SHORT FORM ORDER

INDEX No. 05-4295
CAL. No. 06-01654-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 11/17/06
ADJ. DATE 12/19/06
Mot. Seq. # 001 - MG; CASEDISP

HEATHER ROBERTS, an infant by her father and natural guardian, CHRISTOPHER C. ROBERTS, and CHRISTOPHER C. ROBERTS, individually, Plaintiffs, - against - MIDDLE COUNTRY CENTRAL SCHOOL DISTRICT and CHILDREN'S CHOICE CHILDCARE, INC., Defendants.	SIBEN & SIBEN, LLP Attorneys for Plaintiffs 90 East Main Street, P.O. Box 5149 Bay Shore, New York 11706-9975 STEVEN F. GOLDSTEIN, LLP Attorneys for Defendants One Old Country Road, Suite 370 Carle Place, New York 11514

Upon the following papers numbered 1 to 38 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 19 - 32; Replying Affidavits and supporting papers 33 - 38; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendants' motion for summary judgment dismissing plaintiff's complaint is granted.

Plaintiff Christopher Roberts commenced this action against the Middle Country Central School District Board ("the School District") on behalf of his six-year-old daughter, Heather Roberts ("Heather"), who was injured on June 15, 2004 when she fell and injured her arm after sliding to the bottom of a piece of playground equipment known as the "Triple Wide Slide" located on the premises of Children's Choice Childcare Inc.("Children's Choice"). Plaintiff alleges that the School District and its employees were negligent in failing to provide adequate supervision, allowing the end of the slide to be unusually high from the ground without providing adequate cushioning and failing to warn the student of a known defective condition.

The School District is now moving for summary judgment dismissing plaintiff's complaint on the grounds that plaintiff has failed to establish a prima facie case of negligence or prove that the School District's alleged negligence was the proximate cause of plaintiff's injuries. In support of its motion the School District submits *inter alia* copies of the pleadings; excerpts from the plaintiffs' 50 (h) and deposition transcripts as well as deposition testimony from Janine Tarello, the Assistant Executive Director of Children Choice Childcare Inc. Defendants also submitted a photograph depicting the Triple Wide Slide and the area of the playground where it was located.

In opposition plaintiffs contend that defendants' motion should be denied because defendants have failed to establish their prima facie entitlement to summary judgment and there are multiple issues of fact concerning defendants' lack of adequate supervision on the day of plaintiff's accident. In addition to identical copies of the deposition transcripts submitted by the defendants, plaintiffs also submitted affidavits from the minor, Heather Roberts, and Edward Wankel, an administrator with over thirty years of experience in recreation, education planning and risk management. Plaintiffs also submitted a copy of the accident report and a written statement prepared by Andrea Zobel, an employee of Children's Choice Childcare Inc.

In their reply defendants contend that plaintiff's expert affidavit should not be considered because plaintiff not only failed to identify the expert in pre-trial disclosure, but served the affidavit for the first time within his opposition papers. Alternatively, defendants assert that even if the court were to consider the expert's affidavit, not only did the expert fail to raise an issue of fact as to the adequacy of supervision on the day of the accident, but he indicated that the playground equipment and surface were appropriate for children five years and above. Defendants also argues that the minor plaintiff's affidavit is contradictory to the fair import of her deposition testimony and therefore cannot create an issue of fact that otherwise does not exist (***McLaughlin v Malone & Tate Builders, Inc.***, 13 AD3d 859, 787 NYS2d 157 [2004]).

Initially, it should be noted that plaintiffs' expert's affidavit was not considered as plaintiffs not only failed to identify the expert in pre-trial disclosure but served the affidavit for the first time within their opposition papers nearly five months after filing the note of issue on June 12, 2006 (***Safrin v DTS Russian & Turkish Bath Inc.,*** 16 AD3d 656, 791 NYS2d 443 [2005]; ***Dawson v Cafiero***, 292 AD2d 488, 739 NYS2d 190 [2002]; ***Ortega v New York City Tr. Auth.***, 262 AD2d 470, 692 NYS2d 131 [1999]; ***Mankowski v Two Park Co.***, 225 AD2d 673, 629 NYS2d 847 [1996]; *see also,* CPLR 3101 [d] [1]).

The School District has established its prima facie entitlement to summary judgment by demonstrating that the accident was neither the result of any negligence on the part of its employees, nor the result of defectively designed playground apparatus on its premises(***Davidson v Sachem Cen. Sch. Dist.***, 300 AD2d 276, 751 NYS2d 300 [2002]; ***Merson v Syosset Cen. Sch. Dist.***, 286 AD2d 668, 730 NYS2d 132 [2001]; *see also* ***Convey v City of Rye Sch. Dist.,*** 271 AD2d 154, 710 NYS2d 641 [2000]; ***Totan v Board of Educ. of the City of New York***, 133 AD2d 366, 519 NYS2d 374 [1987]). Plaintiffs failed to submit any evidence that the "Triple Wide Slide" was defectively designed or that the rubber surface beneath the apparatus was inadequate. There is also no evidence of similar incidents occurring on the subject slide prior to plaintiff's accident. Plaintiff's affidavit is also contradictory to the fair import of her deposition testimony since unlike her deposition testimony where she testified that she

was alone on the playground and hurt her arm when she fell to the ground, in her affidavit she indicates that there were other students outside at the time of the accident and that her elbow became injured when she hit it on the side of the slide (*see*, ***McLaughlin v Malone & Tate Builders, Inc***., 13 AD3d 859, 787 NYS2d 157 [2004]; ***Farber v Farm Family Cas. Ins. Co.***, 272 AD2d 747, 707 NYS2d 545 [2000]). Additionally, while plaintiff asserts that she did not recall observing any teachers and speaking with a teacher for the first time after she went inside the school, plaintiffs also submitted a written statement accompanying the accident report wherein Andrea Zobel–a teacher employed by Children's Choice–states that she was on the playground and observed the plaintiff's accident. Nevertheless, despite plaintiffs' attempt to raise factual questions, the undisputed proof establishes that plaintiff was engaged in permissible use of the slide and that the presence or absence of supervision was not the proximate cause of her accident (***Botti v Seaford Harbor Elementary Sch. Dist***., 624 AD3d 486, 808 NYS2d 236 [2005]; ***Davidson v Sachem Cent. Sch. Dist***., 300 AD2d 276, 75 NYS2d 300 [2002]; ***Navarra v Lynbrook Pub Schs***., 289 AD2d 211, 733 NYS2d 730 [2001]. Rather, even assuming arguendo that defendants did breach their supervisory duty, the conduct that caused plaintiff's injuries–Heather's speedy descent and unexpected lunge forward upon reaching the bottom of the slide–was so sudden and spontaneous, and occurred in so short a span of time, that even the most intense supervision could not have prevented it (*see*, ***Sanzo v Solvay Union Free School Dist.***, 299 AD2d 878, 750 NYS2d 252 [2002]; ***Busby v Ticonderoga Cent. School Dist.***, 258 AD2d 762, 684 NYS2d 709 [1999]; *see also*, ***Taylor v Dunkirk City Sch. Dist.***, 12 AD3d 1114, 785 NYS2d 623 [2004]). Accordingly, the School District's motion for summary judgment dismissing plaintiffs' complaint is granted.

Dated: APR 10 2007

J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**