Smith v City of New York
2010 NY Slip Op 30680(U)
March 16, 2010
Supreme Court, New York County
Docket Number: 117109/07
Judge: Cynthia S. Kern
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SCANNED ON 3/19/2010

[* 1]

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

PRESENT: CYNTHIA S. KERN J.S.C. PART 52

Index Number : 117109/2007

SMITH, ISAIAH

VS

CITY OF NEW YORK

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision, ~~except~~ moreover, plaintiff has agreed to discontinue this action against the city with prejudice.

FILED

MAR 19 2010

COUNTY CLERK'S OFFICE NEW YORK

Dated: 3/16/10

CYNTHIA S. KERN J.S.C.

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

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 52

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ISAIAH SMITH, an Infant by his Mother and Natural Guardian, SHATISHA SMITH-HAYWOOD and SHATISHA SMITH-HAYWOOD individually,

Plaintiffs,

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF PARKS & RECREATION, THE DI GENNARO FAMILY YPDC LLC, THE DI GENNARO FAMILY YPDC LLC d/b/a YOUNG PEOPLE'S DAY CAMP OF BROOKLYN and YOUNG PEOPLE'S DAY CAMPS, INC.,

Defendants.

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Index No. 117109/07

DECISION/ORDER

FILED
MAR 19 2010
COUNTY CLERK'S OFFICE
NEW YORK

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	
Answering Affidavits to Cross-Motion.....	
Replying Affidavits.....	3
Exhibits.....	4

The infant plaintiff commenced the instant action to recover damages for personal injuries he allegedly sustained when he fell off the monkey bars at a playground on an outing with his day camp. At oral argument on March 3, 2010, he withdrew his claims against defendants the City of New York and the New York City Department of Parks & Recreation.

The remaining defendants now move for summary judgment on the grounds that plaintiff assumed the risk of his injury as a matter of law and/or that his actions were the sole proximate cause of his injury. For the reasons set forth below, defendants' motion is granted.

The relevant facts are as follows. On July 30, 2007, plaintiff, who was 9 years old at the time, went on an outing with his day camp to a playground in Manhattan. Although he was instructed not to play on the monkey bars, he did so anyway. His hands were wet and he slipped as he was reaching from one bar to another on the monkey bars, causing him to fall and sustain personal injuries. He testified that he had previously played on monkey bars, that he had in fact had fallen off the monkey bars before and that he was aware he could fall off them and get hurt. His mother had even forbade him from playing on the monkey bars because he had gotten hurt on them before.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Wayburn v Madison Land Ltd. Partnership,* 282 A.D.2d 301 (1st Dept 2001). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v City of New York,* 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

Defendants are entitled to summary judgment because plaintiff assumed the risks inherent in playing on the monkey bars as a matter of law. It is well-settled that "one is deemed to have assumed, as a voluntary participant...'those commonly appreciated risks which are inherent in

and arise out of the nature of the sport [or activity] generally..."' *Roberts v Boys and Girls Republic, Inc.*, 51 A.D.3d 246 (1st Dept 2008) (citation omitted). "[T]he scope of plaintiff's assumption... may vary depending upon a particular plaintiff's capacity to appreciate the risks of an activity..." *Id.* Where the risks are obvious, such as the risk of slipping off a diving board or the risks of ice skating, and conditions are "as safe as they appeared to be" courts have found that infant plaintiffs have assumed the risks inherent in such activities. *Cardoza v Village of Freeport*, 205 A.D.2d 571 (2nd Dept 1994); *see also Cook v Town of Oyster Bay*, 267 A.D.2d 192 (2nd Dept 1999). In particular, the Second Department reversed the lower court's denial of summary judgment to defendant school district, finding that the infant plaintiff had assumed the risk of playing on a jungle gym at a playground as a matter of law. *See Auwater v Malverne Union Free School District*, 274 A.D.2d 528 (2nd Dept 2000).

In the instant case, defendants are entitled to summary judgment as plaintiff voluntarily assumed the risks inherent in playing on the monkey bars, such as falling. Plaintiff testified that he had played on the monkey bars before, that he had in fact been injured while playing on the monkey bars previously and that he knew he could get hurt while playing on the monkey bars. Moreover, the risks of playing on the monkey bars were not hidden; the monkey bars were "as safe as they appeared to be." *Cardoza*, 205 A.D.2d 571. Plaintiff clearly was aware of the risks of playing on the monkey bars and assumed those risks as a matter of law. *See Auwater*, 274 A.D.2d 528.

Plaintiff's citations to *Karr v Brant Lake Camp, Inc.*, 261 A.D.2d 342 (1st Dept 1999) and *Benedek v Richland Manor Assocs., LLC*, 21 Misc.3d 1135(A) (Sup Ct, Kings Cty 2008) as cases in which the court held that whether the infant plaintiff assumed the risk was a question of fact

are unavailing as in those cases the participation of a physically larger adult may have increased the risks at issue. There is no evidence in the instant case that the risks at issue were in any way enhanced beyond the normal risks inherent in playing on the monkey bars.

Moreover, *Rivera v Board of Education of City of Yonkers*, in which the Second Department reversed the lower court's granting of summary judgment based on assumption of the risk, is distinguishable. 19 A.D.3d 394 (2nd Dept 2005). In that case, the infant plaintiff was not quite six and the court cited no evidence that she appreciated the risks involved in playing on the monkey bars. *See id.* In the instant case, to the contrary, plaintiff was nine years old at the time of the incident and specifically testified that he had experience on this type of playground equipment and understood the risks involved.

Plaintiff's claim of "negligent supervision" on the part of the day camp is moot in light of the court's finding that he assumed the risk of playing on the monkey bars. Where a plaintiff has assumed the risk of a particular activity, "recovery premised on injury attributable to the risk assumed is barred." *Roberts*, 51 A.D.3d at 251 (1st Dept 2008). Specifically, "[r]ecovery may not, in such a circumstance, be had on a theory of negligent supervision. Negligent supervision remains a viable theory only insofar as the risk upon which the action is based has not been assumed." *Id.* Because this court holds that plaintiff assumed the risks of playing on the monkey bars, the court need not address his theory of negligent supervision. *See Roberts*, 51 A.D.3d at 251.

Plaintiff's citations to *Vonungern v Morris Central School*, 240 A.D.2d 926 (3rd Dept 1997) and *Oliveiro v Lawrence Public Schools*, 23 AD3d 633 (2nd Dept 2005), for the proposition that summary judgment should be denied where plaintiff raises a question of fact as

to inadequate supervision are inapposite. Those cases do indeed address the issue of negligent supervision but do not address the issue of assumption of the risk. As noted above, because this court holds that plaintiff assumed the risks of playing on the monkey bars, it does not and need not reach the issue of negligent supervision. *See Roberts*, 51 A.D.3d at 251.

Accordingly, defendants' motion is granted and plaintiff's complaint is dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 3/16/10

Enter: _____
J.S.C.

HON. CYNTHIA S. KERN

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