

**Matter of Chockalingam v Board of Educ of the  
Westhampton Beach Union Free School Dist**

2011 NY Slip Op 31664(U)

June 17, 2011

Supreme Court, Suffolk County

Docket Number: 05-17621

Judge: Jeffrey Arlen Spinner

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 21 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. JEFFREY ARLEN SPINNER  
Justice of the Supreme Court

MOTION DATE 2-23-11 (#009)  
MOTION DATE 3-16-11 (#010)  
ADJ. DATE 4-13-11  
Mot. Seq. # 009 - MG;CASEDISP  
# 010 - XMD

-----X  
In the Matter of the Claim of SUBRAMANYIR :  
CHOCKALINGAM, an infant, by his parent and :  
natural guardian, MEENA CHOCKALINGAM, :  
and by MEENA CHOCKALINGAM, Individually, :  
: :  
Plaintiff. :  
- against - :  
: :  
THE BOARD OF EDUCATION OF THE :  
WESTHAMPTON BEACH UNION FREE :  
SCHOOL DISTRICT AND THE :  
WESTHAMPTON BEACH UNION FREE :  
SCHOOL DISTRICT. :  
Defendants. :  
-----X

PROKOP & PROKOP  
Attorney for Plaintiff  
267 Carleton Avenue  
Central Islip, New York 11722  
: :  
CONGDON, FLAHERTY, O'CALLAGHAN,  
REID, DONLON, TRAVIS & FISHLINGER  
Attorney for Defendants  
The Omni  
333 Earle Ovington Boulevard  
Uniondale, New York 11553

Upon the following papers numbered 1 to 39 read on this motion for summary judgment and cross motion for discovery; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25; Notice of Cross Motion and supporting papers 26 - 34; Answering Affidavits and supporting papers 35 - 37; Replying Affidavits and supporting papers 38 - 39; Other \_\_\_\_\_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the renewed motion by the defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted.

**ORDERED** that the cross motion by the plaintiff for an order granting them leave to conduct limited discovery, in the form of additional depositions, is denied.

By order dated April 28, 2008, this Court (Spinner, J.) denied the defendants' prior motion for summary judgment, without prejudice to renewal, upon submission of copies of the pleadings.

RR

This action was commenced by the plaintiff Meena Chockalingam (Meena) to recover damages, personally and derivatively, for personal injuries allegedly sustained by the infant plaintiff Subramanyir Chockalingam (Subi), on April 30, 2004. Subi was injured as a result of a jump from a piece of playground equipment, commonly known as a spiral slide, located on the grounds of the Westhampton Beach Elementary School within the Westhampton Beach Union Free School District. At the time of the accident, Subi was standing at the top of the slide when he heard someone behind him scream, he became frightened, and jumped to the ground fracturing his left foot.

The complaint alleges that the defendant Westhampton Beach Union Free School District (the District) sued herein as The Board of Education of the Westhampton Beach Union Free School District and Westhampton Beach Union Free School District was negligent in the care, design and maintenance of the slide, failed to properly supervise the students on the playground, and failed to provide or obtain proper care for Subi after his injury.

Subi testified at a 50-h municipal hearing on December 9, 2004 and he was deposed on April 8, 2009. His earlier testimony can be summarized as follows: He was in fourth grade at Westhampton Beach Elementary School on April 30, 2004 and went to outdoor recess with his class after eating lunch. Recess period was one-half hour from 12:30 p.m. to 1:00 p.m. About 15 to 20 minutes into the recess period, he was standing at the top of the spiral slide ready to go down when "this girl she screamed something behind me. I got scared and I did not know what to do, so I jumped." He indicated that he jumped to his left towards the bench where Mrs. Cap, a school monitor, was sitting. Once Mrs. Cap realized that he could not get up, she came over to him and used her radio (walkie-talkie) to call for the school nurse. Subi further testified that it "took ... long" for Ms. Mulvey, the nurse, to get out to the playground with a wheelchair. Ms. Mulvey took him to the nurse's office and his mother came to take him to the doctor's office. He stated that the slide was not broken, that he could have slid down the slide, but that he was frightened into jumping, and that he had never jumped off the slide before.

