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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

----------x	**TRIAL PART: 16**
CAITLIN BRICAULT, an infant under the age of 14 years, by her mother and natural guardian, NANCY BRICAULT, and NANCY BRICAULT, Individually,	**NASSAU COUNTY**
Plaintiff,	**INDEX NO: 13736-08**
-against-	**MOTION SEQ. NO: 1**
COUNTY OF NASSAU, MINEOLA MEMORIAL PARK and VILLAGE OF MINEOLA,	
Defendants,	**SUBMIT DATE:11/9/10**
----------x	

The following papers having been read on this motion:

Notice of Motion.....1
Opposition.....2
Reply.....3
Cross Motion.....4
Affirmation.....5

Motion by defendant Incorporated Village of Mineola ("Village") for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint as against it is granted. Cross-motion by defendant County of Nassau ("County") for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint as against it is granted.

This is an action to recover damages for personal injuries allegedly sustained by the infant-plaintiff on April 23, 2007 at 5:30 p.m. at Mineola Memorial Park, Mineola, New York.

The infant Catlin Bricault allegedly struck her head on an exposed bolt on the playground equipment while she was playing at the aforementioned park.

It is undisputed that the location of the accident is owned by the Village and is not under the jurisdiction of the County.

Indeed, plaintiff offers no opposition to the County's motion for summary judgment.

Plaintiff, however, requests that the County's motion be denied and an order discontinuing the action as against the County be granted (CPLR 3217).

A motion for leave to discontinue litigation, pursuant to CPLR 3217, is addressed to the sound discretion of the court (*see, Tucker v Tucker*, 55 NY2d 378 [1982]; *Brown v Garcia*, 2 Misc3d 915 [2004]).

A plaintiff should be allowed to discontinue the action at any time "unless substantial rights have accrued or his adversary's rights would be prejudiced thereby" (*see, Louis R. Shapiro, Inc. v Milspemes Corp.*, 20 AD2d 857 [1st Dept. 1964]).

Inasmuch as plaintiff has failed to establish any special circumstances to warrant such relief and has failed to serve a cross-motion seeking such relief (CPLR 2215), plaintiff's request is denied.

The Village moves for summary judgment on the grounds that: a) there is no evidence of a dangerous, defective or unsafe condition; b) *assuming arguendo,* that a dangerous condition existed, the Village had no notice of any such condition and it did not create the condition.

In opposition to the motion, plaintiff contends that the Village failed to satisfy its burden of establishing as a matter of law that the playground was reasonably safe under the circumstances. Specifically, plaintiff argues that the Village has not come forward with any evidence as to the last time the subject piece of equipment was inspected.

Plaintiff also asserts that "the presence of an exposed screw on the subject piece of playground equipment was a dangerous, defective, unsafe and trap-like defect; and triable issues of fact exist as to whether the Village had constructive notice of the dangerous and defective condition."

Finally, plaintiff submits that the Village has failed to exchange "[m]aintenance and/or repair records, regarding the subject premises for a period of (3) years prior to and three (3) months after the accident" in compliance with plaintiff's notice for discovery and inspection dated February 13, 2009.

This court will first address plaintiff's contention that summary judgment should be denied on the grounds that it is premature.

"A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated" (*Evangelista*

v Kambinis, 74 AD3d 1278 [2nd Dept. 2010]; *Matter of Fasciglione*, 73 AD3d 769 [2nd Dept. 2010]; *see* CPLR § 3212[f]; *Rodriguez v DeStefano*, 72 AD3d 926 [2nd Dept. 2010]).

However, "the mere hope that further discovery would yield evidence of a triable issue of fact is not a basis for denying summary judgment" (*JP Morgan Chase Bank, N.A. v Agnello*, 62 AD3d 662 [2nd Dept. 2009] quoting *Lee v T.F. DeMilo Corp.*, 29 AD3d 867, 868 [2nd Dept. 2006]; *see, Chemical Bank v PIC Motors Corp*, 58 NY2d 1023, 1026 [1983]; *Lambert v Bracco*, 18 AD3d 619, 620 [2nd Dept. 2005]). The conclusory assertions contained in plaintiff's counsel's affirmation that further discovery is needed are insufficient to defeat this motion for summary judgment.

This court will now address the merits of the Village's motion for summary judgment.

On a motion for summary judgment, it is incumbent upon the movant to make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The failure to make that showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*Mastrangelo v Manning*, 17 AD3d 326 [2nd Dept. 2005]; *Roberts v Carl Fenichel Community Servs., Inc.*, 13 AD3d 511 [2nd Dept. 2004]). Issue finding, as opposed to issue determination, is the key to summary judgment (*see Kris v Schum*, 75 NY2d 25 [1989]). Indeed, "[e]ven the color of a triable issue forecloses the remedy" (*Rudnitsky v Robbins*, 191 AD2d 488, 489 [2nd Dept. 1993]).

