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SHORT FORM ORDER

ORIGINAL

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INDEX No. 12-195

CAL. No. 16-00090OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 40 - SUFFOLK COUNTY

PRESENT:

Hon. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE 6-15-16
ADJ. DATE 6-15-16
Mot. Seq. # 004 - MD

RT, an Infant under the age of 18 years, by his mother and Natural Guardian, DOREEN TOSCIONE and DOREEN TOSCIONE, Individually,

Plaintiffs,

- against -

THREE VILLAGE CENTRAL SCHOOL DISTRICT,

Defendant.

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Upon the following papers numbered 1 to 43 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-39; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 40-41; Replying Affidavits and supporting papers 42-43; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant's motion for summary judgment dismissing the complaint against it is denied.

Plaintiffs commenced this action to recover damages for injuries allegedly sustained by infant plaintiff R.T. during a technology class at the Robert Cushman Murphy Junior High School located in Stony Brook, New York. The complaint, as amplified by the bill of particulars, alleges that infant plaintiff RT was assaulted by another student in the class on April 15, 2011. The complaint asserts causes of action based on negligence, negligent supervision and hiring, as well as a derivative cause of action by infant plaintiff's mother, plaintiff Doreen Toscione. Plaintiffs allege that defendant Three Village Central School District (hereinafter the School District) was negligent in failing to provide infant plaintiff with a safe environment by allowing, among other things, a known "trouble maker" with violent

propensities to remain undisciplined and unsegregated from the general student body. Plaintiffs further allege that the School District was negligent for the conduct of Mr. Derek Angiermaer, the technology teacher on the date of the incident, arguing that he did not adequately supervise the students in the classroom and was a proximate cause of plaintiffs' injuries.

The School District now moves for summary judgment dismissing the complaint on the ground that Mr. Angiermaer adequately supervised the students and was not a cause of plaintiffs' injuries. The School District argues further that it had no knowledge of any prior incidents between infant plaintiff and the assailant and could not have anticipated the assault. In support of the motion, it submits copies of the pleadings, the verified bill of particulars, the transcripts of infant plaintiff's testimony at a 50-h hearing and his examination before trial, the transcript of the deposition testimony of a nonparty witness, disciplinary records of the student who allegedly assaulted infant plaintiff, and a copy of a report prepared by a hearing officer for the superintendent concerning the subject incident.

Infant plaintiff (hereinafter RT) testified that on the date of the incident, he was in seventh grade and was attending a technology class that was taught by Mr. Derek Angiermaer. He testified that immediately prior to the incident, he was resting his head on the desk and that another student, Jayden, who he referred to as a "somewhat friend," pulled his head back and smashed it into the desk causing his front tooth to break. RT testified that he and Jayden were teasing each other prior to the incident, but that he had no indication that Jayden would do that to him. He testified that at the time of the incident, Mr. Angiermaer was in the classroom talking to another teacher, that he was not in his direct view, and that he and Jayden were not loud when they were teasing each other. RT testified that he informed Mr. Angiermaer of the incident and that Mr. Angiermaer gave him a pass to go to the nurse's office and told Jayden to walk him there and then proceed to the dean's office. He testified that he has been friends with Jayden since elementary school, and that Jayden often has outbursts similar to the subject incident with other students, but not with him.

Mr. Angiermaer testified that he is employed as a teacher by the School District and has been a technology teacher at Robert Cushman Murphy Junior High School for 11 years. He testified that on April 15, 2011, he was the teacher for the technology class and that he was retrieving Lego building parts from the materials closet at the time of the incident. He testified that he met Jayden in January 2011 when the class began. Mr. Angiermaer testified that he was unaware of any disciplinary problems with Jayden prior to the incident, and was unaware that Jayden was involved in any prior physical assaults. He testified that he thought Jayden was a "great student" and always the first to complete his assignments. Mr. Angiermaer testified that he did not hear any altercations prior to the incident and was not aware that it occurred until he was handing out the Lego pieces, when plaintiff handed him his tooth. Mr. Angiermaer testified that plaintiff and Jayden had previously sat together and selected each other as partners for projects, and that he is unaware of any previous verbal altercations between them. He testified that both boys were calm following the incident, and that he gave plaintiff a pass to go to the nurse and phoned administration to inform them that he was sending Jayden to them.

