

Milligan v Harborfields Cent. School Dist.

2011 NY Slip Op 32411(U)

September 12, 2011

Supreme Court, Suffolk County

Docket Number: 06-35754

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 4-19-11 (# 003)
MOTION DATE 4-6-11 (# 004)
ADJ. DATE 5-26-11
Mot. Seq. # 003 - MG
004 - MG; CASEDISP

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NICOLETTE MILLIGAN, an infant by her mother and natural guardian, DONNA MILLIGAN, and DONNA MILLIGAN, individually,

Plaintiffs,

- against -

HARBORFIELDS CENTRAL SCHOOL DISTRICT, WASHINGTON DRIVE PRIMARY SCHOOL, THE LITTLE TYKES COMPANY, LITTLE TIKES COMMERCIAL, INC., LITTLE TIKES COMMERCIAL PLAY SYSTEMS, INC., AND PLAYPOWER LT FARMINGTON, INC. f/k/a LITTLE TIKES COMMERCIAL PLAY SYSTEMS, INC.,

Defendants.

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Upon the following papers numbered 1 to 68 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 28; Notice of Cross Motion and supporting papers 29 - 61; Answering Affidavits and supporting papers 62 - 66; Replying Affidavits and supporting papers 67 - 68; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Harborfields Central School District and Washington Drive Primary School for summary judgment dismissing the complaint against them is granted.

ORDERED that the cross motion by defendants The Little Tikes Company, Little Tikes Commercial Inc. and Little Tikes Commercial Play Systems, Inc., and Playpower LT Farmington, Inc. f/k/a Little Tikes Commercial Play Systems, Inc. for summary judgment dismissing the complaint against them is granted.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by infant plaintiff Nicolette Milligan, then a second grader, to her right leg on May 1, 2006, when she fell from monkey bars in the school's playground during recess at Washington Drive Primary School in Harborfields Central School District ("School District"). Subsequently, the monkey bars were removed from the playground. By their complaint, plaintiffs allege, *inter alia*, that defendants failed to maintain the playground in a reasonably safe condition, and were negligent in failing to properly supervise the infant plaintiff. In their supplemental verified bill of particulars, plaintiffs assert that the rungs of the monkey bars were slippery and improperly maintained; that the rungs were too large for the infant plaintiff's hand size; and that the injuries sustained by the infant plaintiff were the result of inadequate ground cover on the playground surface beneath the monkey bars.

Defendants Washington Drive Primary School and School District (collectively "School defendants") now move for summary judgment dismissing the complaint against them on the basis that they provided the infant plaintiff with an adequate degree of supervision; that the alleged lack of supervision was not a proximate cause of the infant plaintiff's accident; and that there exists no material issue of fact with respect to the allegedly dangerous condition that caused the infant plaintiff's accident. In support, the School defendants submit, *inter alia*, the pleadings, the transcripts of the deposition testimony given by infant plaintiff Nicolette Milligan, Carolyn Benenson, Ellen Willson, and Kenneth Hayward, and the affidavits of Frank Mondelli.

At her examination before trial, the infant plaintiff testified that, on the day of the accident, she was a second grade student in the School District, and that, during a lunch recess, to gain access to the monkey bars, she climbed up foot slots located on opposite ends of the monkey bars on the playground. During the course of playing on the monkey bars, she failed to catch hold of one of the bars and fell to the ground. At the time of the accident, while her left hand was on the third bar, her right hand was on the second bar. She stated that her accident was caused by the sweat on her left hand. Within 10 to 15 seconds after she fell, Mrs. Willson, one of the lunch monitors, came over to assist her up. When Mrs. Willson asked the infant plaintiff what had happened, she said that "[she] was on the monkey bars and [her] hand slipped off and [she] fell." Before the accident, during her first and second grade years, she had played on the monkey bars four to six times and neither fell nor had any problem using them.

At her deposition, Carolyn Benenson testified that she is a library teaching assistant employed by the School defendants, and that, on the day of the accident, four or five lunch monitors including herself, were supervising students in the playground during lunch recess. When the students go out to the playground during recess, they are allowed to use the equipment without asking permission. Mrs. Benenson stated that she did not witness the subject accident. When it was time to go back to class, she saw the infant plaintiff on the ground crying and Mrs. Willson standing next to her. Then, she proceeded to go inside the building with students. She added that, after it rains, a security guard inspects the playground for wetness before recess monitors let students go out.

At her deposition, Ellen Willson testified that, on the day of the accident, she was employed by the School defendants as a paraprofessional, and her duties included watching first and second grade students during lunch recess. There were seven lunch monitors, including Mrs. Willson, supervising students in the

playground during lunch recess. She stated that, while paraprofessionals were generally at a particular location, they moved around as they needed to approach children. Mrs. Willson's station was at the gates where the children came in and out of the playground, and she was the only person who had a walkie-talkie to communicate with the nurse's office or the head office. Although Mrs. Willson did not witness infant plaintiff fall from the monkey bars, a child came over to her and told her about the accident. Then, Mrs. Willson walked over to the accident area and saw Mrs. Benenson walking over to the area at the same time. Mrs. Willson stated that, at the time of the accident, there were at least 140 plus children in the playground, and that the surface of the ground directly underneath the monkey bars was covered with the wood chips.

At his deposition, Kenneth Hayward testified that he has been the director of external services employed by Playpower LT Canada, Inc. since January 2006, and, prior to that, he was employed as the director of external services by Playpower LT Farmington, Inc. since 1996. As the director of external services, he is responsible to ensure that products meet certain standards for each particular product line. He stated that the subject monkey bars used on the day of the accident were manufactured in accordance with the specifications which were tested in 1996 and certified in 1997 by the International Playground Equipment Manufacturers Association ("IPEMA"), an independent laboratory, as in compliance with the voluntary recommendations of the U.S. Consumer Product Safety Commission ("CPSC")'s Handbook and the American Society for Testing and Materials ("ASTM")' standard. According to the specifications, the diameter of the rungs of the subject monkey bars was 1.313 inches, and the standard range for the diameter of the rungs utilized by children ages 5 to 12 was 0.95 to 1.55 inches. In addition, the height of the subject monkey bars was less than the 84 inch maximum standard recommended by the CPSC and ASTM guidelines. Moreover, he stated that the monkey bars were "age appropriate for [the infant plaintiff's] usage."

In his affidavit, Frank Mondelli states that he has been employed as the Building and Ground Workers Facility Supervisor for the School District for over 16 years, and that he oversees the buildings and grounds of all facilities within the School District, including the playground where the subject monkey bars were located. He indicates that the surface of the playground was covered with the wood chips, one foot deep, which "consists of six inches of compacted wood chips, overlaid with an additional six inches of loose wood chip topping." He also states that, according to log books maintained by the School District, the last time wood chips were added to the surface of the playground was on March 2, 2006 approximately two months prior to the subject accident.

Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (*see, Mirand v City of New York*, 84 NY2d 44, 614 NYS2d 372 [1994]; *Ronan v School Dist. of City of New Rochelle*, 35 AD3d 429, 825 NYS2d 249 [2d Dept 2006]). Even assuming there is a question of fact as to the adequacy of supervision, liability for any such negligent supervision does not lie absent a showing that it constitutes a proximate cause of the injury sustained (*see, Mayer v Mahopac Cent. School Dist.*, 29 AD3d 653, 815 NYS2d 189 [2d Dept 2006]; *Capotosto v Roman Catholic Diocese of Rockville Ctr.*, 2 AD3d 384, 767 NYS2d 857 [2d Dept 2003]; *Lopez v Freeport Union Free School Dist.*, 288 AD2d 355, 734 NYS2d 97 [2d Dept 2001]; *Matter of Banks v City School Dist. of Albany*, 257 AD2d 723, 682 NYS2d 474 [3d Dept 1999]).

Moreover, 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 school is warranted (*see, Ronan v School Dist. of City of New Rochelle, supra; Mayer v Mahopac Cent. School Dist., supra; Reardon v Carle Place Union Free School Dist.*, 27 AD3d 635, 813 NYS2d 150 [2d Dept 2006]; *Convey v City of Rye School Dist.*, 271 AD2d 154, 710 NYS2d 641 [2d Dept 2000]).

Here, the adduced records indicate that, during recess, there were several monitors supervising the children and that the injured plaintiff's accident happened as the infant plaintiff slipped off the monkey bars (*see, Troiani v White Plains City School Dist.*, 64 AD3d 701, 882 NYS2d 519 [2d Dept 2009]; *Mata v Huntington Union Free School Dist.*, 57 AD3d 738, 871 NYS2d 194 [2d Dept 2008]; *Berdecia v City of New York*, 289 AD2d 354, 735 NYS2d 554 [2d Dept 2001]). The School defendants met their prima facie burden of demonstrating that the alleged inadequate supervision was not the proximate cause of the injured plaintiff's accident (*see, Mayer v Mahopac Cent. School Dist., supra; Reardon v Carle Place Union Free School Dist., supra; Weinblatt v Eastchester Union Free School Dist.*, 303 AD2d 581, 756 NYS2d 766 [2d Dept 2003]) and the accident could not have been prevented by any reasonable degree of supervision (*see, Calcagno v John F. Kennedy Intermediate School*, 61 AD3d 911, 877 NYS2d 455 [2d Dept 2009]; *Ronan v School Dist. of City of New Rochelle, supra; Lopez v Freeport Union Free School Dist., supra*). Moreover, defendants established their entitlement to summary judgment as a matter of law by demonstrating that the subject playground was maintained and inspected in a reasonably safe condition as to be free of defects (*see, Lopez v Freeport Union Free School Dist., supra*).

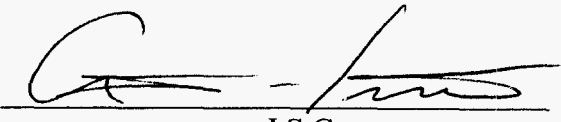
In opposition, plaintiffs relies on the expert affidavit of Steve Bernheim, a certified professional consultant to management. Mr. Bernheim asserts that, although the School defendants knew that 40 to 60 children were falling from the subject monkey bars daily, they let the infant plaintiff use the monkey bars. Such assertion has failed to even address the proximate cause issue (*see, Grandeau v South Colonie Cent. School Dist.*, 2008 NY Slip Op 32199U, 2008 NY Misc Lexis 9494 [Sup Ct, Albany County 2008]). The affidavit of Dr. Bernheim is insufficient to meet plaintiffs' burden and provides no evidentiary basis to create any factual issue as a matter of law (*see, Butler v City of Gloversville*, 52 AD3d 896, 859 NYS2d 284 [3d Dept 2008]). Plaintiffs failed to raise a triable issue of fact as to whether inadequate supervision was a proximate cause of the incident (*see, Capotosto v Roman Catholic Diocese of Rockville Ctr., supra*) and whether the allegedly defective condition on the subject area was a proximate cause of the infant plaintiff's fall (*see, Gallier v Watnick*, 23 AD3d 615, 804 NYS2d 274 [2005]). Accordingly, the School defendants' motion for summary judgment is granted.

Defendants The Little Tikes Company, Little Tikes Commercial Inc. and Little Tikes Commercial Play Systems, Inc., and Playpower LT Farmington, Inc. f/k/a Little Tikes Commercial Play Systems, Inc. (collectively "Little Tikes defendants") cross-move for summary judgment dismissing the complaint against them on the ground that there was no defect in the monkey bars, and that they conformed to established standards. In support, the Little Tikes defendants submit, *inter alia*, the pleadings and the deposition testimony of Kenneth Hayward.

The adduced records indicate that the monkey bars comply with all requirements of the CPSC and ASTM standard, and that the monkey bars were also tested and certified by the IPEMA. While the standard range for the diameter of the rungs of the monkey bars utilized by children ages 5 to 12 was 0.95 to 1.55 inches, the diameter of the rungs of the subject monkey bars was 1.313 inches. Thus, the Little Tikes defendants established their prima facie entitlement to summary judgment dismissing the complaint as asserted against them by showing that there was no negligence on their part, as the subject monkey bars were in compliance with safety standards and were appropriate for use by the infant plaintiff. No party has opposed the Little Tikes defendants' cross motion for summary judgment. Accordingly, the Little Tikes defendants' cross motion for summary judgment is granted.

In view of the foregoing, the motion by the School defendants and the cross motion by the Little Tikes defendants for summary judgment dismissing the complaint are granted and the complaint against them is dismissed.

Dated: September 12, 2011



J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION