Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

James Quinn, an infant by his mother and natural guardian, Susan Quinn and Susan Quinn, individually,

Plaintiffs,

-against-

Babylon Union Free School District,

Defendant.

Motion Sequence No.: 002; MD
Motion Date: 11/29/07
Submitted: 3/12/08

Index No.: 13634/2005

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Upon the following papers numbered 1 - 27 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers, 1 - 17; Answering Affidavits and supporting papers, 18 - 22 ; Replying Affidavits and supporting papers, 23 - 27.

This action was commenced to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiffs James Quinn ("James") and his mother Susan Quinn ("Quinn"), on May 7, 2004, while five year old James was playing on the trapeze rings ("rings") at the Babylon Elementary School playground, a school in the defendant Babylon Union Free School District ("defendant"). While playing on the rings, James fell to the ground and fractured his left wrist. In their verified complaint and bill of particulars the plaintiffs allege that defendant negligently failed to supervise the children on the playground and that it failed to maintain the playground in a reasonably safe condition. Furthermore, the plaintiffs allege, *inter alia*, that defendant had actual or constructive knowledge of the playground's dangerous condition and

failed to warn James of those conditions.

The defendant now moves for summary judgment dismissing the plaintiffs' complaint, contending that there exists no material issue of fact regarding the allegedly dangerous condition that injured plaintiff. In addition, the defendant avers that the supervision of James was adequate and not the proximate cause of his injuries. In support of its motion, the defendant relies on the deposition testimony of the plaintiffs James and Susan Quinn and the 50-h hearing testimony of plaintiff James Quinn. Also offered by the defendant to support its motion is the testimony of kindergarten aide Beth Ann Cullen ("Cullen") and head custodian Patrick Chatterton ("Chatterton"), both employees of the defendant. Finally, the defendant offers proof in the form of photographs of the playground, an incident report documenting the accident and information detailing the purchase and installation of the playground equipment from a non-party vendor.

James testified at the 50-h hearing that on the date of his accident he was playing on the rings in the playground. He testified that the rings on which he was playing were coated in plastic, some of which was ripped and peeling; although he "did not really know" how he fell, this defect, he indicated, contributed to his fall and subsequent injury. He then stated that his teacher was not present during recess and that there were at least seven aides on site. However, during his examination before trial James testified that, when he fell, the aides in charge of recess "were talking". James further stated that after he picked himself up off the ground and approached an aide he was instructed to go to the nurse. When questioned about the area where he fell, he indicated that he landed in wood chips. The defendant contends that this testimony shows that it was not the proximate cause of the James' injuries.

During the deposition of James' mother, plaintiff Susan Quinn testimony was elicited about the events that took place after James' accident. Ms. Quinn indicated that when she arrived at the nurse's office she was informed that James was injured after falling off of a piece of equipment known as a "glider". Ms. Quinn subsequently left the school with James and took him immediately to an orthopedist who applied a cast to James' arm after diagnosing him with a fractured wrist. It was not until the next day, according to Ms. Quinn, that she and her husband discovered that James was actually injured while he was playing on the rings. This fact came to light when the Quinn family returned to the playground. When questioned about the condition of the playground, and specifically the depth of the wood-chip ground covering, Ms. Quinn responded that she did not check the depth of the wood chips, and was not aware of anyone who had done so. The defendant avers that this testimony shows that the play area where James was injured was not defective.

The deposition testimony of Ms. Cullen, an employee of the defendant, focused on the issues of supervision and maintenance of the playground area. Ms. Cullen testified in substance that there were approximately eight aides assigned to the kindergarten recess group, generally spread across the field and playground areas. She also stated that she was one of the three aides

assigned to the playground on the day of James' injury. Ms. Cullen testified that she did not witness James fall because she was escorting another child to the nurse, however, after returning to the playground she saw James crying, approached him, and took him to the nurse. She did not know if anyone else, student or aide, had witnessed James' fall. Later during her deposition Ms. Cullen was questioned about the defendant's playground maintenance procedures. Specifically, she stated that she had seen the custodians sweep the wood chip bedding back into the play area when it was on the cement surrounding the playground, although she could not recall with what frequency this action was performed. Finally, Ms. Cullen testified that there were no restrictions placed on the students' access to the playground and that she had no recollection of any prior injuries resulting from the use of the playground equipment since its installation. The defendant contends that this testimony negates any inference of negligent supervision and supports its theory that James' fall was spontaneous.

