| **Minerva v Half Hollow Hills Cent. Sch. Dist.** |
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| 2013 NY Slip Op 31091(U) |
| May 6, 2013 |
| Sup Ct, Suffolk County |
| Docket Number: 10-3580 |
| Judge: Peter H. Mayer |
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SHORT FORM ORDER

INDEX No. 10-3580
CAL. No. 12-016980OT

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

COPY

***PRESENT:***

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 11-29-12
ADJ. DATE 2-5-13
Mot. Seq. # 002 - MD

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| LIAM MINERVA, AN INFANT UNDER THE AGE OF FOURTEEN (14) YEARS OF AGE, BY HIS MOTHER AND NATURAL GUARDIAN, AMY MINERVA, AND AMY MINERVA, INDIVIDUALLY,<br><br>Plaintiffs,<br><br>-against-<br><br>HALF HOLLOW HILLS CENTRAL SCHOOL DISTRICT AND JOSEPH DEROSA, AN INFANT UNDER THE AGE OF FOURTEEN (14) YEARS OF AGE BY HIS FATHER AND NATURAL GUARDIAN, JOSEPH DEROSA, AND JOSEPH DEROSA, INDIVIDUALLY,<br><br>Defendants. | FELDMAN, KRAMER & MONACO, P.C.<br>Attorney for Plaintiffs<br>330 Vanderbilt Motor Parkway<br>Hauppauge, New York 11788<br><br>CONGDON, FLAHERTY, et al.<br>Attorney for Defendant Half Hollow Hills CSD<br>333 Earle Ovington Boulevard, Suite 502<br>Uniondale, New York 11553-3625<br><br>NICOLINI, PARADISE, FERRETTI & SABELLA<br>Attorney for Defendants DeRosa<br>114 Old Country Road, Suite 500<br>P.O. Box 9006<br>Mineola, New York 11501-9006 |

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant School District, dated October 23, 2012, and supporting papers 1 - 23; (2) Affirmation in Opposition by the plaintiff, dated January 7, 2013, and supporting papers 24 - 29; (3) Affirmation in Opposition by the DeRosa defendants, dated January 28, 2013, and supporting papers 30 - 31;(4) Reply Affirmation by the defendant School District, dated January 30, 2013, and supporting papers 32 - 33; (5) Reply Affirmation by the defendant School District, dated February 4, 2013, and supporting papers 34 - 35; (~~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 this motion by the defendant Half Hollow Hills Central School District for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied.

This action was commenced to recover damages, personally and derivatively, for personal injuries allegedly sustained by the infant plaintiff, Liam Minerva (Liam), on April 24, 2009, when he

was wrestling with a fellow student during recess at Otsego Elementary School within the Half Hollow Hills Central School District (the School District). The complaint alleges that the defendant school district is liable for the infant plaintiff's injuries based on, *inter alia*, its negligence in supervising the students at the school that day. The complaint also alleges that the infant defendant Joseph DeRosa (Joey) negligently or intentionally caused Liam's injuries.

The School District now moves for summary judgment on the sole ground that Liam is not entitled to recover as a matter of law because he was a voluntary participant in an "altercation and struck the first blow." In support of its motion, the School District submits, among other things, the pleadings, an incident report, the depositions of the parties, and the depositions of four nonparty witnesses. Initially, the Court notes that a number of the deposition transcripts of the parties which have been submitted are certified but unsigned, and that the School District has failed to submit proof that the transcripts were forwarded to the witnesses for their review (*see* CPLR 3116 [a]). The Court may consider the parties' unsigned deposition transcripts submitted in support of the motion as the parties have not raised any challenges to their accuracy (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; *see also* ***Bennet v Berger***, 283 AD2d 374, 726 NYS2d 22 [1st Dept 2001]; ***Zabari v City of New York***, 242 AD2d 15, 672 NYS2d 332 [1st Dept 1998]).

The four nonparty witnesses noted above, were 5th Grade students allegedly present at the time that Liam was injured. However, the Court notes that the depositions of the four nonparty witnesses are unsigned, and that the School District has failed to submit proof that the transcripts were forwarded to the witnesses for their review (*see* CPLR 3116 [a]). Under the circumstances, the deposition testimony of the nonparty witnesses is not in admissible form (*see* ***Marmer v IF USA Express, Inc.***, 73 AD3d 868, 899 NYS2d 884 [2d Dept 2010]; ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Mauss***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]). In addition, it is a prerequisite to the admission of a private document offered in evidence by a party to an action that the authenticity and genuineness of the document be established (*see* ***Horowitz v Kevah Konner, Inc.***, 67 AD2d 38, 414 NYS2d 540 [1st Dept 1979]; ***Prestige Fabrics v Novik & Co.***, 60 AD2d 517, 399 NYS2d 680 [1st Dept 1977]; ***Material Men's Mercantile Assn., Ltd. v Material Men's Credit Agency, Inc.***, 191 AD 73, 180 NYS 801 [1st Dept 1920]; *see eg.* ***People v Boswell***, 167 AD2d 928, 562 NYS2d 289 [4th Dept 1990]; ***Greenberg v Manlon Realty***, 43 AD2d 968, 352 NYS2d 494 [2d Dept 1974]). Here, the nonparty depositions and the incident report are inadmissible, and they have not been considered herein.

Liam testified at a 50-h municipal hearing on September 24, 2009 and he was deposed on August 3, 2010. His testimony was essentially the same at both proceedings and can be summarized as follows: He was in the 5th Grade at Otsego Elementary School (school) on the day of this incident. There were five 5th Grade classes at the school, which had a 20-minute recess period before they went to lunch. Liam stated that there were three playgrounds at the school with a lot of running space, that each class had a lunch monitor who took them out onto the playground for recess, and that the lunch monitor for his class was a Ms. Darlene. On the day of this incident, a group of approximately 15 students were in a "free-for-all wrestling match," where they all played around and wrestled as soon as recess began. Approximately 15 minutes into recess, Joey, another 5th Grader, challenged him to wrestle. Liam

testified that he said no at first, and walked away seven to ten steps, that Joey called him a "chicken," and that he turned around, walked back, and "we faced off." He indicated that he made the first move, took Joey to the ground in a headlock, held it for five seconds, and then got up "because he thought it was over." He stated that he took two steps away, and that Joey got up and hit him in the back, knocking him to the ground. While he was on his stomach, Joey grabbed his left arm, pulled it up behind him, and yanked it. He stated that he screamed for Joey to get off him, but that Joey kept going until his arm "snapped," that Joey was on top of him for 30 seconds, and that his friend Sonny came over once he started screaming to ask Joey to get off of him. Liam further testified that the lunch monitors stay on the blacktop near the school, but move around.

Amy Minerva, Liam's mother, testified at a 50-h municipal hearing on September 24, 2009 and she was deposed on August 3, 2010. She testified that she did not observe this incident, that she received a call from the Nurse at the school that Liam was injured, and that she had not made any complaints about Joey's behavior before the incident. She stated that she did not make any complaints about the supervision of the playground before this incident, and did not know of anyone else making complaints.

At his deposition, Joey testified that, during recess, the 5th Grade boys would play wrestling at recess in the grass area behind the "Big Toy," which is a large play set on the playground. On the day that Liam was hurt, a group of 10 to 15 kids started play wrestling at the start of recess. He remembers that Sonny Quagliata and Philip LaGreca were in the 5th Grade that year.[1] Joey further testified that he and Liam were in the group that was play wrestling, that he did not see how Liam got hurt, and that Liam just said "Ow, my arm." He stated that he did not know where the lunch monitors were when Liam got hurt, that he thinks that Liam was hurt approximately 5 minutes before the end of the recess period, and that he does not remember playing with Liam just before he said "Ow, my arm."[2]

Jane Lucca (Lucca) was deposed on November 21, 2011, and testified that she was employed as a lunch monitor at the school on the date of this incident, that she was assigned one of the five 5th Grade classes at the school, and that her duties included the welfare and safety of the students and watching them on the playground during recess. She stated that on the day of this incident she was walking on the blacktop between the school building and the "Big Toy." Lucca further testified that she was on the blacktop when a student informed her that Liam was hurt, that she went to Liam, who was lying on the ground behind the slide on the Big Toy, and that she used a walkie-talkie to call the school nurse. She stated that wrestling is not a permitted activity for the students, that she did not remember where the other four lunch monitors were while she was monitoring the playground, and that no other lunch monitor came over to Liam after he was injured. Lucca further testified that she did not remember how much of the 20-minute recess period had elapsed when she was alerted that Liam had been injured.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to

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[1] The named students are two of the four nonparty witnesses who were deposed in this action.

[2] The deposition transcript of Joseph DeRosa, Joey's father, was submitted and reviewed by the Court. However, the Court does not deem it necessary to summarize said testimony herein.

judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

The School District contends that because Liam voluntarily entered into a fight with Joey and struck the first blow he is precluded from recovering for negligent supervision because his conduct was a direct cause of the incident. It is well settled that "liability for injuries resulting from a fight between two students cannot be predicated on negligent supervision if the plaintiff was a voluntary participant in the fight" (***Williams v Board of Educ. of City School Dist. of City of Mount Vernon***, 277 AD2d 373, 717 NYS2d 190 [2d Dept 2000]; *see also* ***Ruggerio v Board of Educ. of City of Jamestown***, 31 AD2d 884, 298 NYS2d 149 [4th Dept 1969] *affd* 26 NY2d 849, 309 NYS2d 596 [1970].

