S

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

LINDSEY MINGRINO, an infant under the age of 18 years by her mother and natural guardian, DEBBIE MINGRINO,

Plaintiff,

- against -

TOWN OF NORTH HEMPSTEAD, PARK PLAYGROUND RECREATION PRODUCTS, INC., LOUIS BARBATO LANDSCAPING, INC. and PLAYWORLD SYSTEMS, INC,

Defendants.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 19900/05

Motion Sequence No. 005, 006

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	1, 2, 3
Answering Affidavits	4, 5, 6
Replying Affidavits	7, 8
Briefs: Plaintiff's / Petitioner's	
Defendant's / Respondent's	

The defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc. move, under Motion Sequence #5, for an ordergranting summary judgment, and dismissing the plaintiff's complaint and all cross claims upon the ground there are no triable issues of fact as to these defendants' liability. The defendant Town of North Hempstead cross moves, under Motion Sequence #6, for an order pursuant to CPLR 3212 granting it summary judgment

dismissing the plaintiffs' complaint against the defendant Town of North Hempstead, and dismissing all cross claims. The plaintiff opposes both motions. The defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc. and the defendant Town of North Hempstead reply to that opposition. The defendant Louis Barbato Landscaping, Inc. cross moves, under Motion Sequence #7, for an order granting summary judgment, and dismissing the plaintiff's complaint and all cross claims.

The underlying personal injury action seeks to recover for injuries allegedly sustained on April 11, 2005, when the infant plaintiff fell into a piece of playground equipment while running at the Blumenfeld Family Park, Port Washington, New York. The plaintiff commenced three separate actions which were subsequently consolidated by stipulation. This Court reviewed and considered all of the papers submitted with respect to the motion and the two cross motions.

The attorney for the defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc. states, in detail, in a supporting affirmation dated June 25, 2008, the nature of this personal injury action, the relevant factual and procedural history. The attorney for the defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc. points to the sworn testimony of the infant plaintiff, the plaintiff mother, the owner of Park Playground and Recreation Products, Inc., the

compliance manager for Playworld Systems, Inc., the president of Louis Barbato Landscaping, Inc. The attorney for the defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc. asserts the plaintiff has failed to establish the subject playground equipment was defective or the defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc. were negligent.

The plaintiff's attorney contrasts, in an opposing affirmation dated July 25, 2008, to the motion by the defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc., the sworn statements of the plaintiff and defense expert regarding this incident. The plaintiff's attorney points out the defense expert did not personally inspect the subject playground area, but the plaintiff's expert is based upon an inspection of the area where the accident allegedly took place. The plaintiff's attorney points to the deposition of various witnesses which indicate there are triable issues of fact.

The attorney for the defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc. states, in a reply affirmation dated August 5, 2008, a personal inspection of this park is unnecessary based upon the facts of this case and the legal issues presented here. The attorney for the defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc. points out the affidavit of the

defense expert does not rely on any factual findings made from a review of the photographs instead of a personal inspection of the playground. The attorney for the defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc. notes these defendants are sued under a negligent design and manufacture theory, and these defendants did not install nor maintain the playground after its equipment sale in 1996. The attorney for the defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc. avers the defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc. deny a plastic, foam or rubber covering for the "turnbuckle connection" was required, recommended or even advisable given the outdoor environment, and do not contend the playground ever contained such a covering, to wit a protective nylon cap over the lock nuts which the plaintiff took out of context, and misapplied. The attorney for the defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc. maintains their expert established the playground component parts were tested and certified by IPEMA, an independent laboratory, as in compliance with the voluntary recommendations of the American Society for Testing and Materials Standards. The attorney for the defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc. contends personal opinion, without reference to, or reliance

on scientific or other expert evidence cannot raise a triable issue of fact sufficient to deny summary judgment to these defendants, and points to deposition testimony showing there is no factual dispute regarding design nor manufacture. The attorney for the defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc. asserts the mother touched the subject bolt, and testified she did not feel any sharp edges, and the plaintiff's expert allegedly inspected the connection prior to writing the report, yet neither the report nor the affidavit indicates that bolt was touched, examined, measured or tested by the expert, and nowhere does the plaintiff's expert state that bolt was sharp or contained a sharp edge. The attorney for the defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc. states the infant plaintiff was not using any piece of playground equipment at the time of the accident, but rather running through the playground.

The Deputy Town Attorney for the defendant Town of North Hempstead also states, in detail, in a supporting affirmation dated July 2, 2008, the nature of this personal injury action, the relevant factual and procedural history. The Deputy Town Attorney for the defendant Town of North Hempstead states the photograph closeup of the bracket on the apparatus, to wit the slider on a bracket securing a horizontal bar, does not show any visible sharp edges, and the curved corners on the bracket show the end of the screws are covered with lock nuts as recommended. The Deputy Town Attorney for the defendant

Town of North Hempstead asserts neither the Handbook for Public Playground Safety of the United States Consumer Safety Products Commission nor American Society for Testing and Materials Standards guidelines have any recommendations for plastic nor foam coatings on brackets or clamps. The Deputy Town Attorney for the defendant Town of North Hempstead avers this defendant denies receiving any prior complaints about the playground or the brackets, and the photographs show the alleged accident bracket is about one foot off the ground. The Deputy Town Attorney for the defendant Town of North Hempstead argues the cause of this child's fall is unknown, and this park and its equipment were in reasonably safe condition, so the Town of North Hempstead is not negligent, and did not breach any duty.

The plaintiff's attorney states, in an opposing affirmation dated July 25, 2008, to the cross motion by the defendant Town of North Hempstead, it is not contradicted the infant plaintiff sustained injury in the Town of North Hempstead park maintained by this defendant. The plaintiff's attorney points to the deposition of various witnesses which indicate there are triable issues of fact. The plaintiff's attorney states, due to the contradictory statements, it is for a jury to determine the percentage of responsibility among the defendants. The plaintiff's attorney asserts there was no plastic covering, coating nor nylon cap covering the bolts which were the proximate cause of the injury sustained by the infant plaintiff.

The Deputy Town Attorney for the defendant Town of North Hempstead states, in

a reply affirmation dated August 8, 2008, a photograph provided by the plaintiffs show a closeup of the clamp and bolt with a cap on the end of the thread of the bolts, and there are no sharp edges on that clamp, i.e., bracket, bolts or nuts. The Deputy Town Attorney for the defendant Town of North Hempstead states the opposition confuses a lock nut, i.e., "a top hat" with a plastic or foam cover for the bracket, bolt and cap. The Deputy Town Attorney for the defendant Town of North Hempstead asserts there are no missing parts from the installation, and representatives from the manufacturer, distributor and the Town of North Hempstead agreed there is no such thing as a plastic or rubber covering for the bracket, bolt and cap. The Deputy Town Attorney for the defendant Town of North Hempstead avers there is nothing wrong with the installation nor the maintenance as shown in the photographs. The Deputy Town Attorney for the defendant Town of North Hempstead points out the plaintiff's expert stated in the July 18, 2008 affidavit the turn buckle did not have the proper plastic coating wrapped around the bracket as prescribed by ASTM 1487, and the ASTM violations are not mandatory, but are only suggested guidelines. The Deputy Town Attorney for the defendant Town of North Hempstead reiterates the defendants state there is no such thing as a plastic or rubber covering, and these guidelines are insufficient, as a matter of law, to create a question of fact. The Deputy Town Attorney for the defendant Town of North Hempstead turns to issue of defense expert's failure to visit the accident location, and submits there are no measurements involved in the present case and all of the necessary evidence is deduced

from the photographs which show the bracket, bolts and caps, so the defense expert's should be satisfactory. The Deputy Town Attorney for the defendant Town of North Hempstead notes the photographs and the defense deposition witnesses show there is a cap on the ends of the treads and the ends of the bolts are not exposed; none of the defense deposition witnesses ever used nor heard of such a cover, and such a cover is not required by any regulations or standards. The Deputy Town Attorney for the defendant Town of North Hempstead states apparently the opposition is confusing a cover over the ends of the bolts, as shown in photographs, which come with the equipment, and a plastic or rubber covering over the bracket, bolts and nuts which are never furnished nor used. The Deputy Town Attorney for the defendant Town of North Hempstead submits, although the issue of a sign at the park has not been raised in the plaintiff's opposition to the motion by the Town of North Hempstead, a sign, as suggested by the plaintiff is irrelevant to this accident, to wit the infant plaintiff was not playing on the playground equipment, and the opposition failed to submit any authority showing such a sign is a requirement for children entering a park. The Deputy Town Attorney for the defendant Town of North Hempstead states the Town of North Hempstead submitted evidence showing the installation and maintenance of the playground equipment was proper, and there were no missing parts. The Deputy Town Attorney for the defendant Town of North Hempstead states the law submitted by the Town of North Hempstead and the other defendants shows the Town of North Hempstead did not breach any duty owed to the

plaintiffs. The Deputy Town Attorney for the defendant Town of North Hempstead restates the plaintiff has not submitted any proper evidence to show the playground equipment was manufactured, designed, installed or maintained defectively or violated any standards, and the defendants have submitted evidence to prove the playground equipment was properly manufactured, designed, installed and maintain.

The infant plaintiff testified, who was four years old at the time of the incident, being accompanied by a friend and a babysitter, and running on the playground when falling causing the head to strike on a bolt connected to a "squiggly" balance beam. The infant plaintiff testified running on the ground from one side of the playground to the other side, and was not utilizing the "squiggly" balance beam prior to the accident. The infant plaintiff could not testify as to what caused the fall while the infant plaintiff was running. The Deputy Town Attorney for the defendant Town of North Hempstead points out the child testified, on October 27, 2006, she ran into a pole running to the monkey bars, but did not know if she fell, and hitting her head on the pole.

The mother of the infant plaintiff testified, at a municipal hearing on August 25, 2005, the daughter went to a friend's home for a play day, and the babysitter decided to take the children to the subject park. The plaintiff mother testified having gone to that park on two or three prior occasions. The plaintiff mother testified the daughter's father went to the park after the accident, and found their daughter bleeding from the forehead, and it appeared the child hit her head on a pole or pipe, but a plastic surgeon later at the

hospital said it was something protruding, and not a pole or pipe. The plaintiff mother testified she went to the park with child, and saw blood on a bracket near the balance beam which the witness identified as shown in three photographs. The plaintiff mother testified the infant plaintiff showed the mother where she hit her head on the balance beam bracket, but the mother did not know why the daughter fell. The plaintiff mother testified a lady from a preschool day care center next to the playground informed the mother that she wrote a letter to the Town of North Hempstead about the dangerous playground, and mentioned the metal brackets with no foam covering.

The mother of the infant plaintiff also testified, at a deposition the same day as the daughter, to wit September 26, 2007, she was not an eyewitness to the incident, instead the babysitter made the mother aware of what happened. The mother testified the babysitter said the child ran, and tripped which caused the infant plaintiff to hit the head on the playground equipment. The mother testified taking her daughter back to the playground to determine where the incident occurred; inspecting the area; and concluding the daughter hit a bolt in or about the area. The mother's testimony, assuming the area inspected by the mother was where the daughter fell, does not contain any mention of any sharp edges, and no indication the bolt threads protruded in any unsafe fashion.

The current owner of Playground and Recreation Products, Inc. testified, at a deposition on September 26, 2007, that corporation is the sales representative for Park Playground Recreation, Inc., the manufacturer of the product. The current owner of

Playground and Recreation Products, Inc. identified the subject playground equipment as a "rock and roll bar," and the surface material under the playground equipment was engineering wood fiber manufactured by a company called Fibar.

The compliance officer of Playworld Systems testified, at a deposition on February 27, 2007, the playground equipment was manufactured in compliance with all acceptable American Society for Testing and Materials Standards. The compliance officer of Playworld Systems, utilizing photographs, testified the "rock and roll bar" was situated 16 inches above the ground, and the clamping system used to install it employed lock nuts readily equipped with a protective nylon cap over the nuts. The compliance officer of Playworld Systems testified the playground was appropriate for children's ages two years old to 12 years old.

The Recreation Supervisor for the Town of North Hempstead testified, at a deposition on October 27, 2006, he was the Superintendent of Recreation for Garden City from 1971 to 2001, and from 2001 to 2004, he designed, sold and installed playgrounds. The Recreation Supervisor for the Town of North Hempstead testified his duties include assisting the Commissioner in budgeting; preparing bid specifications; developing program requests; assisting with supervising staff; overseeing and training swimming pool operators; visually inspecting and monitoring playgrounds; assisting in playground surfacing needs; and he is familiar with Blumenfeld Family Park. The Recreation Supervisor for the Town of North Hempstead testified the subject equipment was

installed in 1996 or 1997; it was distributed and sold by Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Recreation; the manufacturer was Playworld Systems, Inc.; and the Town of North Hempstead retained Louis Barbado & Sons to install it. The Recreation Supervisor for the Town of North Hempstead testified to prior dealings with Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc., and the specifications for the subject equipment came from the manufacturer. The Recreation Supervisor for the Town of North Hempstead testified, while the Town of North Hempstead had nothing to do with the installation, it did maintain the equipment; inspected Blumenfeld Family Park periodically; a Town of North Hempstead crew raked there, but there were no complaints about the park equipment, and the only problem within that park was the vandalism of a couple of benches, and from park youths using the preschool day care center's bathroom. The Recreation Supervisor for the Town of North Hempstead testified, when showed a photograph of the attachment bracket identified it as never having a cover just like the brackets in the two other Town of North Hempstead parks.

