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SHORT FORM ORDER

INDEX No. 08-36240
CAL No. 12-00146OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 6-25-12 (#003)
MOTION DATE 6-26-12 (#004)
ADJ. DATE 11-27-12
Mot. Seq. # 003 - MD
004 - MD

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VINCENT S. AMANDOLA, an Infant over the age of 13 years, by his Father and Natural Guardian, GLENN AMANDOLA, and GLENN AMANDOLA, Individually,

Plaintiffs,

- against -

ROMAN CATHOLIC DIOCESE OF ROCKVILLE CENTRE, ST. PATRICK SCHOOL, REVEREND ELLSWORTH R. WALDEN, PAUL APONZA, an Infant over the age of 13 years, by his Parent and Natural Guardian, HUMBERTO APONZA, RYAN WOLSIEFER, an Infant over the age of 13 years, by his Parent and Natural Guardian, JAMES WOLSIEFER, DANNY CLEARY, an Infant over the age of 13 years, by his Parent and Natural Guardians, LAWRENCE J. CLEARLY, JR., and DONNA P. CLEARY and RYAN KETTELL, an Infant over the age of 13 years, by his Parent and Natural Guardian, JOHN KETTELL,

Defendants.

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Upon the following papers numbered 1 to 58 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; 17 - 48 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 49 - 54; 55 - 56 ; Replying Affidavits and supporting papers 57 - 58 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants The Roman Catholic Diocese of Rockville Centre, St. Patrick's School and Reverend Ellsworth Walden and the motion by defendants Ryan Kettell and John Kettell are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendants The Roman Catholic Diocese of Rockville Centre, St. Patrick's School, and Reverend Ellsworth Walden for summary judgment dismissing the complaint against them is determined as follows; and it is further

ORDERED that the motion by defendants Ryan Kettell and John Kettell (hereinafter known as the Kettell defendants) for summary judgment dismissing the complaint against them is denied.

Plaintiff Glenn Amandola commenced this action on behalf of himself and his infant son, infant plaintiff Vincent Amandola, to recover damages for injuries sustained by infant plaintiff as a result of assaults that occurred at defendant St. Patrick's School, s/h/a St. Patrick School, which is owned by defendant The Roman Catholic Diocese of Rockville Centre, s/h/a Roman Catholic Diocese of Rockville Centre. In 2006, infant plaintiff, who was a sixth grade student at St. Patrick's School, allegedly was sexually and physically assaulted multiple times at the school by a classmate, infant defendant Paul Aponza. In October 2007, while infant plaintiff was in the seventh grade, he allegedly was physically assaulted by infant defendants Ryan Wolsiefer, Danny Cleary, and Ryan Kettell. The complaint alleges that defendants The Roman Catholic Diocese of Rockville Centre, St. Patrick's School, and Reverend Monsignor Ellsworth Walden, the pastor of St. Patrick's Parish (hereinafter collectively known as the School defendants), were negligent in failing to supervise and restrain the students by allowing infant defendants to assault infant plaintiff. It further alleges that the School defendants were negligent in supervising the school employees and in hiring and retaining the school employees who supervised and taught infant defendants. The complaint further alleges causes of action for breach of contract, breach of implied covenant of good faith and fair dealing, and negligent infliction of emotional distress for expelling infant plaintiff from the school. As to the cause of action against infant defendants Ryan Wolsiefer, Danny Cleary and Ryan Kettell, it alleges that they bullied and physically assaulted infant plaintiff in October 2007.

The Kettell defendants move for summary judgment dismissing the complaint against them on the ground that there is no evidence that the contact between Ryan Kettell and infant plaintiff was harmful or offensive in nature. In support of their motion, the Kettell defendants submit a copy of the pleadings, and transcripts of the deposition testimony of infant plaintiff, Ryan Kettell and Danny Cleary.

