

Alpert v Gymboree Play Programs, Inc.

2008 NY Slip Op 32988(U)

October 31, 2008

Supreme Court, New York County

Docket Number: 115874/06

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. SHIRLEY WERNER KORNREICH
Justice

PART 54

Index Number : 115874/2006

ALPERT, ESMAE

vs
GYMBOREE PLAY PROGRAMS

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 7/10/08

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

this motion to/for Summary Judgment

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1</u>
<u>2</u>
<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED
NOV 05 2008
COUNTY CLERK

Dated: 10/31/08

[Signature]
HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----- X
ESMAE ALPERT, an infant plaintiff by her father and
natural guardian DAVID ALPERT,

Plaintiff,

Index No.: 115874/06

-against-

FILED

DECISION
IN ORDER

GYMBOREE PLAY PROGRAMS, INC., and
MANHATTAN PLAY, INC.,

NOV 05 2008

Defendants.

COUNTY CLERK'S OFFICE
NEW YORK

KORNREICH, SHIRLEY WERNER, J.:

This personal injury action arises out of an accident which occurred during an open house at Manhattan Play, owned and operated by defendants Gymboree Play Programs, Inc. and Manhattan Play, Inc. (hereinafter "Gymboree"), located at 327 West 14th Street, New York, New York. On August 22, 2006, the infant plaintiff, Esmee Alpert, was injured while climbing on a climbing apparatus. Plaintiff alleges that Gymboree was negligent in failing to properly supervise the infant plaintiff and in failing to ensure that the climbing apparatus was properly padded, cleaned and maintained. Defendants now move for summary judgment, pursuant to CPLR § 3212, on the grounds that there was adequate supervision at the time of the accident and that there is no evidence that the monkey bar apparatus was inherently dangerous. Plaintiff opposes.

I. Background

In support of its motion, defendants submit the examinations before trial of David Alpert, Melanic Passignajen, Eli Lucas, and Daphne Shallow and a copy of plaintiff's verified bill of

particulars dated January 19, 2007. David Alpert, the father of the infant plaintiff testified to the following. Mr. Alpert did not witness the accident. On the day in question, Ms. Shallow, the nanny for the infant-plaintiff, took her to Gymboree for an open house between 4:45 and 5:00 p.m. EBT of David Alpert pp. 11-12. At the time of the accident, his daughter had been enrolled at Gymboree for close to two years. *Id.* at 13-14. As an enrollee, young Esmae would go to Gymboree two to three times per week for one hour sessions. *Id.* at 15. Mr. Alpert estimated that his daughter had been to Gymboree "between 100 and 160" times. *Id.* at 25. During these sessions, nearly 50% of the time was devoted to kids playing on equipment and the remaining half was devoted to more structured activities such as singing or group interaction. *Id.* at 16. Mr. Alpert observed that during the play sessions, four to five Gymboree employees were on site, with two to three directly involved with the children. *Id.* at 18. According to Mr. Alpert, the play area was between 50-75 square feet. *Id.* at 20. The floor of the play area was "some sort of cushioned matting" and contained numerous types of play equipment including bean bags and climbing apparatus. *Id.* at 21. These climbing apparatus were located in a circle around the perimeter of the play area so that the middle of the room was open for group activities. *Id.* at 24.

According to Mr. Alpert, Gymboree had a rule that a parent or caretaker had to be with the child at all times and, specifically, had to be within "arms length of the child" if the child was on a piece of equipment. *Id.* at 22. Neither he nor his wife ever made any complaints to Gymboree staff regarding the play area or any of its climbing apparatus. *Id.* at 79-80. He also testified that his daughter did not have any prior accidents in the play area. *Id.* at 80.

Eli Lucas was a teacher for Gymboree. EBT of Eli Lucas pp. 7. Mr. Lucas had approximately 10 years of experience working with children at daycare centers, summer camps and after school centers. *Id.* at 20. At Gymboree his responsibilities included: conducting gym,

art and music classes; communicating with the children and their parents; and cleaning and maintaining the gym. *Id.* at 7. According to Mr. Lucas, teachers at Gymboree are trained to communicate with parents regarding play activities that take place, the setup of the apparatus and what songs the children sing. *Id.* at 21. Mr. Lucas further testified that at the end of and during each class, teachers articulate the rules of the gym to parents and caregivers who are present. *Id.* at 32. Mr. Lucas stated that these rules include:

wearing socks at all time[s]. Those rules include - and this is something I specifically as a teacher always try to reiterate multiple times during the course of the class. I talk about how - I talk about the rule that grown-ups, parents, caregivers are - grown-ups should always be within a hug's reach of their little ones.

I reiterate that - and this is something that all teachers are told to do. I reiterate that the climbers, the apparatus, the apparati are not safe enough for children to climb unassisted or not, or unsupervised. So our policy is to - is to have parents, caregivers always be within a hug's reach of the little ones.

Id. at 33. Mr. Lucas also stated that these rules are posted in multiple locations throughout the gym. *Id.*

Mr. Lucas claimed that the climbing equipment was reconstructed on a bimonthly basis. *Id.* at 22. Experienced teachers were responsible for training new teachers on how to reconstruct the climbing equipment. *Id.* at 24. Teachers were responsible for examining and making sure that the "structural integrity" of the equipment had not been compromised. *Id.* at 34. Mr. Lucas stated that he would personally inspect the equipment and whenever he found something wrong, he would either fix it or report it to management. *Id.* at 35. The equipment and floors were cleaned daily with a mixture of peroxy and water. *Id.* at 23, 35.

Mr. Lucas testified that Gymboree was holding an open house on the day in question. *Id.* at 10. According to Mr. Lucas, during open houses, Gymboree allows the "children to run around...and climb on the different setups as well as participate in demonstration classes that are

run by myself or other teachers.” *Id.* at 10-11. Regarding the set up of the main gym area, Mr. Lucas stated that the center of the gym is covered with a large open mat where children can gather before classes begin and also to sing. *Id.* at 14. The rear half of the room is covered with floor mats and contains all of the climbing apparatus. *Id.* at 13. The mats which lie beneath the climbing apparatus, are between two and three inches thick. *Id.* at 27. He further testified that the A-frame in question was located in the rear end of the gym, in the far left corner. *Id.* at 15. He described the A-frame as follows:

Basically it consists of a wooden frame in the shape of an A which has - on either side has approximately two rungs for climbing. And right in the middle about halfway up is a platform for little ones to climb up to.

The climbing is about, I would say, three feet high where the entire A-frame, from top to bottom, is about five feet high.

And then the ladder is just the regular ladder that sits across. The ladder actually has hooks on both ends to hook on top of the top rung of the A-frame...The first rung is...probably a foot, a foot and a half off the ground.

Id. at 17. Mr. Lucas did not witness the accident. *Id.* at 8, 11. Moreover, in the year prior to August 22, 2006, he was not aware of any incidents involving any of the A-frame climbers at the gym. *Id.* at 37.

Melanie Passignajen was Gymboree’s manager on site on the day of the incident. EBT of Melanic Passignajen at 7. Ms. Passignajen testified that when parents sign their kids up for Gymboree, they receive a welcoming package which contains a letter outlining Gymboree’s health and safety regulations. *Id.* at 52. With regard to safety, all children and grownups in the play area must wear socks at all times. *Id.* at 62. No shoes or bare feet are permitted. *Id.* In addition, there are three signs posted at Gymboree which convey its rules and regulations. *Id.* at 64. One sign is posted “at the far end of the gym...on the door that leads to the art and music

room,” another is on the entry door to the gym and a third is on top of the wall which blocks off the reception area from the gym. *Id.*