The president of the defendant Louis Barbato Landscaping, Inc. since 1997 testified on February 11, 2007, there is no documentation to determine who installed this playground equipment, but the installation was performed in 1996. The corporate defendant's president testified, based upon custom and practice, and the overall nature of the business in or about the area at that time, there was a probability the defendant Louis

Barbato Landscaping, Inc. installed that playground equipment. The president of the defendant Louis Barbato Landscaping, Inc. testified, in detail, concerning the general nature of the playground equipment installation, including the presence of representatives of the Town of North Hempstead during the overall installation process making daily inspections, and a review of the project upon completion.

The plaintiff's expert, a certified professional consultant to management and president of Sports and Recreation Consultants, Inc., in Massapequa Park, New York, stated in an unsworn letter dated June 1, 2005, to plaintiff's counsel, he visited the subject playground on Saturday, May 28, 2005, and inspected the playground equipment. The plaintiff's expert stated he found the turn buckle connection approximately 16 inches off the playground surfacing in which the infant plaintiff fell. The plaintiff's expert described the area's condition, and concluded the turn buckle did not have the proper plastic coating wrapped around as prescribed by ASTM and the United States Consumer Safety Products Commission. The plaintiff's expert stated, in his opinion, the turn buckle exposed areas should have had a plastic coating or a foam coating on top of them to not have an exposed sharp edge. The plaintiff's expert opines the Town of North Hempstead was negligent for having sharp pointed areas of the playground equipment, and did not have the age appropriate signs on their facilities. The plaintiff expert's letter does not project any liability on the part of the manufacturer nor the installer of the subject equipment. The plaintiff's expert states, in the June 23, 2008 affidavit, the June 5, 2008

reference to ASTM 1292 was a typographical error which should be referenced as ASTM 1487. The plaintiff's expert opines, in the June 11, 2008 affidavit, the lack of proper covering and inappropriate signage were the proximate causes, and contributing factors to this accident, and the injury sustained by the infant plaintiff.

The expert of the defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc., a certified public safety inspector with 25 years of experience, states, in an affidavit dated June 24, 2008, reviewing photographs of the playground, the plaintiff's bill of particulars, the plaintiff's expert disclosure, the deposition transcripts of the infant plaintiff and mother, the American Society for Testing and Materials F1292 Standard, and the Handbook for Public Playground Safety of the United States Consumer Safety Products Commission. The expert of the defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc. points out multiple errors in the unsworn letter dated June 1, 2005, by plaintiff's expert, including a misnomer, to wit "turnbuckle," which is actually a "collar" or a "bracket"; a lack of any standard which required brackets or collars to have proper plastic or foam coating; and the ASTM standard deals with protective surfacing placed under playground equipment, addressing a test method to determine the impact attenuation of various surfacing materials, not sharp edges on playground equipment. The expert of the defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc.

and Playworld Systems, Inc. notes the proper standard would be ASTM F1487 which contains requirements for "protrusion hazards" as outlined in the Handbook for Public Playground Safety of the United States Consumer Safety Products Commission. The expert of the defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc. concludes the subject playground equipment is not dangerous, and does not violate any industry standards. The expert of the defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc. opines the product is safe for its intended use, and there was no negligence in the design nor manufacturing.

The attorney for the defendant Louis Barbato Landscaping, Inc. states, in a supporting affirmation dated July 1, 2008, the plaintiffs allege the claim against this defendant is negligent installation of the playground equipment which was allowed to remain in that condition, to wit installing safety devices, such as plastic coating of foam covering brackets causing an unreasonable dangerous condition for children. The attorney for the defendant Louis Barbato Landscaping, Inc. points to the parties' deposition testimony, and the pretrial proceedings, and asserts this defendant did not negligently install nor permit any dangerous condition to exist at the subject playground. The attorney for the defendant Louis Barbato Landscaping, Inc. points out the plaintiff expert's letter does not project any liability on the part of the installer of the subject equipment.

The plaintiff's attorney points, in an opposing affirmation dated June 23, 2008, to the plaintiff expert's affidavit dated June 11, 2008 as stating the lack of proper covering of the nuts and bolts of the bracket in the playground was a contributing factor to the accident and the injury along with the in appropriate signage concerning the appropriate age of the children using the equipment and the park. The plaintiff's attorney also notes the deposition testimony, and states it indicates there are triable issues of fact which preclude summary judgment. The plaintiff's attorney asserts the mother testified feeling unprotected screws and bolts with no rubber or anything, and seeing blood on the bolt part of the bracket. The plaintiff's attorney contends the then four year old infant plaintiff is incapable, as a matter of law, of contributory negligence causing this accident

The infant plaintiff testified, who was four years old at the time of the incident, being accompanied by a friend and a babysitter, and running on the playground when falling causing the head to strike on a bolt connected to a "squiggly" balance beam. The attorney for the defendant Louis Barbato Landscaping, Inc. notes the plaintiff testified running on the ground from one side of the playground to the other side, and was not utilizing the "squiggly" balance beam prior to the accident. The attorney for the defendant Louis Barbato Landscaping, Inc. points out the infant plaintiff could not testify as to what caused the fall while the infant plaintiff was running.

The mother of the infant plaintiff also testified at a deposition the same day as the daughter, to wit September 26, 2007, and this parent testified she was not an eyewitness

to the incident, instead the babysitter made the mother aware of what happened. The mother testified the babysitter said the child ran, and tripped which caused the infant plaintiff to hit the head on the playground equipment. The mother testified taking her daughter back to the playground to determine where the incident occurred; inspecting the area; and concluding the daughter hit a bolt in or about the area. The attorney for the defendant Louis Barbato Landscaping, Inc. states the mother's testimony, assuming the area inspected by the mother was where the daughter fell, does not contain any mention of any sharp edges, and no indication the bolt threads protruded in any unsafe fashion.

The current owner of Playground and Recreation Products, Inc. testified, at a deposition on September 26, 2007, that corporation is the sales representative for Park Playground Recreation, Inc., the manufacturer of the product. The current owner of Playground and Recreation Products, Inc. identified the subject playground equipment as a "rock and roll bar," and the surface material under the playground equipment was engineering wood fiber manufactured by a company called Fibar.

The compliance officer of Playworld Systems testified, at a deposition on February 27, 2007, the playground equipment was manufactured in compliance with all acceptable American Society for Testing and Materials Standards. The compliance officer of Playworld Systems, utilizing photographs, testified the "rock and roll bar" was situated 16 inches above the ground, and the clamping system used to install it employed lock nuts readily equipped with a protective nylon cap over the nuts.

The president of the defendant Louis Barbato Landscaping, Inc. since 1997 testified on February 11, 2007, there is no documentation to determine who installed this playground equipment, but the installation was performed in 1996. The corporate defendant's president testified, based upon custom and practice, and the overall nature of the business in or about the area at that time, there was a probability the defendant Louis Barbato Landscaping, Inc. installed that playground equipment. The attorney for the defendant Louis Barbato Landscaping, Inc. states, even assuming for the purpose of this motion, the defendant Louis Barbato Landscaping, Inc. installed the playground equipment, the deposition clearly demonstrates there are no viable acts of negligence by the defendant Louis Barbato Landscaping, Inc. The president of the defendant Louis Barbato Landscaping, Inc. testified, in detail, concerning the general nature of the playground equipment installation, including the presence of representatives of the Town of North Hempstead during the overall installation process making daily inspections, and a review of the project upon completion.

The attorney for the defendant Louis Barbato Landscaping, Inc. also points to the October 27, 2006 deposition testimony of the representative of the Town of North Hempstead where that witness testified to a belief the installer was Louis Barbato & Sons, however that witness admitted he had not reviewed any records regarding the installation. The attorney for the defendant Louis Barbato Landscaping, Inc. notes that representative from the Town of North Hempstead testified the installation specifications came from the

manufacturer, and after the subject playground equipment was installed, the Town of North Hempstead maintained the playground, including connections, complaints about the park, brackets, and repairs.

Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 325; ***Andre v. Pomeroy***, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (***see, Whelen v. G.T.E. Sylvania Inc.***, 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (***see, e.g., Sillman v. Twentieth Century-Fox Film Corp.***, 3 N.Y.2d 395; ***Gervasio v. Di Napoli***, 134 A.D.2d 235, 236; ***Assing v. United Rubber Supply Co.***, 126 A.D.2d 590). Nevertheless, "the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (***Gervasio v. Di Napoli, supra***, 134 A.D.2d at 236, quoting from ***Assing v. United Rubber Supply Co., supra; see,***

Columbus Trust Co. v. Campolo, 110 A.D.2d 616, ***aff'd*** 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (***see, Andre v. Pomeroy***, 35 N.Y.2d at 364; ***Assing v. United Rubber Supply Co., supra***).

The Second Department holds:

> the plaintiffs' expert opined that the playground apparatus was inherently dangerous as designed and/or installed because it did not meet American Society of Testing Material standards, or standards established by the Consumer Product Safety Commission. These standards, however, are guidelines and are not mandatory, and, as such, are insufficient to raise an issue of fact regarding negligent design or installation (***see Merson v Syosset Cent. School Dist.***, 286 AD2d 668; ***Pinzon v City of New York***, 197 AD2d 680; ***McCarthy v State of New York***, 167 AD2d 516)

Davidson v. Sachem Cent. School Dist., 300 A.D.2d 276, 276-277, 751 N.Y.S.2d 300 [2nd Dept., 2002].

The Second Department also holds:

> To establish a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and that the breach was a proximate cause of the plaintiff's injury (***see Pulka v. Edelman***, 40 N.Y.2d 781, 782, 390 N.Y.S.2d 393, 358 N.E.2d 1019; ***Kipybida v. Good Samaritan Hosp.***, 35 A.D.3d 544, 545, 827 N.Y.S.2d 201). Owners and business proprietors have a duty to maintain their property " 'in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk' " (***Peralta v. Henriquez***, 100 N.Y.2d 139, 143, 760 N.Y.S.2d 741, 790 N.E.2d 1170, quoting ***Basso v. Miller***, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564, 352 N.E.2d 868; ***see Koppel v. Hebrew Academy of Five Towns***, 191 A.D.2d 415, 594 N.Y.S.2d 310)

Dabnis v. West Islip Public Library, 45 A.D.3d 802, 846 N.Y.S.2d 331 [2nd Dept., 2007].

The defendants Park Playground and Recreation Products, Inc. s/h/a Park

Playground Recreation Products, Inc. and Playworld Systems, Inc. established a prima facie entitlement to judgment as a matter of law with respect to the plaintiff's claim and any cross claims. The defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc. presented evidence of the proper standard to apply to this playground equipment, and this playground equipment was found to be in full compliance with the safety criteria outlined in ASTM F1487 (***see Davidson v. Sachem Cent. School Dist.***, 300 A.D.2d, ***supra***). The plaintiffs have not come forth with any admissible evidence demonstrating the playground equipment violated any safety standard or regulation. The defendant Town of North Hempstead established a prima facie entitlement to judgment as a matter of law with respect to the plaintiff's claim and any cross claims. The defendant Town of North Hempstead established its prima facie entitlement to judgment as a matter of law, since its property was in a reasonably safe condition, and it breached no duty to the infant plaintiff (***see Rygel v. 8750 Bay Parkway***, LLC, 16 A.D.3d 572, 792 N.Y.S.2d 160). The defendant Louis Barbato Landscaping, Inc. established a prima facie entitlement to judgment as a matter of law with respect to the plaintiff's claim and any cross claims. In opposition, the plaintiff, with respect to the complaint and the defendants, with respect to any cross claims, fail to raise a triable issue of fact. Moreover, the plaintiff expert's opinion, failed to raise a triable issue of fact sufficient to warrant denial of the motion and both cross motions (***see generally Swan v. Town of Brookhaven***, 32 A.D.3d 1012,

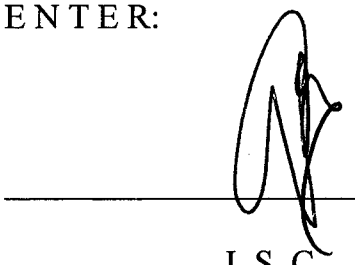
1013-1014, 821 N.Y.S.2d 265 [2nd Dept., 2006]).

Accordingly, the motion by the defendants Park Playground and Recreation Products, Inc. s/h/a Park Playground Recreation Products, Inc. and Playworld Systems, Inc., and the cross motion by the defendant Town of North Hempstead are granted, and the motion by the defendant Louis Barbato Landscaping, Inc. is granted based upon this Court's decision in the consolidated matter under Supreme Court, Nassau County Index number 2253/07. All of the defendants are awarded summary judgment, and the plaintiff's complaint and the cross claims are dismissed.

So ordered.

Dated: **November 25, 2008**

ENTER:



J. S. C.
HON ANTONIO I. BRANDVEEN

FINAL DISPOSITION xxx NON FINAL DISPOSITION