

Argueta v Uniondale Union Free School Dist.

2008 NY Slip Op 33385(U)

November 6, 2008

Supreme Court, Nassau County

Docket Number: 2706/06

Judge: F. Dana Winslow

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

**ERIKA ARGUETA, an infant under the age of
fourteen (14) years, by father and natural Guardian,
CLARO ARGUETA,**

Plaintiff,

-against-

**TRIAL/IAS, PART 7
NASSAU COUNTY**

**MOTION DATE: 8/4/08
MOTION SEQ. NO.: 002**

**UNIONDALE UNION FREE SCHOOL DISTRICT
and NORTHERN PARKWAY SCHOOL,**

Defendants.

INDEX NO.: 2706/06

The following papers having been read on motion (numbered 1-3):

- Notice of Motion.....1**
- Affirmation in Opposition.....2**
- Attorney Affirmation in Reply.....3**

The motion by defendant Uniondale Union Free School District ("School District") pursuant to CPLR 3212 for summary judgment as to plaintiffs' complaint is **granted** for the reasons set forth herein.

The plaintiffs commenced this action for damages due to personal injuries allegedly sustained by plaintiff Erika Argueta (the "infant plaintiff")—a then fourth grade student on June 13, 2005. The swing at the Northern Parkway School (owned and operated by School District) upon which she had been swinging for about a minute broke causing the infant plaintiff to fall. The infant plaintiff stated the chain broke where it met the seat (see Exhibit C, pg. 29 annexed to School District's motion). Allegedly, an "S" hook used to attach the swing chain to the swing seat loop broke (see Exhibit E, pgs. 54-56 annexed to School District's

motion).

As to the swings, the plaintiffs were not aware of incidents of swing chains, “S” hooks, etc. breaking (see Exhibit C, pg. 33). Nor did the plaintiffs offer complaints to School District as to swings or school equipment (see Exhibit D, pgs. 5-6; Exhibit F, pg. 56, both annexed to School District’s motion).

The infant plaintiff had used swings often. She had used the swing in issue at least ten (10) times before the incident (see Exhibit E, pgs. 44-48 annexed to School District’s motion). The infant plaintiff always stayed seated on the swing (Exhibit E, pgs. 48-49).

Although schools are under a duty to adequately supervise the students in their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision, they are not insurers of the safety of their students for they cannot reasonably be expected to continuously supervise and control all of the students’ movements and activities (*Murand v City of New York*, 84 NY2d 44; *Doc v Orange-Ulster Board of Cooperative Educational Services*, 4 AD3d 387; *Johnsen v Carmel Central School District*, 277 AD2d 354).

A school’s duty is to supervise its students with the same degree of care as a parent of ordinary prudence would exercise in comparable circumstances (*David v County of Suffolk*, 1 NY3d 525; *Doe v Department of Education of the City of New York*, 54 AD3d 352).

For a school to breach its duty to adequately supervise students in its charge so as to be liable for foreseeable injuries proximately related to the absence of adequate supervision, the school must have sufficiently specific knowledge or notice of dangerous conduct which caused the injury which injury could reasonably have been anticipated (*In-Ho Yu v Korean Central Presbyterian*

Church, 303 AD2d 369).

Where an incident occurs in so short a span of time that even the most intense supervision could not have prevented it, lack of supervision is not the proximate cause of the injury and summary judgment in favor of the school district is warranted (*Mayer v Mahopac Central School District*, 29 AD3d 653).

Here, the “S” hook just failed with no apparent warning to anyone including the School District’s staff. Two teachers were approximately thirty (30) feet from the infant plaintiff when the incident occurred (see Exhibit C, pg. 41 annexed to School District’s motion).

There is no indication that more intense supervision could have diverted this incident (*Navarra v Lynbrook Public Schools*, 289 AD2d 211; *Ancewicz v Western Suffolk BOCES*, 282 AD2d 632). Short of prohibiting the infant plaintiff from engaging in activity, there was no way to insure that incidents such as the one herein would not occur (see *Reardon v Carle Place Union Free School District*, 27 AD3d 635).

School District has offered the deposition of Robert Kirk, grounds supervisor for all the School District schools (Kirk’s deposition is at Exhibit F annexed to School District’s motion; the following pages refer to that exhibit). Mr. Kirk stated the swing sets at Northern Parkway School were inspected by the main custodian, Frantz Denis, on a daily basis (pgs. 8-9); swing chains are replaced on a need-be basis based on visible wear and tear (p. 10); Mr. Kirk knew of no complaints about the swing chains for one year prior to the incident nor did he know of any children being injured within two years prior to the incident (p. 11); the chains on specific swing set were replaced prior to the incident (P. 12).

School District has also offered the affidavit (School District states no

deposition transcript was available to it in time for this motion) of Frantz Denis (see Exhibit H annexed to School District's motion). Mr. Denis stated he inspected and tested the swing at about 7:30 AM on June 13, 2005, the day of the incident. Mr. Denis stated that the swing set in issue appeared to be in good condition and safe on June 13, 2005. Mr. Denis stated that the ground cover beneath the swing appeared adequate and appropriate. Mr. Davis also checked for broken bottles, grass, etc. in the area around the swing (p. 24). Mr. Denis stated he never received any complaints about the swing set as to hooks, chains, swings or the ground cover.

In the deposition of Mr. Denis (see Exhibit D annexed to plaintiffs' affirmation in opposition; the page numbers refer to that exhibit), Mr. Denis states his inspection/testing of the subject swing set by himself or a member of his staff (pgs. 24, 25) pulled at the swing chain and the seat (pgs. 27, 28); Mr. Denis did this on June 13, 2005, the date of the incident and found the swings to be "okay" (p. 29); Mr. Denis did not receive training on being able to detect a worn condition of the metal (chains, hooks, etc.) on the swing set (pg. 51-54); Mr. Denis did not sit on the swing seats to check them but he did state he used "excessive force" when he did his swing checks (p. 56).

Based on the above, School District contends it had no actual or constructive notice or knowledge of any defect in the subject swing or swing set.

Here, School District has demonstrated that the swing set was maintained in a reasonably safe condition (*Softi v Lindenhurst School District*, 35 AD3d 439; *Lopez v Freeport Union Free School District*, 288 AD2d 355).

Plaintiffs have not presented a viable expert affidavit as to maintenance, testing, ground cover, etc., of the swing set to raise an issue of fact as to School

District's maintenance and testing, ground cover, etc., of the swing and swing set (*see Lemos v City of Poughkeepsie School District*, 299 AD2d 327).

Thus, School District has offered a picture of a fairly strict regimen of inspections and almost daily testing as to the swing set in issue. Plaintiffs merely note that Mr. Denis, as part of his inspection/testing routine did not sit on the swings. They also seek, without justification or a proper basis, to impugn the work ethic of the School District's employees. Clearly, plaintiffs do not offer expert testimony that would present issues of fact as to alleged "proper testing procedure" or metallurgical degrees, tests, etc., needed.

Also, there was adequate playground supervision by School District (two teachers for 50 students). Clearly, the level of supervision, based on the record before the court, was not the cause of the incident (*Merola v Staten Island Academy*, 6 AD3d 508; *Francisquini v New York City Board of Education* 305 AD2d 455; *Weinblatt v Eastchester Union Free School District*, 303 AD2d 581).

Nor is there any indication that a reasonably prudent parent would have stopped the infant plaintiff from swinging on the swing (*see Lemos v City of Poughkeepsie School District, supra*).

The subjective standard of the parents of the infant plaintiff would require subjecting the metal components of the swing to metallurgical testing to detect any potential fatiguing of the metal, supervisory personnel every few feet in the playground and safety netting so that the alleged injuries to the infant plaintiff would not have occurred. Of course, the court cannot require or apply such a subjective standard to the School District.

Adequate playground supervision has been held to exist with 95 students (second graders) and two or three teachers or aides supervising the children

(*Navarra v Lynbrook Public Schools*, 289 AD2d 211) and within two car lengths (*Reardon v Carle Place Union Free School District, supra*).

Alleged inadequate supervision at a school playground was not the proximate cause of a child's injuries, as required to support a negligent supervision claim against a school district, where the child was engaged in an approved use of a playground apparatus at the time of the incident, and there was no proof that closer supervision would have prevented the incident (*see Davidson v Sachem Central School District*, 300 AD2d 276).

Here, the infant plaintiff was sitting on a swing and holding on with both hands, i.e., not standing, "showboating," etc. Two teachers were 30' away from the infant plaintiff when the incident occurred. Plaintiffs needed to do more than merely allege or invoke "inadequate supervision."

This constitutes the Order of the Court.

Dated:

November 6, 2008

ENTER:

[Signature]
J.S.C.

ENTERED

DEC 17 2008

**MASSAU COUNTY
COUNTY CLERK'S OFFICE**