At his deposition, Subi testified that his recess began at 11:30 a.m., that he had gone down the slide three or four times prior to his jump off the slide, and that a monitor, Mrs. Stengel, came to help him after he was injured. He indicated that normally there were about five monitors on the playground during recess period. He stated that the bench to the left of the slide was one to one and one-half feet away from the slide, that he waited about an hour for someone to bring him inside the school, and that he waited in the nurse's office about one to one and one-half hours for his mother to pick him up from school. Subi further testified that Ms. Stengel was standing about 30 feet away from the slide when he fell, that he had never had a problem with someone screaming and scaring him before, and that he did not know of anyone else who had an experience like his.

Meena testified at a 50-h municipal hearing on December 9, 2004, and she was deposed on April 8, 2009. She was not present at the time of her son's accident, but she testified that she was employed by the District on that date as a monitor at the middle school across the street from Subi's elementary school. She was at lunch with her co-workers when, at about 12:40 p.m., she heard a call over the radio that a student at the elementary school had been injured and that the nurse was needed. She stated that the last radio call she heard was at 1:20 p.m. indicating that "they're still looking for a wheelchair." Meena further testified that she received a call from Mrs. Mulvey, the nurse, at 2:20 p.m. telling her that

it had been her son who was injured on the playground. She spoke to Subi over the telephone, and immediately went over to the elementary school. She stated that, while in the nurse's office, she heard Ms. Cap tell Mrs. Mulvey to write everything down on the incident report. She indicated that she had not made any complaints to the District about the playground equipment, the recess monitors, or the girl who screamed behind Subi. She also stated that she did not see any broken equipment on the playground.

The District has moved for summary judgment on the grounds that the plaintiffs have failed to produce any evidence that there was any type of defective or dangerous condition with respect to the slide, that the school provided reasonable and adequate supervision to Subi, and that there was no delay in responding to Subi's accident and, even if there was a delay, it was not the proximate cause of his injury.

In support of its motion, the District submits, *inter alia*, the pleadings, the deposition of the full-time school nurse, two affidavits of the superintendent of the District, the affidavit of the replacement nurse, Mrs. Mulvey, and the affidavit of an expert witness.

Lynn Schwartz, the District superintendent, swears in his two affidavits that there were at most 66 students on the playground at the time of Subi's accident, that there were four monitors for the recess period, and that there were no other similar incidents before Subi's accident. He states that the girl who screamed and scared Subi before his jump was not a discipline problem. Mr. Schwartz further swears that a review of school records indicates that Subi's recess period in fourth grade was from 1:15 p.m. to 1:45 p.m.

At her deposition, Sherry Marks, the full-time nurse at the school, testified that she was not working on the day of Subi's accident. She stated that Mrs. Mulvey was the substitute nurse on duty, that the nurse's office is equipped with a radio, and that she was not aware of any case where the radio malfunctioned. Ms. Marks further testified that if a student does not have an obvious bone fracture she would take the student to the nurse's office to assess the injury and to ice it.

Michelle Mulvey swears in her affidavit that she is a registered nurse, that she believes she was working on the date of Subi's accident, and that she recalls being asked to see Subi on the playground. She states that she does not recall any problem with the radio that day, and that Subi was in the nurse's office "for some time" waiting for his mother who wanted to finish her work day before coming to get him.

The District has submitted the affidavit of Margaret A. Payne, a Certified Playground Safety Inspector by the National Playground Safety Institute. She swears therein, based on her review of certain documents enumerated in her affidavit, that the slide complies with the playground design specifications in the American Standards for Testing and Materials (ASTM) Public Playground Design Standard F 1487. She indicates that there is no requirement in Standard F 1487 for slides to have a device to prevent a child from jumping off of a slide platform. Based on her review, Ms. Payne renders a professional opinion that the slide was well within design standards and it meets playground safety requirements.

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 issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [1991]).

