At a Special Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, 92 Court Street, Binghamton, New York on October 21, 2019.

PRESENT: HON. FERRIS D. LEBOUS
JUSTICE, SUPREME COURT

STATE OF NEW YORK
SUPREME COURT :: BROOME COUNTY

KEVIN GRADY,

DECISION & ORDER

Plaintiff,

Index No.: EFCA2017002132
RJI Year 2019

vs.

CHENANGO VALLEY CENTRAL SCHOOL DISTRICT,
CHENANGO VALLEY BOARD OF EDUCATION,
MICHAEL ALLEN and MATTHEW FERRARO,

Defendants.

APPEARANCES:

COUNSEL FOR PLAINTIFF:

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THE LAW FIRM OF FRANK W. MILLER
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FERRIS D. LEBOUS, J.S.C.

This Decision and Order addresses defendants' motion for summary judgment dismissing the complaint pursuant to CPLR § 3212. Plaintiff Kevin Grady opposes the motion in all respects. The court heard oral argument of counsel on October 21, 2019.

BACKGROUND

This action arises from a personal injury suffered by plaintiff while participating in baseball practice for the Chenango Valley high school varsity baseball team. This accident occurred on March 8, 2017 and was the third practice of the season, but the first practice held outside. At the time of the accident the two coaches on the field were varsity baseball coach Michael Allen and junior varsity baseball coach Matthew Ferraro.

On the day of this accident, the varsity and junior varsity teams combined for a baseball drill that will be referred to herein as the "Warrior drill". The Warrior drill is comprised of two separate infield drills running at the same time. Coach Allen was positioned near home plate and hit a ground ball to the third baseman, who then threw the ball to a player positioned at the traditional first base. Simultaneously, Coach Ferraro, also positioned near home plate, was running a double play drill by hitting a ball to a player at the shortstop position who flipped the ball to a player at second base, who in turn threw the ball to a player at "Short First Base".

This "Short First Base" is positioned directly in the base path between first and second bases but near the traditional first base so as to replicate the throwing distance from second to first. The coaches had positioned a protective screen behind Short First Base but in front of the traditional first base to protect the players at the traditional first base. To be clear, this set up

meant that a player throwing from second base to the Short First Base was also aiming directly at the player at the traditional first base - protected only by the screen.

Plaintiff, approximately 5' 7" and a left-handed player, was one of four or five players taking turns receiving throws at the traditional first base when he was struck in the eye by an errant throw from second base intended for "Short First Base". The record does not contain any specific description of whether the ball went over the screen or one side of the screen. According to Allen's testimony, plaintiff had just caught a throw from third when he was struck by an errant throw from second base to Short First Base (Defs Ex G, p 124).

The protective screen placed between Short First Base and traditional first base was placed by varsity coach Allen. Coach Allen states the screen measured 7 feet by 7 feet and was the largest available at the school and he positioned it as a matter of "common sense and experience" (Defs Ex I, p 21; Allen Aff, ¶ 9). The distance between the SFB and traditional first base is described as "a few feet" (Ferraro Aff, ¶ 7).

Plaintiff suffered catastrophic injuries to his right eye and now has only partial peripheral vision in that eye, able to only see light and shapes. This action was commenced on September 7, 2017 by the filing of a summons and complaint containing two causes of action, namely negligence and negligent hiring, retention and supervision. On October 18, 2017, defendants interposed an answer with affirmative defenses. The parties engaged in discovery and plaintiff filed a note of issue on July 23, 2019. The scheduling of a pre-trial conference is being held in abeyance pending the resolution of this motion.

DISCUSSION

On a motion for summary judgment, the moving party must present evidentiary facts demonstrating the absence of any material issue of fact thereby establishing the party's right to judgment as a matter of law, while the opposing party must "[p]roduce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [citation omitted]" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The court must accept the non-moving party's evidence as true and grant him every favorable inference (*Hourigan v McGarry*, 106 AD2d 845 [3d Dept 1984], *lv dismissed* 65 NY2d 637 [1985]).

Generally, schools have a duty to reasonably and adequately supervise students in their charge and are liable for foreseeable injuries proximately related to the absence of adequate supervision and the applicable standard is that of an ordinary prudent parent in comparable circumstances (*Mirand v City of New York*, 84 NY2d 44 [1994]). The standard of care is *not* the same, however, when the student is participating in school-sponsored extracurricular athletic activity such as here. In extracurricular athletic endeavors, schools are required to exercise reasonable care to protect student athletes from any "unassumed, concealed or unreasonably increased risks" (*Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 658 [1989]).

"If the risks of the activity are fully comprehended or perfectively obvious, plaintiff has consented to them and defendant has performed its duty [citation omitted]" (*Turcotte v Fell*, 68 NY2d 432, 439 [1986]). Schools are not required to protect student athletes from risks inherent in the sport or the activity in which they are engaged (*Barretto v City of New York*, 229 AD2d

214, 218 [1st Dept 1997], *lv denied* 90 NY2d 805 [1997]; *Morgan v State of New York*, 90 NY2d 471, 484 [1997]). Notably, this "[p]rimary assumption of the risk doctrine also encompasses risks involving less than optimal conditions [citations omitted]" (*Bukowski v Clarkson Univ.*, 19 NY3d 353, 356 [2012]).

In support of their motion for summary judgment, defendants submit plaintiff's GML § 50-h hearing testimony and deposition testimony, affidavits from coaches Allen and Ferraro, as well as an expert affidavit from Scott R. Cassidy, the LeMoyne College baseball head coach.

In the first instance, the court does not find the affidavits from Cassidy, Allen or Ferraro particularly compelling. Each opine that the protective screen was proper in size and/or placed in the proper location to provide adequate safety to players standing at the traditional first base. However, none of the submissions, particularly the expert's opinion, is supported by any scientific or technical data supporting their conclusions.

That said, however, defendants have also submitted plaintiff's GML § 50-h testimony in which he stated he was an experienced and knowledgeable baseball player having participated in organized baseball from a young age starting with T-ball through high school (Defs Ex G, p 12). Plaintiff also admitted he signed a Duty to Warn form acknowledging "participation in interscholastic athletics involves certain inherent risks" (Defs Ex Q). Further, plaintiff testified that he had previously participated in this Warrior drill while a member of both the JV and varsity teams (Def Ex G, pp 35-36).

As for the day of this accident, plaintiff testified that "there were many errant balls which was unusual compared to the times we've done it before" (Def Ex G, p 36) which he believed was due to new and inexperienced JV players on the field (Def Ex G, p 36). Plaintiff recalls that immediately prior to his injury that there were at least a couple of other errant throws that hit other players (Ex G, p 37). Most notably, plaintiff testified as follows:

> Q. At anytime prior to being injured did you complain to anyone about how the drill was being conducted?
> A. Yes.
> Q. To whom did you complain?
> A. I complained to the other first basemen.
> Q. What was your complaint?
> A. This drill was dangerous.
> Q. Why did it seem dangerous to you?
> A. I was watching other errant throws and…
> Q. How many other errant throws had you seen prior to making the complaint?
> A. I'm not really sure when I started complaining, but probably after the first few.

(Def Ex G, p 44).

Based upon plaintiff's 50-h testimony, the court finds that defendants have met their prima facie burden for summary judgment dismissing the complaint by establishing that plaintiff was aware of and appreciated the risk inherent in this activity, namely being struck by an errant throw and that he voluntarily assumed that risk.

In opposition, plaintiff argues that this admission of his awareness of the risk does not negate defendants' duty because a multiple-ball activity in not an inherent risk in the regulation

game of baseball.[1] The court finds plaintiff's argument is without merit. Whether or not a multiple-ball activity is inherent in the regulation game of baseball, plaintiff's awareness here was specifically related to this activity, the multiple ball drill which he had played on previous occasions and his specific awareness of errant throws immediately prior to this accident. The court finds that errant throws were apparent to plaintiff thereby limiting the duty owed by defendants to plaintiff (*Legac v South Glens Falls Cent. School Dist.*, 150 AD3d 1582 [3d Dept 2017], *lv denied* 30 NY3d 905 [2017]).

In opposition, plaintiff submits the expert affidavit of Raymond Salvestrini, the director of Athletics for the Danbury Public Schools in Connecticut. Salvestrini opines that, among other things, defendants were negligent in the size and positioning of the protective screen, failed to inspect the field, and failed to assess the readiness of the players to participate in this drill, all in violation of 8 NYCRR § 135.4. The court finds, however, that Salvestrini - like defendants' expert - does not provide any scientific and/or technical data supporting his opinion that the size and positioning of the protective screen were inadequate.

During oral argument, plaintiff relied on several cases as authority to deny defendants' motion including *Weinberger v Solomon Schechter Sch. of Westchester*, 102 AD3d 675 (2d Dept 2013) and *Parisi v Harpursville Cent. School Dist.*, 160 AD2d 1079 (3d Dept 1990). In *Weinberger*, the Second Department reversed a judgment after a jury verdict determining that faulty equipment and decreased distance between a pitcher and a batter required by the School's

[1]Defendants also move for summary judgment arising from allegations involving the medical treatment received by plaintiff. Plaintiff has failed to address that portion of the motion and, as such, those allegations are deemed abandoned.

athletic director did not represent risks that were inherent in the sport of softball but enhanced the risk of being struck by a line drive. In *Parisi*, the Third Department found questions of fact regarding injuries suffered by a student when a pitched ball struck her in the face because the State Public High School Athletic Association contained specific regulations requiring catchers to wear a helmet and mask. The court finds *Weinberger* and *Parisi* distinguishable from the case at bar due to the absence here of any applicable and specific regulation alleged to have been violated by defendants and the equipment at issue here is alleged to have been suboptimal, not defective.

Plaintiff's expert specifically cites defendants alleged violation of 8 NYCRR § 135.4 (c)(7)(i)(d)(2) labeled "Scope of duties and responsibilities" which imposes a duty of preventing athletic injuries, assisting in risk management by selecting protective equipment and inspection of fields and playing surfaces (Salvestrini Aff, ¶ 2).[2] The court finds this provision is applicable to athletic trainers and does not pertain to the coaches herein. Moreover, even if the regulation were applicable the court finds that it is general in nature and does not set forth any specific requirement or standard of conduct sufficient to create a duty.[3] Based upon the foregoing, the court finds that plaintiff has failed to prove that he was faced with a risk that was unassumed, concealed or unreasonably increased and has failed to raise a triable issue of fact.

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[2]Plaintiff's expert also mentions a New York State Public High School Athletic Association Handbook at one point in his affidavit but does not offer any relevant rules therefrom or offer any further analysis of such a Handbook (Salvestrini Aff, ¶ 2).

[3]The court finds this situation analogous to the Labor Law § 241 (6) cases in which liability is contingent upon proof of a violation of a specific requirement or standard of conduct compared to a broad, general standard that a work area work area provide reasonable and adequate protection and safety (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]).

Parenthetically, the court notes that it is mindful of the circumstances surrounding this accident namely a school sanctioned activity, team coaches dictating the method and manner of practice including the selection of equipment such as the size and location of the protective screen, and the involvement of minors who may or may not have the maturity to object to directions from a school authority figure. In this court's view, under these circumstances equity should dictate a balancing of the parties' respective degree of fault. Nevertheless, the court is constrained by the case law that mandates that plaintiff's recognition of the danger - notwithstanding he was a minor at the time - and decision to continue participating in the activity "[c]ommensurately negates any duty on the part of the defendant to safeguard him or her from the risk [citation omitted]" (*Trupia v Lake George Cent. School Dist.*, 14 NY3d 392, 395 [2010]; *Turcotte,* 68 NY2d at 438-439).

CONCLUSION

Based upon the foregoing, the court finds that defendants' motion for summary judgment is GRANTED and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: October 31, 2019
Binghamton, New York

HON. FERRIS D. LEBOUS

All papers submitted in connection with this motion and the Decision and Order have been electronically filed with the Broome County Clerk through the NYSCEF System:

1. Defendants' Notice of Motion dated July 24, 2019;
2. Attorney Affirmation of John P. Powers, Esq. dated July 24, 2019 with exhibits;
3. Affidavit of Scott R. Cassidy sworn to March 7, 2019;
4. Affidavit of Michael Allen sworn to March 18, 2019;
5. Affidavit of Matthew Ferraro sworn to March 27, 2019;
6. Affidavit of Brad Tomm sworn to March 18, 2019;
7. Affidavit of Karen Lipyanek sworn to March 22, 2019;
8. Defendants' Memorandum of Law dated July 24, 2019;
9. Affirmation in Opposition to Motion For Summary Judgment of Nicholas I. Timko, Esq. dated October 7, 2019 with exhibits including expert Affidavit of Raymond Salvestrini sworn to October 4, 2019 [annexed thereto as Exhibit 1];
10. Plaintiff's Memorandum of Law in Opposition dated October 7, 2019;
11. Reply Affidavit of Michael Allen dated October 11, 2019; and
12. Defendants' Reply Memorandum of Law dated October 11, 2019.