Grandeau v South Colonie Cent. School Dist.
2008 NY Slip Op 32199(U)
August 6, 2008
Supreme Court, Albany County
Docket Number:
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

DAVID GRANDEAU, Individually and as Parent and Natural Guardian of MICHAEL GRANDEAU, an Infant,

-against-

THE SOUTH COLONIE CENTRAL SCHOOL DISTRICT and THE SOUTH COLONIE CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION,

Defendants.

DECISION and ORDER
INDEX NO. 4181-06
RJI NO. 01-07-088315

Supreme Court Albany County All Purpose Term, July 22, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Eight year old Michael Grandeau, after finishing baseball practice, went to the nearby playground with his friends. Michael's father stayed at the baseball field to pick up the equipment and talk with other parents. While unsupervised, Michael climbed on top of the

playground's monkey bars, tried to get down quickly, lost his grip and fell. Michael broke his left arm in the fall.

David Grandeau, as the father of and on behalf of Michael, brought suit against defendants for Michael's personal injuries. Michael claims his injuries were proximately caused by the defendants' negligent maintenance and/or installation of the monkey bars because the ground cover beneath them was insufficient at the time of his fall, by the defendants' failure to warn of the danger posed, and by the defendants' creation of a public and/or private nuisance. Issue was joined and discovery is complete. Defendants now bring a motion for summary judgment, which is opposed by plaintiff. Because defendants have demonstrated their entitlement to judgment as a matter of law, and plaintiff has failed to rebut such showing, defendants' motion for summary judgment is granted.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). On a motion on for summary judgment, the movant must establish by admissible proof, the right to judgment as a mater of law. (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Gilbert Frank Corp. v. Federal Insurance Co., 70 NY2d 966 [1988]).

If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). In opposing a motion for summary judgment, one must produce "evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (Id. at 562). Moreover, all evidence must be viewed in the light most favorable to the opponent

of the motion. (Amidon v. Yankee Trails, Inc., 17 A.D.3d 835 [3d Dept. 2005]; Crosland v. New York City Transit Auth., 68 NY2d 165 [1986]).

"To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom." (Solomon by Solomon v. City of New York, 66 NY2d 1026, 1027 [1985]). "Proximate cause is generally a jury question, but summary judgment is appropriate where record evidence reveals that the alleged breach of duty could not have played a role in causing the injury sustained." (Butler v. City of Gloversville, 52 AD3d 896 [3d Dept. 2008]; see also Abair v. Town of N. Elba, 35 AD3d 935 [3d Dept. 2006]).

The defendants' "duty to maintain their playground facilities in a reasonably safe condition" is well established. (Butler, supra). Plaintiff's complaint is based, in part, upon defendants' alleged breach of such duty in the installation and maintenance of the ground cover below the monkey bars where plaintiff fell.

In support of its position that the ground cover beneath the monkey bars was not a proximate cause of Michael's injury, defendants offer the affidavit of biomedical engineer James C. Otis. He reviewed the specific pleadings and depositions in this action, reviewed testing data for the engineered wood mulch used at the playground, the industry standards for ground cover in playgrounds, coupled with a personal inspection of the playground at issue. From such review he calculated the force created by Michael's weight falling from the height of the monkey bars and compared it to the capacity of an eight year old's arm to absorb such force. He found that the pressure created by Michael's falling body far exceeded the capacity of his arm and no amount of ground cover, that complied with industry standards, would have absorbed the amount of force

necessary to prevent Michael's arm from breaking. He concluded that the ground cover, or lack thereof, played no role in Michael's broken arm. Rather, the force associated with his falling body, and its manner of impact with his arm, caused the break.

The foregoing establishes defendants' right to judgment as a matter of law because in showing that the playground's ground cover played no role in Michael's arm breaking, it affirmatively demonstrated that the plaintiff could not prove that the alleged breach of duty (inadequate ground cover) proximately caused plaintiff's injury.

Plaintiff's rebuttal proof consists of Dr. Gary Neifeld's "unsworn" affirmation[1]. He does not specify the pleadings or depositions he reviewed in preparing his affirmation nor does he state that he examined either the playground or Michael. Nor does he have any experience evaluating playgrounds or rely upon any industry standards. Rather, he based his affirmation on "his experience as an emergency physician and [his] intuitive reasoning and logic." From such basis he concludes that if the "playground apparatus were not as high as it was and if the mulch beneath it had been of greater depth, that it is probable that this boy would have sustained less severe injuries than he did." This conclusion is wholly speculative and fails to address the specific instance of Michael's fall or the falling body / force issue, clearly set forth by Dr. Otis. Because Dr. Neifeld's affidavit is not based upon the facts in this case, and a reasoned analysis therefrom, it's conclusions are not credible, unsubstantiated and lack an evidentiary basis. Dr. Neifeld's affidavit fails to raise any genuine issue of fact and is insufficient to meet plaintiff's

[1] The affirmation is not affirmed to be true under penalties of perjury. Because the affirmation was signed by Dr. Neifeld "pursuant to CPLR 2106" the Court will consider it. The better practice, however, is for the affirming doctor to specifically swear to the affirmation's contents under the penalty of perjury consistent with the statute.

