SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Scan

Present: HON. WILLIAM R. LaMARCA
Justice

NICHOLAS FRIGENTI, an infant under the age of 14 years, by his mother and natural guardian, DONNA FRIGENTI, individually,

Plaintiffs,

-against-

NORTH BELLMORE UNION FREE SCHOOL DISTRICT,

Defendant.

Motion Sequence #001
Submitted October 24, 2007

INDEX NO: 18641/05

The following papers were read on these motions:

BELLMORE Notice of Motion.....1
Affirmation in Opposition.....2
Reply in Further Support.....3

Relief Requested

Defendant, NORTH BELLMORE UNION FREE SCHOOL DISTRICT(hereinafter referred to as the "DISTRICT"), moves for an order, pursuant to CPLR §3212(b), granting summary judgment and dismissing the plaintiffs' complaint in its entirety. Plaintiffs, NICHOLAS FRIGENTI, an infant under the age of 14 years, by his mother and natural guardian, DONNA FRIGENTI, and DONNA FRIGENTI, individually, oppose the motion, which is determined as follows:

Background

This personal injury action against the DISTRICT, arises from an accident in which the infant plaintiff, NICHOLAS, fell from the monkey bars in the playground at the John G. Dinklemeyer School in North Bellmore, New York, on July 3, 2005, at approximately 11:30 A.M., causing him to sustain a fractured elbow. NICHOLAS was five (5) years old at the time, and had been taken to the playground by his grandmother, non-appearing third-party defendant, CAROLYN DIAMOND, who was supervising NICHOLAS at the time of the accident, as the school was closed for the summer. There is no claim against the DISTRICT for negligent supervision. The sole claim against the DISTRICT is for negligent maintenance of the equipment.

In support of the motion to dismiss, the DISTRICT submits the pleadings, the plaintiff's bill of particulars, and the transcripts of the depositions of the parties and the head custodian of the school, Daniel Landon, which the DISTRICT claims supports dismissal of the action. It is the DISTRICT's position that Langdon testified that he oversees the maintenance of the school premises and that the surface under the monkey bars is comprised of wood chips that he rakes at least once a week, or as needed, and that he inspects the area at least once a week. The DISTRICT claims that no prior injuries or accidents involving kids falling from the monkey bars had been reported and no repairs to the monkey bars had been made. The DISTRICT asserts that it is entitled to summary judgment because it has presented evidence that it maintained the moneky bars in a reasonably safe condition and because plaintiffs have offered no proof to the contrary.

In opposition to the motion, counsel for plaintiffs claims that the motion is frivolous because, through discovery, defendant is aware of the plaintiffs' claim that the DISTRICT

deviated from good and accepted practice by permitting the wood chips in the monkey bar area of the playground to become uneven, worn, compacted and dangerous to the intended users. Counsel states that the Notice of Claim, the Complaint and the Bill of Particulars all refer to a deviation from the standards promulgated by the U.S. Consumer Products Safety Commission and the American Society of Testing and Materials (ASTMF1292). Michael Asheroff, an expert retained by NICHOLAS' father, submits an affidavit herein, in which he claims he has over thirty (30) years of experience and training dealing with management, operation, construction, and maintenance of public recreational facilities and playgrounds. He states that he conducted a physical examination at the site of the accident, on July 25, 2005, and found that the wood chips in the area were 1 ½ inches deep and were not adequate to the task. Mr. Asheroff asserts that the U.S. Consumer Products Safety Commission and the American Society of Testing and Materials recommends 6 inches of shock absorbing material as a minimal acceptable standard under climbing equipment, and that the subject surface herein fell far short. He concludes that the depth of the wood chips at the accident location was insufficient to provide the necessary shock absorption and that the DISTRICT's failure to provide a safe surface was a proximate cause of plaintiff's injury. Counsel for plaintiffs urges that the motion for summary judgment be denied because questions of fact exist as the DISTRICT's maintenance of the wood chip playground surface.

In reply counsel for the DISTRICT points out that there is a long line of Second Department cases that hold that the CPSC guidelines are nonmandatory and thus insufficient to create an issue of fact as to negligence. *See, Sobti v Lindenhurst School District,* 35 AD3d 439, 825 NYS2d 251 (2nd Dept. 2006); *Swan v Town of Brookhaven*, 32

AD3d 1012, 821 NYS2d 265 (2nd Dept. 2006); *Capotoso v Roman Catholic Diocese of Rockville Centre,* 2 AD3d 384, 767 NYS2d 857 (2nd Dept. 2003); *Washington v City of Yonkers,* 293 AD2d 741, 742 NYS2d 316 (2nd Dept. 2002). Counsel points out that the CPSC guidelines are directed to preventing "serious head injuries" and state that "it should be recognized that all injuries due to falls cannot be prevented no matter what playground surfacing material is used". Counsel states that, based on the facts herein, with the school closed for the summer and their being no other adult supervision, it was the grandmother's responsibility to better supervise the boy so that he would not use the monkey bars where he could not properly reach them.

The Law

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (*see, Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]. Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; *see also S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (*see Glover v City of New York*, 298 AD2d 428,

748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (*See, Mosheyev v Pilevsky, supra*).

It is a fundamental principle of law that before a party may be held liable in negligence, it must be shown that the party owed a duty of care to the plaintiff. *Strauss v Belle Realty Company*, 65 NY2d 399, 492 NYS2d 555, 482 NE2d 24 (C.A. 1985). In the absence of a duty, there is no breach and without a breach there is no liability. *Pulka v Edelman,* 40 NY2d 781, 390 NYS2d 393, 358 NE2d 1019 (C.A. 1976). To establish a claim sounding in negligence, it is incumbent upon the plaintiffs to demonstrate that the defendants breached a legal duty owed to him and that this breach was a substantial factor in occasioning the plaintiff's injuries (*Pulka v Edelman, supra; Derdiarian v Felix Contracting Corp.,* 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 [C.A. 1980]).

It is well settled that, "[a] landowner has a duty to maintain its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury and the burden of avoiding the risk" (*Branham v Loews Orpheum Cinemas, Inc.*, 31AD3d 319, 819 NYS2d 250 [1st Dept. 2006]; *Kellman v 45 Tiemann Assoc.*, 87 NY2d 871, 638 NYS2d 937, 662 NE2d 255 [C.A. 1995]; *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868 [C.A. 1976]; *Beck v J.J.A. Holding Corp.*, 12 AD3d 238, 785 NYS2d 424 [1st Dept. 2004]). In order to recover damages for an alleged breach of this duty, a plaintiff must first demonstrate that the defendant created or had actual or constructive notice of the hazardous condition which precipitated the injury (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493, 646 NE2d 795 [C.A. 1994]; *Beck v J.J.A. Holding Corp., supra*). To constitute constructive

notice, the defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant or its agents to discover and remedy it (*Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837, 797 NYS2d 369, 830 NE2d 267 [C.A. 2005]; *Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646, 492 NE2d 774 [C.A. 1986]; *Green v City of New York*, 34AD3d 528, 825 NYS2d 227 [2nd Dept. 2006]). Notably, a "general awareness of a dangerous condition" will not suffice (*Solazzo v New York City Transit Authority*, 6 NY3d 734, 810 NYS2d 121, 843 NE2d 740 [C.A. 2005]; *Piacquadio v Recine Realty Corp., supra,* at 967; *Panetta v Phoenix Beverages, Inc.*,29 AD3d 659, 816 NYS2d 122 [2nd Dept. 2006]; *Melendez v New York City Housing Authority*, 23 AD3d 211, 803 NYS2d 547 [1st Dept. 2005]).

In view of the accepted belief that "[n]o person can be expected to guard against harm from events which are . . . so unlikely to occur that the risk . . . would commonly be disregarded" (*Di Ponzio v Riordan*, 89 NY2d 578, 657 NYS2d 377, 679 NE2d 616 [C.A. 1997], quoting Prosser and Keeton, Torts § 31, at 170 [5th Ed.]), the law draws a distinction between possibilities which are remote in nature to those that are reasonably foreseeable. A risk of harm is deemed to have been foreseeable if such hazzard could have been reasonably anticipated (*Di Ponzi v Riordan, supra*).

Applying these principles to the allegations herein, it is the judgment of the Court that the plaintiff has raised issues of fact as to whether the DISTRICT breached its duty to maintain the playground in a reasonably safe condition. Giving plaintiff every favorable inference, the Court denies the DISTRICT's motion for summary judgment.

Conclusion

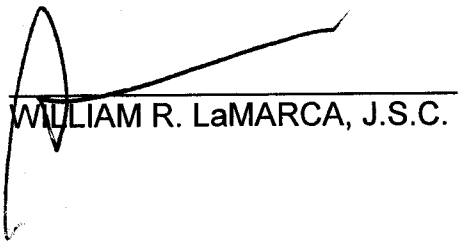
Based on the foregoing, it is hereby

ORDERED, that the DISTRICT's motion for summary judgment is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: January 11, 2008



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