Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Chelsea Cosquillo-Zumbana, an infant by her mother and natural guardian, Martha Zumbana and Martha Zumbana, individually,

Plaintiffs,

- against -

The City of New York, The New York City Department of Education and The Renaissance Charter School,

Defendants.

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The Renaissance Charter School,

Third-Party Plaintiff,

- against -

Fairmont Archer Inc., Tom Rooney, Tempositions, Inc., and School Professionals,

Third-Party Defendants.

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Index Number: 23500/10

Motion Date: 9/25/12

Motion Cal. Number: 11

Motion Seq. No.: 5

The following papers numbered 1 to 14 read on this motion by defendant/third-party plaintiff, The Renaissance Charter School, for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Memorandum of Law	5
Affirmation in Partial Opposition	6-7
Affirmation in Opposition-Exhibits	8-10
Reply(Renaissance)	11-12
Reply(School Professionals)	13-14

Upon the foregoing papers it is ordered that the motion is

decided as follows:

Motion by Renaissance for summary judgment dismissing the complaint and all cross-claims against it is granted.

Infant plaintiff, a kindergarten student at the Renaissance Charter School in Queens County, sustained a fracture of her right humerus when she fell off a horizontal ladder, which plaintiff refers to as "monkey bars", in the school's indoor playground on September 23, 2009. Plaintiff alleges that Renaissance was negligent in constructing an indoor playground structure whose horizontal ladder (monkey bars) was inappropriately high for 5-year-old kindergarten students according to the prescribed height guidelines set by the United States Consumer Product Safety Commission (CPSC) and the American Society for Testing Materials (ASTM), in failing to provide plaintiff with adequate supervision and in failing to display any warning signs on the playground structure. Both Renaissance and plaintiff cite to and rely upon the CPSC and ASTM guidelines and specifications.

Infant plaintiff testified in her deposition that her teacher, John, brought her kindergarten class of 25 students to the playground and went back to the classroom, leaving them with the substitute recess teacher. She explained that she got up to the monkey bars (the horizontal ladder rings) via a bridge. She grabbed onto one of the monkey bars (i.e., a triangular ring) with both hands, then she let go with one hand and reached for the next ring but her hand slipped and she fell. She fell on her initial attempt to use the monkey bars. She was the only one using the monkey bars. She was not playing with anyone else but was playing by herself. When shown a photograph of the playground area with the monkey bar apparatus (a copy of which is annexed to the moving papers as exhibit "F") and asked where the recess teacher was when she was using the monkey bars, plaintiff indicated that the teacher was standing by the wall on the left side of the monkey bars. Plaintiff also testified that when she fell, the teacher picked her up and brought her to the nurse.

Cindy Cooper Blair, the substitute recess teacher, avers in her affidavit annexed to the moving papers that during the recess period, she stood within 20 feet of infant plaintiff observing her use the monkey bars. There was no indication that plaintiff was in distress or in need of aid. She stated that she had been advised that the kindergarten children were allowed to use all the playground equipment, including the subject monkey bars. She stated that while thus observing plaintiff on the monkey bars, another kindergarten student asked for help to tie his or her shoe and that only a few seconds passed from the time she tied the other child's

shoe to the time plaintiff suddenly fell from the monkey bars.

The documentary and demonstrative evidence presented show that the playground apparatus in question is one continuous composite structure that includes a gazebo-like structure, climbing equipment, slides, platforms of different heights, tunnels, a bridge and overhead horizontal ring ladder. The overhead ladder is composed of 11 evenly-spaced triangular-shaped rings welded to a bar fixed horizontally across the apparatus. The rings and bar are tubular metal painted in what appears to be a powder-coated treatment. The rings are spaced 11 inches apart and are reached from a platform, or bridge, on each end of the playground apparatus, which platform is 36 inches in height as measured from the padded playground surface. The rings' handgrips are at a height of 69.5 (as per plaintiff's expert) or 70 inches (as per Renaissance's expert) above the padded playground surface. A child using the horizontal rings would take hold of a ring with both hands while standing on the bridge, step off the bridge and then work his or her way across the ladder by reaching for and grabbing each ring with alternating hands. Thus, after stepping off the bridge platform, the child would hang from the rings with his or her feet not reaching the ground. Upon reaching the other side, the child would then step onto the bridge platform.

