| **Holder v Our Lady of Lourdes Sch.** |
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| 2013 NY Slip Op 30857(U) |
| April 15, 2013 |
| Supreme Court, Suffolk County |
| Docket Number: 10-10160 |
| Judge: Denise F. Molia |
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SHORT FORM ORDER

**COPY**

INDEX No. 10-10160
CAL. No. 12-01258OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

***PRESENT:***

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 11-16-12
ADJ. DATE 12-28-12
Mot. Seq. # 001 - MotD

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ANTHONY HOLDER, an infant under the age of 14 years, by his mother and natural guardian, ANDREA HOLDER, and ANDREA HOLDER, Individually,

Plaintiffs,

- against -

OUR LADY OF LOURDES SCHOOL and OUR LADY OF LOURDES R.C. CHURCH,

Defendants.

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Upon the following papers numbered 1 to 19 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9 ; ~~Notice of Cross Motion and supporting papers~~ ___; Answering Affidavits and supporting papers 10 - 17; Replying Affidavits and supporting papers 18-19 ; ~~Other~~ ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion by defendants Our Lady of Lourdes School and Our Lady of Lourdes R.C. Church for summary judgment dismissing the complaint is granted to the limited extent that the first and second causes of action for negligent supervision are dismissed, and the motion is otherwise denied.

Plaintiff Andrea Holder commenced this action individually and on behalf of her son Anthony Holder to recover for the injuries he allegedly sustained on September 21, 2007 when he was four years old and fell off a slide on the playground located on the premises of defendants Our Lady of Lourdes School and Our Lady of Lourdes R.C. Church in West Islip, New York. By their bill of particulars, plaintiffs allege that the defendants were negligent, among other things, in failing to supervise infant plaintiff at the playground and in failing to maintain the premises in a reasonably safe condition. Specifically, plaintiffs allege that the playground equipment was at a height too great for use by the infant plaintiff and that the surface beneath the equipment and in the playground area was in a dangerous and defective condition.

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Defendants now move for summary judgment dismissing the complaint, arguing that the slide was not defective; the slide was appropriate for the age of the child; the accident happened due to the intervening act of a third-party rather than an inherently dangerous condition; there was adequate supervision of infant plaintiff; and, that there was adequate ground cover in place on the date of the accident. In support of the motion, defendants submit a copy of the pleadings, transcripts of the parties' deposition testimony and the affidavits of Michele Monaco, a volunteer at the defendant school and Louise Krol, the principal of the school. Plaintiffs oppose the motion, arguing that there is a triable issue of fact as to whether the playground equipment was properly maintained, whether the playground equipment was safe for a four year-old child and whether the school was on notice that the subject equipment was too high. Plaintiffs submit their attorney's affirmation, copies of photographs of plaintiff's injuries, documentation relating to the playground equipment installation, maintenance and warranty validation, landscaping maintenance records, student accident report and transcripts of their deposition testimony.

At his examination before trial, infant plaintiff testified that the accident occurred during a kindergarten recess, approximately ten minutes after the recess had started. He indicated that he was about to use the slide for the third time that day when another child, Matthew, pushed him from behind causing him to fall off the slide at the outdoor playground. Infant plaintiff stated that while he attempted to put his hands out to protect his fall, he was unable to and landed face first. He testified that Matthew had never pushed him before that day and that he was surprised when he was pushed as he considered him a friend. The plaintiff testified that the gym teacher had previously instructed the children on how to use the playground equipment which, was subsequently reinforced by the people who would stay around the playground during recess. He further indicated that at the time of the accident, there were some parents or grandparents outside with the children. An adult helped him up and brought him to the nurse's office.

At her examination before trial, Andrea Holder testified that she went to the playground a few days after the accident to take pictures and informally measured the height of the subject equipment which was estimated to be in excess of five feet five inches tall. She further testified that the principal had stated that the kindergarten and pre-kindergarten children do not usually play on that area. In addition, Andrea Holder indicated that after the accident Ms. Monaco reported that she was in the area and had turned her back for a second when Anthony fell. Ms. Holder indicated that neither she, nor her husband ever measured the depth of the ground cover.

