

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D27569
C/hu

_____AD3d_____

Argued - April 13, 2010

MARK C. DILLON, J.P.
RUTH C. BALKIN
PLUMMER E. LOTT
SANDRA L. SGROI, JJ.

2009-04011

DECISION & ORDER

Christopher Sarnes, etc., et al., appellants, v City of
New York, et al., respondents.

(Index No. 102774/05)

Barasch McGarry Salzman & Penson, New York, N.Y. (Dominique Penson of
counsel), for appellants.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York, N.Y. (Vanessa M.
Corchia of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from
an order of the Supreme Court, Richmond County (Aliotta, J.), dated March 30, 2009, which granted
the defendants' motion for summary judgment dismissing the complaint.

ORDERED that the order is reversed, on the law, with costs, and the defendants'
motion for summary judgment dismissing the complaint is denied.

According to the deposition testimony of the infant plaintiff, who was 12 years old at
the time of the accident, he sustained injuries while attempting to do "chin-ups" on a metal bar that
was connected to scaffolding in a schoolyard during his lunch recess. According to the infant
plaintiff, there was only one school aide supervising approximately 300 students at the time of the
accident.

The Supreme Court should have denied the defendants' motion for summary judgment
dismissing the complaint. The defendants failed to meet their prima facie burden of demonstrating

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that the accident was not proximately caused by their alleged negligent supervision of the infant plaintiff or their alleged negligent construction and/or maintenance of the scaffold (*see Sarbak v Sementilli*, 51 AD3d 1001, 1002; *Oliverio v Lawrence Pub. Schools*, 23 AD3d 633, 634; *Morr v County of Nassau*, 22 AD3d 728, 728-729; *Rivera v Board of Educ. of City of Yonkers*, 19 AD3d 394). Contrary to the defendants' contention and the conclusion of the Supreme Court, the doctrine of primary assumption of risk is not applicable to the facts herein (*see Trupia v Lake George Cent. School Dist.*, 14 NY3d 392).

DILLON, J.P., BALKIN, LOTT and SGROI, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court