Ms. Passignajen testified that on the day in question, Gymboree was hosting an open house event to provide the general public and member-families with an opportunity to see their play programs in action. *Id.* at 10. Ms. Passignajen witnessed the infant-plaintiff’s accident which occurred between 5:30 and 6:00 p.m. inside of the play area. *Id.* at 11. She was working the play area along with a Gymboree teacher named Eli Lucas. *Id.* at 12, 22. There were twenty children in the room at the time. *Id.* at 12. The accident occurred on a piece of equipment called an “A-frame” located in the back, far left of the gym. *Id.* at 13-14. Ms. Passignajen stated that the A-frames are set up every two weeks and are checked every day by her and another teacher. *Id.* at 45-46. Each and every Gymboree site throughout the country sets its A-frames up the same way. *Id.* at 25.

At the time of the accident, Ms. Passignajen was standing on mats in the center of the gym, approximately 10-15 feet from Esmae. *Id.* at 36, 59. As the infant-plaintiff crossed in front of her field of vision, she saw her “bump her knee on the ladder rung.” *Id.* She further testified that the infant’s caretaker, Ms. Shallow was standing against the back wall approximately 20 feet away from Esmae. *Id.* at 74-75. The accident report she filed regarding this incident states: “The child, in excitement, accidentally bumped her knee on [the] A-frame as she was climbing onto setup. Caregiver was not properly responding to child.” *Id.* at 55. In addition, Ms. Passignajen stated that in the three years prior to this accident, no incidents occurred regarding any of the A-frames located at Gymboree. *Id.* at 73.

Daphnic Shallow is the nanny employed by the Alpert family and is responsible for taking care of young Esmae. EBT of Daphnic Shallow p. 7. Ms. Shallow testified that for

approximately one year she took Esmac to Gymboree for classes two to three times per week. *Id.* at 12. On the day in question, she walked Esmac to Gymboree to attend the previously discussed open house session. *Id.* at 11-13. Ms. Shallow stated that the accident took place at approximately 5:00 p.m. on monkey bars in the far left-hand side of the gym near the back. *Id.* at 16, 21. She further stated that at the time of the accident, she was standing underneath the monkey bars, right behind Esmac waiting for her to climb up. *Id.* at 23, 27. Ms. Shallow described the accident as follows:

[Esmac] went up on the monkey bar once before, came across, get down and then she going back now to go up again. So when she went up on one of the bar, then when she was going to lift her leg to go to move her hands to go on the other one, then she slipped, she slide. When she slide, she hit her kncc on the bar and then she fell to the ground...

I was standing...behind her and because when she go up, I have to hold her so that she can come across on the monkey bar. So after she slipped and she hit her foot when I go to - she already fell on the ground.

Id. at 26-28. Ms. Shallow claimed that Esmac was only on the ground for a “second or so” before she picked her up, put her on her lap, and sat on the floor to see what had happened. *Id.* at 29. At the time of the accident, Esmac was wearing socks per Gymboree rules and regulations. *Id.* at 27.

Ms. Shallow also testified that Esmac played on the monkey bars “all the time.” *Id.* at 42. She alleged that she was not aware of Gymboree’s rule that she was required to be within a hug’s reach of the child during play time in the gym area. *Id.* at 51. Ms. Shallow did state, however, that she was aware that whoever took the child to class was responsible for looking after and taking care of the child. *Id.* In addition, she testified that during her previous visits to Gymboree she always followed Esmac around as she played. *Id.* at 52. Prior to this accident, Ms. Shallow testified that she never complained to either Gymboree’s manager or any of its teachers regarding

any deficiencies with respect to the equipment in the gym area and that Esmac had never been injured in any of her prior trips to Gymboree. *Id.* at 55.

In the verified bill of particulars, plaintiff alleges that “the nature of the [dangerous] condition was an unsafe, unpadded wooden monkey bar apparatus which posed a foreseeable threat to its users, more particularly, the infant plaintiff herein.” Defendants Exhibit B, Plaintiff’s Verified Bill of Particulars at ¶16. Plaintiff also alleges that defendants were negligent “in failing to ensure that the apparatus...was padded...cleaned...maintained, in allowing the apparatus to be on the premises in its dangerous unpadded state...in failing to monitor, maintain and inspect the apparatus...[and]...in failing to recognize and comprehend the danger posed by the apparatus.” *Id.* at ¶¶ 6, 12.

In opposition to the motion, plaintiff offers the affidavit and expert report of Dr. James Pugh, PhD, P.E. On September 20, 2007, Dr. Pugh performed a site inspection at Gymboree. He subsequently wrote up a report dated May 1, 2008. In his report, citing the American Society for Testing and Materials Standard F 1148-98c Standard Consumer Safety Performance Specification for Home Playground Equipment and two separate volumes from the United States Consumer Product Safety Commission, Dr. Pugh states:

that the proximate cause of the accident suffered by Esmae Alpert was the absence of required handrails on the subject equipment and the failure of Gymboree, Inc., to require approved slip-resistant footwear. Further, it is my additional considered opinion, rendered to a reasonable degree of certainty in my areas of expertise enumerated below, that had either of the two items enumerated as the aggregate proximate cause of the accident been corrected and had there been either handrails or approved sneakers in use, the accident would not have occurred and the injuries not suffered.

Plaintiff’s Exhibit A.

II. Conclusions of Law

It is well established that summary judgment may be granted only when it is clear that no

triable issues of fact exist. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Friends of Animals, Inc. v. Associated Fur Mfts., Inc.*, 46 N.Y.2d 1065, 1067 (1979). A failure to make a *prima facie* showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez, supra*, 68 N.Y.2d at 324; *Zuckerman, supra*, 49 N.Y.2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in a light most favorable to the party opposing the motion. *Martin v. Briggs*, 235 A.D.2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman, supra*, 49 N.Y.2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

“Schools are under a duty to adequately supervise students in their charge, and they will be held liable for foreseeable injuries proximately related to absence of adequate supervision.” *Mirand v. City of New York*, 84 N.Y.2d 44, 49 (1994). This is so, because in assuming physical custody and charge of students, the school stands in the place of the parent or guardian. *Barretto v. City of New York*, 229 A.D.2d 214, 218 (1st Dept 1997). However, the standard of care is not the same for school-sponsored extracurricular activities. *Id.* “In the context of wholly voluntary participation in intramural, interscholastic and other school sponsored extracurricular athletic

endeavors, [the court has] required the exercise of the less demanding ordinary reasonable care standard...defined as...ordinary reasonable care to protect student athletes...from unassumed, concealed or unreasonably increased risks.” *Id.* quoting *Benitez v. New York City Bd. of Educ.*, 73 N.Y.2d 650, 656, 658 (1989). Therefore, a school board’s duty of student supervision is different for voluntary after-school extracurricular athletic activities compared to regularly scheduled school-day classes. *Barretto*, 229 A.D.2d at 219. The rationale is that a higher standard of care is required where the student is required to attend the activity. *Id.* Conversely, where the activity is voluntary the normal risks associated with the activity are accepted and a duty is imposed upon a school only where the risks are unreasonably increased, concealed or are of an unassumed nature. *Id.* Consequently, “if defendants conduct was reasonable in light of what could be anticipated, there is no breach of duty, no negligence and no liability.” *Id.* quoting *Gordon v. City of New York*, 70 N.Y.2d 839, 841 (1987).

The instant case is different from that brought against a school where the school or daycare center takes the place of the parent. Gymboree did not substitute for the parent or caregiver. Thus, supervision is not an issue. Mr. Alpert and Ms. Shallow both testified that they were aware of Gymboree’s rule that a parent or caretaker is required to be with the child at all times. And, Ms. Shallow insisted that she supervised and controlled Esmac at all times.

