

**Padden v County of Suffolk**

2007 NY Slip Op 31076(U)

April 26, 2007

Supreme Court, Suffolk County

Docket Number: 0002194/2005

Judge: Robert W. Doyle

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

**P R E S E N T :**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 11-22-06  
ADJ. DATE 1-22-07  
Mot. Seq. # 001 - MD

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NICOLE PADDEN, an infant under 14 years of age, by her parent and natural guardian, PATRICIA DEROSA-PADDEN and PATRICIA DEROSA-PADDEN, individually,	:	
	:	MICHAEL F. PERROTTA, ESQ.
	:	Attorney for Plaintiffs
	:	775 Park Avenue, Suite 205
	:	Huntington, New York 11743-3976
	:	
Plaintiffs,	:	
	:	CHRISTINE MALAFI, Suffolk Cty Atty
- against -	:	By: Anthony P. Moncayo, Esq.
	:	Attorney for Defendant
COUNTY OF SUFFOLK,	:	100 Veterans Memorial Hwy, PO Box 6100
	:	Hauppauge, New York 11788
	:	
Defendant.	:	

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Upon the following papers numbered 1 to 36 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 20 - 30; Replying Affidavits and supporting papers 31 - 36; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion (001) by defendant County of Suffolk pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint of the infant plaintiff Nicole Padden and her mother, Patricia DeRosa-Padden, on the issue of liability, opposed by plaintiff, is denied.

This is an action premised upon the alleged negligence of defendants on June 12, 2004 arising out a fall by the infant plaintiff, Nicole Padden, from a playground glide-bar apparatus located in Southaven Park, Yaphank, owned by the County of Suffolk. The child was seven years of age at the time of the accident. The County of Suffolk seeks an order granting summary judgment on the issue of liability arguing that while hanging from the apparatus, the child released her grip and dropped to the ground approximately two feet to the mulch/Fibar-covered ground, and sustained injury.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the

case. To grant summary judgment it must clearly appear that no material and triable issue of fact is

presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843), and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790).

In support of motion (001), defendants have submitted, inter alia, unsigned, unsworn copies of the 50-h transcript, deposition transcripts of plaintiff mother and the infant and employee Adam Berlin; copy of the summons and complaint, answer and demands; copy of the verified bill of particulars; and various discovery items including records, logs and diagrams.

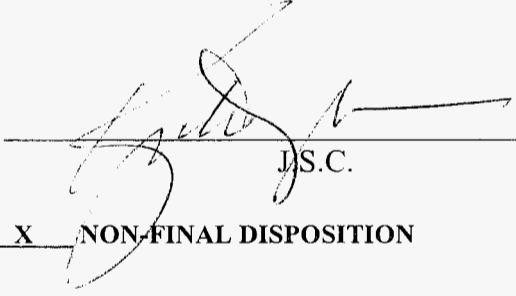
Adam Berlin, an employee of the County of Suffolk, testified on January 6, 2006 at his examination before trial (defendant’s exhibit J), that he is a Parks Supervisor since 1999 (p.4) at the Southaven Park where the accident occurred. Mr. Berlin testified that he and his staff would visually inspect the premises of the main playground to see if anything was broken or needed repair (p.37), and replace the wood chip matting (p.28), called Fibar, underneath the equipment on the playground (p.10). He stated they periodically replaced and refilled the Fibar matting or repositioned it by raking it (p.23). It was his goal to maintain an approximate one foot depth of Fibar material under and around the playground apparatus (p.28). He testified that he did not know when for the last time prior to June 12, 2004, he inspected the area in question (p.31), and he couldn’t state exactly the amount and condition of the Fibar material that was under the apparatus on that date, but thought it was good because it was inspected about once a week (p.32). Mr. Berlin testified that there was no indication in his records that on June 12, 2004 that there was any maintenance done on the Fibar material either by raking or filling (p.63). No records were produced by the County to demonstrate when the last time was the Fibar was filled or raked in the area of the apparatus immediately prior to the accident. Mr. Berlin did not know when for the last time prior to June 12, 2004 he saw the condition of the apparatus (p.36), but when he would inspect it, he would “throw the glider down and throw it back” pushing it towards the end (p.39). When it reached the end, it would bounce (p. 40). He further described that there was a platform to give kids reach to grab it, considering it is about six feet off the ground (p. 40). He did not believe it had a pitch (40). When Mr. Berlin was shown several photographs of the play area and glide apparatus at his examination before trial, he was unable to determine the depth of the Fibar material from looking at the photos (p. 46-47, 48). Based upon the foregoing, the County of Suffolk has offered only speculation as to the presence and depth

of the Fibar under the apparatus on June 12, 2004 when the accident occurred, and has not offered any evidence as to the depth of the Fibar material under the apparatus for a reasonable period before that date. Accordingly, it is determined that defendant has not met its burden of demonstrating there are no material issues of fact to entitle the County to an order for summary judgment. Despite the same, it is determined that plaintiffs have met their burden of demonstrating that there exists material issues of fact as to the depth and condition of the Fibar on the date of the accident.

The infant plaintiff's mother testified at a hearing held pursuant to GML 50-h on November 30, 2004 (defendant's exhibit B) and at her examination before trial (defendant's exhibit H), that she assisted her child onto the glider the first time, but the glider did not go all the way to the end (defendant's exhibit H, p.25), so she assisted the child back to the platform while the child was holding onto the bar so she could take another turn. On the second time, the glider moved along its track very fast and bounced back a little bit (p. 29) about two feet (p.30), it jolted her (p.29) and crashed into the end bar (p. 29), her hands were knocked off by the jolt (p.32). She fell two feet to the ground (p. 35), landed on her left ankle and was in a ball on the ground (p.35). She further testified that under the apparatus there was dirt that was very hard like concrete (plaintiff's exhibit D, p.36-37). It was a bit of dirt and a little bit of mulch (p. 36-37). Plaintiff's exhibit D contains work sheets dated April 7, June 21, July 29, and August 6, that show Fibar was raked or spread in the playground area and under the swing, but the year is not on the records. 100 yards of Fibar was delivered on September 30, 2004. Plaintiff's exhibit H demonstrates "chips at playground done" May 9, 2004. The date of the within accident was June 12, 2004. Based upon the foregoing, it is determined by this Court that plaintiff has raised material factual issues going to the issue of whether, on the date of the accident, the playground area was properly maintained with a sufficient amount of chips to provide a safe environment under the glider as set forth by Mr. Berlin as twelve inches in depth, or in the materials annexed as plaintiff's exhibit A, p.1, recommending a minimum of 10 inches, and as much as 12 inches for fall heights greater than 48 inches.

Accordingly, defendant's motion (001) for an order granting summary judgment on the issue of liability is denied.

Dated: APR 26 2007

  
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J.S.C.

         FINAL DISPOSITION

  X   NON-FINAL DISPOSITION