SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X **TRIAL/IAS PART 21**

DIANA RUIZ, As Parent and Natural Guardian of CAIN LUIS RUIZ, an infant,

Plaintiffs,

- against -

Index No. 014776/08
Mot. Seq. # 1, 2, 3
Submit Date 1/27/11

VALLEY STREAM UNION FREE SCHOOL DISTRICT 13, and JOHN DOE, as Parent and Natural Guardian of BETHUEL ELIACIN, an infant,

Defendants.

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The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1 (1A) 2, 3
Answering Affidavit 4,
Reply Affidavit..... 5,6,7

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Companion motions pursuant to CPLR 3212 by defendant parent and natural guardian of Bethuel Eliacin and by the Valley Stream Union Free School District 13 (School District) respectively for summary judgment dismissing the complaint as to said defendants are determined as hereinafter provided.

Cross motion by plaintiff pursuant to CPLR 3212 against defendants is **DENIED** in view of the dispositions on the motions in chief.

BACKGROUND

In this action, the mother of plaintiff Cain Luis Ruiz seeks to recover damages for injuries sustained by her nine year-old son, a fourth grader at the Howell Road Elementary School in Valley Stream, during a scheduled physical education class when he was hit on the back of his head by a swing. Immediately prior to the accident, Cain and another fourth grader, Bethuel Eliacin, had been swinging on adjacent swings[1] in the school's outdoor playground for approximately five to ten minutes. According to Cain's deposition testimony, Bethuel was not swinging in the regular manner but was spinning around on the swing and swinging diagonally/sideways in Cain's direction. At some point, Bethuel jumped off the swing as he was swinging in a sideways direction. As Cain describes it, Bethuel held onto the swing with his left hand as he jumped off pulling the swing forward. He then let the swing go propelling it in a sideways direction with increased force. The swing hit Cain in the back of the head causing him to fall to the ground below.

Both defendant School District and the defendant parent of Bethuel Eliacin seek summary judgment dismissing the complaint. The School District's motion is predicated on the grounds that there was adequate supervision[2] on the playground at the time of the accident which, in any event, was of such a sudden and unexpected nature, that no level of supervision could have prevented it. The Eliacin defendant argues that Bethuel was not negligent when he jumped

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[1]Defendant Bethuel was sitting on the swing located to the right of the swing on which Cain was swinging.

[2]The class was supervised by a physical education teacher who had been employed in the Valley Stream School District for thirty-seven years.

off the swing as he was merely playing/acting as any child of his age, experience, intelligence and degree of development would have done, and, in any event, Cain assumed the risk of playing on the swings.

ANALYSIS

School District

Although schools are under a duty to adequately supervise the students in their charge, and will be held liable for foreseeable injuries proximately related to the absence of supervision (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010]; *Mirand v City of New York*, 84 NY2d 44, 49 [1994]), they are not the insurers of safety as they cannot be expected to continuously supervise and control all of the students' movements and activities. *Keaveny v Mahopac Cent. School Dist.*, 71 AD3d 955 [2nd Dept. 2020]; *Troiani v White Plains City School Dist.*, 64 AD3d 701, 702 [2nd Dept. 2009]; *Macalino v Elmont Union Free School District*, 18 AD3d 625 [2nd Dept. 2005]. There is no liability absent a showing that the negligent supervision was a proximate cause of the injury sustained. *Harris v Five Point Mission Camp Olmstedt,* 73 AD3d 1127, 1128 [2nd Dept. 2010]; *Tanenbaum v Minnesauke Elementary School,* 73 AD3d 743, 744 [2nd Dept. 2010]. A school's duty is to supervise its students with the same degree of care as a parent of ordinary prudence would exercise in comparable circumstances. *David v County of Suffolk*, 1 NY3d 525, 526 [2003]. In order to find that a school has breached its duty to provide adequate supervision in the context of injuries caused by the acts of a fellow student, it must be shown that the school had sufficiently specific knowledge or notice of the dangerous conduct which caused the injury, i.e., that the acts of the third party could reasonably have been anticipated. *Whitfield v Board of Educ. of City of Mouont Vernon*, 14 AD3d 552, 553 [2nd Dept.

2005]. Actual or constructive notice to the school of prior similar conduct is generally required because school personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place on a daily basis among students. *Janukajtis v Fallon*, 284 AD2d 428, 429 [2nd Dept. 2001].

Even if a breach of the duty of supervision is found, the inquiry is not ended as the question arises whether such negligence was the proximate cause of the injuries sustained. *Paragas v Comsewogue Union Free School Distr.*, 65 AD3d 1111 [2nd Dept. 2009]; *Ronan v School Dist. of City of New Rochelle*, 35 AD3d 429, 430 [2nd Dept. 2006]. An 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 have put a reasonable person on notice to protect against the injury causing act. *Nocilla v Middle Country Cent. School Dist.*, 302 AD2d 573 [2nd Dept. 2003]. Where an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not a proximate cause of the injury. *Soldano v Bayport-Blue Point Union Free School Dist.*, 29 AD3d 891 [2nd Dept. 2006]; *Reardon v Carle Place Union Free School Dist.*, 5 AD3d 667, 668 [2nd Dept. 2004].

A request for summary judgment must be granted if the proponent makes a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact and the opponent fails to rebut the showing. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]. In this regard, the evidence must be viewed in a light most favorable to the party opposing the motion who must be given the benefit of every favorable inference. *Cortale v Educational Testing Service*, 251 AD2d 528, 531 [2nd Dept. 1998].