In addition, Gymboree was a voluntary activity. Plaintiff assumed the inherent risks commonly associated with that activity. *Thomas v. Broadway Pilates, Ltd.*, 52 A.D.3d 232 (1st Dept 2008) citing *Morgan v. State of New York*, 90 N.Y.2d 471 (1997). Mr. Alpert testified that Esmac had been enrolled at Gymboree for approximately two years prior to the accident. During this time, she would go to Gymboree two to three times per week for one hour sessions. He estimated that Esmac had been to Gymboree between 100 and 160 times. Both Mr. Alpert and

Ms. Shallow testified that Esmac played on A-frames all the time during these sessions. The testimony, therefore, at best establishes that the infant slipped and hit her leg while playing on the A-frame. An infant slipping and falling while playing on gym equipment is a voluntary inherent risk associated with this type of activity. *Auwarter v. Malverne Union Free School District*, 274 A.D.2d 528 (2d Dept 2000) (summary judgment granted and complaint dismissed where infant plaintiff injured due to fall while playing on a jungle gym. “By engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and which flow from such participation.” Second Department found that infant plaintiff consented to all risks inherent in and flowing from playing on jungle gym); *see also Thomas*, 52 A.D.3d at 232 (by voluntarily participating in fitness and exercise program and using equipment which caused injury at defendant’s studio for five years prior to accident, plaintiff consented to and was aware of risks commonly associated with the activity).

Finally, plaintiff relies on Dr. Pugh’s expert report as evidence that issues of fact exist. However, Dr. Pugh’s report is defective on two fronts. First, Dr. Pugh’s report alleges that the proximate cause of the accident was the lack of handrails on the A-frame apparatus and the failure of Gymboree to require children to wear slip-resistant footwear. Neither theory of negligence was alleged by plaintiff in the bill of particulars. “A plaintiff cannot defeat an otherwise proper motion for summary judgment by asserting a new theory of liability for negligence for the first time in opposition to the motion.” *Winters v. St. Vincent’s Medical Center of Richmond*, 273 A.D.2d 465 (2d Dept 2000); *see also Abalola v. Flower Hosp.*, 44 A.D.3d 522 (1st Dept 2007).

Second, Dr. Pugh bases his conclusions on rules promulgated by the American Society

for Testing and Materials and the United States Consumer Product Safety Commission. Absent evidence that a particular non-mandatory guideline or recommendation promulgated by government or professional entities have been adopted into actual practice, it will not be held to place a higher standard of care on a defendant. *Capotosto v. Roman Catholic Diocese of Rockville Centre*, 2 A.D.3d 384. (2d Dept 2003). Guidelines established by the American Society for Testing and Materials and the United States Consumer Product Safety Commission are not mandatory and are not considered in determining whether a playground apparatus was negligently designed or installed. *Davidson v. Sachem Central School District*, 300 A.D.2d 276 (2d Dept 2002); *Merson v. Syosset Central School District*, 286 A.D.2d 668, 670 (2d Dept 2001) (guidelines for playground equipment promulgated by Consumer Product Safety Commission neither mandatory nor exclusive standards for playground safety); *Sobti v. Lindenhurst School District*, 35 A.D.3d 439 (2d Dept 2006) (nonmandatory United States Consumer Product Safety Commission guidelines referred to by plaintiff insufficient to raise triable issue of fact as to whether defendants proximately caused nine-year old plaintiff's playground injuries).

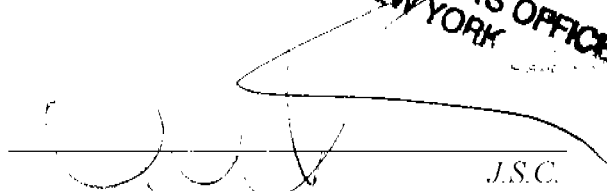
Accordingly, it is

ORDERED that defendants motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

ENTER

DATE: October 31, 2008
New York, NY

FILED
NOV 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

J.S.C.