The liability of a school district is governed by the same principles as those that govern private land owners (*Stevens v Cent. School Dist. No. 1 of Town of Ramapo*, 25 AD2d 871, 270 NYS2d 23 [2d Dept 1966] *aff'd* 21 NY2d 780, 288 NYS2d 475 [1968]). A landowner has a duty to maintain its premises in a reasonably safe condition and to warn of a dangerous condition that is not readily observable with the reasonable use of one's senses (*DiVietro v Gould Palisades Corp.*, 4 AD3d 324, 325, 771 NYS2d 527 [2d Dept 2004]). Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends upon the particular circumstances of each case and is generally a question of fact (*Shalamayeva v Park 83<sup>rd</sup> St. Corp.*, 32 AD3d 387, 820 NYS2d 607 [2d Dept 2006]).

Here, the District has made a prima facie showing of entitlement to judgment as a matter of law with respect to the plaintiffs' claims based on the alleged dangerous, defective and unsafe nature of the subject slide. The defendant has established as a matter of law that the playground area was in a reasonably safe condition (*see Sobti v Lindenhurst School Dist.*, 35 AD3d 439, 825 NYS2d 251 [2d Dept 2006]; *Capotosto v Roman Catholic Diocese*, 2 AD3d 384, 767 NYS2d 857 [2d Dept 2003]; *Banks v Freeport Union Free School Dist.*, 302 AD2d 341, 753 NYS2d 890 [2d Dept 2003]; *Vonungern v Morris Cent. School*, 240 AD2d 926, 658 NYS2d 760 [3d Dept 1997]).

In addition, the defendant has established that it neither created the allegedly defective condition nor had actual or constructive notice thereof. A property owner may be held liable for injuries arising from a dangerous condition on its property if it created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it (*see Sowa v SJNH Realty Corp.*, 21 AD3d 893, 894, 800 NYS2d 749 [2d Dept 2005]; *Curiale v Sharrotts Woods, Inc.*, 9 AD3d 473, 781 NYS2d 47 [2d Dept 2004]; *Lee v Bethel First Pentecostal Church of Am.*, 304 AD2d 798, 762 NYS2d 80 [2d Dept 2003]; *Patrick v Bally's Total Fitness*, 292 AD2d 433, 739 NYS2d 186 [2d Dept 2002]). In order 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 discover and remedy it (*see Chianese v Meier*, 98 NY2d 270, 746 NYS2d 657 [2002], *citing Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986], *citing Negri v Stop & Shop*, 65 NY2d 625, 491 NYS2d 151 [1985]).

In response, the plaintiffs have submitted the affidavit of their attorney which contains mere conclusions and unsubstantiated allegations that the slide was defective and that it was not maintained in

a safe manner. The plaintiffs' opposition fails to raise a triable issue of fact (*Zuckerman v City of New York, supra*). Accordingly, the first branch of the District's motion for summary judgment is granted.

The defendants made a prima facie showing of entitlement to judgment as a matter of law with respect to the plaintiffs' second cause of action which seeks to recover damages for the District's negligent supervision of Subi. Where an incident occurs in "so short a span of time that even the most intense supervision could not have prevented it, lack of supervision is not the proximate cause of the injury and summary judgment in favor of the school defendants is warranted" (*Janukajtis v Fallon*, 284 AD2d 428, 726 NYS2d 451 [2d Dept 2001] quoting *Convey v Rye School Dist*, 271 AD2d 154, 710 NYS2d 641 [2d Dept 2000]; see also *Tanenbaum v Minnesauke Elementary School*, 73 AD3d 743, 901 NYS2d 102 [2d Dept 2010]). The evidence submitted established, as a matter of law, that there was adequate playground supervision and that the level of supervision was not the proximate cause of the infant plaintiff's accident (see *Miller v Kings Park Cent. School Dist.*, 54 AD3d 314, 863 NYS2d 232 [2d Dept 2008]; *Benson v Union Free School Dist. #23*, 37 AD3d 748, 830 NYS2d 757 [2d Dept 2007]; *Botti v Seaford Harbor Elementary School Dist. 6*, 24 AD3d 486, 808 NYS2d 236 [2d Dept 2005]). The burden then shifted to the plaintiffs to raise a triable issue of fact as to the adequacy of supervision and whether inadequate supervision was a proximate cause of the infant plaintiff's injuries (*Peuplie v Longwood Cent. School Dist.*, 49 AD3d 837, 854 NYS2d 491 [2d Dept 2008]; *Davidson v Sachem Cent. School Dist.*, 300 AD2d 276, 751 NYS2d 300 [2d Dept 2002]). The plaintiffs did not meet that burden. Accordingly, that branch of the defendant's motion which seeks summary judgment dismissing the plaintiffs' claims based upon negligent supervision is granted.

In addition, the District has made a prima facie showing of its entitlement to judgment as a matter of law on the issue of liability for allegedly failing to provide or obtain proper care for Subi by submitting undisputed evidence showing that it did not cause, contribute to, or exacerbate his injuries. To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty and that the breach of such duty was a proximate cause of his or her injuries (see, *Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]; *Engelhart v County of Orange*, 16 AD3d 369, 790 NYS2d 704, *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). Again, the plaintiff has failed to produce evidentiary proof in admissible form sufficient to raise an issue of fact requiring a trial on this cause of action.

Accordingly, the District's motion for summary judgment dismissing the complaint is granted.

The plaintiffs cross move for an order granting them leave to conduct limited discovery, in the form of additional depositions of former employees of the District who were present on the date of Subi's accident. Initially, the Court notes that the plaintiffs filed a note of issue in this matter on January 26, 2010. As such, the plaintiffs are required to demonstrate that unusual or unanticipated circumstances developed subsequent to the filing of the note of issue and certificate of readiness which required additional discovery to prevent substantial prejudice (see *Utica Mut. Ins. Co. v P.M.A. Corp.*, 34 AD3d 793, 826 NYS2d 138 [2d Dept 2006]; *Audiovox v Benyamini*, 265 AD2d 135, 707 NYS2d 137 [2d Dept 2000]; cf. *Mosley v Flavius*, 13 AD3d 346, 785 NYS2d 742 [2d Dept 2004]; 22 NYCRR 202.21 [d]). They have failed to do so. Indeed, there is no reason why the additional discovery sought could not have been requested prior to the filing of the note of issue.

Chockalingam v Board of Education

Index No. 05-17621

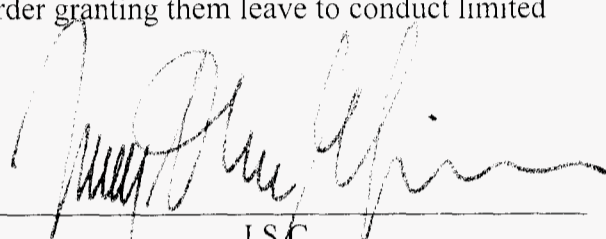
Page 6

Moreover, the plaintiffs' assertions concerning the necessity of further discovery in order to oppose the requests for summary judgment lack merit inasmuch as the plaintiffs filed their note of issue and the certificate of readiness for trial indicating that discovery proceedings known to be necessary were completed: that there were no outstanding requests for discovery; and that the case was ready for trial. A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence, and the plaintiffs failed to make the requisite evidentiary showing (*see Panasuk v Viola Park Realty, LLC*, 41 AD3d 804, 839 NYS2d 520 [2d Dept 2007]). The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion (*see Kimyagarov v Nixon Taxi Corp.*, 45 AD3d 736, 846 NYS2d 309 [2d Dept 2007]).

The statements in the affirmation of plaintiffs' counsel that the defendants have somehow acted inappropriately regarding disclosure of the addresses of the former employees are without merit, and the bald and conclusory statements that the former employees are actually still employed by the District do not adequately support the granting of the cross motion.

Accordingly, the plaintiffs cross motion for an order granting them leave to conduct limited discovery is denied.

Dated:     JUN 17 2011    



J.S.C.  
**HON. JEFFREY ARLEN SPINNER**

  X   FINAL DISPOSITION             NON-FINAL DISPOSITION