Defendant School District has established its *prima facie* entitlement to summary judgment by demonstrating that it provided adequate supervision and, in any event, the level of supervision provided was not a proximate cause of the accident. Any alleged inadequacy of supervision furnished by defendant School District cannot, under these circumstances, be considered a cause of the infant-plaintiff's injuries. *Doyle v Binghampton City School Dist.*, 60 AD3d 1127, 1128 [3rd Dept. 2009].

Even accepting as true the factual assertion made by plaintiff that the teacher was sitting on a bench where a handball wall obstructed her view of the swings, rather than walking around supervising as she testified, the record is devoid of evidence that Cain's injuries were caused by anything other than the sudden, impulsive act of Bethuel Eliacin which could not have been foreseen or prevented by closer supervision.

While plaintiff provides the affidavit of an expert in the field of physical education, recreation and coaching training, his assertions, *inter alia*, that the experienced teacher supervising the children on the playground at the time of the accident did not take some unspecified appropriate action beyond warning them about not fooling around on the swings; that she should have been more vigilant and observant; and that she should not have walked to another part of the playground, are far too general and conclusory to support a finding of liability against defendant School District. To create a material issue of fact through the use of an expert's affidavit, the expert must base his opinions upon empirical data or foundational facts. Here, it is unclear whether the expert has any experience with children in an elementary school setting, either in structured physical education class or unstructured play. *Bellinger v Ballston Spa Central School Dist.*, 57 AD3d 1296, 1298 [2nd Dept. 2008] (internal quotation marks and

citations omitted). It bears noting that a teacher's duty of supervision is the same as that of a reasonably prudent parent. *Lizardo v Board of Educ. of City of New York*, 77 AD3d 437, 438 [1st Dept. 2010].

Infant Defendant

With respect to Bethuel Eliacin, the standard of conduct to which a child must conform to avoid being negligent is that of a reasonably prudent child of like age, intelligence and degree of development and capacity under the same circumstances. *Gonzalez v Medina*, 69 AD2d 14, 18 [1st Dept. 1979]; *Bruenn v Pawlowski,* 292 AD2d 856 [4th Dept. 2002]. Children at play, however, are not absolved from the obligation which rests on every person to exercise reasonable care to avoid injury to others. If personal injuries result from the failure of a child to exercise such reasonable care, there is actionable negligence for which the child may be held liable. 66 NYJ2d, Infants § 49, p. 277.

The doctrine of assumption of the risk recognizes that a voluntary participant in a sport or recreational activity consents to the commonly appreciated risks which are inherent in and arise out of the nature of the sport or activity generally and flow from such participation. *Gallagher v County of Nassau*, 74 AD3d 877, 878 [2nd Dept. 2010]. To establish that a plaintiff assumed the risk of engaging in an activity, a defendant must show that the plaintiff was aware of the defective or dangerous condition and the resultant risk. *Trainer v Camp Hadar Hatorah*, 297 AD2d 731 [2nd Dept. 2002]. Awareness of risk is not determined in a vacuum but rather against the background of skill and experience of the particular plaintiff. *Clark v Interlaken Owners, Inc.*, 2 AD3d 338 [1st Dept. 2003].

The recreational activities encompassed by the doctrine of assumption of the risk include games as well as frolic. *Bierach v Nichols*, 248 AD2d 916, 917 [3rd Dept. 1998]. By his participation, a person assumes any risks that are known, apparent or the reasonable consequence of participation. *Roberts v Boys & Girls Republic, Inc.*, 51 AD3d 246, 247 [1st Dept. 2008], *aff'd* 10 NY3d 889 [2008]. When the doctrine is applicable, it acts as a bar to liability based upon defendant's alleged negligence. *Trupia ex rel. Trupia v Lake George Cent. School Dist.*, 62 AD3d 67, 69 [3rd Dept. 2009] aff'd 14 NY3d 392 [2010].

There are, however, limitations to the scope and applicability of the doctrine. Participants do not assume concealed or unreasonably increased risks, nor do they assume the risk of another participant's negligent act which enhances the risk of injury. *Schoenlank v Yonkers YMCA*, 44 AD2d 927, 928 [2nd Dept. 2007); *Convey v City of Rye School Dist.*, 271 AD2d 154, 158 [2nd Dept. 2000]. In assessing whether a defendant has violated a duty of care in the context of an injury sustained during a sport or game, the trier of fact must determine whether the defendant created a unique condition over and above the usual dangers inherent in the sport or game. *Convey v City of Rye School Dist., supra.* On the record presented, the court cannot conclude as a matter of law that Cain was aware of, appreciated and voluntarily assumed the risk from which his injuries arose.

Viewing the evidence in the light most favorable to plaintiff, Bethuel Eliacin's reliance on the doctrine of assumption of the risk begs the questions of whether his conduct in jumping off the swing in the manner he did deviated from the degree of care expected of a reasonable, prudent child of his age, experience and degree of development and/or whether his conduct created a condition over and above the usual dangers inherent in playing on a swing. The

existence of these questions, which require resolution by the trier of fact, precludes summary dismissal of the complaint as to defendant Bethuel Eliacin.

Accordingly, the motion by defendant School District for summary judgment dismissing the complaint is **GRANTED**.

The motion by defendant-parent of Bethuel Eliacin for summary judgment dismissing the complaint is **DENIED**.

The cross motion by plaintiff for summary judgment against the defendants is **DENIED** in view of the dispositions on the motions in chief.

Dated: Mineola, New York
March 15, 2011

ENTER:

HON. JEFFREY S. BROWN
J. S. C.

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