Mr. Chatterton, during his deposition, spoke generally about his duties as the head custodian for the defendant's elementary school. He stated that he would hand out duty assignments to his janitorial crew and maintain the school grounds. When specifically questioned about the playground maintenance procedures he stated that on Mondays he would give the playground an overview and pick up any debris from the prior weekend; this would take approximately ten minutes. Mr. Chatterton testified that he did not know, nor did he regularly check, the depth of the wood chips located in the play area. He did, however, state that on occasion the wood chips would have to be raked at the bottom of the slides due to a divot that is created from normal usage. Mr. Chatterton then explained that if the children or the aides see something wrong in the play area they would bring it to his attention and he would remedy the situation. Finally, Mr. Chatterton could not determine with accuracy the distance between the rings from which James fell and the wood chip layer on the ground where he landed. The defendant avers that Mr. Chatterton's testimony indicates that the playground was not negligently maintained or in an unsafe condition.

Finally, in further support of its motion for summary judgment the defendant offered photographs of the playground and, specifically, photographs of the area under the rings where James fell. The defendant also supplied a copy of the Notice of Contract detailing the equipment purchased for the playground installation, including the quantity of wood chip bedding required to meet the safety requirement standards. The defendant relies on these documents to support its argument that the playground was properly designed and maintained.

In Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880 [Second Dept., 1994], the Appellate Division, Second Department, observed, in relevant part, as follows:

> It is well established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (see, Winegrad v. New York Univ. Med. Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (see, State Bank of Albany v. McAuliffe, 97 AD2d 607 [Third Dept., 1983]), but once a *prima facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman, *supra*).

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 [1976]; Engelhart v. County of Orange, 16 AD3d 369 [Second Dept., 2005] *lv denied* 5 NY3d 704 [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 (see, Derdiarian v. Felix Contr. Corp., 51 NY2d 308 [1980]; Maheshwari v. City of New York, 2 NY3d 288 [2004]; Forman v. City of White Plains, 5 AD3d 434 [Second Dept., 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 [1986]; Hartman v. Mountain Val. Brew Pub, 301 AD2d 570 [Second Dept., 2003]; Babino v. City of New York, 234 AD2d 241 [Second Dept., 1996]).

In New York, the liability of a school district is governed by the same principles as those that govern private land owners (see, Stevens v. Central School Dist. No. 1 of the Town of Ramapo, 25 AD2d 871 [Second Dept., 1966], *aff'd,* 21 NY2d 780 [1968]). 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 (see, DiVietro v. Gould Palisades Corp., 4 AD3d 324 [Second Dept., 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 is generally a question of fact (Shalamayeva v. Park 83rd St. Corp., 32 AD3d 387 [Second Dept., 2006]). The defendant school district's submissions in support of their summary judgment motion are insufficient to show prima facie that they were not negligent in the maintenance of the playground. More specifically, both Ms. Cullen and Mr. Chatterton testified that they did not know the depth of the wood chips underneath the rings. The testimony also leaves open the question of how often the wood chip depth is checked.

Although testimony was elicited to the effect that the wood chips in the play area are raked when the custodial crew sees fit, an issue of fact still exists as to specific procedures used to determine if the wood chips are maintained at the proper coverage level. The submission of the Notice of Contract detailing the amount of wood chips necessary to meet the required coverage level is insufficient without proof regarding the actually amount of wood chips installed, or whether those wood chips remained in the play area between the date of installation and the date of James' accident approximately seven months later. Thus, absent sufficient evidence regarding the safety material under the rings, defendant 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 [Third Dept., 1997]; Dash v. City of New York, 236 AD2d 579 [Second Dept., 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 [1994]; Swan v. Town of Brookhaven, 32 AD3d 1012 [Second Dept., 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" (see, Krumbiegel v. Riverhead Cent. School Dist., 37 AD3d 766 [Second Dept., 2007]; David v. County of Suffolk, 1 NY3d 525 [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 [Second Dept., 2006]; Swan v. Town of Brookhaven, *supra).* Defendant argues that James' wrist fracture 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 the defendant. James testified that there were at minimum seven aides supervising recess on the date of his injury. Furthermore, Ms. Cullen corroborated his testimony when she stated that there were eight aides on recess duty, with three aides, including herself, assigned to the playground. The fact that Ms. Cullen was in the nurse's office with another student and therefore unavailable to supervise James does not save the defendant's argument; there were two other aides on the playground that afternoon, neither of whom witnessed, and according to James' testimony, helped him after his fall. It was only after Ms. Cullen returned to the playground that James' injury was recognized and he was escorted to the nurse's office. This fact, coupled with James' testimony that the other aides were "talking", 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 [Second Dept., 2005]; Rivera v. Board of Educ. of City of Yonkers, 19 AD3d 394 [Second Dept., 2005]; Douglas v. John Hus Moravian Church, 8 AD3d 327 [Second Dept., 2004]; see, also, David v. City of New York, 40 AD3d 572 [Second Dept., 2007]).

The defendant failed to demonstrate the absence of a triable issue of fact; therefore, the burden never shifted to plaintiff. As a result, this court need not consider plaintiffs' submissions in opposition. Accordingly, it is

ORDERED that this motion by defendant, Babylon Union Free School District, for an order granting summary judgment dismissing the complaint is denied.

Dated: May 20, 2008

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.