SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JULIO RODRIGUEZ III **PART 62**

Justice

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MICHAEL OREJUELA, MIGUEL OREJUELA

Plaintiff,

- v -

CITY OF NEW YORK, THE NEW YORK CITY BOARD/DEPARTMENT OF EDUCATION,

Defendant.

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INDEX NO. 151168/2017

MOTION DATE 09/05/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for SUMMARY JUDGMENT.

Plaintiffs Michael Orejuela and Miguel Orejuela ("plaintiffs") commenced this action seeking to recover damages allegedly sustained by infant plaintiff ("plaintiff") on January 20, 2016, during his gym class in P.S. 126. Plaintiff alleges that he was injured when a classmate hit his mouth with the handle of the classmate's hockey stick while they were playing puff hockey during gym class. Defendants City of New York and New York City Department of Education, collectively "City", now move for summary judgment pursuant to CPLR §3212. Plaintiff opposes the motion.

Parties' Contentions

First, the City argues that it is entitled to summary judgment because it did not breach its duty to supervise. It is their position that "no amount of supervision could have prevented Plaintiff's injuries, which resulted from the sudden, unforeseen and spontaneous actions of a classmate who accidentally struck Plaintiff's mouth during a game of puff hockey." (Defendants' motion, pg. 11.) Even assuming *arguendo* that defendants breached their duty of supervision, the City contends that it was not the proximate cause of plaintiff's "sudden and spontaneous incident." (*Id.* at 13.) Furthermore, the City moves to dismiss plaintiffs' allegation that the City was negligent in failing to provide mouth guards, helmets, and/or protective gear. Lastly, the City moves to dismiss this action against it on the ground that the City cannot be held liable for torts purportedly committed by DOE, which is a separate legal entity.

As a preliminary matter, in their opposition, plaintiffs stipulate to discontinue the instant action as against defendant City of New York only. (Plaintiffs' Affirmation in Opposition, pg. 2.) Plaintiffs further withdraw "all claims regarding lack of protective gear and inadequate

space." (*Id.*) Plaintiffs state that "[t]hough these [protective gear and inadequate space] are causative factors, and supported by the facts, proximate cause of plaintiff's injuries is the distribution of sticks." (*Id.*) It is the plaintiffs' position that "[u]nder the circumstances, a prudent parent would not have distributed the sticks at the time and place as this negligent teacher did." (*Id.* at 6.)

In reply, the City states that plaintiffs' allegation that DOE breached its duty to supervise plaintiff when the gym teacher, John DeMatteo ("Mr. D"), distributed the hockey sticks to the students was improperly asserted for the first time in opposition to the instant motion. Therefore, it is the City's position that this Court should disregard the new theory of liability.

Discussion

The proponent of a motion for summary judgment must tender sufficient evidence to show its entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The moving party must make a *prima facie* showing of entitlement to judgment by demonstrating the absence of any material issues of fact (*Pullman v. Silverman*, 28 NY3d 1060 [2016]). The papers will be scrutinized in a light most favorable to the non-moving party (*Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]). Once the proponent of a summary judgment motion makes such a *prima facie* showing, "the burden shifts to the opposing party to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so" (*Friedman v Pesach*, 160 AD2d 460 [1st Dept 1990]).

"Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision...Schools are not insurers of safety, however, for they cannot reasonably be expected to continuously supervise and control all movements and activities of students; therefore, schools are not to be held liable 'for every thoughtless or careless act by which one pupil may injure another'" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]).

"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... Even if a breach of the duty of supervision is established, the inquiry is not ended; the question arises whether such negligence was the proximate cause of the injuries sustained. In some cases, the wrongful conduct of a fellow pupil may be considered extraordinary and intervening, thus breaking the causal nexus between a defendant's negligent act or omission and a plaintiff's injury. The test to be applied is whether under all the circumstances the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the school's negligence." (*Id.*)

Upon a review of the motion papers and after oral argument, this Court finds that the City met its prima facie burden of demonstrating that the alleged inadequate supervision was not the

proximate cause of plaintiff's accident. In opposition, plaintiff failed to raise a triable issue of fact as to whether inadequate supervision was a proximate cause of the plaintiff's accident.

During his 50-h hearing, plaintiff testified that on the day of the accident, Mr. D divided the students into two groups to play hockey. Mr. D gave instructions on how to play hockey, even though "they weren't very much well explained". (Plaintiff's 50-h transcript, Exhibit E, Pg. 9.) Furthermore, plaintiff described the accident as follows: the goal was open and he asked someone to pass him the ball, "but a kid [Ethan] ran in front of [him]. Which by the way, he was on the same team, so it made no sense." (*Id.* at 14.) As plaintiff was getting low to hit the ball, Ethan swung the hockey stick and hit plaintiff's face. (*See id.*) The incident occurred about a minute and a half after the hockey game had started. (*Id.* at 16.)

During his deposition, Mr. D. testified, in relevant part, as follows: on the day of the accident, his students were playing puff hockey, which is a modification of regular hockey (Mr. D's EBT transcript, Exhibit I, Pg. 15.); puff hockey involves a nerf puff ball and plastic hockey sticks with a puff foam pillow piece at the end of the hockey stick (*id.* at 22-23.); Mr. D went over puff hockey lesson plans with the entire class prior to the students starting the game, with an emphasis on safety (*id.* at 14-20.); Mr. D did not witness the incident but based on his training as a teacher, he was able to adequately supervise the two hockey games that were going on during the gym class (*id.* at 20, 24-25).

Even assuming *arguendo* that there is a question of fact as to the adequacy of supervision, this Court finds that the inadequate supervision was not the proximate cause of the subject accident. The instant case is similar to *Mayer v. Mahopac Cent. School Dist.*, 29 AD3d 653 [2nd Dept 2006]. In *Mayer*, the plaintiff's accident occurred while playing floor hockey in a school gymnasium during a physical education class. Plaintiff alleged that he was controlling the ball when he tripped over a hockey stick that another student had thrown in the direction of the ball and had landed between his legs. There, the Second Department held that the plaintiff's accident was caused by a "spontaneous and unforeseeable act committed by a fellow…student" *(citing to Sangineto v Mamaroneck Union Free School Dist.*, 282 AD2d 596 [2001]). Similarly here, plaintiff's injury was caused by the spontaneous act of a fellow classmate, who struck plaintiff's mouth with a hockey stick during a hockey game. As demonstrated by the record, this incident "occurred in such a short span of time that it could not have been prevented by the most intense supervision." (*Kamara v City of New York*, 93 AD3d 449, 450 [1st Dept 2012], *citing to Paca v City of New York* 51AD3d991, 993 [2nd Dept 2008]). Accordingly, and upon the foregoing, including all papers and exhibits submitted by the parties, it is

ORDERED that defendants City of New York and DOE's motion for summary judgment dismissing plaintiff's complaint as against them is granted in its entirety; and it is further

ORDERED that defendants City of New York and DOE shall serve a copy of this order with notice of entry upon plaintiff, the Clerk of the Court (60 Centre Street, Room 141B), and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), within 30 days; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly and that the case be marked disposed.

Any argument or requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected. This constitutes the decision and order of the court.

December 30, 2019

HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE