SCANNED ON 1/28/2008

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35
Justice

Index Number : 114439/2005
WISNIA, AVRAM
VS
NEW YORK UNIVERSITY
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE 7/13/08
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

his motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
JAN 28 2008
NEW YORK
COUNTY CLERK'S OFFICE

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant New York University for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the court upon the submission of an appropriated bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/23/08

J.S.C.
HON. CAROL EDMEAD

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

---X

AVRAM WISNIA,

Plaintiff,

MEMORANDUM DECISION

Index No. 114439/2005

-against-

NEW YORK UNIVERSITY,

Defendant.

---X

EDMEAD, J.:

In this negligence action, defendant New York University (NYU) moves for an order granting it summary judgment, pursuant to CPLR 3212, dismissing the complaint.

The following facts are not in dispute. During the spring of 2004, plaintiff Avram Wisnia was a matriculated student at NYU, completing his junior year. He resided at an NYU residence hall, Third Avenue North, that is located at 75 Third Avenue, New York, New York (the Premises). During his junior year, plaintiff was elected as a Secretary of the Third Avenue North Student Counsel (TASC), a student-run organization responsible for, among other things, planning and overseeing dormitory events. As part of its spring activities, TASC organized a "Beach Bash Event" to take place in the courtyard of the Premises on May 1, 2004. The activities on that day included: a DJ, a "moon-bounce," jell-o wrestling in a kiddie pool, volleyball, water guns, and water balloons. Plaintiff took part in planning the Beach Bash. He was responsible for advertising the event to other students living in the residence hall and he was in charge of supplying food for the event.

On May 1, 2004, plaintiff alleges that he took a trip to the store to purchase snacks for the

day's events. Upon his return to the Premises, several of his friends from TASC beckoned him to investigate the quality of the jell-o in the kiddie pool. Plaintiff placed the items he purchased from the store on a nearby table and proceeded to walk over to look at the pool. When he arrived at the pool, two members of TASC, Alex and Carmen, grabbed plaintiff and pushed him into the kiddie pool. Plaintiff climbed out of the pool, removed his cell phone and wallet from his pocket, walked over to Carmen and started grappling with the young man. At that time, they were in close proximity to the kiddie pool. After several seconds of horse-play, both men landed in the kiddie pool after being pushed in by another member of TASC. It is during this second fall that plaintiff allegedly sustained an injury to his hip.

The entire incident was captured on video by a DJ hired to video record the event.

As a result, plaintiff commenced this lawsuit asserting a cause of action for negligence, asserting damages in the amount of one million dollars.

Defendant argues that it is entitled to summary judgment because: (1) plaintiff cannot demonstrate that defendant owed a duty to plaintiff, (2) plaintiff's primary and voluntary assumption of the risk in the activity leading up to his injury, relieved defendant of its liability, (3) defendant did not proximately cause plaintiff's injury, and thus (4) there are no remaining triable issues of material fact.

Plaintiff contends that defendants are not entitled to summary judgment because: (1) the assumption of the risk defense is not available in this case because plaintiff was not engaged in a sporting activity, (2) plaintiff's act of roughhousing was not something that he consented to, and (3) defendant had a duty not to permit and sanction a dangerous condition as a pool of watery jell-o on concrete for jell-o wrestling.

A party moving for summary judgment must demonstrate his, her, or its entitlement thereto as a matter of law, pursuant to CPLR 3212 (b). To defeat summary judgment, the party opposing the motion must show that there is a material question of fact that requires a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Here, defendant has demonstrated its entitlement to summary judgment and plaintiff has failed to show that a material question of fact remains.

Assumption of the risk

Despite plaintiff's argument to the contrary, it is difficult to imagine a more compelling set of facts for the application of the doctrine of primary assumption of risk. That doctrine provides that a voluntary participant in a sporting or recreational activity "consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport [or recreational activity] generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484 [1997]; *Joseph v New York Racing Assn.*, 28 AD3d 105, 108 [2d Dept 2006]; *Koubek v Denis*, 21 AD3d 453 [2d Dept 2005]). Contrary to defendant's contention, individuals are not restricted to playing organized sports for this doctrine to apply. The doctrine also applies to various types of unorganized sports as well as many forms of recreational activity (*see Marcano v City of New York*, 99 NY2d 548, 549 [2002] ["plaintiff assumed the risk of injury when he swung on, and subsequently fell off, an exercise apparatus constructed over a concrete floor"]; *see Koubek v Denis*, 21 AD3d 453, *supra* [plaintiff assumed the risk of injury when she climbed on a three-foot high trampoline located in a defendant's back-yard]; *see Yisrael v City of New York*, 38 AD3d 647, 648 [2d Dept 2007] [plaintiff assumed risk when jumping rope on concrete pavement]).

A plaintiff who voluntarily participates in a recreational activity is deemed to consent to the apparent or reasonably foreseeable consequences of that activity. This includes those risks associated with the construction of the playing surface and any open and obvious condition on it (*Joseph v New York Racing Assn.*, 28 AD3d 105, *supra*). Moreover, it is not necessary to the application of the doctrine that the injured plaintiff may have foreseen the exact manner in which the injury occurred, so long as he or she is aware of the potential for injury from the mechanism from which the injury results (*id.*). Therefore, "if the risks of the activity are fully comprehended or perfectly obvious, the plaintiff has consented to them and the defendant has performed its duty" (*id.*) (*internal quotation marks and citation omitted*).

In his examination before trial, plaintiff testified that he took part in planning the events of the Beach Bash, which included a DJ, moon-bounce, jell-o wrestling in a kiddie pool, water-guns, water-balloons, and volleyball (Avram Wisnia Examination Before Trial, at 66-90, dated November 17, 2006). In said testimony, plaintiff acknowledged that he was aware of the existence of, and the dangerous nature of, conducting a jell-o wrestling match in a kiddie pool on the concrete surface of the courtyard (*id.*). In fact, it was plaintiff who suggested placing gym mats underneath the pool to provide added safety (*id.* at 79).

However, plaintiff argues that he did not voluntarily enter into the kiddie pool, and thus should not be deemed to have assumed the risk for his injuries. This Court is not persuaded by plaintiff's argument. Plaintiff voluntarily entered the Premises to take part in the activities that were planned on that day. Those activities included a jell-o-wrestling match. The record also reveals that, after the first roughhousing incident that landed plaintiff into the kiddie pool, plaintiff climbed out of the pool, took his cell phone and wallet out of his pocket, placed them on a table,

approached Carmen (who was standing in front of the kiddie pool), grappled with him and they were subsequently pushed into the pool a second time (Avram Wisnia's Examinations Before Trial, dated November 17, 2006). Plaintiff testified that it was this second incident that caused his injuries. Thus, it is clear from plaintiff's testimony that he voluntarily engaged in grappling, wrestling, and rough play on the concrete surface in front of the pool. Although plaintiff may not have foreseen the exact manner in which his injury occurred, he was aware of the potential for injury when he decided to grapple with another student in front of a kiddie pool on a concrete surface (*see Joseph v New York Racing Assn.*, 28 AD3d 105, *supra*). Under these facts, plaintiff fully comprehended the risk of the activity in which he was engaged and assumed the risk of the injuries which he sustained (*see Marcano v City of New York*, 99 NY2d 548, *supra*).

Negligence

Plaintiff further argues that defendant had a duty to protect plaintiff from his injuries. Plaintiff contends that defendant should have supervised the student activities on the date to prevent students from engaging in a jell-o wrestling match in a kiddie pool on a concrete surface. Plaintiff further argues that defendant's failure to honor that duty makes it liable for plaintiff's injuries.

Here, it is clear that defendant has no legal duty to protect plaintiff from the actions of his fellow students.

To prevail upon a negligence claim, plaintiff must establish the existence of a legal duty, a breach of that duty, proximate causation and damages (*Luina v Katharine Gibbs School N.Y., Inc.*, 37 AD3d 555, 556 [2d Dept 2007]). The existence of a legal duty presents a question of law for the court (*id.*).

New York has affirmatively rejected the doctrine of "*in loco parentis*" at the college level and colleges in general have no legal duty to shield their students from the dangerous activity of other students (*id.; see also Sirohi v Lee*, 222 AD2d 222 [1st Dept 1995]). This principle derives from the rejection of the many factors which distinguish the relationship between a college and its students from that of lower-level learning institution and their students (*Ellis v Mildred Elley School*, 245 AD2d 994, 995 [3d Dept 1997]). One such factor is the age and maturity of the students and the concomitant need for the closer supervision of younger children (*id.*). "School personnel cannot reasonably be expected to guard against an injury caused by the impulsive, unanticipated act of a fellow student" (*id.* at 997) (*internal quotation marks and citation omitted*). As stated above, given plaintiff's testimony and the underlying facts, it is clear that defendant had no obligation to supervise the students' conduct at the Beach Bash (*see Talbot v New York Inst. of Tech.*, 225 AD2d 611, 612 [2d Dept 1996]). Defendant could not have reasonably been expected to guard against an injury caused by the impulsive, unanticipated act of a fellow student.

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Plaintiff has failed to raise any triable issue of fact in opposition to the motion.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the court upon the submission of an appropriated bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 23, 2008

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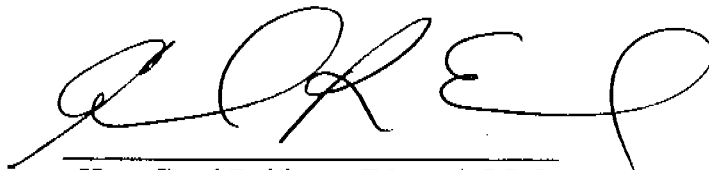

Hon. Carol Robinson Edmead, J.S.C.