burden. (Butler, supra [holding that because plaintiff's expert's affidavit was conclusory and without an evidentiary basis it failed to meet plaintiff's burden to prevent summary judgment]; see also Passero v. Puleo, 17 AD3d 953 [3d Dept. 2005][granting summary judgment because plaintiff's expert's affidavit was "unsupported by the record... and... too generalized and conclusory"])

Plaintiff's "school safety procedures" expert, Steve Bernheim, submitted an affidavit that is similarly defective. Mr. Bernheim's affidavit incorporates numerous conclusions, without any analysis supporting them. His affidavit fails to raise a genuine issues of fact because it fails to engage in a fact based analysis, it merely speculates and concludes. His affidavit merely refers to the CPLR §3101(F) expert response served, which states his opinions. This is insufficient to create an issue of fact. Mr. Bernheim's single fact based claim, is based upon the ground cover beneath the monkey bars being 5 ½ - 6" less than the height of ground cover depth as indicated by stickers pasted to the monkey bars and the state guidelines. Such assertion fails to even address the proximate cause issue, however, and as such fails to raise a genuine issue of material fact with regard to proximate causation.

The affidavits of plaintiff's experts are conclusory, insufficient to meet plaintiff's burden and provide no evidentiary basis to create any factual issue as a matter of law. (Butler v. City of Gloversville, 52 AD3d 896 [3d Dept. 2008]).

Moreover, Dr. Otis demonstrates that the absorbency of the ground cover in existence at the time of Michael's fall, even though it was less than where the stickers indicated, still performed its cushioning function at a level that was entirely consistent with the manufacturer and the industry standards. He based such conclusion upon his comparison of the shock

absorption testing data for the material placed at the playground and the requirements of shock absorption as contained in the US Consumer Product Safety Commission (CPSC) handbook and the guidelines promulgated by the American society for Testing and Materials (ASTM). He specifically noted that the playground's materials exhibited shock absorption capabilities well within the acceptable range. Additionally, defendants' playground safety expert, Margaret Payne, examined the playground, the specific pleadings and the depositions herein. She found that, in her professional opinion, the monkey bars and surrounding ground cover were reasonably safe. Ms. Payne specifically demonstrated how the monkey bars' stickers failed to indicate the proper depth of ground cover. She established that the monkey bars here were set lower than the maximum recommended height, that the height of the monkey bars is directly correlated to the depth of necessary ground cover, that the various acceptable ground covers have different absorbency rates for their thickness, and that there is no industry standard applicable to monkey bars that would require a depth of manufactured wood chips at the stickers' recommended depth.

Because defendants affirmatively demonstrated that plaintiff cannot prove their alleged breach of duty was a proximate cause of Michael's injury, and plaintiff has failed to rebut such demonstrated proof, defendants' motion for summary judgment on the defendants' alleged negligent maintenance and installation of ground cover, is granted.

Plaintiff's complaint also alleges defendants were negligent in failing to warn of the danger posed by the playground, by failing to post signs requiring parents to supervise their children. However, "a landowner has no duty to warn of an open and obvious danger." (Tagle v. Jakob, 97 NY2d 165 [2001]). Here, the monkey bars are, without question, "open and obvious". Moreover, the playground was located at the grade school Michael attended. Both Michael and

his father were very familiar with the playground and the monkey bars. "The rule of law which imposes no duty to warn against obvious dangers is founded in the rationale that, under such circumstances the condition is a warning itself." (MacDonald v. City of Schenectady, 308 AD2d 125, 128 [3d Dept. 2003] [internal quotations omitted]) On this record, defendants' had no duty to warn, as the obvious nature of the monkey bars and playground itself are a warning enough. Accordingly, the defendants' breached no duty by not placing signs warning of the playground's danger.

Plaintiff's cause of action for private nuisance is also misplaced. (Lajoy v. Luck Bros., Inc., 34 AD3d 1015 [3d Dept. 2006] [stating "the elements of a private nuisance cause of action are (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act." Here, there is no claim that plaintiff's real property was interfered with]). Likewise, no cause of action for public nuisance is stated. (Andersen v. University of Rochester, 91 AD2d 851, 852 [3d Dept. 1982] [stating "a public nuisance exists when there is an interference with a public right." This record is devoid of any public right alleged to have been interfered with). As such, summary judgment is granted dismissing the nuisance causes of action.

Accordingly, defendants' motion for summary judgment is granted in all respects and plaintiff's complaint is dismissed.

All papers, including this Decision and Order, are being returned to the attorney for the defendants. The signing of this Decision and Order shall not constitute entry or filing under

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CPLR §2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED.

Dated: August 6, 2008
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion for Summary Judgment, dated May 15, 2008; Attorney Affidavit in Support of Motion for Summary Judgment of Christopher Mills, dated May 15, 2008, with attached exhibits A-O; Affidavit of Michael O'Neill, dated May 14, 2008, with attached exhibit A; affidavit of Margaret Payne, dated May 13, 2008, with attached exhibits A-C; Affidavit of James C. Otis, dated May 14, 2008, with attached exhibits A-C; Memorandum of Law in Support of Motion for Summary Judgment of Christopher Mills, dated May 15, 2008.
2. Affidavit of Steve Bernheim, dated July 15, 2008, with attached exhibit A; Affidavit of Gary L. Neifeld, dated July 15, 2008, with attached unnumbered exhibit; Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment of Steven Melley, dated July 16, 2008.
3. Reply Affidavit of Christopher Mills, dated July 26, 2008.