SHORT FORM ORDER

INDEX No. 11-37610
CAL. No. 13-01610OT

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 11-19-13
ADJ. DATE 12-17-13
Mot. Seq. # 001 - MD

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JOSEPH JOHN GUIDA, an infant by his natural guardian, LOUIS E. GUIDA, JR., and LOUIS E. GUIDA, individually,

Plaintiffs,

-against-

MATTHEW REED, an infant by his father and natural guardian, STEPHEN REED, and STEPHEN REED, individually,

Defendants.

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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 October 29, 2013, and supporting papers 1 - 16; (2) Affirmation in Opposition by the plaintiffs, dated December 10, 2013, and supporting papers 1 - 21; (3) Reply Affirmation by the defendants, dated December 13, 2103, and supporting papers 22 - 23 (~~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 defendants 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 sustained by the infant plaintiff, Joseph John Guida (Joseph), on August 3, 2011, while playing in a travel league baseball game at Baseball Heaven, 350 Sills Road, Yaphank, in New York. Joseph was a member of the MLI Phantoms (Phantoms), which was participating in the summer baseball league organized by Baseball Heaven. The infant defendant Matthew Reed (Matthew) was a member of the Smithtown Bulls (Bulls) which was playing against the Phantoms on that date. In their complaint, the plaintiffs allege, among other things, that Matthew's "reckless and intentional ... actions ... exacerbated and unreasonably increased the risk beyond what is normally encountered, maliciously running into the

Plaintiff in flagrant disregard of baseball heaven's league rules, creating a dangerous condition over and above the usual dangers inherent in the game of baseball."

The following facts involving this incident are undisputed.[1] On August 3, 2011, the Bulls were at bat in the bottom of the first inning. Joseph was playing second base, and Matthew was on first base. The batter hit a ground ball to the shortstop, who threw the ball to Joseph. Joseph caught the ball, stepped on second base and attempted to throw the ball to first base to complete a double play. When the ball was hit, Matthew ran towards second base, slid and came into contact with Joseph's left leg.

The defendants now move for summary judgment on the grounds that Joseph assumed the risk of his activities and that the defendants did not breach a duty of care. In support of the motion, the defendants submit, among other things, the pleadings, the deposition transcripts of the parties, and the deposition transcripts of four nonparty witnesses. The deposition transcripts of the plaintiffs are certified but unsigned, and the defendants have failed to submit proof that the transcripts were forwarded to the witnesses for their review (*see* CPLR 3116 [a]). However, the Court may consider the 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]). In addition, the depositions of three of the four nonparty witnesses are unsigned, and the defendants have failed to submit proof that the transcripts were forwarded to those nonparty witnesses for their review (*see* CPLR 3116 [a]). Under the circumstances, the deposition testimony of three of the four 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]).

At his deposition, Joseph testified that he was 16 years old at the time of this incident, and that he began training in baseball when he was five years old, that there were "guidelines ... to prevent such injury," and that he was taught how "to get out of the way." He stated that, on the day of this incident, the batter hit the ball to the right of the shortstop, who fielded the ball, and that he went over to "turn the double play." He indicated that the shortstop threw the ball to him, he caught the ball and stepped on second base with his left foot, that "just as I was stepping on the base, I stepped back with my left foot," that he was on the back side of the base, and that he felt an impact. Joseph further testified that his "[l]eft foot was stepped probably two feet back from second base ... towards right field" at the time of impact, that the impact occurred "[p]robably two and a half feet" out of the base path, and that the impact occurred as the result of Matthew's slide.

Joseph's father, the plaintiff Louis Edward Guida, Junior (Guida), was deposed on February 21, 2013. He testified that he was an assistant coach for the Phantoms on the day of Joseph's accident, that he was standing on the third base line right next to the dugout at the time, and that he observed the

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[1] The Court will not undertake the daunting task of explaining the basic rules, and relevant terms, of the game of baseball to the uninitiated.

shortstop field the ball and throw towards second base. He stated that Joseph caught the ball, and as Joseph was backing up going towards centerfield, he was struck approximately three to four feet behind second base. He indicated that he saw Matthew running towards second base, that Matthew began his slide approximately one to two feet away from the base, and that Matthew slid with both feet "a good two feet high" off the ground. Guida further testified that, according to his understanding of the baseball heaven league rules, a player is supposed to slide right into a base, not so hard or fast as to slide "through" or past the base, always within the base path, and not "high." He stated that a slide should start three to five feet in front of a base, that you don't bring your legs up high, and that your legs should be no more than six to eight inches off the ground. He indicated that he observed Joseph catch the ball and almost simultaneously back off the base, that Joseph had his leg "planted" behind the base outside the base path starting to make the throw to first base, and that "the runner came in and that is when the damage happened." Guida further testified that after the play Matthew and the batter who hit the ball to the shortstop were called out.

