At an I.A.S. Part 52 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, located at 80 Centre Street, Borough of New York, City and State of New York, on the 21st day of JUNE 2018

PRESENT:

HON. ALEXANDER M. TISCH, A.J.S.C.

A.L., an infant by his mother an natural guardian, JENNY LOO, and JENNY LOO, individually,

Plaintiffs,

-against-

THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF EDUCATION

Defendant(s).

MOTION SEQ. # 1

INDEX NO.: 150623/2012

The following papers numbered 19 to 69 read on this motion	NYSCEF Doc. Nos.
Notice of Motion to Strike Answer, Affirmations & Exhibits	19–43
Notice of Cross-Motion for Summary Judgment, Affirmation in Support of Cross-Motion and in Opposition to Motion to Strike	45, 47–57
Reply Affirmation in Support of Motion to Strike and Opposition to Summary Judgment	63–69

Hon. Alexander M. Tisch, A.J.S.C.:

Upon the foregoing papers, plaintiff moves this Court for an order striking defendants' answer for failing to comply with discovery and for sanctions. Defendants cross move for summary judgment. The motion and cross motion are resolved as follows.

The evidence presented in support of defendants' cross motion for summary judgment (e.g., plaintiff's and Ms. Vega's testimonies) failed to eliminate triable issues of fact as to whether inadequate supervision was a proximate cause of the plaintiff's accident (see Mazzio v Highland Homeowners Assn. & Condos, 63 AD3d 1015, 1016 [2d Dept 2009] [by submitting conflicting evidence in support of their motion, "the defendants failed to sustain their burden of demonstrating the absence of any material issue of fact"]). Assuming, arguendo, that defendants met their initial prima facie burden demonstrating that they satisfied their duty of care, plaintiff raised an issue of fact in opposition by

pointing to evidence showing that the sequence of events leading up to the infant plaintiff's injuries did not occur spontaneously or without sufficient time for a supervisor to act. In arguing that "[n]o reasonable level of supervision could have prevented Plaintiff's accident" (Sisnett aff, ¶ 39), defendants would have this Court believe that minutes of taunting and exchanging curse words (as recounted by the infant plaintiff) did not require any intervention and would not have stopped the situation from escalating. This Court cannot agree and, accordingly, in viewing the evidence in the light most favorably to the plaintiff (see Valentin v Parisio, 119 AD3d 854, 855 [2d Dept 2014]), the motion for summary judgment is denied (see Ferguson v Shu Ham Lam, 59 AD3d 388, 389 [2d Dept 2009] [summary judgment should be denied "where there are facts in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility"]; see, e.g., Shoemaker v Whitney Point Cent. School Dist., 299 AD2d 719 [3d Dept 2002]; Armellino v Thomase, 72 AD3d 849 [2d Dept 2010]).

Defendants' cross motion for summary judgment is granted solely to the extent that the plaintiffs' claims against the City of New York are dismissed as unopposed, but the City of New York will still be included as a defendant subject to sanctions as discussed infra.

Regarding plaintiffs' motion to strike the defendants' answer, the Court will not recite the facts but refers to plaintiffs' counsel's affirmation in support of their motion to strike (Massimo aff, ¶¶ 9–20). These facts were not contested. Specifically, counsel for defendants do not contest that they kept agreeing to provide documents and a witness with knowledge of student aide training/training of Ms. Vega, and were court-ordered to do so, for almost three years. After plaintiffs' demand dated July 28, 2014 was served, it took a year and a half for defendants to provide any response, which was replete with objections. Since then, defendants provided piecemeal responses and objections, agreeing to

provide the requested information, were court ordered to do so, and carried this out for three years, ultimately leading to no actual response at all. Defendants also do not contest that they canceled the January 24, 2017 deposition without any reason, the day before it was scheduled, and did not agree to produce anyone else until the next compliance conference. Defendants do not contest that, at that conference on February 22, 2017, counsel insisted that Clara Harvey was the person with the requisite knowledge of student training; yet once her deposition was actually held, it turned out she had no knowledge at all of student aide training. Defendants do not contest that they only conducted a search for the 2010-2011 handbook in April of 2017 — which was over six years after the accident and almost three years since it was initially requested — only to find out, surprisingly, that the defendants were no longer in possession of the handbook.

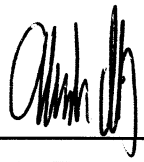
In response to plaintiffs' motion, however, defendants claim that they did not have to provide the materials or produce the requested witness, and the information sought is irrelevant. Contrary to defendants' contentions, the information is relevant and defendants cannot simply ignore their obligation to provide discovery. Defendants incredulously put the burden on plaintiffs to find out who is responsible for training student aides (see Sisnett aff, ¶ 16), when that knowledge is undoubtedly within the knowledge of defendants and its employees. Defendants also incredulously claim that plaintiffs' motion "is frivolous and a waste of judicial resources" (Sisnett aff, ¶ 22), when defendants failed to respond to demands and failed to comply with court orders, conference after conference, and good faith letter after good faith letter, frustrating the parties from proceeding with discovery and moving the case forward.

The pattern of noncompliance represents to the Court that the failure to provide disclosure was willful. It is evident that defendants failed to set forth any excuse for their delay and other contumacious

behavior (see Fish & Richardson, P.C. v Schindler, 75 AD3d 219, 220, 222 [1st Dept 2010]). For example, the Court notes that there was no excuse whatsoever as to why a search for the requested documents was only conducted nearly three years after it had been requested. Accordingly, the Court finds that this warrants an appropriate sanction (see Figdor v City of New York, 33 AD3d 560, 560–61 [1st Dept 2006] ["Defendant's response to the myriad discovery orders entered in this action over the course of some two years has been inexcusably lax. While discovery has trickled in with the passage of each compliance conference, the cavalier attitude of defendant, resulting as it has in substantial and gratuitous delay and expense, should not escape adverse consequence"] [internal citations omitted]). It is hereby ORDERED that defendants' are precluded from offering evidence as to their liability.

This shall constitute the decision and order of the Court.

ENTER,



HON. ALEXANDER M. TISCH
A.J.S.C.