At his examination before trial, Father Michael Vetrano testified that he is employed by the Diocese of Rockville Centre and since 2000 has been the resident pastor of Our Lady of Lourdes. He characterized the un-gated playground as a "general parish amenity" which was there for the enjoyment and benefit of the parish members and any community member. Father Vetrano described the playground as being predominantly a wooden and metal structure with a pea gravel safety surface underneath which was maintained at a level of six to eight inches. He indicated that general maintenance of the ground was performed on a weekly basis and that a minimum of four adults (one teacher, one or two paid aides and one or two volunteer aides), provided supervision for the children while they utilized the playground. He testified that he was not aware of any complaints regarding the playground equipment or playground safety surface although, he was aware of one prior accident involving a sixteen year old child who was injured when he jumped from a high point on the playground.

The witness further indicated that he was informed about the accident involving Anthony Holder and that it was his understanding that Anthony was at the top of the slide when he was pushed by another student.

In her affidavit, Michelle Monaco states that she was a volunteer at Our Lady of Lourdes School on September 21, 2007, and believes that Anthony Holder was one of twenty-eight kindergarten children present on the playground. There were four monitors present to supervise the children that day, and she was assigned to the area where Anthony fell. She states that just prior to the accident she was standing a few feet away from Anthony Holder, that the children using the slide were taking turns and that she did not observe any pushing or shoving. In addition, while supervising her assigned spot, she noticed a boy hanging on a bar under the slide and went to his assistance. When she returned to the slide, she saw that Anthony Holder had hit the ground. While she did not observe any child push the plaintiff, she did not have any reason to anticipate that another child would push Anthony. She was subsequently informed that another child had pushed Anthony Holder.

In her affidavit, Louise Kroll, who is employed as the principal of Our Lady of Lourdes School, states that she was present at school on September 21, 2007, the day that Anthony Holder fell from the slide he was using during recess. The equipment and slide where the accident occurred were used on a regular basis by kindergarten children with appropriate adult supervision. On the date of the accident, several adults including Michelle Monaco were supervising the children while they were using the playground equipment. Ms. Kroll asserts that at no time did she advise Mr. and Ms. Holder that the kindergarten children should not have been using the playground equipment nor, did she ever indicate that the playground was unsafe or that the slide was too high for the kindergarten children. She states that no complaints about the slide or the playground equipment were brought to her attention at any time prior to Anthony Holder's accident. She learned from Ms. Monaco that she was in close proximity to the slide and that she was momentarily attending to another child when Anthony's accident occurred. Lastly, while she is aware that Anthony was pushed from the slide by another child, she is unaware of any circumstance that would have alerted Ms. Monaco or any other adult monitor that such action was to be anticipated or foreseen.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; 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 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Maxwell v Rockland County Community College***, 78 AD3d 793, 911 NYS2d 130 [2d Dept 2010]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Schools are under a duty to adequately supervise the students in their charge and 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]; ***Nash v. Port Washington Union Free School***

***Dist.***, 83 AD3d 136, 922 NYS2d 408 [2d Dept 2011]; ***Swan v Town of Brookhaven***, 32 AD3d 1012, 821 NYS2d 265 [2d Dept 2006]). While schools are not insurers of safety, they are obligated to exercise such care of their students as a parent of ordinary prudence would observe in similar circumstances (*see* ***Mirand v City of New York***, *supra* at 49). In order for a plaintiff to prevail in a breach of duty cause of action, where it is alleged that the school failed to provide adequate supervision and the alleged injuries were the result of another student's actions, a plaintiff must establish that the school "had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated " (*see* ***Mirand v. City of New York***, *supra* at 49). "[S]chool personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place among students daily" (*see* ***Armellino v. Thomase***, 72 AD3d 849, 899 NYS2d 339 [2d Dept 2010], quoting ***Mirand v. City of New York***, *supra* at 49). Accordingly, an injury to a student which is the result of "the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act " (*see* ***Mirand v. City of New York***, *supra* at 49).

Moreover, it is fundamental that for a plaintiff to recover against a defendant in a negligence action, the plaintiff must prove that the defendant owed the plaintiff a duty and that the breach of that duty resulted in the injuries sustained by the plaintiff (*see* ***Lugo v Brentwood Union Free School Dist.***, 212 AD2d 582, 622 NYS2d 553 [2d Dept 1995]; ***Kimbar v Estis***, 1 NY2d 399, 153 NYS2d 197 [1956]). There must be evidence that establishes that the defendant either created the defective condition or had actual or constructive notice of the dangerous condition, such that the defect was apparent, visible and existed for a sufficient length of time to allow the defendant time to discover and remedy the situation (*see* ***Moss v JNK Capital Ltd.***, 211 AD2d 769, 621 NYS2d 679 [2d Dept 1995]; ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Cafiero v Inserra Supermarkets***, 195 AD2d 681, 599 NYS2d 342 [3d Dept 1993]). Furthermore, the fact that the defendant may have a general awareness that a defective condition may exist is not legally sufficient to constitute notice of the particular condition that caused the plaintiff's injuries (*see* ***Faricelli v TSS Seedman's, Inc.***, 94 NY2d 772, 698 NYS2d 588 [1999]; ***Kennedy v Wegmans Food Markets, Inc***., 90 NY2d 923, 664 NYS2d 259 [1997]; ***Gordon v American Museum of Natural History***, *supra*).

