

Rivera v Westbury Union Free School Dist.

2009 NY Slip Op 30774(U)

March 31, 2009

Supreme Court, Nassau County

Docket Number: 019963/06

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

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

JUANA RIVERA, an infant under the age of 16
years, by her Mother and Natural Guardian
SANDRA ROQUE and SANDRA ROQUE
Individually,

TRIAL / IAS PART 31
NASSAU COUNTY

Index No. 019963/06

Motion Sequence No. 001

Plaintiffs,

- against -

WESTBURY UNION FREE SCHOOL DISTRICT
and BOARD OF EDUCATION OF THE
WESTBURY UNION FREE SCHOOL
DISTRICT,

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendant Westbury Free School District moves for summary judgment in this personal injury action. The plaintiffs oppose the motion. The underlying action arises from a June 16, 2006 incident during the infant plaintiff's kindergarten recess period. The claim allegedly develops from the infant plaintiff playing hide 'n seek with several classmates on the playground equipment at the Dryden Street School, where the plaintiff

was injured as the plaintiff attempted to step down from the playground equipment platform, and her arm got caught in the adjacent railing. The plaintiffs contend this defendant was negligent when it failed to properly maintain, operate, and control the playground. The plaintiffs maintain the students were non properly supervised, and they were not provided with a safe playground set, while this defendant contends it was not negligent since the infant plaintiff and her classmates were supervised by three aides on the playground. The defense maintains the defendant installed state of the art playground equipment just four years earlier after receiving a playground grant, and the installation was approved by the New York State Education Department, Bureau of Facilities Planning Service. This Court has carefully reviewed and considered all of the papers submitted with respect to this motion.

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 defense attorney points, in a supporting affirmation dated September 22, 2008, to the October 10, 2006 deposition testimony of the injured infant plaintiff, photograph of the playground equipment, the January 14, 2008 deposition testimony of Michael Batkiewicz, the defendant's Director of School Facilities and Operations, who supervises all custodians, cleaners, security, maintenance and ground keepers, and is responsible for the physical plant and any construction done within the defendant school district, the May 9, 2008 deposition testimony of Dellarie Taylor, a teacher's aid at the Dryden Street School, and the May 9, 2008 deposition testimony of Sarwat Malik, a bus monitor and

teacher's aid at the Dryden Street School. The defense attorney notes Batkiewicz never received any complaints about the playground equipment, and the other depositions describe the circumstances about the incident. The defense attorney asserts the defendant neither manufactured, designed nor installed the subject equipment, and, absents anything in disrepair, the defendant had no responsibility for the configuration and setup of the equipment.

The plaintiffs' attorney points, in an opposing affirmation dated November 7, 2008, to an affidavit dated October 24, 2008, by William Marletta, the plaintiffs' expert for playground safety. Marletta states, in some length and detail, it is his professional opinion, with a reasonable degree of certainty as a certified safety professional, defects and hazards in design including inappropriateness of the equipment design for children of this age group, lack of safety handrails and flexing of the pole supports permitting movement of the Bongo step surface when stepped on, caused and represent the proximate causes of this accident. The plaintiffs' attorney also points to photographs of the playground equipment, the October 12, 2006 deposition testimony of the injured infant plaintiff, and other deposition testimony. The plaintiffs' attorney maintains the defendant had responsibility for the design of the playground equipment since staff was involved in its planning and design. The plaintiffs' attorney opines the playground is in violation of the Handbook for Public Playground Safety, and the defense failed to submit proof New York State provided detailed plans containing measurements or ensured

compliance with manufacturing, design and installation requirements. The plaintiffs' attorney challenges the legal authority offered by the defense with respect to playground equipment installation. The plaintiffs' attorney asserts the defendant participated in the design of the set, maintained it, and supervised the infant plaintiff's use of it. The plaintiffs' attorney avers the defendant knew the ages of the students using the equipment; there were no handrails; the height of the elevated section from which the infant plaintiff descended; the heights of the standers (Bongo steps); and some of the children had difficulty going up and down the steps. The plaintiffs' attorney contends the defense failed to establish entitlement to summary judgment.

The defense attorney reiterates in detail, in a reply affirmation dated January 6, 2009, there are no triable issues of fact regarding any negligence by this defendant which proximately resulted in an injury to the infant plaintiff. The defense attorney points out The Spector Group designed the playground equipment which was manufactured by Mercal Recreation Company, and installed by Playsafe Playground of New York, and no employees of the defendant were involved in the installation. The defense attorney notes Playsafe Playground of New York determined, as testified to by Batkiewicz, the spacing for the openings in the railings for the blue platform, and the heights for the platform and Bongo steps were determined by the manufacturer and the architect. The defense attorney submits the plaintiffs failed to come forth with any evidence the playground design was unsafe, and points out Marletta's credentials reveal his experience has been primarily in

trip, slip and fall hazards, not playground safety, design nor installation with respect to children in an elementary school setting. The defense attorney opines Marletta's and plaintiff counsel's references to the Consumer Products Safety Commission Handbook for Playground Safety Publication # 325 are misplaced as support for their allegations regarding safety as it relates to this playground equipment because those standards are not mandatory, but merely suggested guidelines. The defense attorney avers Marletta's conclusions reached by playground measurements are unsupported regarding the Bongo step as a dangerous or hazardous design defect, and he failed to point to any standard for his position the height of the platform surface is excessive. The defense attorney maintains, even assuming Marletta's playground measurements are correct, there is nothing to suggest the riser height of the platform surface is excessive, and notes when the playground was installed in 2001 or 2002, there were no standards for Bongo steps, and the ASTM 1487 Standard 8.15 requirements for such was adopted in 2005. The defense attorney opines the infant plaintiff attempted, as shown in a defense photograph, to move through the opening in the railing, grasp the adjacent railing as stepping onto the Bongo step, but her hand and arm inadvertently went through the railing, so the plaintiffs' contention an additional railing would have prevented the accident fails to appreciate the mechanics of what occurred. The defense attorney disagrees with the plaintiff expert's opinion the playground equipment was not school age appropriate because the expert failed to support that conclusion, rather plaintiffs' counsel quoted the CPSC Handbook,

Sections 10.0 and 6.3 to suggest the infant plaintiff should be considered preschool age, rather than five years old in 2006. The defense attorney claims, with regard to the claim of negligent supervision of the infant plaintiff, the defendant is not an insurer of safety, and does not have any obligation to provide constant supervision of children. The defense attorney notes the infant plaintiff specifically testified, at the time of the accident, one of the aides, Ms. Martinez, was right next to her when it happened, and the defense attorney points out three school aides supervised, in and around the playground equipment, the infant plaintiff's class and one other kindergarten class.

The defendant established its *prima facie* entitlement to judgment as a matter of law by presenting evidence that it maintained the playground in a reasonably safe condition (*see Swan v Town of Brookhaven*, 32 AD3d 1012 [2006]; *Capotosto v Roman Catholic Diocese of Rockville Ctr.*, 2 AD3d 384, 386 [2003]; *Banks v Freeport Union Free School Dist.*, 302 AD2d 341 [2003]; *Lopez v Freeport Union Free School Dist.*, 288 AD2d 355 [2001]; *Cronin v Middle Country Cent. School Dist.*, 267 AD2d 269 [1999]).

Sobti v. Lindenhurst School Dist., 35 A.D.3d 439, 825 N.Y.S.2d 251 (2nd Dept., 2006).

In opposition, the plaintiffs relied on the opinion of an expert who inspected the playground approximately seven months after the incident and thus failed to establish the condition of the playground at the time of the incident (*see McCarthy v. State of New York*, 167 A.D.2d 516, 517, 562 N.Y.S.2d 190). Moreover, the expert relied upon alleged violations of guidelines promulgated by the American Society for Testing and Materials and the United States Consumer Product Safety Commission, which are nonmandatory and not meant to be the exclusive standards for playground safety (*see Merson v. Syosset Cent. School Dist.*, 286 A.D.2d 668, 670, 730 N.Y.S.2d 132). This and the other evidence submitted by the plaintiffs in opposition was insufficient to raise a triable issue of fact (*see Sobti v. Lindenhurst School Dist.*, 35 A.D.3d 439, 825 N.Y.S.2d 251; *Swan v. Town of Brookhaven*, 32 A.D.3d 1012, 821 N.Y.S.2d 265; *Capotosto v. Roman Catholic Diocese of Rockville Ctr.*, 2 A.D.3d at 386, 767 N.Y.S.2d

857; *Davidson v. Sachem Cent. School Dist.*, 300 A.D.2d 276, 277, 751 N.Y.S.2d 300; *Washington v. City of Yonkers*, 293 A.D.2d 741, 742, 742 N.Y.S.2d 316; *Merson v. Syosset Cent. School Dist.*, 286 A.D.2d 668, 670, 730 N.Y.S.2d 132)

Miller v. Kings Park Cent. School Dist., 54 A.D.3d 314, 315, 863 N.Y.S.2d 232 (2nd Dept., 2008).

The infant plaintiff was engaged in an approved use of a playground apparatus at the time of the accident, and there was no proof that closer supervision would have prevented the accident. Thus, we find that the defendants are entitled to summary judgment dismissing the negligent supervision cause of action.

On the issue of negligent maintenance, installation, and design of the playground apparatus, we find that the defendants met their prima facie burden of showing that they did not create an unsafe or defective condition (see *Kaplan v. Waldbaum's, Inc.*, 231 A.D.2d 680, 647 N.Y.S.2d 560). In opposition, 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 A.D.2d 668, 730 N.Y.S.2d 132; *Pinzon v. City of New York*, 197 A.D.2d 680, 602 N.Y.S.2d 909; *McCarthy v. State of New York*, 167 A.D.2d 516, 562 N.Y.S.2d 190)

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

“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 (see, *Mirand v City of New York*, 84 NY2d 44), they are not insurers of safety” (*Lawes v Board of Educ.*, 16 NY2d 302, 306]” (*Shabot v. East Ramapo School Dist.*, 269 A.D.2d 587, 703 N.Y.S.2d 268 [2nd Dept., 2000]).

Assuming the existence of triable issue of fact with respect to the defendant's allegedly negligent supervision, liability for any such negligent

supervision does not lie absent a showing that it constitutes a proximate cause of the injury sustained (*see, Schlecker v. Connetquot Cent. School Dist. of Islip*, 150 A.D.2d 548, 541 N.Y.S.2d 127). Where, as here, the “accident 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 defendant[] is warranted” (*Janukajtis v. Fallon*, 284 A.D.2d 428, 726 N.Y.S.2d 451, *quoting Convey v. City of Rye School District*, 271 A.D.2d 154, 160, 710 N.Y.S.2d 641)

Lopez v. Freeport Union Free School Dist., 288 A.D.2d 355, 356, 734 N.Y.S.2d 97 (2nd Dept., 2001).

In opposition, the plaintiffs failed to raise a triable issue of fact as to whether inadequate supervision was a proximate cause of the accident (*see Tanon v. Eppler, supra; Weinblatt v. Eastchester Union Free School Dist.*, 303 A.D.2d 581, 756 N.Y.S.2d 766). The fact that the infant plaintiff had successfully jumped off the swing at the bottom of its arc approximately five minutes before the accident, apparently without being seen, is insufficient, standing alone, to raise a triable issue of fact as to whether he had been engaging in a prohibited activity “for an extended period of time” and whether “more intense supervision may have prevented the accident” (*cf. Douglas v. John Hus Moravian Church of Brooklyn, Inc.*, 8 A.D.3d 327, 328, 778 N.Y.S.2d 77)

Reardon v. Carle Place Union Free School Dist., 27 A.D.3d 635, 636, 813 N.Y.S.2d 150 (2nd Dept., 2006); *see also Carey v. Commack Union Free School Dist. No. 10*, 56 A.D.3d 506, 867 N.Y.S.2d 525 (2nd Dept., 2008).

In support of its motion for summary judgment, the appellant established its entitlement to judgment as a matter of law by demonstrating that it did not breach its duty of supervision, either by not providing a sufficient number of supervisors or by failing to adequately supervise the plaintiff (*see Davidson v. Sachem Cent. School Dist.*, 300 A.D.2d 276, 751 N.Y.S.2d 300; *David v. County of Suffolk, supra; Navarra v. Lynbrook Pub. Schools, Lynbrook Union Free School Dist.*, 289 A.D.2d 211, 733 N.Y.S.2d 730; *Berdecia v. City of New York*, 289 A.D.2d 354, 355, 735 N.Y.S.2d 554; *see generally Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572; *cf. Oliverio v. Lawrence Pub. Schools*, 23 A.D.3d 633, 634-635, 805 N.Y.S.2d 638).

As to the teacher-student ratio, it is undisputed that one supervisor was sitting next to the infant plaintiff in the wagon at the time of her injury,

another was riding across from her, and 12 other adult supervisors were present with the approximately 40 students. This level of supervision was adequate under the circumstances (*see Berdecia v. City of New York, supra; Navarra v. Lynbrook Pub. Schools, Lynbrook Union Free School Dist., supra*)

David v. City of New York, 40 A.D.3d 572, 573-574, 835 N.Y.S.2d 377 (2nd Dept., 2007).

The Second Department, in an analogous personal injury action, indicated a seven year old plaintiff sustained personal injuries, from a fall off parallel bars in a Long Island school district playground, in an attempt to descend it, during a school recess. When it happened, four second-grade classes were on the playground with about 95 students, including four special education students, and either two or three teachers or aides supervising the children. The Second Department held:

The defendant demonstrated, prima facie, its entitlement to summary judgment as a matter of law, by showing that there was adequate playground supervision and, in any event, that the level of supervision was not the proximate cause of the incident (*see, Tessier v. New York City Health & Hosps. Corp.*, 177 A.D.2d 626, 576 N.Y.S.2d 331). The burden then shifted to the plaintiffs to produce evidentiary proof in admissible form sufficient to show the existence of a triable question of fact (*see, Taylor-Warner Corp. v. Minskoff*, 167 A.D.2d 382, 561 N.Y.S.2d 797). The plaintiffs failed to raise a triable issue of fact as to inadequate supervision and whether the level of supervision was a proximate cause of the alleged accident. Therefore, the plaintiffs did not meet their burden of proof as a matter of law, and the motion for summary judgment should have been granted

Navarra v. Lynbrook Public Schools, 289 A.D.2d 211, 733 N.Y.S.2d 730 (2nd Dept., 2001); *see also Conte v. Minnesauke Elementary School*, 56 A.D.3d 511, 866 N.Y.S.2d 872 (2nd Dept. 2008).

Here, the defendant Westbury Free School District has shown there was adequate playground supervision at the time of this incident, and the level of supervision was not

the proximate cause of this incident. While the plaintiffs' expert inspected the playground on May 6, 2008, approximately two years after the incident, it fails to establish the condition of the playground at the time of the incident. Moreover, the plaintiffs' expert based his opinion upon alleged violations of promulgated guidelines which are not mandatory nor exclusive standards for playground safety.

The Court is constrained, as a matter of law, and finds the defendant Westbury Free School District demonstrated its entitlement to summary judgment. In opposition, the plaintiffs fail to raise a triable issue of fact.

Accordingly, the motion is granted. So ordered.

So ordered.

Dated: **March 31, 2009**

ENTER:



J. S. C.

FINAL DISPOSITION XXX

NON FINAL DISPOSITION

ENTERED
APR 02 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE