

Smith v City of New York
2010 NY Slip Op 31886(U)
July 12, 2010
Supreme Court, New York County
Docket Number: 117109/07
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C.
Justice

PART 52

Index Number : 117109/2007
SMITH, ISAIAH
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
REARGUMENT/RECONSIDERATION

INDEX NO. 117109/07
MOTION DATE _____
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

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.*

FILED
JUL 15 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/12/10

CYNTHIA S. KERN
J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

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

Plaintiffs,

Index No. 117109/07

-against-

DECISION/ORDER

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.,

FILED
JUL 15 2010
COUNTY CLERK'S OFFICE
NEW YORK

Defendants.

-----X
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.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	_____
Answering Affidavits to Cross-Motion.....	_____
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

-----X
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. On March 16, 2010, this court issued a decision granting defendants' The Di
Gennaro Family YPDC LLC, The Di Gennaro Family YPDC LLC d/b/a Young People's Day

Camp of Brooklyn, Young People's Day Camp of Brooklyn and Young People's Day Camps Inc. (collectively, "YPDC") motion for summary judgment. Plaintiff now moves for leave to renew and reargue this court's March 16th decision. For the reasons set forth more full below, plaintiff's motion is denied.

On a motion for leave to reargue, the movant must allege that the court overlooked or misapprehended matters of fact or law. CPLR 2221(d)(2). As plaintiff has not established that the court overlooked or misapprehended matters of fact or law, his motion for leave to reargue is denied.

On a motion for leave to renew, the movant must allege new facts not offered on the prior motion and a reasonable justification for the failure to present those facts on the prior motion or shall demonstrate that there has been a change in the law that changes the court's prior determination. CPLR 2221(e)(2) and (3). Plaintiff argues that a case decided by the Court of Appeals on April 6, 2010, several weeks after this court's decision in the instant case, *Trupia v Lake George Central School District*, 14 N.Y.3d 392 (2010) has changed the state of the law. Because the court finds that *Trupia* does not affect the outcome of the instant action, plaintiff's motion for leave to renew is also denied.

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.

The court granted defendants' motion for summary judgment, holding that plaintiff was aware of the risks of playing on the monkey bars, the risks of playing on the monkey bars were not hidden and that he had assumed the risks inherent in playing on the monkey bars as a matter of law. The Court of Appeals decision in *Trupia* does not alter that result. The *Trupia* court limited the application of the doctrine of the assumption of risk but held that it still applied to "athletic and recreative activities." *Id.* at 395. In *Trupia*, the infant plaintiff was injured when sliding down a bannister, an activity the court termed "horseplay." Finding that horseplay was not "worthy of protection" nor worth encouraging, the court held that the Appellate Division was correct in denying the defendant school district's motion to amend its answer to assert assumption of the risk as an affirmative defense. *See id.* In a case following and citing *Trupia*, the First Department held that plaintiff had assumed the risks inherent in fitness training, implicitly determining that such an activity was an athletic and/or recreational pursuit. *See Khedouri v Equinox*, 73 A.D.3d 532 (1st Dept 2010). Similarly, the instant case involves the very kind of activity the Court of Appeals deemed socially worthy and thus one in which the assumption of the risk may apply. Playing on the monkey bars is precisely the type of "recreative" activity the Court held was worthy of protection. The monkey bars exist for children to play on and plaintiff was using them as intended when he was injured. Therefore, even if this court had been able to take *Trupia* into consideration, it would have reached the same decision and granted defendants' motion for summary judgment.

Accordingly, plaintiff's motion for leave to renew and reargue is denied. This constitutes

the decision and order of the court.

Dated: 7/12/10

Enter:
 J.S.C.

CYNTHIA S. KERN

FILED^{S.}

JUL 15 2010

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NEW YORK