SCAN

SHORT FORM ORDER mg,md

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

JORDY RABINOWITZ,

Plaintiff(s),

-against-

GREAT NECK PARK DISTRICT, et al.,

Defendant(s).

MOTION DATE: 4/21/08
INDEX No.:9259/06
MOTION SEQUENCE NO:4,5

CAL. NO.:2008H0492

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-4
Notice of Cross Motion.....	5-7
Answering Affidavits.....	8,9
Replying Affidavits.....	10,11
Briefs:	

Upon the foregoing papers, it is ordered that this motion by defendant Sear-Brown Group, Inc., d/b/a Stantec Consulting Services [hereinafter "Stantec"] for an order pursuant to CPLR 3211(a)(7), 3211(h),3212(i) and 214-d dismissing the plaintiffs' complaint is granted. Motion by defendant Wausau Tile [hereinafter "Wausau"] for an order pursuant to CPLR 3211 seeking dismissal of the grounds of spoliation, or, alternatively seeking an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiffs' complaint is denied.

This is an action to recover money damages for personal injuries which arise out of an occurrence which took place on July 30, 2005, when infant plaintiff Sara Rabinowitz was present on the grounds of John Ieopi Park, which is located within the geographical parameters of Great Neck Park District {hereinafter Great Neck Park}. Sara was playing in an area of the park containing a series of wading pools which in turn housed several concrete sprinklers in the form of certain animals, specifically a porpoise, an elephant and a whale. On the date in question, the plaintiff was playing on the sprinkler constructed in the shape of a whale which contained a slide incorporated into the top of the animal-like structure. As the plaintiff was climbing up the whale so as to access the slide, she slipped off the side and fell

sustaining physical injury, including cracking her chin.

As to the moving defendants herein, Stantec was responsible for designing the play area in which the plaintiff's accident occurred. Alternatively, defendant Wausau was the manufacturer of the particular whale sprinkler from which the plaintiff fell.

As a result of said injuries, on June 7, 2006, Jordy Rabinowitz, individually and on behalf of his daughter and infant plaintiff herein, Sara Rabinowitz, commenced a cause of action originally naming Great Neck Park as the sole defendant. Thereafter, in April 2007, Great Neck Park commenced a third-party action naming Stantec, Wausau and Pav-Lak Contractors. In August 2007, the plaintiffs served a supplemental summon and amended complaint adding Stantec, Wausau and Pav-Lak Contractors as direct party defendants.

By order of this court dated August 31, 2007, the third-party complaint interposed by Great Neck Park and as asserted against Stantec, was dismissed without prejudice based upon Great Neck Park's " failure to comply with the notice of claim provisions and pleading requirements contained in CPLR 214-d subd. 1, 2 and 6."

The central contention posited by counsel for Stantec is that the underlying complaint should be summarily dismissed based upon the plaintiffs' failure to comply with certain statutory provisions relevant to actions interposed against certain design professionals.

In support of this contention, counsel relies principally upon the provisions as set forth in CPLR 214-d,3211(h),3212(i). CPLR 214-d[1] provides that as to claims for personal injury which are commenced, *inter alia*, against architects and engineers, and which are predicated upon acts or omissions which occurred more than ten years prior to the commencement of the action, a notice of claim must be served by the plaintiff upon such professional, at least ninety days before interposition of the action.

Annexed to Stantec's moving papers are various documents provided by counsel to demonstrate both that Stantec was a licensed professional as contemplated by CPLR 214-d during all times relevant to the within action and that the work rendered by the defendant was completed by the summer of 1990, more than ten years prior to the commencement of the action. Amongst these documents is the Environmental Assessment Form filed in connection with the subject design project dated April 12, 1989, as well as portions of the August 1, 1989 agreement executed by and between Great Neck Park and Stantec for the architectural and design services which Stantec was to provide.

Counsel argues that given the time which elapsed between the completion of the design work and the commencement of the within action, the plaintiff was required by applicable statutory provisions to serve a notice of claim upon Stantec and to particularly allege in the amended complaint that service of same was achieved. Counsel asserts that the plaintiff has failed to comply with these statutory mandates and consequently dismissal of the within action is required and warranted pursuant to CPLR 3211(h) and 3212 (i).

In response to the application interposed by Stantec, the plaintiffs have not filed any opposition although they were duly served with the relevant motion papers.

Whereas CPLR 214-d sets forth certain condition precedents for causes of actions commenced against design professionals, CPLR 3211(h) and 3212(i) provide the mechanism by which these professionals can move for dismissal of certain complaints, where, as here, there is alleged non-compliance on the part of the plaintiffs with the requirements of CPLR 214-d. CPLR 3211(h) provides the following in pertinent part:

> "A motion to dismiss based upon paragraph seven of subdivision (a) of this rule, in which the moving party has demonstrated that the action, . . . subject to the motion is an action is which a notice of claim must be served on a licensed architect, engineer, . . . pursuant to the provisions of subdivision one of section two hundred fourteen of this chapter shall be granted unless the party responding to the motion demonstrates that a substantial basis in law exists to believe that the performance, conduct or omission complained of licensed architect, engineer, . . . as set forth in the notice of claim was negligent and that such performance, conduct or omission was a proximate cause of personal injury, . . . complained of by the claimant or is supported by a substantial argument for an extension, modification or reversal of existing law."