Summary judgment is rarely appropriate in negligence actions (*Ugarriza v Schmeider*, 46 NY2d 471, 475 [1979]), even where the salient facts are conceded, since the issue of whether the defendant or the plaintiff acted reasonably under the circumstances is generally a question for jury determination (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Davis v Federated Department Stores, Inc.*, 227 AD2d 514 [2nd Dept. 1996]; *see John v Leyba*, 38 AD3d 496 [2nd Dept. 2007]).

"[The] owner of premises cannot be held liable for injuries caused by an allegedly defective condition unless the plaintiff establishes that the owner either created or had actual or constructive notice of the condition" (*Wolf v Fairfield Inn*, 2010 WL4241604 [2nd Dept. 2010]; *Bolloli v Waldbaum, Inc.*, 71 AD3d 618, 619 [2nd Dept. 2010]).

To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the] defendant's employees to discover and

remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986].

To satisfy its burden in the issue of lack of constructive notice, defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (*Id., see Porco v Marshalls Dept. Stores*, 30 AD3d 284, 285 [1st Dept. 2006]; *Feldmus v Ryan Food Corp.*, 29 AD3d 940, 941 [2nd Dept. 2006]; *Lorenzo v Plitt Theatres, Inc.*, 267 AD2d 54, 56 [1st Dept. 1999]).

Further, a "general awareness" that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff's fall. (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967 [1994]).

In support of its motion for summary judgment, the Village submits the examination-before-trial of plaintiff, the examination before trial of Leonard Palumbo, the Deputy Superintendent of Public Works, and the sworn affidavit of Thomas Rini, the Village Superintendent of Public Works.

Plaintiff Bricault testified that she was born on April 26, 1998. (Exhibit G, p. 6). She was involved in an accident on April 25, 2007, at approximately 5:00 p.m., at a playground that she had never visited before the accident date. *Id.* She did not know the name of the playground or the street on which it was located. *Id.* at p. 27). It was not yet dark out when the accident occurred (*Id.* at p. 9).

At the time of the accident, plaintiff was playing a game of "tag" and was hiding from her friends underneath the playground set with her feet standing on the ground. (*Id.* at p. 14).

The accident occurred when the plaintiff turned her head and contacted a metal screw attached to the metal playground set. (*Id.* at p. 13). A photograph depicting the subject screw was marked as Defendant's Exhibit "B" for identification. The left side of her head, approximately one inch above her left eye, contacted the screw. (*Id.* at p. 17). She was unsure of where the screw was specifically located, but it may have been on the side of the slide not depicted in the aforesaid photograph of the playground set. (Exhibit G, pgs. 13, 26). Plaintiff had never walked through or stood in the specific accident location, prior to the time of the accident. (*Id.* at pgs. 16, 17).

On March 20, 2010 Leonard Palumbo ("Palumbo") testified at an examination-before-trial on behalf of defendant Village.

Palumbo has been employed by Village since November 2004, when he started as a laborer.

(Exhibit J, p. 5). As a laborer, he repaired potholes, trimmed trees, cut grass and did anything else required to maintain the Village. (*Id* at p. 5). In April 2008, he was promoted to Deputy Superintendent of Public Works. (*Id.* at pgs. 6, 10). As Deputy Superintendent, Palumbo oversees the duties of all Public Works employees, assigns jobs and received complaints from residents. (*Id.* at p. 5).

Palumbo inspected the subject playground in 2007. (Id. at p. 11). The Superintendent sets the inspection schedule. (*Id.* at pgs. 15, 22). He would not have performed playground maintenance duties after he was promoted in April 2008. (*Id.* at p. 31). In 2007, Palumbo used a maintenance checklist and checked the entire playground set, including underneath the structure. (*Id.* at pgs. 11, 19, 27, 37). Specifically, he inspected any area of the equipment where nuts and bolts were located and checked the tightness of all bolts and for any cracks or defects, such as pieces of cut plastic. (*Id.* at pgs. 11, 12, 19, 37). If he found anything loose, then he would tighten it. (*Id.* at p. 16).

The screws and bolts on the playground set are encased in plastic covers to prevent people from contacting the metal. (*Id.* at pgs. 16, 17). Part of Palumbo's inspection included checking for missing plastic covers on the ends of the screws and bolts. (*Id.* at p. 17). The Village has replacement pieces of plastic available and can also order additional pieces if needed. (*Id.* at p. 17). Palumbo did not remember ever seeing any missing plastic covers. (*Id.* at pgs. 18, 19). However, he recalled replacing plastic coverings on a different piece of playground equipment at the subject park. (*Id.* at p. 32).

Palumbo was unaware of any accidents similar to this one prior to the date of infant plaintiff's accident and he never had to perform any post-accident maintenance on any screws or bolts prior to plaintiff's accident. (*Id.* at pgs. 24, 25).

Palumbo's current job responsibilities also include handling complaints. (*Id.* at p. 26). If Palumbo received a complaint, then he performs an inspection of the alleged problem and attempts to fix the problem. (*Id.* at p. 29). He never received any verbal complaints concerning exposed screws or bolts on the subject playground equipment. (*Id.* at p. 30). The prior Deputy Superintendent would have received any complaints made prior to April 2008. (Exhibit J, p. 26). There are 15 other laborers and additional park workers who are also involved in the maintenance of the playground sets. (*Id.* at p. 25).

In his affidavit, Rini states that he has been employed as Village Superintendent of Public Works since 2000, including in April 2007. Rini oversees the Department of Public Works which is responsible for maintaining Village parks, including Mineola Memorial Park and the playground equipment therein.

According to Rini, there is a laborer stationed at Mineola Memorial Park year round who is responsible for regularly inspecting the park and checking the playground equipment for any unsafe conditions. If any defects or unsafe conditions are identified, the laborer notifies Public Works, pursuant to Village custom and practice. In addition, members of Rini's maintenance staff regularly inspected Mineola Memorial Park and its playground equipment prior to plaintiff's accident.

Rini further swears that the Department of Public Works receives and maintains Village records pertaining to written notices of defects and unsafe conditions within Village parks, including the playground equipment therein. As part of his duties, Rini is responsible for searching Village records for such notices. In fact, Rini conducted a search for notices of defects, complaints and unsafe conditions at Mineola Memorial Park for the time period up to and including April 25, 2007 and determined that no complaints or notices of any defect have ever been received by the Village regarding any loose, uncovered or exposed bolts/screws at any time prior to Bricault's accident. Rini is also unaware of any such complaints or conditions.

Overall, the Village witnesses Rini and Palumbo demonstrate that the Village lacked any notice of any condition concerning the subject playground equipment prior to Bricault's accident. Furthermore, there is no evidence that the Village created any dangerous, unsafe or defective condition concerning the subject playground equipment.

Moreover, Palumbo never had to perform any post-accident maintenance on any screws/bolts prior to plaintiff's accident and he never received any verbal complaints concerning exposed screws/bolts on the subject playground equipment. As noted above, Rini conducted a search for notices of defects, complaints and unsafe conditions at Mineola Memorial Park for the time period up to and including April 25, 2007 and determined that no complaints or notices were ever received by the Village related to loose, uncovered or exposed screws/bolts at any time prior to Bricault's accident. Rini is also personally unaware of any such complaints or conditions.

Defendant Village has made a *prima facie* showing of entitlement to judgment as a matter

of law that the playground was in a reasonably safe condition (*Peralta v Henriquez*, 100 NY2d 139, 143 [2003]) and it breached no duty to plaintiff (*see Rygel v 8750 Bay Parkway, LLC*, 16 AD3d 572 [2nd Dept. 2005]; *Mingrino v Town of North Hempstead*, 2008 WL 5203296 [NY Sup]). The Village further established it did not have notice of the alleged condition and it did not create such condition.

Consequently, the burden shifts to plaintiff to create an issue of fact sufficient to defeat this motion.

Viewing the evidence in the light most favorable to plaintiff *(Robinson v Strong Memorial Hospital,* 98 AD2d 976 [4th Dept. 1983]; *Judice v DeAngelo*, 272 AD2d 583 [2nd Dept. 2000]), we find that plaintiff has failed to raise an issue of fact sufficient to defeat this motion. Plaintiffs have not provided any evidence that the Village somehow created the alleged condition and plaintiff possesses no knowledge that the alleged condition existed at any time prior to the time of her accident. Nor has plaintiff come forward with any evidence that the Village was required to cover the bolt that allegedly caused the accident.

Furthermore, members of the maintenance staff of Rini regularly inspect the park and its playground equipment prior to plaintiff's accident and the Village never received any complaints concerning uncapped screws or bolts on the subject playground equipment.

In view of the foregoing, the Village's motion for summary judgment is granted. The County's cross-motion for summary judgment is granted.

This constitutes the order and judgment of this court.

DATED: December 13, 2010

ENTER

HON. ARTHUR M. DIAMOND J.S.C.