SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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MARVIN STATEN, an Infant Over the Age of 14 years by his Parent and Natural Guardian CASSANDRA DOZIER and CASSANDRA DOZIER, Individually,

Plaintiffs,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, CAMP CHEN-A-WANDA, INC., LOUIS CINTRON, SR., LOUIS CINTRON, JR., an infant over the age of 14 years by his Parent and Natural Guardian, LOUIS CINTRON, SR., BARBARA ROSE CINTRON and LOUIS CINTRON, JR. an infant over the age of 14 years by his Parent and Natural guardian, BARBARA ROSE CINTRON,

Defendants.

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Part C-2

Present:

HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No. 104585/07

Motion No: 1415-005
1471-006

The following papers numbered 1 to 6 were fully submitted the 3rd day of July, 2013:

Papers Numbered

Notice of Motion of Defendant Camp Chen-A-Wanda, Inc. for Summary Judgment (Affirmation in Support) (Dated April 25, 2013).....1

Notice of Motion of Defendants The City of New York and The New York City Department of Education for Summary Judgment (Affirmation, Memorandum of Law in Support) (Dated April 25, 2013).....2

Plaintiffs' Affirmation, Expert Affidavit, Memorandum of Law in Opposition to Summary Judgment Motion of Defendant Camp Chen-A-Wanda (Dated June 17, 2013).....3

Plaintiffs' Affirmation, Expert Affidavit, Memorandum of Law in Opposition to Summary Judgment Motion of Defendants The City of New York and The New York City Department of Education (Dated June 17, 2013).....4

Reply Affirmation in Response to Plaintiffs' Opposition to Defendant Camp Chen-A-Wanda's Motion for Summary Judgment (Dated July 1, 2013).....5

Reply Memorandum of Law in Support of The City of New York and The New York City Department of Education's Motion for Summary Judgment (Dated July 1, 2013).....6

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Upon the foregoing papers, the motion for summary judgment (No. 1415-005) of defendant Camp Chen-A-Wanda, Inc. (hereinafter the "Camp") is granted; the cross motion for summary judgment (No. 1471-006) of defendants The City of New York and The New York City Department of Education (hereinafter "City") is granted to the extent of dismissing the claims of the individual plaintiff, Cassandra Dozier. The balance of the cross motion is denied.

This matter arises out of an incident which occurred on August 25, 2007 at the Camp's premises in Pennsylvania, where the infant plaintiff, Marvin Staten (hereinafter "plaintiff") was enrolled in a week-long football camp with the balance of his high school football team. Plaintiff, who was entering his sophomore year at Tottenville High School on Staten Island, claims to have sustained extensive injuries to his left eye when he was struck by glass from a window pane which had allegedly been broken by a punch thrown by defendant and fellow teammate, Louis Cintron, Jr. (hereinafter "Cintron"). It appears undisputed that the window broke while plaintiff and/or Cintron were engaging in "horseplay."

At his deposition, plaintiff testified that shortly after dinner on the date of the accident, he was standing outside his cabin, looking in through a window at eye-level to "see if anybody was messing around with [his] stuff" when, after a few seconds, defendant Cintron "punched [through] the glass" (*see* Plaintiff's March 27, 2009 EBT, pp 70-71; Camp's Exhibit F). No criminal charges were filed against plaintiff's teammate, who was, however, dismissed from the camp, "cut" from his high school team, and suspended from Tottenville High School following the incident.

The claims against the Camp and the City are grounded in allegations of negligent supervision and maintenance of the premises where the incident occurred (*see* Plaintiffs' Amended Verified Complaint, Camp's Exhibit A, para "Thirty-Sixth").

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It is noted that prior to this incident, *i.e.,* on February 14, 2006, Cintron had been disciplined by Tottenville High School for engaging in disruptive conduct with another student (*see* City's Exhibit I; *see also* Staten v. City of New York, 90 AD3d 893). It is likewise noted that pursuant to a written contract drawn on Camp Chen-A-Wanda letterhead, dated and signed August 20, 2007, Tottenville High School coach Jim Munson agreed that "each bunk will be supervised by a coach, former player, or other adult who is at least nineteen years of age" (*see* City's Exhibit C). To the extent relevant, the bunk "leaders" supervising plaintiff's bunk were two seniors, one of whom was defendant Cintron.

In moving for summary judgment, Camp argues, *inter alia*, that: (1) it owed no duty to supervise plaintiff or to otherwise protect him from horseplay; (2) no facts have been adduced in support of plaintiffs' claim that the subject window constituted a "defective condition"; and (3) since the proximate cause of the accident was the sudden, unanticipated independent actions of Cintron (*i.e*., punching the glass), the Camp cannot be found liable for plaintiff's injury.

In opposition to the motion, plaintiff alleges, *inter alia*, that not only was the Camp negligent in its maintenance of the premises, but that it was negligent: (1) *per se* in using ordinary or "annealed" glass for the cabin windows rather than safety glass, in violation of Pennsylvania State and International Building Codes (*see* June 12, 2013 affidavit of Plaintiff's Expert, Michael J. Peterson, Plaintiff's Exhibit H); (2) in failing to properly exercise risk management, and (3) in failing to supervise its post-season campers and protect them against horseplay. Plaintiff further argues that while Cintron's actions might be considered "intervening," his conduct was not a superseding cause of the accident. Notably, plaintiff submits the affidavit of Michael J. Peterson (*see* Plaintiffs' Exhibit H), an "expert with 44 years in the camping industry and a co-author of the American Camp Association's '2006 Camp Accreditation Process Guide'" (*see* Plaintiffs'

Memorandum of Law), who opined, *inter alia*, "with a reasonable degree of professional certainty of the camping industry...that [the Camp] should have begun and completed replacement of all non-reinforced glass in hazardous or even marginally hazardous locations within [its] camp with safety impact rated glass, plexi glass (plastic),...safety film, or...reinforced...small gauge hardware cloth wire a full two decades before this accident." The expert further opined that had these steps been taken, the punch "would not [have] shattered safety impact rated glass, plexi-glass, glass covered with safety film or reinforced glass" (*id*.).

As previously indicated, the Camp's motion for summary judgment is granted, and the complaint and any cross claims as against this defendant are hereby severed and dismissed.

In the opinion of this Court, it is constrained by the 2005 decision of the Court of Appeals in Buchholz v. Trump 767 Fifth Avenue, (5 NY3d 1) to hold that the "conclusory testimony" offered by plaintiff's expert was "insufficient to raise a question of fact as to whether [the Camp] breached its duty to maintain[] [its] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" and, further, that the failure of plaintiff's expert to quote any "authority, treatise [or] standard" in support thereof rendered his ultimate opinion speculative and/or "unsupported by any evidentiary foundation...[sufficient] to withstand summary judgment (*id.* at 9 [internal quotation marks omitted]; *see* Diaz v. New York Downtown Hosp., 99 NY2d 542, 544). [1]

[1]The decedent in Buchholz was pushed and fell through an office window after engaging in "play fighting" with three co-workers following their attendance at a St. Patrick's Day Parade in 1999 (*id.* at 4). Plaintiff alleged that the premises' owner was negligent, *inter alia*, in failing to furnish shatterproof glass windows and a safety rail across the window's face in contravention of certain sections of the New York City Administrative Code, particularly §27-651 ("Panels subject to human impact loads"). Plaintiff's expert, a registered architect and licensed engineer, submitted an affidavit opining that the window's very low sill was problematic, and further, that "good and accepted engineering and building safety practices dictated that a protective barrier bar be installed" (*id*. at 6). Nevertheless, the trial court's denial of the owner's summary judgment motion was reversed on appeal (*see* Buchholz v. Trump 767 Fifth Ave., LLC, 4 AD3d 178) and affirmed by the Court of Appeals based, *inter alia*, on the speculative nature of the opinion of plaintiff's expert.

Here, plaintiff's expert placed substantial reliance on the language of the 2006 American Camp Association Accreditation Process Guide in formulating his opinion. However, although alleged to have been tested "numerous times in litigation", Mr. Peterson failed to demonstrate, *e.g.*, where or when this guide has been accepted as an authoritative reference work in any court of law, or its applicability to a camp constructed in the 1940s. Moreover, his opinion that the failure to replace unannealed windows violated certain Pennsylvania codes or statutes is not compelling or binding upon this Court. To the contrary, Peterson's reliance on 34 Pa. Admin. Code §47.398, to require the use of "safety glass" in bunk windows represents a misreading of the statute, as the provision in question was not adopted until 1972 (some thirty years after the Camp began its operations), and neither it nor any other Pennsylvania building code or regulation has been cited requiring that bunk windows be retrofitted to conform to the 1972 requirements (*cf*. Buchholz v. Trump 767 Fifth Avenue, 5 NY3d at 9). Moreover, he failed to show that the window in question was actually in a "hazardous" location for purposes of the cited codes, *i.e.*, within 24 inches of the bunkhouse door. In fact, no measurement was provided. "Although noncompliance with...a customary practice or industry standard may be evidence of negligence, the failure to abide by guidelines or recommendations that are not generally-accepted standards in an industry will not suffice to raise an issue of fact as to a defendant's negligence" (Diaz v. New York Downtown Hosp., 287 AD2d 357, 358, *affd* 99 NY2d 542 [citations omitted]; *see also* Ambrosio v. South Huntington Union Free School Dist., 249 AD2d 346). This, similarly to Buchholz, is just such a case[2].