CPLR 3212(i) and the provisions therein contained are substantially similar in substance to those embodied in CPLR 3211(h). The only difference in language between the two statutory provisions is that the first sentence of CPLR 3212(i) refers to the making of "A motion for summary judgment. . . " as opposed to an application made under CPLR 3211(a)(7).

In the instant matter, the cause of action against Stantec is

predicated upon negligence with regard to the professional design services rendered in connection to the area of the park in which the plaintiff was injured. Based upon the record as developed, it is undisputed that the within action, as asserted against Stantec, was commenced more than ten years after the the design services were completed and therefore more than ten years after any alleged negligence could have occurred.

Consequently, under the circumstances extant, by operation of the statute, it was incumbent upon the plaintiff to serve a notice of claim upon Stantec as a condition precedent to commencement of the instant action (CPLR 214-d; *Dorst v Eggers Partnership,* 265 AD2d 294).

Inasmuch as the record demonstrates that the plaintiffs have failed to serve the requisite notice of claim, the motion by Stantec seeking dismissal of the plaintiffs' complaint is hereby granted.

Defendant Wausau moves for dismissal of the plaintiffs' complaint on two separate bases. Initially, Wausau moves for dismissal of the complaint based upon alleged spoliation of evidence, particularly, the subject whale. Alternatively, Wausau moves for summary judgment dismissing the plaintiffs' complaint.

As the that branch of the application predicated upon spoliation, counsel argues that on October 4, 2007 and January 4, 2008, demands were made to Great Neck Park for information regarding the location of the whale sprinkler so that an inspection thereof could be conducted. Counsel states that in response, Great Neck Park informed Wausau that they had no information regarding the whale or its present location. Wausau contends that due to the failure of Great Neck Park to properly preserve the whale for inspection, it was severely prejudiced and the plaintiffs' complaint should therefore be dismissed.

Counsel further contends that while the plaintiffs may not have been the particular party responsible for the spoliation, they were nonetheless aware of the importance of the whale sprinkler to future litigation and thus were under a duty to insure its preservation.

The plaintiffs oppose the application and argues that Great Neck Park was aware of the pending litigation at the time the whale was removed and as a result it was Great Neck Park, and not the plaintiffs, which was under a duty to preserve the whale sprinkler. The plaintiffs also argue that they did not, at any time, have custody or control of the subject whale and were not in any position to keep or maintain the whale sprinkler. Finally, the

plaintiffs argue that any remedy for the alleged spoliation should be by and between Great Neck Park and Wausau.

In order to sustain a claim of spoliation it is incumbent upon the moving party to demonstrate that another party to the action, either negligently or intentionally, disposed of integral pieces of evidence, prior to the other party being afforded an opportunity to undertake an inspection of the evidence (*Kirschen v Marino*, 16 AD3d 555; *see also Kirkland v New York City Hous. Auth.*, 236 AD2d 170). In making such an application, the party seeking sanctions for the alleged spoliation, must demonstrate that the resultant inability to inspect the evidence in issue has severely prejudiced its ability to defend the underlying action (*Kirkland v New York City Hous. Auth., supra; see also Squitieri v City of New York,*248 AD2d 201).

A review of the plaintiffs' amended complaint reveals that the allegations therein contained assert that defendant Wausau was careless and negligent in the construction of the whale sprinkler and that it was "inherently defective in both design and manufacture". In cases alleging a design defect, the fact that the particular product alleged to have caused the plaintiff's injuries has been destroyed or is otherwise unavailable for inspection, does not, in and of itself, constitute prejudice requiring dismissal of the plaintiffs' action (*Klein v Ford Motor Company,* 303 AD2d 376).

While the best evidence of a defectively designed or manufactured product is clearly the product itself, the existence of a design or manufacturing defect are issues, both of which can be proven by the introduction of circumstantial evidence (*Ramos v Howard Industries,* 10 NY3d 218; *Lichtenstein v Fantastic Merchandise Corp.* , 46 AD3d 762; *Kirschen v Marino*, 16 AD3d 555;*Klein v Ford Motor Company*, *supra; see also Otis v Baush & Lomb*, 143 AD2d 649). Such evidence may include photographs, in addition to evidence of other products of similar design (*Kirschen v Marino*, *supra* ;*Klein v Ford Motor Company*, *supra; see also Rios v Johnson V.B.C.*, 17 AD3d 654).

As to the matter of the availability of evidence probative to the issue of defective design and manufacture, annexed to Wausau's moving papers, are several photographs of the Whale sprinkler in question. These photographs were identified by the plaintiff, Jordy Rabinowitz, as accurately depicting the specific whale as it appeared on the day of the accident (*see Kirschen v Marino,, supra*). Moreover, Wausau has at its disposal evidence of sprinklers which are of identical design and which are still being produced. A review of the deposition testimony of Rodney Dombrowski, who appeared on behalf Wausau on September 21, 2007 and who is employed in the capacity of Vice President of Operations, reveals that the

company is still producing the type of whale sprinkler which was involved in the subject accident (*Klein v Ford Motor Company*, supra).