The School defendants move for summary judgment dismissing the complaint against them on the ground that plaintiffs failed to demonstrate that their lack of supervision was the proximate cause of the injuries sustained by infant plaintiff. As to the alleged assaults committed by infant defendant Aponza, the School defendants contend that there was no specific knowledge or notice of the alleged dangerous conduct as the school semester had just commenced. As to the alleged assault by infant defendants Wolsiefer,

Cleary, and Kettell, the School defendants argue that there was no notice of a need for greater supervision as there was no known history of animosity between the students. In support of the motion, the School defendants submit, among other things, a copy of the pleadings, transcripts of the parties' deposition testimony, an affidavit and a transcript of the deposition testimony of Linda Pymm, assistant principal of St. Patrick's School, and an affidavit of Virginia Romaneck, a substitute teacher at the school.

The affidavit of Mrs. Pymm states that infant plaintiff and infant defendant Aponza were new transfer students during the 2006 to 2007 school year, and that she interviewed both children and their parents prior to their admittance. It states that there are no written records of infant defendant Aponza that reflected a history of violent or sexually inappropriate conduct, and that he did not have any past history of being a disciplinary problem. It states that sometime during the week of September 11th or September 18th, infant plaintiff's mother went to Mrs. Pymm's office and told her that infant defendant Aponza had been rubbing his genitals into infant plaintiff's backside. The affidavit states that infant plaintiff did not inform any school officials regarding infant defendant Aponza's behavior. It states that Mrs. Pymm assured infant plaintiff's mother that there would be an investigation into the matter, and that infant defendant Aponza denied the accusation. It states that the principal spoke to the parents of infant defendant Aponza, and directed that they keep him home from school for one week during the investigation, and that infant defendant Aponza left the school without returning during the investigation. The affidavit further states that infant defendants Wolsiefer, Kettell, and Cleary had attended St. Patrick's for several years prior to 2007 incident, and that none of them had any history of violent behavior or history of being physically or verbally abusive to any other student prior to the 2007 incident.

Ms. Romaneck's affidavit states that on the day of the October 2007 incident, she played a film for the class and, when class was over, she turned on the lights and walked to the doorway to dismiss the class. It states that she positioned herself in the doorway so she could keep her attention focused upon both the children who were in the process of leaving the classroom and those who had already assembled out in the hallway. It states that she did not observe the alleged incident, and that she monitored dismissal for approximately one minute before being alerted to an incident that occurred in the music room between infant plaintiff and several other boys. The affidavit states that infant plaintiff advised her that he had been injured, and she sent him to the nurse's office. It further states that there were no warnings or anything else that occurred during the class which would alert her that there might be a disturbance between infant plaintiff and any of the other students in the class.

Plaintiffs oppose the motion by the Kettell defendants, arguing that there is a triable issue of fact as to whether the contact between infant defendant Kettell and infant plaintiff was harmful and offensive. Plaintiffs also oppose the motion by the School defendants, arguing that they had a responsibility to protect infant plaintiff from infant defendant Aponza, because they were given actual notice of his prior dangerous behavior. Plaintiffs also argue that Romaneck failed to adequately supervise the students in her class when infant plaintiff was allegedly assaulted. In opposition, plaintiffs submit a copy of a police statement of a nonparty witness regarding the alleged assault of infant plaintiff by infant defendants Wolsiefer, Cleary, and Kettell, hospital records from the emergency department of Huntington Hospital, and correspondences sent by Walden to the parents of the students involved in the 2007 incident. The Kettell defendants oppose the School defendants' motion for summary judgment, arguing that a triable issue of fact exists as to whether school officials were on notice of infant defendant Aponza's behavior.

At his examination before trial, infant plaintiff testified that he started attending St. Patrick's School in the sixth grade, and that within a few weeks another student named Paul Aponza began kneeing him from behind. He testified that infant defendant Aponza would do this daily and, when infant plaintiff's friend tried to intervene, he also was assaulted. He testified that he told infant defendant Aponza to stop hitting him, but that he did not tell his teacher about the incidents. Infant plaintiff testified that the assaults escalated, and that infant defendant Aponza would grab and touch his genitals. He stated that he told his mother about what infant defendant Aponza was doing, and that his mother informed the principal. He testified that the principal interviewed him regarding the incidents, and later told him that, as no teacher witnessed the incidents, she could not punish infant defendant Aponza. Infant plaintiff testified that infant defendant Aponza touched him inappropriately the next day in the hallway of the school the day after the meeting with the principal. He testified that he informed his mother and his mother went to speak to the principal again. Infant plaintiff stated that after his mother's second meeting with the principal, he and infant defendant Aponza were given detention together during lunch recess. He explained that the sexual assaults continued daily, that the police became involved in the case and that infant defendant Aponza eventually left the school. He testified that there were no incidents of assault after infant defendant Aponza left the school, until an incident during music class in his seventh grade. He testified that at the time of the second incident, the class was watching a movie with the lights out when the substitute teacher stepped out of the classroom and a student named Tim Pamlini flipped his chair from underneath him. He stated that he fell to the floor with the chair on top of him, and that another student shouted, "kick him while he's down." He testified that he observed infant defendants Cleary and Wolsiefer start kicking him in the stomach, legs and his head. He stated that he covered his face and told them to stop, and that a student named Kyle McCarthy jumped in front of the group to stop them from kicking him. Infant plaintiff testified that infant defendants Wolsiefer, Kettell, and Cleary were acquaintances of his and that he had no prior problems with them before the subject incident. He stated that Kettell apologized for his role in the incident.

At his examination before trial, infant defendant Ryan Kettell testified that he was friends with infant plaintiff and that on the day of the incident there was a substitute music teacher. He testified that he was also friends with infant defendants Wolsiefer and Cleary, but that he does not recall if they were in the room when the incident occurred. He testified that someone pulled infant plaintiff's chair causing him to fall to the floor, and that infant plaintiff was laughing. He testified that he observed Kyle McCarthy kicking plaintiff twice in the chest, but does not recall if anyone else kicked infant plaintiff. Infant defendant Kettell stated that he used his foot and "tapped" infant plaintiff's foot twice as a joke because someone yelled out, "kick him while he's down." He stated that he did not tap infant plaintiff's foot hard, and that he left the classroom afterwards. He testified that he heard someone say that infant plaintiff was crying so he returned to the classroom, helped infant plaintiff up from the floor and brought him to the school nurse. He testified that infant plaintiff was laughing and joking on the way to the nurse's office.

At his examination before trial, infant defendant Daniel Cleary testified that prior to the incident, infant plaintiff was a constant annoyance and disruption and getting the class into trouble. He testified that as infant plaintiff was about to get up from his seat, someone pulled the chair out from under him, another person yelled, "kick him while he's down," and a "mob" surrounded infant plaintiff. He testified that infant plaintiff was laughing as Kyle McCarthy kicked him in the head, and a student named Will Lalor kicked him in the chest. He testified that he did not observe infant defendant Wolsiefer kick infant plaintiff and that infant defendant Kettell tapped infant plaintiff on the leg. He stated that he tried to assist infant

plaintiff, but that he was pushed from behind. He further testified that when he left the class with infant defendant Wolsiefer, infant plaintiff was still on the floor.

At his examination before trial, infant defendant Ryan Wolsiefer testified that the incident occurred at the end of class after the bell rang, and that he was walking out of the class room when he heard a student named J.J Hickey yell, "kick him while he's down." He testified that infant plaintiff was curled up on the floor laughing and he does not recall if anyone kicked infant plaintiff.

At her examination before trial, Joan Amandola, infant plaintiff's mother, testified that she first became aware of an incident between infant defendant Aponza and her son while she was volunteering at the school, when infant plaintiff told her that infant defendant Aponza had kneed him. She testified that she brought infant plaintiff to Mrs. Pymm, the assistant principal, and told him that he needs to speak to her if someone is bothering him. She testified that a few weeks later when she picked infant plaintiff up from school, he was crying hysterically and told her that infant defendant Aponza was beating him and touching his private parts. She testified that she reported the incident to the police and spoke to the assistant principal and principal the next morning. She stated that they told her that unless another person sees the incident, they cannot take one student's word over the other, and that infant plaintiff and infant defendant Aponza would serve detention together during recess. She testified that infant defendant Aponza left the school within a few weeks, but that he continued to inappropriately touch infant plaintiff prior to leaving the school. She testified that after infant defendant Aponza left the school, there were no other incidents until the subsequent year when infant plaintiff was kicked by a group of boys during music class. She stated that when infant plaintiff returned from school and informed her of the incident, she took him to the hospital and the police were contacted. She further stated that after she informed school officials, she and her husband attended two meetings with the parents of boys involved in the alleged kicking incident and school officials. She testified that the fathers of infant defendants Cleary and Wolsiefer refused to apologize for the incident as their sons had denied kicking infant plaintiff. She testified that she and her husband attended a meeting with Monsignor Walden, who informed them that it would be in the best interest of the school for infant plaintiff to leave.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

It is well settled that a school has a duty to provide supervision to ensure the safety of the students in its charge, and is liable for foreseeable injuries proximately caused by the absence of adequate supervision (*see* ***Mirand v City of New York***, 84 NY2d 44, 614 NYS2d 372 [1994]; ***Staten v City of New York***, 90 AD3d 893, 935 NYS2d 80 [2d Dept 2011]; ***Nash v Port Wash. Union Free School Dist.***, 83 AD3d 136,

922 NYS2d 408 [2d Dept 2011]). "In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated" (***Mirand v City of New York***, *supra*; *accord* ***Bucholz v Patchogue-Medford School Dist.***, 88 AD3d 843, 931 NYS2d 113 [2d Dept 2011]). Consequently, an injury caused by an impulsive and unanticipated act of a fellow student will not give rise to liability absent proof of prior conduct that would have put a reasonably prudent person on notice to protect against the injury-producing act (*see* ***Schleef v Riverhead Cent. School Dist.***, 80 AD3d 743, 915 NYS2d 506 [2d Dept 2011]; ***Tanenbaum v Minnesauke Elementary School***, 73 AD3d 743, 901 NYS2d 102 [2d Dept 2010]; ***Mayer v Mahopac Cent. School Dist.***, 29 AD3d 653, 815 NYS2d 189 [2d Dept 2006]).

Here, viewing the record in a light most favorable to the plaintiffs, a triable issue of fact exists as to whether the School defendants' employees had knowledge constituting notice of a particular danger to the infant plaintiff prior the alleged assaults by infant defendant Aponza (*see* ***Smith v Poughkeepsie City School Dist.***, 41 AD3d 579, 839 NYS2d 99 [2d Dept 2007]; ***Hernandez v City of New York***, 24 AD3d 723, 808 NYS2d 714 [2d Dept 2005]). Infant plaintiff and his mother both testified that infant defendant Aponza continued to assault infant plaintiff after infant plaintiff's mother informed employees of the School defendants twice that infant defendant Aponza had assaulted him. However, the affidavit and deposition testimony of Mrs. Pymm states that after infant plaintiff's mother reported the alleged assault, infant defendant Aponza stayed home from school during the investigation and never returned. The conflicting deposition testimony of the parties as to whether there were subsequent assaults by infant defendant Aponza after it was reported to school officials raises issues of credibility which may not be resolved on a summary judgment motion (*see* ***Gordan v Honig,*** 40 AD3d 925, 837 NYS2d 197 [2d Dept 2007]; ***Ahr v Karolewski,*** 48 AD3d 719, 853 NYS2d 172 [2d Dept 2008]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]).

