

Hunter v Fun 4 All, Inc.

2010 NY Slip Op 32214(U)

August 18, 2010

Supreme Court, Suffolk County

Docket Number: 04-27721

Judge: Denise F. Molia

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY



PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 2-19-10
ADJ. DATE 7-9-10
Mot. Seq. # 007 - MD
009 - XMD

-----X
DYLAN W. HUNTER an infant under the age of :
eighteen (18) years by his mother and natural :
guardian CINDY HUNTER and CINDY HUNTER, :

EWALL & EWALL
Attorney for Plaintiff
946 Park Avenue
Huntington, New York 11743

Plaintiff, :

- against - :

FUN 4 ALL, INC., :

Defendant. :

RIVKIN RADLER LLP
Attorney for Fun 4 All, Inc.
926 Rexc corp Plaza
Uniondale, New York 11556-0926

-----X
FUN 4 ALL, INC., :

Third-Party Plaintiff, :

- against - :

RECREATION INSTALLATION, INC., :

Third-Party Defendant. :

MALAPERO & PRISCO LLP
Attorney for BCI Burke Co., LLC, BCI Burke, BCI
Burke Co., BCI Burke Premier Play Environments
& Empire Recreation, LLC
295 Madison Avenue, 4th Floor
New York, New York 10017

-----X
FUN 4 ALL, INC., :

Third-Party Plaintiff, :

- against - :

LANDSCAPE STRUCTURES, INC., :

Third-Party Defendant. :

EMPIRE RECREATIONAL, ProSe
590 Grand Avenue
Ridgefield, New Jersey 07657

-----X
FUN 4 ALL, INC., :

Third-Party Plaintiff, :

- against - :

GAME-TIME, INC., GAMETIME, INC., :
PLAYCORE INC., PLAYCORE WISCONSIN :
INC. and MARTURANO RECREATION :
COMPANY, :

Third-Party Defendant. :
-----X

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of motion (007), the BCI defendants have submitted, inter alia, an attorney’s affirmation; copies of the pleadings, answers, plaintiff’s verified bill of particulars; copies of the transcripts of the examinations before trial of Scott Suprina dated July 6, 2007, Cindy Hunter dated July 30, 2008 and December 8, 2005, Susan Nalewajk dated September 11, 2008 and January 30, 2006, Scott Liebelt dated November 13, 2008; a copy of the infant plaintiff’s emergency room record from St. Charles Hospital; out-of-state affidavits of Tim Ahearn-undated and one dated August 12, 2009; various photographs of the equipment; and a warranty.

In support of motion (009), Fun 4 All has submitted, inter alia, an attorney’s affirmation; copies of the summons and complaint, answers, and verified bill of particulars; copies of the transcripts of the examinations before trial of Scott Suprina dated July 6, 2007, Cindy Hunter dated July 30, 2008 and December 8, 2005, Dylan Hunter dated December 8, 2005 and July 30, 2008, Susan Nalewajk dated January 30, 2006 and September 11, 2008, Scott Liebelt dated November 13, 2008; out-of-state affidavits of Thomas Pienciak dated April 12, 2010 and Mari S. Truman dated April 13, 2010; copy of an incident report dated November 11, 2003; a copy of the infant plaintiff’s emergency room record from St. Charles Hospital and other medical records; notice to supervise children at all times, photographs of the equipment.

Here the out-of-state affidavits of Tim Ahearn, Thomas Pienciak and Mari S. Truman are not in admissible form as they are not sworn to under the penalties of perjury and do not comport with the requirements of CPLR 2106 and 2309(c), and lack a certificate of conformity as required by N.Y. Real. Prop. Law. § 299-a(1) (*See, Ford Motor Credit Company v Prestige Gown Cleaning Service*, 193 Misc2d 262, 748 NYS2d 235 [Civ Ct Queens County 2002], wherein it was provided that “[a]n oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation”).

The incident report signed by Susan Nalewajk, dated November 11, 2003 at 12:00 o’clock sets forth to the effect that Dylan Hunter was climbing on the grey curved steps on the Cube Scape and fell off hitting his

forehead-right side of eyebrow sustaining bleeding and a laceration. Two adult guests who heard Dylan fall but did not see him fall, held Dylan while pressure was applied to the wound until the ambulance arrived. The report further indicates that Dylan's mother was paged to come to his side while waiting for arrival of the ambulance.

Cindy Hunter testified to the effect that she is the mother of Dylan Hunter who was four years of age when, on November 11, 1003, she brought him to Fun 4 All. She purchased tickets for admission but was not asked how old the child was and was not given any oral or written instructions about the use of any of the equipment nor was she advised of any age limits for the children. She claims there were no signs posted with instructions about the equipment being used by Dylan. When the accident occurred, she states she was about two feet from the child and was walking with her daughter to the lunch room with her back to the child. She did not think he would get hurt using the equipment and indicated the equipment was such that she would not have been able to go on it with him. As she was leaving, Dylan was standing there and was just about to go up the arch ladder which goes into a "round ball" or round fiberglass dome. She did not remember hearing Dylan cry out or fall, but one of Dylan's friends, Patrick Burke, came to her, seconds (less than a minute after she began walking away) and told her that Dylan had an accident and was bleeding. She returned and found Dylan on the ground to the left side of the arch climber in between the arch climber and the bubble. There was no one from Fun 4 All supervising the area when the incident occurred, but two adults were holding Dylan's shirt on his head to stop the bleeding. She never had conversation with either of them after the incident and knew of no one who witnessed the accident. She did not recall telling anyone that Dylan hit his head on a metal pole.

Susan Nalewajk testified to the effect that she is a professional engineer registered in New York and Indiana with an emphasis on environmental engineering. On November 11, 2003 she was the president and owner of Fun 4 All in Port Jefferson, but sold it in 2004 or 2005. The equipment was installed new in 1994 by Recreation Facilities Installation. Scott Suprina was her contact person. She did not know if she or Suprina selected the subject equipment for installation. Suprina had purchased that equipment, known as a "Cube Scape," or the two yellow pods, through Recreation Facilities Installation, but she did not know who manufactured it, but believed it was BCI Burke. She participated in the selecting of the pieces of the equipment and how they would be configured, and required that the equipment be installed per manufacturer's instructions and that all equipment meet or exceed the consumer product safety code. She did not remember if there was an age restriction for the particular equipment, however, stated that no matter what the child's age, supervision was required. She stated the equipment would be safe for a four year old with adult supervision-direct hands-on assistance. This provision was enforced with her employees who monitored the general play in the playground area. She wrote the training manual for those employees who were also given on-the-job training which included safety training concerning the children's conduct, various safety issues such as untied shoelaces and improper use of equipment, and use of age appropriate equipment, to make sure child was with an adult, and to follow the signs which were on each individual piece of play equipment. She did not witness the accident as she was at the front desk, and after investigation, came to the conclusion that the incident occurred on the curvy steps leading to the cube scape. The curved steps have deep rungs with metal bars on either side connecting them like a ladder. When she arrived at the scene, she saw Dylan lying on the floor about three or four feet away from the base of the curved steps of the cube scape, flat on his back with his head closest to the steps and his feet further away. She knew of no witnesses, but spoke to two women who were tending to Dylan either before or after she went for sterile bandages. She went to the front desk and paged for Dylan's mother who was not there, and returned to the child. When Dylan's mother did not return, she went

back to the desk to page her several times. One of the boys with Dylan found Dylan's mother in the snack bar. After the ambulance left with the child, she inspected the area, saw blood on the floor but did not see any on the cube scape.

Scott Liebelt testified on behalf of the BCI Burke defendants to the effect that he is employed by BCI Burke as the lead project engineer for about one year and prior to that as engineering manager since 2001 doing lead product development safety compliance and addressing customer service issues. He represents the company in certification meetings for the International Playground Equipment Manufacturers Association (IPEMA) and provides guidance in product development to make sure equipment meets the safety standards, and provides expertise for sales people concerning safety compliance questions. He was familiar with the U.S. Safety Product Commission handbook and made sure the equipment manufactured by BCI Burke complied with that handbook for public playground safety. He identified a photo of the Cube Scape used by BCI and stated it was identified as the Series 2000. The Kid Kapsule (bubble) is the unit on the left-hand side of the picture with the bubble on top, sold in a configured unit. He also identified a Kid Kapsule and Loop Climber (which does not have a significant distinction from the Arch Climber) with a warning indicating that there should be resilient energy absorbing material under the equipment to cushion accidental falls and refers to the guidelines of the Consumer Product Safety Commission. After being shown pictures, he opined that the equipment was assembled correctly. He identified the yellow bubbles as Burke equipment. However, stated different manufacturers produce bubble windows. With reference to the top photo in Exhibit C-2, he could not answer if the Loop Climber and the two bubbles and bubble window were assembled correctly as he did not know what the installation documents were for that configuration. He identified two obstructions under the Loop Climber in photo C-2: a bubble window and the green support tube for the other tubes to the side. Exhibit 9 was identified as a BCI play structure with an age appropriate sign on it. He did not know if the equipment identified in photo C-2 was sold to Fun 4 All. He could not identify the Loop Climber as being a BCI product. In photo C-2, he did not believe the green support tubes were BCI Burke equipment. He did not know if BCI Burke included in the market materials made a claim that their products were fully compliant with U.S. Safety Commission, but it is his understanding they the BCI products are. He was not aware of any recalls to the Kid Kapsule or the Loop Climber since 1994. He, along with Tim Ahern the CEO, and the product designers, determine whether or not a BCI product is age appropriate. Customers can make requests for design configurations, but BCI must approve it. He was not sure if the Loop Climber depicted in the photographs was a BCI Burke product. He felt the Loop Climber, if sold today, would be appropriate for children ages two to twelve.

Scott Suprina testified to the effect that he was the owner of Recreation Installations, Inc. and managed it. He designed and sold an interior play space to Fun 4 All on or about December 12, 19994. When shown Exhibit C-2, he recognized the playground equipment as the Cube Scape manufactured by Burke Playground Equipment, exclusive of the slide attached to the green pole which was not manufactured by Burke. He identified the Arch Climber and a Lexan or plastic bubble panel as both manufactured by Burke. When he received that equipment it had a layout calling for the Arch Climber and the bubble panel to be placed where it was located, but he determined the orientation in the room. He tried to adhere to the Consumer Product Safety guidelines in installing the play area and suggested signage and placed some which included signs allover the facility requiring adult supervision of the children at all times. He also adhered to Burke's design and specifications for installation. It was the first year that Burke offered the Game Cube which they was offered with different specifications and layouts. He used the standard Burke layout for the equipment. He identified a flat panel or an opening with a ring around it to finish the plastic (described the ring as a perimeter

Hunter v Fun 4 All et al
 Index No. 04-27721
 Page No. 6

flange that allows the bubble to bolt on with the bolts being to the exterior to the piece of equipment, with a quarter-inch raised area, which he opined could cause injury if someone fell directly onto it). He thought the child might have hit his head on that flange.

Based upon the foregoing, it is determined that the moving defendants have not demonstrated prima facie entitlement to summary judgment dismissing the complaint due to the existence of factual issues. Factual issues precluding summary judgment include, but are not limited to, what part of the equipment, if any, the child sustained injury on; whether or not the child was injured on BCI equipment; whether BCI marketed the equipment as age appropriate for the infant plaintiff; what specifications were used to install the equipment; whether the equipment as installed complied with Consumer Product Safety Standards and installation specifications; whether the flanged flat panel opening created a dangerous section on the equipment; whether the bolts were safely positioned to avoid injury; whether any of the defendants knew or should of known of any dangerous condition which could cause injury in the nature of a laceration; whether Fun 4 All had adequate supervision and signage at the site apprising adults of the need to supervise children at all times; and whether the equipment, including the Arch Climber, was age appropriate and safe for use as the only means of ingress and egress of the particular equipment.

Accordingly, motions (007) and (009) are denied in their entirety.

Dated: 8-18-2010

Hon. Denise F. Molia

 J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION