SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

RENATTA MARREROS, an infant under the age of 14 years, by her parent and natural guardian, ROSARIO NOLASCO and ROSARIO NOLASCO, Individually,

Plaintiffs

Index No.: 13486/09
Motion Seq. No.: 01
Motion Date: 07/28/11

- against -

SHELLEY WILLIAMS, MISS SHELLEY UPWARD PREP, INC. and ALTHEA ROSE,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition, Affidavit and Exhibits	2
Affirmation in Reply and Exhibits	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR § 3212, for an order granting defendant Miss Shelley's Upward Prep., Inc. s/h/a/ Miss Shelley Upward Prep., Inc. ("Miss Shelley") summary judgment dismissing the Verified Complaint of plaintiffs Renatta Marreros, an infant under the age of 14 years, by her parent and natural guardian Rosario Nolasco and Rosario Nolasco, individually; and move, pursuant to CPLR § 3215(c), for an order deeming the Verified Complaint against defendants Shelley Williams ("Williams") and Althea Cooke i/s/h/a/ Althea

Rosa ("Rosa") abandoned. Plaintiffs oppose defendants' motion.

The infant-plaintiff was 4 ½ years old and a student at defendant Miss Shelley when she fell off a cube-shaped piece of playground equipment sustaining personal injuries. Defendant Miss Shelly is a school and day care center. Defendant Shelley Williams was the owner and founder of defendant Miss Shelley. Defendant Rosa was a teacher at defendant Miss Shelley at the time of the incident. She has been employed at Miss Shelley since 1995. On the date of the incident defendant Rosa was the teacher of a class of sixteen four-year old children, including the infant-plaintiff. Since September 2008, Ms. Candida Dilone served as defendant Rosa's teacher's assistant. At defendant Miss Shelley, there is an outdoor playground that includes a cube-shaped apparatus with various openings to permit children to play inside. A photograph of the cube-shaped playground apparatus is annexed as Exhibit I to Defendants' Notice of Motion. It is alleged that the infant-plaintiff climbed to the top of the cube and fell off thereby sustaining a serious personal injury.

The Verified Complaint alleges that the "defendants had a duty to maintain the school and surrounding area in a reasonably safe condition" (*see* Defendants' Affirmation in Support Exhibit A ¶ 32); "the defendants had a duty to provide adequate security for the students" (*see* Defendants' Affirmation in Support Exhibit A ¶ 33); and "the defendants had a duty to provide adequate supervision for the students attending the prep school, and in particular, the plaintiff" (*see* Defendants' Affirmation in Support Exhibit A ¶ 34). In support of their motion for summary judgment, the attorneys for defendants argue that, while school districts are under a duty to adequately supervise the students under their control, they are not the insurers of the safety of their students and will only be held liable for "foreseeable injuries proximately related

to the absence of adequate supervision." *See Mirand v. City of New York*, 84 N.Y.2d 44, 614 N.Y.S.2d 372 (1994). Schools are not expected to control all movements and activities of students (*see Mirand v. City of New York, supra*, at 49), nor can they "reasonable be required to watch all movements of pupils." *Totan v. Board of Educ. of City of N.Y.*, 133 A.D.2d 366, 519 N.Y.S.2d 374 (2d Dept. 1987). Defendants assert that the children played inside the cube, peeking their heads out and playing "ice cream." Defendant Rose testified at her Examination Before Trial ("EBT") that, while the children were permitted to play inside the cube, they were not allowed to climb on top of the apparatus or sit atop or astride it. *See* Defendants' Affirmation in Support Exhibit G. They instructed the class to "just be inside" the cube and told them that they were not to climb the sides or sit on top. *See id.*

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.,* 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

The Court finds that defendants have failed to make an adequate *prima facie* show of entitlement to summary judgment. The testimony of the school aide at defendant Miss Shelley's, that children climbing on top of the subject playground apparatus was a persistent and recurring school-wide safety concern creates an issue of fact as to the adequacy of supervision so as to preclude the granting of summary judgment. Issue finding, rather than issue determination, is the key to summary judgment. *See Matter of Cuttitto Family Trust*, 10 A.D.3d 656, 781 N.Y.S.2d 696 (2d Dept. 2004). The Court should refrain from making credibility determinations and the motion papers should be scrutinized carefully in the light most favorable to the party opposing the motion. *See S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 357 N.Y.S.2d 478

(1974); *Glover v. City of New York*, 298 A.D.2d 428, 748 N.Y.S.2d 393 (2d Dept. 2002). Where causation is disputed, summary judgment is not appropriate unless "only one conclusion may be drawn from the established facts." *Speller v. Sears, Roebuck & Co.*, 100 N.Y.2d 38, 760 N.Y.S.2d 79 (2003). A party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merits of its defense. *See Fromme v. Lamour*, 292 A.D.2d 417, 738 N.Y.S.2d 863 (2d Dept. 2002). Although there is not one iota of credible, probative evidentiary proof in the submission before the Court that the infant-plaintiff was pushed off the cube by her classmate Najee Gist, there is a question of fact as to whether defendants took reasonable precautions against the danger of the children climbing on top of the cube and whether the supervision was commensurate with the known or ascertainable dangers. *See Van Leet v. Kilmer,* 252 N.Y. 454 (1929); *Pike v. Consolidated Edison Co. of N.Y.*, 303 N.Y.1 (1951). Accordingly, the motion for summary judgment dismissing the Verified Complaint only as to defendant Miss Shelley is hereby **DENIED.**

In reaching its decision, the Court rejected and disregarded the Affidavit from plaintiffs' expert in opposition to defendants' motion for summary judgment. Moreover, the Court did not consider the allegations set forth in the plaintiff's document styled as their "Third Supplemental Bill of Particulars," served after the filing of the Note of Issue. Defendants rejected the Bill of Particulars in a timely manner. *See* CPLR § 3042(b); CPLR §3043(b); *Golub v. Sutton*, 281 A.D.2d 589, 723 N.Y.S.2d 59 (2d Dept. 2001).

The Court considered only those allegations set forth in ¶¶ 32, 33 and 34 of the Verified Complaint, to wit: the Verified Complaint alleges that the "defendants had a duty to maintain the school and surrounding area in a reasonably safe condition" (*see* Defendants' Affirmation in Support Exhibit A ¶ 32); "the defendants had a duty to provide adequate security for the

students" (*see* Defendants' Affirmation in Support Exhibit A ¶ 33); and "the defendants had a duty to provide adequate supervision for the students attending the prep school, and in particular, the plaintiff" (*see* Defendants' Affirmation in Support Exhibit A ¶ 34).

On September 1, 2009, defendant Miss Shelley served a Demand for Experts on plaintiffs. On May 4, 2011, plaintiffs filed their Note of Issue and made no disclosure pursuant to CPLR § 310(d)(1) by identifying an expert. On July1, 2011, defendant Miss Shelley moved for summary judgment and dismissal of the Verified Complaint. At the time the motion was made, plaintiffs had still not made any disclosure pursuant to CPLR § 310(d)(1) or identified a proposed expert. The first time plaintiffs disclosed the identity of an expert was in their September 2, 2011 opposition to the within summary judgment motion. To date, there has still been no expert disclosure or any attempt to comply with CPLR § 310(d)(1). The Second Department has long held that an expert affidavit submitted in opposition to a summary judgment motion should be rejected if the identity of the expert was not disclosed during pre-trial discovery and the summary judgment motion is made after the plaintiff files a note of issue and certificate of readiness. *See King v. Gregruss Mgmt. Corp.*, 57 A.D.3d 851, 870 N.Y.S.2d 103 (2d Dept. 2008); *Construction by Singletree, Inc. v. Lowe*, 55 A.D.3d 861, 866 N.Y.S.2d 702 (2d Dept. 2008); *Colon v. Chelsea Piers Mgmt., Inc.*, 50 A.D.3d 616, 855 N.Y.S.2d 201 (2d Dept. 2008); *DeLeon v. State of New York*, 22 A.D.3d 786, 803 N.Y.S.2d 692 (2d Dept. 2005); *Safrin v. DST Russian & Turkish Bath, Inc.*, 16 A.D.3d 656, 791 N.Y.S.2d 443 (2d Dept. 2005).

With respect to defendants' application, pursuant to CPLR § 3215(c), for an order deeming the Verified Complaint against defendants Williams and Rosa abandoned, plaintiffs do not contest or contradict the assertion that they failed to enter a judgment against defendants Williams or Rosa within one year of either's default in accordance with CPLR § 3212(c). Since

no judgment has been entered against defendants Williams or Rosa within a year of their default, plaintiffs' Verified Complaint against each of them is **dismissed as abandoned**. Defendants Shelley Williams and Althea Cooke i/s/h/a Althea Rosa shall be deleted as party defendants.

Therefore, it is ordered that defendants' motion, pursuant to CPLR § 3212, for an order granting defendant Miss Shelley summary judgment dismissing plaintiffs' Verified Complaint is hereby **DENIED.** Defendants' motion, pursuant to CPLR § 3215(c), for an order deeming the Verified Complaint against defendants Williams and Rosa abandoned is hereby **GRANTED**.

The remaining parties shall appear for Trial in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on November 22, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
November 14, 2011