With regard to the fifth cause of action against the School defendants for breach of contract and the sixth cause of action for breach of implied covenant of good faith and fair dealing for expelling infant plaintiff, the School defendants argue that plaintiffs were required to commence these causes of action by service of a petition pursuant to Article 78 of the CPLR. Plaintiffs agree that the School defendants are entitled to a dismissal of these causes of action. The seventh and eighth causes of action for negligent infliction of emotional distress are dismissed because the School defendants' conduct was not sufficiently outrageous to support such a claim (*see* ***Stein v 92nd St. YM-YWHA, Inc.***, 273 AD2d 181, 710 NYS2d 68 [1st Dept 2000]). Moreover, a claim of negligent infliction of emotional distress may not be entertained where, as in this case, it falls within the ambit of other traditional tort claims asserted by the plaintiff (*see* ***Fischer v Maloney***, 43 NY2d 553, 402 NYS2d 991 [1978]; ***Butler v Delaware Otsego Corp.***, 203 AD2d 783, 610 NYS2d 664 [3d Dept 1994]).

As to the third cause of action for negligent hiring and retention, the School defendants have failed to address this claim in their motion papers. Thus, summary judgment as to this claim is denied. Accordingly, the School defendants motion for summary judgment in their favor is denied as to the first four causes of action, but is granted as to the fifth, sixth, seventh and eighth causes of action.

As to the Kettell defendants' motion for summary judgment, to sustain a cause of action to recover damages for civil assault, there must be proof of physical conduct placing the plaintiff in apprehension of harmful contact (*see* ***Marilyn S. v Independent Group Home Living Program, Inc.***, 73 AD3d 892, 903 NYS2d 403 [2d Dept 2010]; ***Cotter v Summit Sec. Servs., Inc.***, 14 AD3d 475, 788 NYS2d 153 [2d Dept 2005]). The elements of a cause of action to recover damages for civil battery are bodily contact, made with intent which is offensive in nature (*see* ***Fugazy v Corbetta***, 34 AD3d 728, 825 NYS2d 120 [2d Dept 2006]; ***Tillman v Nordon***, 4 AD3d 467, 771 NYS2d 670 [2d Dept 2004]; ***Zgraggen v Wilsey***, 200 AD2d 818, 606 NYS2d 444 [3d Dept 1994]). An action for civil battery may be sustained without a showing that the actor intended to cause injury as a resulted of the intended contact, but it is necessary to show that the intended contact was itself "offensive," i.e., wrongful under all the circumstances (***Zgraggen v Wilsey***, *supra*).

While it is undisputed that infant defendant Kettell intended to contact infant plaintiff, and that the contact was without consent, the Kettell defendants met their burden of showing that the contact was not "offensive" (*see* ***Marilyn S. v Independent Group Home Living Program, Inc.***, *supra*; ***Cotter v Summit Sec. Servs., Inc.***, *supra*). Infant defendant Kettell described the contact as a "tap" and that infant plaintiff was laughing during the incident. However, in opposition, plaintiffs raised a triable issue of fact as to whether the bodily contact was "offensive" (*see* ***Fugazy v Corbetta***, *supra*; ***Siegell v Herricks Union Free School Dist.***, 7 AD3d 607, 777 NYS2d 148 [2d Dept 2004]; ***Goff v Clarke***, 302 AD2d 725, 755 NYS2d 493 [3d Dept 2003]). In the police statement of Kyle McCarthy, he states that he observed "Daniel Cleary, Ryan Wolsiefer [sic], and Ryan Kettell [sic] kicking Vincent hard and Vincent started to cry," and that he was also kicked while trying to protect infant plaintiff. Moreover, the conflicting deposition testimony of the parties as to circumstances surrounding the incident raises issues of credibility which may not be resolved on a summary judgment motion (*see* ***Gordan v Honig***, *supra*; ***Ahr v Karolewski,*** *supra*; ***Kolivas v Kirchoff***, *supra*).

Accordingly, the Kettell defendants' motion for summary judgment dismissing the complaint against them is denied.

Dated: JUNE 6, 2013.

Daniel Martin
J.S.C.

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION