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

PRESENT: HON. EILEEN A. RAKOWER PART 15

Justice

Index Number : 105445/2008
MASLAWI, NATHANIEL
VS.
WEST SIDE FAMILY CENTER
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. 105445/08
MOTION DATE
MOTION SEQ. NO. 003
MOTION CAL. NO.

n this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 12 2010
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 10/7/10

HON. EILEEN A. RAKOWER 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 15

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NATHANIEL MASLAWI, an Infant, by his Father and Natural Guardian, NAUHM MASLAWI, and NAUHM MASLAWI, Individually,

Plaintiffs,

- against -

WESTSIDE FAMILY CENTER INC. and ELAINE ROSNER,

Defendants.

Index No. 105445/08
ORDER AND DECISION
Mot. Seq.: 003

EILEEN A. RAKOWER, J.S.C.

Plaintiffs bring this action for injuries infant plaintiff allegedly sustained when a gate closed on his thumb while he was in the care of defendants the Westside Family Center, Inc ("Westside") and Elaine Rosner (collectively "defendants"). The accident occurred on September 22, 2006 at Westside's physical location, which is 63 West 92nd Street in the County and State of New York. Defendants now move for summary judgment pursuant to CPLR 3212. Plaintiff opposes.

The undisputed facts are as follows: Infant plaintiff was approximately two and a half years old at the time of the incident. Ms. Rosner, Chief Executive Officer, director and teacher at Westside, along with another employee of Westside, were caring for infant plaintiff and two other children. At around twelve p.m. Ms. Rosner, the employee, and the children were returning to Westside from a visit to Central Park. The other Westside employee took a child and went inside the building. Another child was met by her babysitter outside the building.

Westside is located on the bottom floor of a brownstone. The subject gate is

iron and is located at sidewalk level, three steps up from the ground level. The gate itself is approximately two and a half to three feet wide. The opening to the gate is approximately thirty to thirty six inches wide . The gate door swings open away from the sidewalk. There are no springs attached to the door and it closes with a "latch" or "lever" that can be lifted up.

According to Ms. Rosner's testimony, on the date of the accident, the gate was "wide open," and she stopped in front of it in order to say hello to a babysitter, who was sitting near the building. Ms. Rosner was standing at the "edge" of the "open gate," where the hinge is. Ms. Rosner claims that she was holding infant plaintiff the entire time"by his trunk," with both her hands. As she was about to bring him down the stairs, Ms. Rosner claims that she felt him moving and that she heard a yell and she heard the door close. Ms. Rosner states that infant plaintiff "sort of swiped around [her] and pull[ed] the door." Ms. Rosner claims that she immediately released the latch and opened the door.

Defendants, in support of their motion, submit: the pleadings; plaintiffs' bill of particulars, the deposition transcript of Nauhm Maslawi, infant plaintiffs father; the deposition transcript of Hana Maslawi, infant plaintiff's mother; the deposition transcript of Elaine Rosner; the affidavit of Elaine Rosner; a print out from the NYS Department of State, Division of Corporations; and preliminary conference order dated May 22, 2009. Defendants argue that the action should be dismissed because there were no defects in the gate and infant plaintiff was being properly supervised at the time of the incident. Even if the gate was defective, defendants point out, they had no notice, either actual or constructive, of such defect.

Plaintiffs, in opposition, submit only an attorney's affirmation and argue that there are questions of fact as to whether Ms. Rosner's "inattentiveness" to infant plaintiff was the cause of his accident. Plaintiffs assert that Ms. Rosner's own testimony shows that she "knew that the gate presented a menace to [infant plaintiff," because she stood in front of it. Alternatively, plaintiffs argue that the action should go to a jury on the theory of *res ipsa loquitur*.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party

opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Initially, it is well settled that in order for a defendant to be found negligent for a defective condition on his or her property, the defendant must have caused or created the defect, or had actual or constructive notice of the existence of such defect. (see *Beck v. J.J.A. Holding Corp.*, 12 A.D.3d 238 [1st Dept. 2004]). The burden is upon plaintiff to make such a showing. (*Strowman v. Great Atlantic and Pacific Tea, Co., Inc.*, 252 AD2d 384[1st Dept. 1998]). Plaintiffs advance no arguments that the subject gate was defective. Even if such a claim were made, there is no evidence of a defect, nor is there any evidence that defendants had notice of an alleged defect.

A teacher's duty to supervise his or her charges requires "such care of them as a parent of ordinary prudence would observe in comparable circumstances." (*Mirand v. City of New York*, 84 NY2d 44, 49[1994]). In order for a defendant to be found liable for negligent supervision of a child, the lack of supervision must be the proximate cause of the child's injury. (see *Esponda v. City of New York*, 62 AD3d 458[1st Dept. 2009])."Where an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not the proximate cause of the injury and summary judgment in favor of the defendant . . . is warranted." (*Esponda* at 459)(internal citations omitted).

Ms. Rosner testifies:

> Q: When Nati's body moved, where did his body move to?
> A: I have to say that I cant answer it. I didn't see it, I heard his voice. That's all, It was so much, it was a tiny little time everything happened
> . . .
> A: It's something I can't explain, you know, exactly. When he was with me and I felt him moving, you know, I was in the process to bring him down and he just grabbed, must have grabbed the gate because he screamed and I saw the gate was closed. It happened in a very, very tiny

fraction of a moment, you know . . .

There is no indication from Ms. Rosner's testimony that she failed to adequately supervise infant plaintiff. Indeed, Ms. Rosner's undisputed testimony[1] is that she had both her hands on infant plaintiff's trunk because "it's a safer way to hold then the arms."Ms. Rosner also testifies that she was blocking the open gateway, not, as plaintiffs claim, because she thought the gate itself was dangerous, but because she "didn't want [infant plaintiff] to go down the stairs." In light of Ms. Rosner's testimony, plaintiffs fail to offer what, if any, additional steps Ms. Rosner could have taken to prevent infant plaintiff's accident.

In order to rely on the doctrine of *res ipsa loquitur*, plaintiffs must establish that: (1) the accident would not ordinarily occur in the absence of negligence; (2) the instrumentality which caused the accident was in the exclusive control of the defendant and; (3) nothing plaintiff did in any way contributed to the happening of the event. (*Hodges v. Royal Realty Corp.*, 42 AD3d 350, 352[1st Dept. 2007]). Plaintiff fails to establish any of the above.

Wherefore it is hereby

ORDERED that the motion for summary judgment is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: October 7, 2010

EILEEN A. RAKOWER, J.S.C.

[1]Infant plaintiff's father testifies at his deposition that it was not clear from speaking with Ms. Rosner that she was actually holding onto infant plaintiff when the accident happened. However his testimony regarding his conversation with Ms. Rosner is insufficient to raise an issue of fact as plaintiffs fail to submit any additional evidence in support of their arguments. (see; *Candela v. City of New York*, 8 AD3d 45[1st Dept. 2004]).