SHORT FORM ORDER

INDEX No. 04-3812
CAL. No. 06-02851-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 4/13/07
ADJ. DATE 6/29/07
Mot. Seq. # 001 - MD

TYLER CAREY, an infant over the age of 14, by his mother and natural guardian, NATALIE CAREY, Plaintiff, - against - COMMACK UNION FREE SCHOOL DISTRICT NO. 10 and WOOD PARK PRIMARY SCHOOL, Defendants.	KENNEDY & GILLEN Attorneys for Plaintiff 1050 Franklin Avenue Garden City, New York 11530 LAMB & BARNOSKY, LLP Attorneys for Defendants 534 Broad Hollow Road, P.O. Box 9034 Melville, New York 11747-9034

Upon the following papers numbered 1 to 45 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 27; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 28 - 34; Replying Affidavits and supporting papers 35 - 45; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Commack Union Free School District No. 10 for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied.

This action was commenced to recover damages, personally and derivatively, for injuries allegedly sustained by infant plaintiff, Tyler Carey ("Tyler"), on October 16, 2001 as he was playing outside on the playground at the Wood Park Primary School. Tyler, a kindergarten student at Wood Park Primary School on the date of the incident, allegedly sustained a fractured elbow when he lost his grip while hanging from metal hand rings and fell to the ground. Plaintiff alleges that defendant Commack Union Free School District No. 10 (hereinafter the District), which owns and operates Wood Park Primary School, negligently failed to supervise the children on the playground and that it failed to maintain the playground area in a reasonably safe condition. In addition, plaintiff alleges, among other things, that the District knew of the dangerous conditions on the playground and that it failed to warn of those conditions.

The District now moves for summary judgment dismissing the complaint, alleging that no material issues of fact exist regarding the alleged dangerous condition and that defendant's supervision of plaintiff was adequate and not the proximate cause of the accident. Plaintiff opposes the motion, arguing that multiple

issues of fact exist as to whether the District was negligent in the maintenance and supervision of the playground where infant plaintiff's injury occurred. The District's submissions in support of its motion for summary judgment include copies of the pleadings; the 50(h) testimony and deposition testimony of plaintiffs Tyler and Natalie Carey; the deposition testimony of Donna Berk and George Baer; a written statement of Donna Berk dated January 17, 2002; a copy of the loss control survey recommendations from the District's insurance carrier; and copies of photographs depicting the playground. Attached to plaintiff's opposition papers are an affidavit in opposition by Natalie Carey; the District's "Buddy's Briefs," dated May 4, 2001; an affidavit and investigation report by Steve Bernhein, a forensic examiner; and a complete copy of the U.S. Consumer Product Safety Commission's Handbook for Public Playground Safety.

Tyler testified at the 50-h hearing and the deposition that on the afternoon of the accident, his kindergarten teacher, Mrs. Berk, took her class of 23 students outside to play. He testified that he previously had been on the school playground with a teacher's aide and that there was no aide assisting Mrs. Berk the afternoon he was injured. Tyler testified that when the class went outside to play, it was not given any instructions as to what playground equipment the students could play on. He testified that once outside, he went to play on the metal rings first. Tyler testified that he climbed the steps onto the platform to reach the rings, then grabbed them, one with each hand. He stated that when he tried to swing his body to catch the next ring, he fell to the ground, landing on his back and elbow. Tyler testified that the ground underneath the rings was very hard, made up of little rocks. He stated that when he started to cry, Mrs. Berk, who had been sitting on a bench near the school, instructed another student named Casey to help him and take him to the nurse's office. Tyler testified that his mother picked him up from school and brought him to the hospital for treatment.

Natalie Carey's pretrial testimony reveals that on the incident date she received a phone call from the school nurse, who told her that Tyler bumped his arm and was complaining of pain. Mrs. Carey testified that within five minutes she went to the school to get Tyler. She testified that when she arrived at the nurse's office, she heard Tyler screaming in pain and observed his left elbow sticking out the wrong way. Mrs. Carey testified that she brought Tyler to the emergency department at St. Catherine's Hospital and then to an orthopedic surgeon. Mrs. Carey testified that she was advised by his treating physician that Tyler suffered multiple fractures to his left elbow.

Donna Berk testified at an examination before trial that she was Tyler's kindergarten teacher and that she was present when Tyler was hurt on the playground. Mrs. Berk testified that on the date of the incident she took her students outside at the end of the day to play on the playground. She testified that no other classes and no other adults were present at the playground when her class went outside. Mrs. Berk stated that she was standing in front of a bench located near the playground area where her class was playing at the time of Tyler's accident. She testified that she had been advised by the school principal, George Baer, and other teachers that kindergartners were not permitted to go on certain playground equipment, such as a silver slide, the monkey bars, and the swings in the back area. She testified that she did not recall seeing the accident but that she did instruct another student to accompany Tyler to the nurse's office, which is located in the front of the building.

Mrs. Berk further testified that she did not know whether the school had any safety rules and guidelines pertaining to the playground, aside from what she learned from other teachers. She testified that she never learned of any rules regarding the kindergartners' use of certain playground equipment, other than

the silver slide, the monkey bars and the far swings; which were located in the two other play areas. She also testified that she never was provided with any training, instruction, or guidelines relative to safety and children using playground equipment. Further, Mrs. Berk testified that the ground underneath the area of the metal rings was covered with pea gravel. She testified that she did not know the depth of the pea grave or whether the gravel ever was raked, graded, smoothed or replenished.

Mr. Baer testified at an examination before trial that he was the school principal of Wood Park when the incident happened. He testified that he became aware of the incident when the school nurse advised him of Tyler's injury, but he could not recall whether he later went outside to inspect the playground equipment. Mr. Baer testified that the ground cover underneath the metal rings is pea gravel or a stone bed and that it was installed by the district. Like Mrs. Berk, Mr. Baer testified that he did not know the depth of the pea gravel. Moreover, he testified that the school's insurance company would come to the school at least once a year to inspect the building and grounds and provide suggestions on things that need to be fixed or changed. After such suggestion, the insurance company would produce a document entitled "Loss Control Survey Recommendations" for the District.

In addition, Mr. Baer testified that he had implemented a school policy barring kindergartners from playing on certain apparatus on the school playground, namely the big slide, the swings and the dome monkey bars. He further testified that teacher aides at the school previously had expressed concerns about the young students using the metal rings. Mr. Baer testified that in response to the aides' concerns, he told them that the equipment was approved for use by this age group. However, he also advised the aides that if they observed a child was having difficulty playing on the rings, they could tell that child to get off.

To obtain summary judgment, the movant must establish his cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in his favor (CPLR 3212[b]), and he must do so "by tender of evidentiary proof in admissible form" (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]; *see,* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions, unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact in opposition to a motion for summary judgment (***Zuckerman v City of New York***, *supra*). In determining a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility but to determine whether issues of fact exist precluding summary judgment (*see*, ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty and that the breach of such duty was a proximate cause of his or her injuries (*see*, ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704, *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). Although proximate cause generally is a matter for the jury, a plaintiff who brings a negligence action must establish prima facie that the defendant's negligence was a substantial cause of the event which produced his or her injury (***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 315, 434 NYS2d 166 [1980]; *see*, ***Maheshwari v City of New York***, 2 NY3d 288, 778 NYS2d 442 [2004]; ***Forman v City of White Plains***, 5 AD3d 434, 773 NYS2d 102 [2004]). Further, while proximate cause may be inferred from the facts and circumstances surrounding the injury, there must be sufficient proof in the record to permit a finding of proximate cause based not upon speculation, but upon the logical inferences to be drawn from the evidence (*see*, ***Schneider v Kings Highway Hosp. Ctr.***, 67 NY2d 743,

500 NYS2d 95 [1986]; ***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 754 NYS2d 31 [2003]; ***Babino v City of New York***, 234 AD2d 241, 650 NYS2d 778 [1996]).

A landowner has a duty to maintain its premises in a reasonably safe condition and to warn of a dangerous condition that is not readily observable with the reasonable use of one's senses (***DiVietro v Gould Palisades Corp.***, 4 AD3d 324, 325, 771 NYS2d 527 [2004]). Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends upon the particular circumstances of each case and generally is a question of fact (***Shalamayeva v Park 83rd St. Corp.,*** 32 AD3d 387, 388, 820 NYS2d 607 [2006]). The District's submissions in support of the motion are insufficient to show prima facie that they were not negligent in the design and maintenance of the playground. More specifically, both Mr. Baer and Mrs. Berk testified that they did not know the depth of the pea gravel underneath the metal rings or whether the District had ever replenished the gravel in the playground area. Thus, absent sufficient evidence regarding the material under the metal rings, defendants failed to show as a matter of law that the playground area was in a reasonably safe condition (*see*, ***Vonungern v Morris Cent. School***, 240 AD2d 926, 658 NYS2d 760 [1997]; ***Dash v City of New York***, 236 AD2d 579, 654 NYS2d 33 [1997]).

Further, while not insurers of safety, schools are under a duty to adequately supervise the students in their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (*see*, ***Mirand v City of New York,*** 84 NY2d 44, 614 NYS2d 372 [1994]; ***Swan v Town of Brookhaven***, 32 AD3d 1012, 821 NYS2d 165 [2006]). "[A] school is obligated to exercise such care over students in its charge that a parent of ordinary prudence would exercise under comparable circumstances" (***Krumbiegel v Riverhead Cent. School Dist.***, 37 AD3d 766, 766, 830 NYS2d 762 [2007]; *see*, ***David v County of Suffolk***, 1 NY3d 525, 775 NYS2d 229 [2003]). However, where an accident occurs in so short a span of time that no amount of supervision could have prevented it, any lack of supervision is not the proximate cause of the accident (*see*, ***Ronan v School Dist. of City of New Rochelle***, 35 AD3d 429, 825 NYS2d 249 [2006]; ***Swan v Town of Brookhaven***, *supra).* Defendant argues that Tyler's elbow injury was due to a spontaneous event that could not have been prevented by any amount of supervision. However, the record indicates that a question of fact exists as to the quality of the supervision provided by defendant. Here, Mr. Baer testified that he previously had been advised by school employees that the metal rings were not appropriate play apparatus for kindergartners. Moreover, Tyler's testimony that his teacher was sitting on a bench approximately 20 feet away coupled with both his and Mrs. Berk's testimony that she did not witness the incident further give rise to a triable issue of fact. The testimony demonstrated that there was no aide present while they were outside, and the injury took place almost immediately after the class was permitted to play outside. The testimony presented raises a triable issue as to whether the amount of supervision provided by the school at the time of the accident was reasonable and adequate under the circumstances (*see*, ***Oliverio v Lawrence Public Schools***, 23 AD3d 633, 805 NYS2d 638 [2005]; ***Rivera v Board of Educ.***, 19 AD3d 394, 796 NYS2d 182 [2005]; ***Douglas v John Hus Moravian Church***, 8 AD3d 327, 778 NYS2d 77 [2004]; *see also*, ***David v City of New York***, 40 AD3d 572, 835 NYS2d377 [2007]).

Since the District failed to demonstrate no triable issue of fact, the burden never shifted to plaintiff. As a result, this court need not consider plaintiff's submissions in opposition. Accordingly, defendants' motion for summary judgment is denied.

Dated: NOV 15 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION