

Platovsky v City of Long Beach

2011 NY Slip Op 30664(U)

March 7, 2011

Sup Ct, Nassau County

Docket Number: 6461/06

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY
Present:

HON. ANTHONY L. PARGA
Justice

-----X
**NEAL PLATOVSKY, an infant, by his parent
and natural guardian, SHERI PLATOVSKY,**

Plaintiff,

-against-

**THE CITY OF LONG BEACH, PLAYWORLD
SYSTEMS, INC., NATIONAL WASTE
TECHNOLOGIES, INC. and ESERAC
REALTY CORP.,**

Defendants.

PART 8

INDEX NO. 6461/06

XXX

**MOTION DATE: 1/20/11
SEQUENCE NO. 002, 004**

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Upon the foregoing papers, the motion by defendant Playworld Systems, Inc. and the cross-motion by defendant City of Long Beach for summary judgment are granted. The motion by defendant Eserac Realty Corp. for summary judgment (Seq. 03) has been withdrawn by the movant.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

The within action arises from a claim of personal injuries allegedly sustained by the infant plaintiff, Neal Platovsky, then aged three and a half, as a result of a fall from a playground slide on April 18, 2004, at Magnolia Park, Long Beach, New York. It is alleged that the infant plaintiff sustained a displaced fracture of the right distal radius and right ulna, among other injuries.

Playworld Systems, Inc. (hereinafter "Playworld") is the manufacturer of the "jet slide" from which the plaintiff fell. The slide in question was sold by Playworld to its distributor in 1993, who in turn sold it to the City of Long Beach. In plaintiff's response to Playworld's interrogatories, plaintiffs allege only that the slide was inappropriate for the age group utilizing the playground, i.e., was unsafe, etc. for use by children five (5) years old and under, as the slide openings were too large for such children, thereby creating a danger to them, and that the defendant Playworld failed to inform the co-defendants and/or the plaintiff that the slide was to be utilized only by children aged five years and older. Plaintiff does not allege that the slide was unsafe, defective, hazardous, improper, or dangerous, that the product was not of merchantable quality, that the slide was defectively designed, defectively manufactured, defectively installed, defectively inspected, defectively tested, defectively serviced, defectively repaired, defectively distributed, defectively sold or defectively purchased, or that there was a breach of warranty. Plaintiffs allege that the defendants failed warn and inform the plaintiffs that the slide should not be used by children aged five and under because the slide openings were too large for such children and that the City of Long Beach failed to separate the slide at issue from other playground equipment based upon age restrictions.

The deposition testimonies submitted by the movants indicate that the infant plaintiff fell from the top of the slide, before sitting to slide down. Neither the infant plaintiff's father nor his grandfather, who were both present at the playground, saw the plaintiff fall. The infant plaintiff, who was only 3 and ½ years old at the time of the accident, four year old at his 50(H) hearing, and eight years old at his deposition, testified at first that another child pushed him off the slide, then that he tripped at the top of the slide and fell through the opening to slide "between the...blue pole and the orange slide." The infant plaintiff's mother testified that her son had used the slide at issue over 400 times on other occasions before the accident without a problem. She also testified that the infant plaintiff told her that he tripped prior to falling.

Defendants Playworld and the City of Long Beach have moved for summary judgment. In support of their arguments, defendant Playworld submits the deposition transcript of Daryl Rarich, a witness on behalf of Playworld. Mr. Rarich has been employed as a compliance manager at Playworld since 1991. His duties include reviewing Playworld products to be compliant with U.S. Consumer Product Safety Commission ("CPSC") guidelines, American

Society for Testing and Materials ("ASTM") standards, as well as Canadian and European standards. He is a certified safety inspector. Mr. Rarich testified that the jet slide at issue is intended for children 2 to 12 years old and was designed and tested in accordance with the recommendations in the CPSC guidelines, specifically section 9.1 pertaining to "Slides" and section 7, pertaining to "General Hazards." Mr. Rarich testified that there were no complaints received by Playworld regarding the jet slide prior to April 18, 2004. In addition, a prototype of the slide was made and tested by Playworld using weights in accordance with ASTM 1487. A general hazards test was also conducted in the same manner as described in the handbook using gauges and head probes. The probes were used to ensure that a two-year old child, in the minimum percentile, could not go through the openings on the jet slide. The probes did not go through the openings, and the slide passed the test. Based upon the tests, the slide was deemed appropriate for children ages 2 to 12. Defendants Playworld and the City of Long Beach argue that the plaintiff cannot establish negligence against them as the pleadings rely on the theory that defendants' failed to warn that the slide was not appropriate for use by children under the age of 5. There is no evidence in the record that the infant plaintiff's was entrapped in any portion of the slide.

Plaintiff's expert, Steve Bernheim, a professional sports and recreation consultant, drafted an unaffirmed report, dated August 2, 2005, wherein he stated that the city of Long Beach was in violation of Section 4.3 of the CPSC regarding "Age Separation of Equipment" because it did not have a sign posted that the playground was for children aged 5-12. He further stated that the slide was too high for children aged 2-5 and that the slide violated Section 7.5 of the CPSC entitled "Entrapment." The report was later amended by letter dated January 10, 2005, to omit the allegations of entrapment and to add that the runoff was not far enough, even though there is no evidence that the infant plaintiff was injured coming down the slide. Mr. Bernheim also claimed that the slide was too high, although there is no indication that Mr. Bernheim measured the slide at the time of his inspection, nor do his initial reports indicate the height or any reference to any guideline which states a maximum height.

