SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

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AUSTIN SWISLOSKY, an infant under the age of 18 years by his mother and natural guardian, JULIE SWISLOSKY and JULIE SWISLOSKY, Individually,

Plaintiff,

-against-

SEAFORD UNION FREE SCHOOL DISTRICT and HARBOR ELEMENTARY SCHOOL,

Defendants.

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TRIAL TERM PART: 48

INDEX NO.: 17976/06

MOTION DATE:1-16-07
SUBMIT DATE:2-27-08
SEQ. NUMBER - 001

The following papers have been read on this motion:

Notice of Motion, dated 12-12-07.....1
Memorandum of Law, undated 2
Affirmation in Opposition, dated 2-6-08.....3
Reply Affirmation, dated 2-21-08.....4

This motion by the defendants pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted and the complaint is dismissed.

This action concerns an injury allegedly suffered by the infant plaintiff ("Austin") on October 24, 2005 when he was a first grade student at defendant Seaford Union Free School District ("District")'s Harbor Elementary School.

The essential facts are undisputed. Austin was a member of one of three classes released to an outdoor play area after lunch in the school cafeteria. There were some 20-28 students in each class. Three adult aides, as well as other adults assigned to a number of special education students, were present as supervisors. Austin himself recalled as many as five adults being present outdoors during this recess period.

There were two locations in the outdoor area that contained playground equipment; one had wooden play equipment, the other equipment made of metal and plastic. Austin was playing on the latter. Austin stated at this deposition that he fell from a "little" slide that was straight. It was one that he had used before without incident, including after school, when he would be taken there by his mother. His mother described the slide as being about 4 ½ feet in height. Austin described the incident as follows: he sat down on the top of the slide with his feet pointed to the bottom, and then pushed against slide to go down. Although he did not remember what happened next, he stated that "I think I leaned over. And that's how I fell." He made it half way down before falling off. There is no evidence that any adult supervisor witnessed the accident.

Austin fell on his right arm next to the slide, on to wood chips, which covered the ground beneath all the playground equipment in that location. He testified that these chips were light and crunchy, and some of them stuck to his clothing. After the accident, Austin approached Suzanne Chermak, an instructional aide assigned to his class, and reported the incident to her. Plaintiffs allege that as a result of the fall he sustained fractures to radius and ulna of the right arm.

In their complaint and bill of particulars, the plaintiffs allege that the District is liable under essentially two theories of negligence: first, that there was inadequate supervision, and,

second, that the equipment was not safe, including the claim that the surface on to which Austin fell was not adequately cushioned. Defendants rely on, *inter alia,* deposition transcripts and an affidavit from James Anthony, the grounds supervisor for the District. Among other things, he states that there had not been any prior injuries resulting from falls from the equipment on which Austin had been playing, and that he had never observed bare patches under the equipment; rather, the surface was covered with the wood chips. He also had testified at his deposition that wood chips were always beneath the equipment. Chermak also testified that wood chips were present on the day of the accident. An invoice presented by the District indicates that it took delivery of 50 cubic yards of the these wood chips for Harbor Elementary School on October 18, 2005, approximately one week before the accident, but there is no evidence regarding when and where they were spread.

The law on summary judgment is well settled. Summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395 (1957); *Bhatti v. Roche,* 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief. *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient

to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton,* 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.,* 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.,* 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.,* 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but

simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC,* 27 AD3d 684 (2d Dept. 2006).

Based on the record before it, the Court finds that the defendants have made a *prima facie* showing that they are entitled to judgment as a matter of law. They have demonstrated that the accident was the result not of inadequate or poor supervision, but rather of a sudden action of a child who was otherwise engaged in normal play. Therefore, any temporary inattention of the adult supervisors on duty – even assuming that this was the case – was not a cause of such accident. *Reardon v Carle Place Union Free School Dist.*, 27 AD3d 635 (2d Dept. 2006); *Botti v Seaford Harbor Elementary School Dist. 6,* 24 AD3d 486 (2d Dept. 2005); *Cerrato v Carapella,* 22 AD3d 701 (2d Dept. 2005); *see generally, Mirand v City of New York,* 84 NY2d 44 (1994). The District has demonstrated that the supervision was adequate in any event.

Further, the District has demonstrated that it maintained the play area, and specifically the surface under the equipment, in a reasonably safe condition. *See, Sobti v Lindenhurst School Dist.*, 35 AD3d 439 (2d Dept. 2006); *Swan v Town of Brookhaven,* 32 AD3d 1012 (2d

Dept. 2006).

In response, the plaintiffs have submitted the affirmation of their attorney. No additional evidence is presented, as counsel relies on the defendants' submissions and legal argument.

With regard to the negligent supervision claim, there is nothing offered that would place in issue the showing that the alleged lack of adequate supervision was a proximate cause of the accident. Accordingly, under the authority cited above the claim based on negligent supervision must be dismissed.

The sole argument presented concerning the surface under the slide is that Austin's mother, plaintiff Julie Swisloky, testified that she visited the site two days after the accident and that she observed very little coverage from the wood chips, and took pictures indicating the same. [1]

However, these photographs (annexed to the moving papers) appear to show the presence of wood chips generally under the play equipment at issue, and certainly none show bare ground under the slide. In addition, and more importantly, the fact that plaintiff acknowledged that her observations and photographs were made two days post-accident undermines both as admissible evidence of conditions on the day Austin fell. This is especially true where there is no dispute that the cushioning material was wood chips, which are light, and thus easily moved and rearranged. There also is no testimony offered as to how she knew that wood chips were put down afterwards, as she also claims. In any event,

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[1] No challenge is made to the use of wood chips themselves as an adequate material for cushioning falls, by way of an expert's affidavit or otherwise.

this does nothing to place in issue defendant's proof concerning their presence on the day of the accident. Accordingly, the plaintiffs have failed to place in issue defendants' proof that the playground area in which Austin fell was in reasonably safe condition on the day of the accident, and the claim that it was not must therefore be dismissed.

Finally, the Court notes, but must reject, the plaintiffs' attempt to raise the absence of bars near the top of the slide. This contention is not found in the complaint or bill of particulars, and thus cannot be raised now to defeat this motion. *Figueroa v Gallagher,* 20 AD3d 385 (2d Dept. 2005). In any event, given Austin's uncontradicted version of how the accident occurred, such a defect, even if it existed, was not a proximate cause of the accident.

This shall constitute the Decision and Order of this Court

ENTER

DATED: March 20, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED

MAR 24 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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