At his deposition, Matthew testified that he was 17 years old at the time of this incident, and that he first played baseball when he was approximately nine years old. On the day of the game against the Phantoms, his father was acting as the head coach because the head coach was on vacation. He stated that it was the bottom of the first inning, that he was on first base, and that the batter hit a ground ball to the shortstop. Matthew further testified that he ran "as fast as I could straight to the bag," that he started his slide six to seven feet in front of the bag, and that he saw the second baseman "in front of second base ... closest to first base." He indicated that Joseph had his right foot on second base with the baseball in his hand, and that his right foot, which was extended in his slide, came into contact with Joseph's left foot or ankle. He stated that he knew he was out at second base, that the batter was called out for interference, and that interference is called when a player is "unable to get a throw off because the runner was in his way." Matthew further testified that the league rules require a runner to "slide or avoid," meaning that the runner can either "get out of play completely ... or you can slide directly into the bag staying in the base path."

Matthew's father, the defendant Stephen Reed (Reed), was deposed on May 24, 2013. He testified that he was filling in for the head coach on the day of this incident, that he was also the third base coach at the time of this incident, and that he did not see Matthew start his slide, but that he saw him slide "before he reached second base." He stated that the second baseman had his left foot on second base, that Matthew's foot which was on the ground struck Joseph in the "ankle area," and that Joseph was "flipped in the air." He indicated that Matthew and the batter running to first base were called out, but that he was unsure if it was for interference. Reed further testified that the league rules included a no contact rule and provided that a runner must "slide or avoid," meaning that "you slide into the bag or avoid the player ..."

At his deposition, nonparty witness Craig Denane (Denane) testified that he is a state certified high school baseball umpire, that he was the "field umpire" on the day of this incident, and that he was approximately 15 to 20 feet away from second base at the time of this incident. He indicated that "As the ball was put into play [Matthew] is forced onto the next base. He proceeded straight to the next base. When he saw the [second baseman] was coming into his baseline, he put himself on the ground in a legal sliding position and tried to slide to second base which he is entitled to do." Denane further testified that

the runner was in the base path, and that the second baseman "received the ball at second base. He touched the base in order to have the put out on the force play, and in his attempt to throw the ball to get the runner at first base, he came into the runner's base path." He indicated that the second baseman should have come off the base towards the centerfield side or the pitcher's mound to make his throw. Denane further testified that a runner is required to remain in the base path, that the "avoid contact" rule requires a runner to either "slide, give yourself up completely or move completely out of the way," and that, when a player is forced at a base, the rules require that the runner not "make contact beyond the base in which you are going to." He indicated that he did not remember if the batter running to first base was called out for interference, and that the runner from first to second base began his slide approximately 8 to 10 feet from second base. He stated that the second baseman stepped on second base with his right foot, and in attempting to throw to first base, he stepped forward with his left foot "and brought his right foot forward as well putting him on the first base side of second base in the runner's path." Denane then testified that the second baseman's right foot was on second base while attempting to tag the runner, and that his left foot was on the first base side of second base.

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 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]).