Based upon the availability of the photographs and the availability of other products of like design, the court finds that the defendant has failed to meet it's burden that it would be severely prejudiced in mounting a defense by virtue of the missing whale sprinkler. Accordingly, that branch of the defendant's application which seeks dismissal of the plaintiffs' complaint based upon spoliation is hereby denied.

The court now addresses that branch of Wausau's motion made pursuant to CPLR 3212 and which seeks summary judgment dismissing the within complaint. Counsel contends that Wausau cannot be held liable to the plaintiffs because the whale sprinkler, which purportedly caused the plaintiff's injuries, was open and obvious and not inherently dangerous. Counsel makes particular reference to the deposition testimony of Jordy Rabinowitz, wherein he testified that both his children had visited this exact location on 5 to 10 separate occasions prior to the happening of the subject accident and that the children had utilized the various animal sprinklers without incident. Counsel also relies upon the heretofore referenced photographs of the whale sprinkler, which were identified by Mr. Rabinowitz as accurately depicting the site of the subject accident. Counsel argues these two pieces of record evidence conclusively demonstrate that whale was open and obvious, not inherently dangerous and thus any injuries sustained by the plaintiff are not actionable. The plaintiffs oppose the application and argue that the whale sprinkler was improperly designed for use as a slide inasmuch as it the structure did not have a safe way to properly ascend the slide such as steps, hand rails or footholds. Counsel for the plaintiffs posits that the design was wholly unsafe for use by children and that both Wausau and Great Neck Park were on notice of the dangerous condition given the occurrence of a prior accident whereby another infant had sustained injury while playing on an identical whale sprinkler.

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as the existence of a triable issue of fact (*Sillman v Twentieth Century Fox*, 3 NY2d; *Bhatti v Roche*, 140 AD2d 660). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof in admissible form sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor. Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation (CPLR 3212 [b]; *Olan v Farrell Lines*, 64 NY2d 1092).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d). Conclusory allegations are insufficient and to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates*, 191 AD2d 631). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Barr v County of Albany*, 50 NY2d 247; *Daliendo v Johnson*, 147 AD2d 312).

As stated above, the plaintiffs herein are alleging both defective design and defective manufacture of the whale slide/sprinkler. In a design defect case, a cause of action sounding in negligence can be sustained against a manufacturer where it can be shown that the manufacturer was responsible for a defect that caused the plaintiff's injury and that the manufacturer could have foreseen the injury (*Robinson v Reed-Prentice Division of Package Machinery Co.*, 49 NY2d 471). A product which is defectively designed "is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use; that is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce"(*Scarangella v Thomas Built Buses, Inc.*, 93 NY2d 655, quoting *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102).

Allegations of defective design are to be contrasted with allegations of defects in the manufacture of a product. A product can be found to present an unreasonable risk of harm and thus be defectively designed notwithstanding that it was constructed meticulously and in strict compliance and accordance with company plans and specifications (*Robinson v Reed-Prentice Division of Package Machinery Co., supra*). Alternatively, in cases alleging that a product has been defectively manufactured, the resultant harm arises from a flaw in the actual process by which the item was produced and for which the manufacturer can be held strictly liable (*Opera v Hyva*, 86 AD2d 373; *see also Caprara v Chrysler Corp.*, 52 NY2d 114, dissenting opinion).

In the instant matter, the court having reviewed the record in the light most favorable to the non-moving party, finds that the defendant has not demonstrated the absence of material issues of

fact (*Sillman v Twentieth Century Fox, supra*). The product in issue, the cement whale, was designed to be used as both a slide, as well as a sprinkler. The targeted users of such combination slide/sprinkler were young children.

Initially, with regard to the plaintiffs claim as to defective design, the defendant's proffer of the annexed photographs and the testimony of Mr. Rabinowitz, are in this court's view, insufficient to demonstrate entitlement to summary judgment. The evidence provided does not demonstrate that the whale sprinkler, as a matter of law, was not unreasonably dangerous for its intended use by children, given the absence of any handrails or other devices to aid the users in ascending to the top of the slide (*Robinson v Reed-Prentice Division of Package Machinery Co., supra*).

As to the plaintiffs' claim of an alleged defect in manufacture, here again Wausau has failed to demonstrate the absence of a material issue of fact. While the court is cognizant that the particular whale from which the plaintiff fell is no longer available and that as a result the defendant could not provide an expert affidavit based upon an examination thereof, this did not prevent the defendant from providing an expert affidavit based upon a review of the conditions of production under which these whales are still being produced and upon a review of the relevant design specifications (*see Ramos v Howard Industries, supra*).

Based upon the foregoing, the cross motion by defendant Wausau seeking summary judgment is denied.

Dated: JUN 11 2008

J.S.C.

ENTERED

JUN 16 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE

rabin