Here, there is a issue of fact as to whether Liam voluntarily entered into a fight under these circumstances, or whether he intended merely to engage in more play wrestling with Joey (***McKinnon v Bell Sec.***, 268 AD2d 220, 700 NYS2d 469 [1st Dept 2000]; *cf.* ***MacNiven v East Hampton Union Free School Dist.***, 62 AD3d 760, 878 NYS2d 449 [2d Dept 2009] [infant plaintiff "jumped in" to a fight between other team members]; ***Williams v City of New York***, 41 AD3d 468, 837 NYS2d 300 [2d Dept 2007] [defendants established prima facie that the infant plaintiff was a voluntary participant in fight]; ***Legette v City of New York***, 38 AD3d 853, 832 NYS2d 669 [2d Dept 2007] [defendants established prima facie that the infant plaintiff was a voluntary participant in the fight]; ***Pitner v Brentwood Union Free School Dist.***, 254 AD2d 340, 678 NYS2d 665 [2d Dept 1998] [infant plaintiff a voluntary participant in fight]; ***Danna v Sewanhaka Cent. High School Dist.***, 242 AD2d 361, 662 NYS2d 71 [2d Dept 1997] [infant plaintiff voluntarily entered into fight and struck the first blow]; ***Ruggerio v Board of Educ. of City of Jamestown***, *supra* [high school student elected to engage in fight with another student]).

Failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

In addition, the record reveals that there are issues of fact regarding the plaintiff's claim that the School District failed to adequately supervise the infant plaintiff. While not insurers of the safety of its students, schools are under a duty to adequately supervise the students in their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (*see* ***Mirand v City of New York,*** 84 NY2d 44, 614 NYS2d 372 [1994]; ***Swan v Town of Brookhaven***, 32 AD3d 1012, 821 NYS2d 165 [2d Dept 2006]). "[A] school is obligated to exercise such care over students in its charge that a parent of ordinary prudence would exercise under comparable circumstances" (***Krumbiegel v Riverhead Cent. School Dist.***, 37 AD3d 766, 830 NYS2d 762 [2d Dept 2007]; *see* ***David v County of***

***Suffolk***, 1 NY3d 525, 775 NYS2d 229 [2003]). The record contains uncontradicted evidence that the 5th Grade boys were engaged in "play wrestling" activity, admittedly prohibited by the school, for approximately 15 minutes before Liam was injured. It has been held that, "[g]enerally, issues of proximate cause are for the fact finder to resolve" (***Gray v Amerada Hess Corp.***, 48 AD3d 747, 748, 853 NYS2d 157 [2d Dept 2008], quoting ***Adams v Lemberg Enters., Inc.***, 44 AD3d 694, 695, 843 NYS2d 432 [2d Dept 2007]). In addition, it is well settled that a court's responsibility in considering a motion for summary judgment is issue finding, not issue determination (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rennie v Barbarosa Transport, Ltd.***, 151 AD2d 379, 543 NYS2d 429 [1st Dept 1989]). Issues of negligence, proximate cause, and foreseeability are generally best left to a jury for resolution, even when the facts are undisputed (***Mei Cai Chen v Everprime 84 Corp.***, 34 AD3d 321, 825 NYS2d 184 [1st Dept 2006]; ***Vaswani v Martin***, 278 AD2d 96, 717 NYS2d 533 [1st Dept 2000]; ***Rotz v City of New York***, 143 AD2d 301, 532 NYS2d 245 [1st Dept 1998]). It cannot be said as a matter of law that a jury could not determine that the School District's failure to halt the play wrestling for a certain period of time amounted to a failure to supervise the students and the proximate cause of Liam's injury.

Because summary judgment deprives the litigant of his or her day in court, it is considered a "drastic remedy" which should be invoked only when there is no doubt as to the absence of triable issues (***Andre v Pomeroy***, 35 NY2d 361, 364 [1974]; ***Elzer v Nassau County***, 111 AD2d 212 [2d Dept 1985]). Indeed, where there is any doubt as to the existence of triable issues, or where the issue is even arguable, the Court must deny the motion (***Chilberg v Chilberg***, 13 AD3d 1089, 788 NYS2d 533 [4th Dept 2004], *rearg denied* 16 AD3d 1181, 792 NYS2d 368 [4th Dept 2005]; ***Barclay v Denckla***, 182 AD2d 658, 582 NYS2d 252 [2d Dept 1992]; ***Cohen v Herbal Concepts, Inc.***, 100 AD2d 175, 473 NYS2d 426 [1st Dept 1984], *affd* 63 NY2d 379, 482 NYS2d 457 [1984]).

Accordingly, the School District's motion for summary judgment dismissing the complaint is denied.[3]

Dated: 5/6/13

Peter H. Mayer
PETER H. MAYER, J.S.C.

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[3] The attorney for Joey and his father submits an affirmation in opposition to the instant motion incorrectly designated as a reply affirmation. He opposes the School District's motion on the ground that the notice of motion does not include a request that his clients' cross claims should also be dismissed. However, considering the findings herein, the Court deems the issue academic.