As a general rule, a plaintiff who voluntarily participates in a sporting or recreational event is held to have consented to those commonly-appreciated risks that are inherent in, and arise out of, the nature of the sport generally and flow from participation therein (*see* ***Morgan v State of New York***, 90 NY2d 471, 662 NYS2d 421 [1997]; ***Mendoza v Village of Greenport***, 52 AD3d 788, 861 NYS2d 738 [2d Dept 2008]; ***Paone v County of Suffolk***, 251 AD2d 563, 674 NYS2d 761 [2d Dept 1998]), including the injury-causing events which are the known, apparent, or reasonably foreseeable risks of the participation (*see* ***Cotty v Town of Southampton***, 64 AD3d 251, 880 NYS2d 656 [2d Dept 2009]; ***Rosebaum v Bayis Ne'Emon Inc.***, 32 AD3d 534, 820 NYS2d 326 [2d Dept 2006]). In addition, the plaintiff's awareness of risk is to be assessed against the background of the skill and experience of the particular plaintiff (*see* ***Maddox v City of New York***, 66 NY2d 270, 496 NYS2d 726 [1985]; ***Kremerov v Forest View Nursing Home, Inc.***, 24 AD3d 618, 808 NYS2d 329 [2 Dept 2005]; ***Gahan v Mineola Union Free School Dist.***, 241 AD2d 439, 660 NYS2d 144 [2d Dept 1997]). If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty" (***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]). Stated otherwise, the duty of the defendant is to protect the plaintiff from injuries arising out of unassumed, concealed, or unreasonably increased risks (*see* ***Manoly v City of New York***, 29 AD3d 649, 816 NYS2d 499 [2d Dept 2006]; ***Lapinski v Hunter Mountain Ski Bowl***, 306 AD2d 320, 760 NYS2d 549 [2d Dept 2003]; ***Pascucci v Town of Oyster Bay***, 186 AD2d 725, 588 NYS2d 663 [2d Dept 1992]).

A defendant participating in a sport "unreasonably increases the risks inherent in a sport only where his or her conduct is both without competitive purpose and constitutes a flagrant infraction unrelated to the normal method of playing the game" (***Anand v Kapoor***, 61 AD3d 787, 877 NYS2d 425 [2d Dept 2009]; citing ***Turcotte v Fell***, 68 NY2d at 441; ***Mayer v Gulmi***, 64 AD3d 754, 883 NYS2d 579 [2d Dept 2009]; ***Glazier v Keuka College***, 275 AD2d 1039, 713 NYS2d 381 [4th Dept 2000]; *cf.* ***Cook v Komorowski***, 300 AD2d 1040, 752 NYS2d 475 [4th Dept 2002] [no evidence that conduct of competitor was a flagrant infraction unrelated to normal method of playing the game and done without any competitive purpose]; ***Barton v Hapeman***, 251 AD2d 1052, 674 NYS2d 188 [4th Dept 1998] [opposing player's conduct was not flagrant infraction unrelated to normal method of playing hockey]; ***Rosenblatt v Kahn***, 245 AD2d 438, 666 NYS2d 666 [2d Dept 1997] [participant in softball game assumed risk as sliding into first base was expressly permitted by rules of play]).

Here, the defendants have failed to establish their prima facie entitlement to judgment as a matter of law. There are issues of fact as to where Joseph was positioned at the time of Matthew's slide, whether the slide was performed within the league rules, and whether that slide was a flagrant infraction of said rules. The court's function on summary judgment is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility (*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]).

In addition, the defendants have failed to establish that Matthew's conduct was not reckless or intentional or that it served a competitive purpose. Those determinations depend, at least in part, on where Joseph was positioned at the time of Matthew's slide, and the manner in which the slide was performed. It has been held that the defendant has the burden of establishing as a matter of law that plaintiff's action is barred by the doctrine of primary assumption of risk (***Weller v Colleges of the Senecas***, 217 AD2d 280, 635 NYS2d 990 [4th Dept 1995]). The question of whether Joseph assumed the risk of being impacted by Matthew's slide should be determined by the trier of fact, and may not be determined as a matter of law (***Anand v Kapoor***, *supra*; ***Jacobs v Kent***, 303 AD2d 1000, 757 NYS2d 408 [4th Dept 2003]; ***Laboy v Wallkill Cent. School Dist.***, 201 AD2d 780, 607 NYS2d 746 [3d Dept 1994]).

Here, the defendants have failed to establish their entitlement to judgment as a matter of law. Failure to make such prima facie showing 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*; *see also* ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***Bozza v O'Neill***, 43 AD3d 1094, 842 NYS2d 88 [2d Dept 2007]). Accordingly, the defendants' motion for summary judgment is denied.

Dated: 2/25/14

PETER H. MAYER, J.S.C.