Mr. Neil Lederer testified that he was the interim superintendent of the School District during the 2010/2011 school year and worked there until June 30, 2012. He testified that his duties included

educational administration, which entails addressing student behavioral issues. Mr. Lederer testified that the School District was required to utilize a student code of conduct handbook, and that the handbook provides disciplinary consequences and procedures. He testified that Mr. Robert Neugebauer was the dean of discipline at the time of the incident, and that his duties include investigating student complaints, among other things. He testified that Mr. Neugebauer makes recommendations to the principal, who has the ultimate authority to determine the type of student discipline to be employed. He testified that student discipline is typically progressive, ranging from warnings to in-school suspension. Mr. Lederer was shown several incident reports prepared by school authorities for infractions allegedly committed by Jayden on September 17, 2010, October 22, 2010, November 5, 2010, December 17, 2010, January 5, 2011 and February 15, 2011. The reports involve physical assaults committed by Jayden against other students but do not involve RT. According to the incident reports, Jayden received in school suspensions and warnings as a result.

It is well settled that a party moving for summary judgment 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 Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***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 (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]. 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 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]).

A school has a common law duty to adequately supervise its students, as they have physical custody of the students, and stand in for their parents while in attendance (***Stephenson v City of New York***, 19 NY3d 1031, 954 NYS2d 782 (2012). As such, the school's duty of care is the same duty of a parent, and it is required to exercise such care as a parent of ordinary prudence would observe in comparable circumstances (***Mirand v City of New York***, 84 NY2d 44, 614 NYS2d 372 (1994). However, liability will not be imposed for injuries caused to plaintiff by unforeseeable acts of third parties (***Brandy B. v Eden Cent. School Dist.***, 15 NY3d 297, 907 NYS2d 735 [2010]), as schools are not insurers of safety, and they cannot supervise and control all movements and activities of their students (***Nash v Port Wash. Union Free School Dist.***, 83 AD3d 136, 922 NYS2d 408 [2d Dept 2011]). Therefore, to hold a school district liable for injuries caused by a third party, it must be established that the school district had sufficiently specific knowledge or notice of the dangerous conduct that caused plaintiff's injuries (***Fernandez v City of Yonkers***, 139 AD3d 895, 31 NYS3d 595 [2d Dept 2016]). "[A]n injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would put a reasonable person on notice to protect against the injury-producing act" (***Mirand v City of New York***, 84 NY2d 44, 49, 614 NYS2d 372).

The School District, as the movant, has the burden of establishing that it did not have knowledge or notice that the student who assaulted plaintiff would commit such act (*see* ***Cruz v Brentwood Union Free Sch. Dist.***, 125 AD3d 924, 5 NYS3d 184 [2d Dept 2015]). Here, the incident reports and disciplinary action taken against Jayden establish that the School District could have anticipated such conduct. In addition to having notice of the conduct, the injury must have been proximately caused by the lack of supervision (***Mathis v Board of Educ. of City of New York***, 126 AD3d 951, 7 NYS3d 182 [2d Dept 2015]). An accident that occurs "in so short a span of time that even the most intense supervision could not have prevented it," is not an accident that is caused by a lack of supervision (***Convey v City of Rye School Dist.***, 271 AD2d 154, 160, 710 NYS 2d 641 [2d Dept 2000]). Whether such supervision was adequate and, if inadequate, whether it was a proximate cause of the injury, is generally a question for the trier of fact to resolve (***DiGiacomo v Town of Babylon***, 124 AD3d 828, 2 NYS 3d 548 [2d Dept 2015]). Here, the School District has not established, prima facie, that it provided adequate supervision or took appropriate actions to provide a safe environment for its students (***Smith v Poughkeepsie City School Dist.***, 41 AD3d 579, 839 NYS2d 99 [2d Dept 2007]). Accordingly, the School District's motion for summary judgment in its favor dismissing the complaint is denied.

Dated: 10/21/16

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**