Here, defendant established prima facie that it provided adequate supervision of the infant plaintiff during recess, and that a lack of supervision was not a proximate cause of infant plaintiff's injuries (*see* ***Troiani v White Plains School Dist.***, 64 AD3d 701, 882 NYS2d 519 [2d Dept 2009]; ***Arceri v Smithtown Cent. School Dist.***, 82 AD3d 1140, 919 NYS2d 860 [2d Dept 2011]; ***Cimafonte v Levittown Bd. of Educ.***, 299 AD2d 445, 749 NYS2d 735 [2d Dept 2002]; *cf.* ***Arceri v Smithtown Central School District***, 82 AD3d 1140, 919 NYS2d 860 [2d Dept 2011] [in contrast, court found that defendant failed to satisfy its initial burden of proof that infant plaintiff was engaged in an age appropriate activity at time of accident and that it maintained its playground in a reasonably safe condition]). Further, the court finds that plaintiff's accident was spontaneous in nature and that no amount of supervision could have prevented the occurrence (*see* ***Troiani v White Plains City School District***, 64 AD3d 701 [2d Dept 2009]; ***Lucian v Our Lady of Sorrows School***, 79 AD3d 705 [2d Dept 2010]. The infant plaintiff testified that he was using the slide for the third time that day when another child, Matthew, pushed him from behind causing him to fall. Infant plaintiff testified that Matthew had never pushed him before that day and that he was surprised when he was pushed as he considered him a

friend. The combined testimony of the infant plaintiff, Michelle Monaco, Father Vetrano and the affidavit of Louise Kroll establishes that this event was an unforeseeable, impulsive and unanticipated act without knowledge or notice (***Brandy B. v Edin Central School District***, 15 NY3d 297, 907 NYS2d 735 [2010]). The plaintiffs having failed to raise a material issue of fact requiring a trial on their claim of negligent supervision, the first and second causes of action alleging negligent supervision are dismissed.

As to plaintiff's claim that the school negligently permitted plaintiff to play on playground equipment which was purportedly inappropriate for a child who was four years and nine months old at the time of the accident, defendant has failed to establish prima facie it entitlement to judgment as a matter of law. Defendant did not satisfy its initial burden of proof with sufficient evidence demonstrating that the playground equipment was appropriate for the plaintiff's age group (*see* ***Arceri v Smithtown Central School District***, 82 AD3d 1140, 919 NYS2d 860 [2d Dept 2011]). As such, a triable issue exists as to whether the plaintiff was engaged in an age appropriate activity.

With respect to plaintiff's claim that the defendant permitted a dangerous condition to exist by not maintaining an adequate ground cover, it is well settled that the school district can only be held liable for injuries sustained as a result of a dangerous or defective condition if the plaintiff can show that the district either created the condition or had actual or constructive notice of its existence (*see* ***Culotta v Smithtown Cent. School Dist.***, 37 AD3d 755, 831 NYS2d 238 [2d Dept 2007]; ***Feldman v South Huntington U.F.S.D.***, 262 AD2d 276, 691 NYS2d 120 [2d Dept 1999]). Here, defendant has failed to established prima facie that it did not have notice of the alleged defect. Father Michael Vetrano testified that he believed that the pea gravel ground cover used to cushion the impact from a potential fall under the slide was maintained in a reasonably safe condition. However, defendant has failed to submit sufficient evidence, expert or otherwise, showing that the ground covering was maintained in a reasonably safe condition so as to cushion the impact of a child who might fall or land from the slide. Thus, a triable issue of fact exists as to whether adequate ground cover existed at the time of the accident and whether defendant had notice of it.

In view of the foregoing, the motion by defendants Our Lady of Lourdes School and Our Lady of Lourdes R.C. Church for summary judgment dismissing the complaint is granted to the limited extent that the first and second causes of action for negligent supervision are dismissed, and the motion is otherwise denied.

Dated: April 15, 2013

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**