In opposition to Playworld's motion and the City of Long Beach's cross-motion, plaintiffs submit an affidavit executed by plaintiff's expert, Mr. Bernheim, on December 23, 2010, which states that the height of the subject slide was 70", which Mr. Bernheim attests

exceeds the standards of the CPSC for children 2 to 5 years of age. Mr. Bernheim also states that the openings on the side of the slide were 4 inches on one side and five and a half inches on the other side, exceeding the guidelines of the ASTM. Accordingly, Mr. Bernheim attests that the slide created a danger for children under five. Mr. Bernheim's affidavit, and his reports noted above, however, fail to cite to a specific section of the CPSC guideline which allegedly sets forth the maximum heights of slides for children aged 2 to 5. In addition, there is nothing within the guidelines submitted by the plaintiffs which evidence a maximum height requirement. Further, with respect to the openings on the sides of the slide, Mr. Bernheim's affidavit also fails to identify the maximum size of the opening which is approved by the ASTM. The ASTM guidelines submitted by plaintiff do not provide a maximum size for the opening, but instead mandate the use of head and torso probes to determine whether an opening is the appropriate size to prevent head entrapment. Mr. Bernheim fails to state that he used any probe to test these openings. On the other hand, defendant Playworld's witness, Daryl Rarich, testified that he did utilize the head and torso probes to test the jet slide template and that the slide passed the tests.

Defendant Playworld contends that Mr. Bernheim relied upon a section designed to guard against a child's head becoming entrapped in a part of the slide, but failed follow the specified procedures to properly test the equipment. Further, defendants note that all parties concur that no part of the infant plaintiff was caught in any part of the equipment.

In addition, defendant City of Long Beach's Assistant Superintendent of Recreation, Robert H. Sondergaard, testified at his deposition that he had not received any complaints about the slide prior to the plaintiff's accident and that the slide was inspected daily, but no defects were found at any time prior to plaintiff's accident.

Defendant Playworld has demonstrated its prima facie entitlement to judgment as a matter of law. The plaintiff's allegation that the jet slide was inappropriate for children under five years of age due to risks associated with entrapment fails because entrapment was not a proximate cause of plaintiff's injuries. (*See, Donuk v. Sears and Roebuck and Co.*, 52 A.D.3d 456, 59 N.Y.S.2d 701 (2d Dept. 2008)). Further, plaintiff's claim that the slide openings and height of the slide were not appropriate for children under the age of five is unsupported by the evidence submitted before this Court. Playworld's witness, Mr. Rarich, specifically testified that a prototype of the jet slide was tested in accordance with the guidelines of the CPSC and ASTM

and was found to be appropriate for children aged two to twelve years. The evidence before this court demonstrates that the slide at issue was appropriate for children aged two to five years of age. Accordingly, plaintiff's only claim against the defendants, that they failed to warn that the slide should not be utilized by children aged five and under because the slide openings were too large for such children, cannot be sustained.

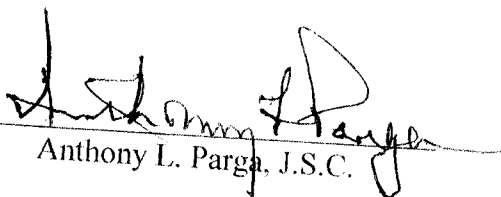
The affidavit of plaintiff's expert, submitted in opposition, fails to demonstrate that the slide violated the guidelines of the CPSC and ASTM with respect to the slide openings and the height of the slide for children aged two to five. Further, there is no evidence that the slide was defective, contained a manufacturing flaw, or required a warning against its use by children under five. Additionally, there is no evidence that defendant Playworld installed the playground equipment or had any notice of a defect. Lastly, the alleged violations of the CPSC do not mandate an award on behalf of the plaintiff as the guidelines are not mandatory or meant to be exclusive standards for playground safety. (See, *Pinzon v. City of New York*, 197 A.D.2d 680, 602 N.Y.S.2d 909 (2d Dept. 1993); *Merson v. Syosset Central School District*, 286 A.D.2d 668, 730 N.Y.S.2d 132 (2d Dept. 2001); *Troiani v. White Plains City School District*, 64 A.D.3d 701 (2d Dept. 2009)).

As there is no evidence that the jet slide that the plaintiff fell from was intended for children over five only, there can be no finding of negligence on the part of the City of Long Beach for failing to separate this equipment from other equipment deemed appropriate for children under five years. There is no evidence in the record that the City of Long Beach knew or should have known that the slide in question was not appropriate for the age group using the playground or that the failure to separate the slide at issue from other playground equipment was a proximate cause of the plaintiff's accident. A municipality is under a duty to maintain its park and playground facilities in a reasonably safe condition. (*Nicholson v. Board of Education of City of New York*, 36 N.Y.2d 798, 330 N.E.2d 651 (1975); *Swan v. Town of Brookhaven*, 32 A.D.3d 1012, 821 N.Y.S.2d 265 (2d Dept. 2006)). The City of Long Beach's witness, Mr. Sondergaard testified that the City of Long Beach inspected the playground and slide at issue daily and that they were never determined to be in a defective condition prior to plaintiff's accident. In addition, the City of Long Beach never received any complaints about the slide prior to the plaintiff's accident.

Defendants Playworld and the City of Long Beach have demonstrated their entitlement to summary judgment on the issue of liability as a matter of law and the plaintiff has failed to raise a triable issue of fact to defeat the prima facie showing by the defendants. 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 demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (Ct. of App. 1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (Ct. of App. 1980)).

Accordingly, the motion by defendant Playworld and the cross-motion by defendant the City of Long Beach for summary judgment are granted.

Dated: March 7, 2011


Anthony L. Parga, J.S.C.

ENTERED
MAR 11 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE