plaintiffs' cross motion for an order dismissing the first, second, third and seventh affirmative defenses contained in defendants' answers is denied, as moot.

Dated: 1/12/12

PETER H. MAYER, J.S.C.