SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 7
NASSAU COUNTY

DINA L. MOAKLEY, an infant under the age of eighteen (18) years, by her mother and natural guardian, LISA DUNN, and LISA DUNN, Individually,

Plaintiff(s),

-against-

CARLE PLACE UNION FREE SCHOOL DISTRICT and CARLE PLACE HIGH SCHOOL,

Defendant(s).

ORIGINAL RETURN DATE:07/17/07
SUBMISSION DATE: 07/31/07
INDEX No.: 8543/06

MOTION SEQUENCE #1

The following papers read on this motion:

Notice of Motion.....	1
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Motion by defendants for an order pursuant to CPLR 3212 awarding them summary judgment dismissing plaintiffs' complaint is granted.

Plaintiffs bring this action to recover for personal injuries sustained by plaintiff Dina L. Moakley on October 19, 2005 while practicing a certain cheerleading stunt in defendants' school gym.

At the time of the accident, infant plaintiff was 16 years of age and in the 11th grade. She had been on the cheerleading squad since the 9th grade and had previously practiced and performed the stunt at issue numerous times beginning in the 10th grade. At the time of the accident, plaintiff was being assisted/spotted on both her left and right sides as well as behind and the team coach, Melissa Mehling, was nearby observing. The stunt was begun with plaintiff in the center of a single mat of the type and size regularly used during practices and estimated by plaintiff to be "a little smaller" than the deposition room which respective counsel estimated to be 9 feet by 9 feet or 9 feet by 9 feet 9 inches (Deposition Transcript of Dina Moakley, at p.23; see, also, Deposition Transcript of defendants by Melissa Mehling, at p.31). No matting, however, was used during games or pep rallies.

Factual disputes exist as to whether plaintiff Dina Moakley was practicing a "twist-up", as contended by plaintiffs, or a "prep", as contended by defendants, and whether plaintiff landed off the mat (feet first) as contended by plaintiffs or on the mat (again feet first) as contended by defendants. The discrepancy regarding which stunt was being practiced is not material as they differ in the manner in which plaintiff would have been raised into a heightened position about which plaintiffs claim no breach of duty by defendants. Plaintiff's accident occurred when, while in the raised position, she concededly lost her balance and began to fall before the coordinated dismount could be achieved.

Defendants move for summary judgment on the ground that plaintiff Dina Moakley assumed the risk of injury from a fall and that there was no breach of defendants' duty to supervise the adequacy of the matting.

As a cheerleader experienced in performing the stunt(s) at issue as well as others, plaintiff clearly assumed the risk of falling (Rendine v. St. John's Univ., 289 AD2d 465; Fisher v. Syosset Cent. School Dist., 264 AD2d 438).

Plaintiffs, however, contend that because a mat was provided and plaintiff Dina Moakley fell beyond the mat, she cannot be found to have knowingly assumed the risk of making contact with the hard gymfloor instead of the mat.

"[Participants] who voluntarily join in extracurricular interscholastic sports [or activities] assume the risks to which their roles expose them but not risks which are 'unreasonably increased or concealed' (citations omitted)" (Benitez v. New York City Bd. of Ed., 73 NY2d 650, 658). Thus, "a board of education, its employees, agents and organized athletic councils must exercise ordinary care to protect student athletes voluntarily involved in extracurricular sports from unassumed, conceded or unreasonably increased risks" (Id.).

Assuming for purposes of this motion that plaintiff did land off the mat, the court agrees that she could not reasonably be expected to have foreseen such a landing as the stunt was begun from the center of the mat, and she had three spotters present. Moreover, both a "twist up" and a "prep" are premised on essentially vertical movements consistent with the positioning of three spotters.

However, and for these same reasons, this court finds that defendants have established, prima facie, that they did not breach any duty by failing to provide additional safeguards against such a remote risk. In other words, "plaintiff's injury was not the consequence of a failed duty of care on the part of [defendants]" (Rendine v. St. John's Univ., supra).

Of course, if as alleged by defendants, plaintiff landed on the mat, plaintiff assumed such a fall (Id.; Fisher v. Syosset Cent. School Dist., supra).

In either event, "[t]he injury in this case, in sum, was a luckless accident arising from the vigorous voluntary participation in competitive interscholastic athletics)" (Benitez v. New York City Bd. of Educ., supra, at p.659).

Plaintiffs' opposition papers fail to create a trial issue of fact requiring a trial.

Plaintiffs' complaint is dismissed without costs.

This decision constitutes the order and judgment of the court.

Dated: 9-6-07

HON THOMAS P. PHELAN

J.S.C.

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