Renaissance has proffered evidence that it maintained the subject playground set in a safe condition (see Miller v Kings Park Cent. School Dist., 54 AD 3d 314 [2nd Dept 2008]). Plaintiffs do not allege that plaintiff's injuries were caused by any design or manufacturing defect, inadequacy or lack of maintenance of the playground equipment and do not dispute Renaissance's proof to this effect. Plaintiffs' only allegation concerning the playground apparatus was that the distance from the horizontal ladder rings to the padded floor area below exceeded the prescribed height appropriate for 5-year-old kindergarteners.

In support of the motion, Renaissance submits the affidavit of its expert certified playground safety inspector, Lisa Thorsen, who averred, inter alia, that the design and specifications of the overhead horizontal rings complied with CPSC and ASTM standards for public playground equipment intended for use by school age children ages 5-12. Thorsen averred that she measured the distance from the ring grips to the padded floor surface as being 70 inches. She said that this height is within the CPSC and ASTM guidelines for school age children 5-12 years old, which guidelines set a maximum height of 84 inches for such age group. Thorsen explained that the CPSC Handbook sets forth the type and size of playground equipment appropriate for different age groups, including preschool children 2-5 years old and school age children 5-12 years old. Since the CPSC defines school age children as children 5-12 years old, and since plaintiff was in kindergarten, and therefore in school, and was 5 years and two months old on the date of the accident, the

specifications governing equipment for use by school age children 5-12 years old are the relevant provisions governing in the present matter. Thorsen concluded that the subject playground equipment met all the CPSC and ASTM guidelines applicable to structures designed for school age children and was appropriate and safe for use by infant plaintiff.

Section 5.3.2.5 of the CPSC Public Playground Safety Handbook provides, in relevant portion:

> The maximum height of overhead rings measured from the center of the grasping device to the protective surface should be:
> - Preschool-age (4 and 5 years): 60 inches.
> - School-age: 84 inches.

Section 1.8 of the Handbook defines "school-age children" as "children 5 years of age through 12 years of age".

The Handbook addresses the reason for including 5-year-olds in the guidelines for equipment intended for the use of both the pre-school and school-age group. Section 2.2.3 titled "Age group" states, in relevant portion, "In areas where access to the playground is unlimited or enforced only by signage, the playground designer should recognize that since child development is fluid, parents and caregivers may select a playground slightly above or slightly below their child's abilities, especially for children at or near a cut-off age (e.g., 2-years old and 5-years old). This could be for ease of supervising multiple children, misperceptions about the hazards a playground may pose to children of a different age, advanced development of a child, or other reasons. For this reason, there is an overlap at age 5."

Likewise, the ASTM specifications for the height of overhead rings, set forth in the Standard Consumer Safety Performance Specification for Playground Equipment for Public Use (F 1487-05), at §8.3.3, provides, in relevant portion, "The maximum height of upper body devices for use by 2 through 5-year-olds shall be no greater than 60 in. (1520mm), measured from the center of the grasping device to the top of the protective surfacing below. The maximum height of upper body devices for use by 5 through 12-year-olds shall be no greater than 84 in. (2130mm)."

The subject overhead horizontal ring ladder at 70 inches in height, 14 inches less than the maximum height for overhead rings for 5-year-olds prescribed by both the CPSC guidelines and the ASTM standards, was thus well within the safety specifications for use by infant plaintiff.

Since the playground at issue was, by all applicable

standards, suitable for use by 5-year-olds, and infant plaintiff was in fact over 5 years of age on the date of the accident, plaintiffs' related cause of action alleging negligence in the failure to have a warning sign posted on the playground equipment informing that it is intended for use only by school-age children 5-12 years of age must also fail.

Therefore, Renaissance has established its prima facie entitlement to summary judgment as a matter of law by submitting evidence that the subject playground apparatus was in a safe condition and suitable for use by infant plaintiff and, thus, eliminating all issues of fact in this regard (see Swan v Town of Brookhaven, 32 AD 3d 1012 [2nd Dept 2006]; see also Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851 [1985]; Zuckerman v. City of New York, 49 NY 2d 557 [1980]).

The burden then shifted to plaintiffs, in opposition, to raise a triable issue of fact as to a dangerous condition of the playground apparatus (see Zuckerman v. City of New York, supra). Plaintiffs have failed to meet their burden.

Plaintiffs annex to their opposition papers an affidavit of their expert, Steve Bernheim, which is limited to addressing the only issue raised in this case concerning the safety of the playground equipment, namely, the height of the horizontal rings. He measures the height of the horizontal rings as 69.5 inches and opines that this was excessively high in violation of the CPSC and ASTM standards applicable to horizontal rings intended to be used by infant plaintiff's age group.

His opinion that the horizontal rings of the playground apparatus were inappropriately high for infant plaintiff is based upon his definition of a kindergarten student as being a pre-school age child and, therefore, that the standard applicable in this case was the 60-inch maximum height for pre-school age children 2-5 years old, rather than the 84-inch maximum for school-age children 5-12 years old. However, his assertion that a kindergarten student is not a school-age child but a pre-school age child is entirely unfounded, and erroneous. Bernheim cites to no provision of the CPSC Handbook, ASTM specifications or any other authority defining a kindergarten student as being a pre-school child. Indeed, it is non-sequitur to conclude that because plaintiff was a kindergarten student at the school, she was pre-school. Indeed, this Court can find no statutory or case law authority defining a pre-school age child as including a 5-year-old kindergarten student and a school-age child as excluding a 5-year-old kindergarten student. Indeed, within the New York City public school system, it has always been recognized that a kindergarten student is a school-age child attending school. Although the maintenance of a kindergarten is discretionary with the Department of Education, once a kindergarten is established, it becomes part of the public school system, and

when a child reaches the age of five years, he or she is entitled to attend public school, and therefore, a 5-year-old kindergarten student is a school-age child attending school (see Education Law §3202; Isquith v Levitt, 285 AD 833 [2nd Dept 1955]). Although Renaissance is a charter school, the same definition and enrollment criteria apply. "Charter schools are 'within the public school system' (Education Law §2850[2][e]). Any child who is eligible for admission to a public school is qualified for admission to a charter school, and the charter school 'shall enroll each eligible student who submits a timely application'...(Education Law §2854)[2][b])" (New York Charter Schools Association, Inc. v DiNapoli, 13 NY 3d 120, 123 [2009]).

Thus, contrary to Bernheim's assertion, infant plaintiff was a school-age child and part of the group for which the subject playground equipment was intended and safe to use according to the CPSC and ASTM standards.

Building upon his erroneous premise that a 5-year-old kindergarten student is a pre-schooler and not a school-age child, Bernheim also declares, "At the time of the incident, the infant Plaintiff was a pre-school kindergarten student, who was only 5 years and 2 months old (on the low end of 5 year olds) and belonged to a group of less physically developed children." In making this statement, he is merely assuming, with no factual basis, that all 5-year-old children who are pre-school (which he erroneously defines as including kindergarten students), merely by virtue of being in kindergarten, are necessarily less physically developed than 5-year-old children attending school (which he defines, citing no factual basis, as grade-school children, commencing with first grade) and, thus, less able to use the equipment. He provides no objective basis for this assumption, but rather such assumption is based purely upon his citation and mis-characterization of Thorsen's averments in her affidavit, that the overlap at 5 years old between the pre-school 2-5-year-old group and the school-age 5-12-year-old group in the CPSC guidelines reflects a recognition that children develop physically and cognitavely at different rates. In fact, Thorsen does not aver that 5-year-old kindergarten students are pre-school age children and that because they are pre-school they are less developed than school-age 5-year-olds (first graders, according to Bernheim) and thus not suited to use the horizontal rings designed for the school-age 5-12-year-old group. She actually acknowledges that plaintiff, as a kindergarten student and 5 years old on the date of the accident, fit the guidelines for school-age children regarding the use of the 84-inch specification rings.

Moreover, Thorsen merely acknowledged that one of the reasons for the overlap between the two groups in the specifications was a recognition of the variation in children's physical development and coordination at 5 years old. It is not implicit in such observation

that the determining factor as to whether a child at 5 years old is developed enough to use the taller set of equipment is whether he or she is attending regular school or is in a pre-school program, and she does not imply that the variation in child development is the only reason for the overlap. Indeed, Section 2.2.3 of the CPSC Handbook heretofore cited makes it clear that the overlap at age 5 includes considerations besides variation in physical development, such as "the ease of supervising multiple children", "misperceptions about the hazards a playground may pose to children of a different age", or "other reasons". Moreover, with respect to the variations in physical development, especially at or near the cut-off age, "parents and caregivers may select a playground slightly above or slightly below their child's abilities". Thus, the CPSC guidelines make it clear that there is no prohibition or advisement against any 5-year-old using the taller playground set, regardless of whether he or she is in kindergarten, first grade or still actually in pre-school such as nursery school. Thus, even if, arguendo, plaintiff were in pre-school, her use of the subject playground set with its 70-inch-high rings would not be in violation of the applicable guidelines. But, as heretofore stated, since plaintiff was 5 years old and a kindergarten student, she was a school-age child within the definition of the CPSC guidelines, as a matter of law, and thus within the group for which the 84-inch tall rings were appropriate pursuant to the guidelines.

Likewise, the use of the subject playground set by plaintiff was not contrary to the ASTM specifications, which mirror the CSPC guidelines. Since there is an overlap at age 5, it was not inappropriate for Renaissance to have provided either the shorter or the taller set for use by the then 5-year-old plaintiff.

In addition, Bernheim's opinion that "infant Plaintiff suffered her injuries because the horizontal ladder was too high from the ground for a child of Plaintiff's physical development, age and abilities" is speculative, since he fails to set forth what plaintiff's physical development and abilities were, and even had he done so, his opinion would be incompetent since he does not present any qualifications, medical or otherwise, to assess the development and abilities of plaintiff or any child.

Finally, since the subject playground set was appropriate for use by 5-12 year-old children, Bernheim's statement that the CPSC and ASTM prescribe that there should be a sign providing a minimum age requirement and that he did not observe such a sign posted is irrelevant.

Therefore, Bernheim's opinion that the horizontal rings in question "are not safe for pre-school kindergarten students between the ages of 2 through 5 years old, and do not meet the recommendations prescribed by the USCSP and the ASTM" is based upon false premises, speculation and incompetent conclusions, and thus

does not raise an issue of fact.

Renaissance has also established a prima facie entitlement to summary judgment dismissing plaintiffs' cause of action for negligent supervision. A school is not an insurer of the safety of its students, but since it stands in loco parentis with its charges, it does have the duty to supervise them adequately and will be held liable if its failure to provide adequate supervision is a substantial factor in causing foreseeable injuries (see Mirand v City of New York, 84 NY 2d 44 [1994]).

The record on this motion establishes that infant plaintiff did nothing more than go to the playground and proceed to use the overhead rings, a normal approved use of an apparatus that, as heretofore discussed, was safe and appropriate for use by plaintiff. The recess teacher stood observing plaintiff from a short distance as she played. The photograph annexed to the moving papers as Exhibit "F" and marked as Exhibit "A" at infant plaintiff's deposition, shows a tan wall with blue wall mats immediately to the left of the subject playground set, where infant plaintiff indicated the teacher was standing. This establishes that the teacher was standing directly next to the playground set. Moreover, there were no other children using the playground set and there is no issue of plaintiff engaging in any type of horseplay or misuse of the apparatus that warranted interdiction or any heightened level of scrutiny. Moreover, closer supervision could not have prevented the accident since plaintiff fell suddenly and immediately upon making her first reach for a ring. Thus, Renaissance has established its prima facie entitlement to summary judgment by showing that there was adequate playground supervision and that, in any event, the alleged lack of supervision was not a proximate cause of the accident (see Carey v Commack Union Free School Dist. No. 10, 56 AD 3d 506 [2nd Dept 2008]; Botti v Seaford Harbor Elementary School Dist. 6, 24 AD 3d 486 [2nd Dept 2005]; Berdecia v City of New York, 289 AD 2d 354 [2nd Dept 2001]).

Plaintiff fails to raise an issue of fact in opposition.

Accordingly, the motion is granted and the complaint and all cross-claims are dismissed as against Renaissance.

Dated: October 5, 2012

KEVIN J. KERRIGAN, J.S.C.