The City's cross motion for summary judgment is granted in part, and denied, in part, as hereinafter provided.

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[2]Also worthy of note is the Camp's uncontroverted representation that no similar incidents (other than, *e.g.,* windows broken by vandalism) occurred during its sixty-year history (*see* February 3, 2010 EBT of Craig Neier, Camp's Exhibit C).

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In arguing for dismissal of the negligent supervision claim, the City argues that (1) it provided more than enough chaperones at the training camp, (2) issued oral and written instructions against the type of conduct which caused plaintiff's injury; (3) the sudden, spontaneous and unforeseeable nature of defendant Cintron's actions were such that no reasonable amount of supervision could have prevented the injury, and (4) it had no prior notice of the latter's propensity to engage in the type of conduct that caused plaintiff's injury. Moreover, the City maintains that it did not legally own, occupy, or control the Camp; that Cintron's independent and spontaneous actions breached any chain of causation connected to the condition or maintenance of the camp and/or its cabin windows; and that it possessed no actual or constructive notice of any dangerous condition regarding the composition of the window itself.

In opposition, plaintiffs argue, *inter alia*, that the lack of supervision which encouraged the horseplay causing the injury is evident by the City's failure to (1) place an adult in each cabin, as required under plaintiff's interpretation of the terms of its contract with the Camp (*see* City's Exhibit C); (2) adhere to the Regulations of the Chancellor governing adult supervision on school trips (*see* City's Exhibit D), and (3) comply with American Camp Association standard HR-10A and 10B regarding the supervision of campers (*see* June 12, 2013 affidavit of plaintiffs' expert, Michael J. Peterson, "Opinions 1").

Here, the duty of supervising the student/athletes was contractually assumed by the City. 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 the injury. Put simply, the third-party acts must reasonably have been anticipated (see Brandy B. v. Eden Cent. School Dist., 15 NY3d 297, 302; Mirand v. City of New York, 84 NY2d 44, 49; Shannea M. v. City

of New York, 66 AD3d 667; Doe v. Department of Educ. of City of NY, 54 AD3d 352). In this regard, actual or constructive notice to the school of prior similar conduct is generally required, since school personnel cannot be reasonably expected to guard against all of the sudden and spontaneous acts that take place among students on a daily basis.

Here, the proof of Cintron's 2006 suspension for fighting at school serves to preclude the City from demonstrating prima facie that his designation as bunk "leader" was reasonable as a matter of law (*see* Staten v. City of New York and Camp Chen-A-Wanda, Inc., 90 AD3d 893; *see also* September 16, 2009 EBT of James Munson, pp 16, 33, 39-42; the Camp's Exhibit E). Neither is Coach Munson's investigation purportedly uncovering a conflicting version of the events in which the breaking of the glass is attributed to plaintiff "put[ting] his face" against it (*see* EBT of James Munson, p 54) sufficient to warrant dismissal of the cause of action pleaded on behalf of the infant plaintiff.

However, it is well settled that a parent cannot recover for the loss of society and companionship of a child who was negligently injured (*see* White v. City of New York, 37 AD2d 603), while a claim for the loss of a child's services must be capable of monetarization in order to be compensable (*see* DeVito v. Opatich, 215 AD2d 714). Here, plaintiff's mother has offered no proof of the value of any services rendered to her by her son. As a result, so much of the complaint as seeks an award of damages in her individual capacity for the loss of her son's services must be severed and dismissed.

Accordingly, it is

ORDERED, that the motion for summary judgment of defendant Camp Chen-A-Wanda Inc. is granted, and the complaint and any cross claims as against this defendant are hereby severed and dismissed; and it is further

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ORDERED, that the cross motion for summary judgment of defendants The City of New York and The New York City Department of Education is granted to the extent that the cause(s) of action asserted by plaintiff Cassandra Dozier in her individual capacity are hereby severed and dismissed, and it is further

ORDERED that the remainder of the cross motion for summary judgment is denied.

E N T E R,

/s/
Hon. Thomas P. Aliotta
J.S.C.

Dated: September 18, 2013