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| <b>A.I. v Sweet Home Day Care Ctr.</b>   |
| 2019 NY Slip Op 32560(U)   |
| August 16, 2019  |
| Supreme Court, Kings County  |
| Docket Number: 521809/2016   |
| Judge: Lara J. Genovesi  |
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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 16<sup>th</sup> day of August 2019.

P R E S E N T:

HON. LARA J. GENOVESI,  
J.S.C.

-----X  
A.I. BY MOTHER AND NATURAL GUARDIAN,  
SHOHISTA TURDIEVA and SHOHISTA  
TURDIEVA, Individually,

Plaintiffs,

Index No.: 521809/2016

Mtn Seq. 007

DECISION & ORDER

-against-

SWEET HOME DAY CARE CENTER and  
WOODMERE DAY CARE CENTER, INC.,

Defendants.

2019 AUG 30 AM 8:28  
KINGS COUNTY CLERK

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

|   |                         |
|---|-------------------------|
|   | <u>NYSCEF Doc. No.:</u> |
| Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____ | _____ 84-98 _____       |
| Opposing Affidavits (Affirmations) _____  | _____ 101-111 _____     |
| Reply Affidavits (Affirmations) _____   | _____ 127-128 _____     |

**Introduction**

Defendants, Sweet Home Day Care Center, Inc., and Woodmere Day Care Center, Inc., move by notice of motion, sequence number seven, pursuant to CPLR § 3212 for summary judgment dismissing plaintiffs' complaint with prejudice, together with such

other and further relief as the court deems just and proper. Plaintiffs, A.I. by his mother Shohista Turdieva, and Shohista Turdieva individually, oppose this application.

### ***Background***

Infant plaintiff, who was four years and eleven months old at the time, allegedly sustained personal injuries on July 5, 2016, at DiGilio Playground in Brooklyn, New York, when he fell from a set of parallel bars and fractured his arm. Plaintiff, Shohista Turdieva, testified at an examination before trial (EBT) on March 9, 2018, with the use of a Russian interpreter (*see* NYSCEF Doc. # 89, EBT of Shohista Turdieva). Plaintiff testified that while in childcare, her son was assigned to a group of 25 students which had two supervising adults, when the accident occurred in July 2016 (*see id.* at 31).

At the time of the accident, infant plaintiff was at the playground under the supervision of Khrystyna Grynyuk and Nataliya Komarnytska, staff at Sweet Home Day Care (Sweet Home), where he was enrolled for the summer. Grynyuk and Komarnytska testified at an EBT on July 9, 2018 with the use of a Russian interpreter (*see generally*, NYSCEF Doc. # 90, EBT of Khrystyna Grynyuk; NYSCEF Doc. # 91). EBT of Nataliya Komarnytska). Grynyuk testified that during day care, she was the teaching assistant and Komarnytska was the teacher assigned to infant plaintiff's group (*see* Grynyuk EBT at 24). Komarnytska testified that she was a teacher's aide assigned to the group (*see* Komarnytska EBT at 20, 21). The group consisted of students, four to five years of age. Sweet Home had approximately 42 children during the summer of 2016 (*see* Grynyuk EBT at 21). The children were divided into three groups of "usually twelve people" (*id.*).

Grynyuk testified that infant plaintiff was assigned to a group of approximately 7-10 children (*see* Grynyuk EBT at 24-25).<sup>1</sup> Komarnytska testified that she worked with a group of 12 children in the summer of 2016 (*see* Komarnytska EBT at 22).

Q. Do you recall how much staff was back in the day care program back in July of 2016?

A. Each group has two teachers for children three. Nine teachers.

Q. Does that include teachers and teaching assistants?

A. Yes.

(Grynyuk EBT at 21-22).

The teacher and teaching assistant were not responsible for separate tasks; they, collectively, were responsible for feeding the children, exercise, games, making their beds, playing with them, taking them to the restroom and generally supervising the children (*see id.* at 28-29). The instructors take the children to the park every day from 9:45 a.m. to 10:45 a.m. (*see id.* at 35; *see also* Komarnytska EBT at 26). When taking children to the park, the procedure is that they “gather the children together. The first teacher standing in front and the second one behind, and we walk to park. We try to keep them all within the vision spectrum” (*id.* at 34). They are not permitted to take more than twelve children to the park at one time (*see id.*). Generally, the children were permitted to play in the jungle gym; “the equipment wasn’t that tall” (*id.* at 36). However, they were never given a specific instruction as to whether the children should not be permitted to play on the jungle gym (*see id.* at 37). Grynyuk testified “[t]his instruction wasn’t

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<sup>1</sup> When asked how many children were assigned to her group, Grynyuk testified “Back then, seven or eight children. On the list was ten” (*id.* at 27-28).

given to us. During pre-k, we had some commissions that came and checked on us, and nobody told us that the children are not supposed to play” (*id.* at 37). She described this “commission” as the “social work, health department” (*id.*).

- Q. Now these people came from the City of New York?  
A. U pre-k program. I don't know.  
Q. I understand. Were people that came, U pre-k program, do you know if they were from the City of New York?  
A. Probably, yes.  
Q. They came and observed kids playing at a park?  
A. Yes.  
Q. This specific park where the accident occurred?  
A. Yes.  
Q. Do you know when that was?  
A. When they came to check?  
Q. Yes.  
A. They came to us every two weeks. There would be a different person that would come every time.  
Q. What was the purpose of their visit?  
A. They overlook children and how we work.  
Q. Did they observe this specific group?  
A. They come from September until the end of June. In the summertime nobody comes.  
Q. In the pre-k program, that's where you are saying they came?  
A. Yes.

(*id.* at 38-39).

The manager Olga allowed the staff to take the children to the playground, but she had no specific instructions regarding the jungle gym (*see id.* at 40).

Grynyuk testified that the parents are aware the they take the children to the park. The parents receive a schedule of events which states that from 9:45 a.m. to 10:45 a.m. they walk to the park (*see id.* at 35; *see also* Komarnytska EBT at 26, 41). Grynyuk repeatedly testified that the parents understood that by taking the children to the park, that

included use of the jungle gym; she told them specifically that the children would be playing on the jungle gym (*see id.* at 43-44). However, she testified that she never specifically told plaintiff that that infant plaintiff would be playing on the jungle gym (*see id.* at 46). Grynyuk testified that the employees received a written “safety plan” which includes instructions for supervision of children at the jungle gym, specifically (*see id.* at 48).

### ***The Incident***

Grynyuk and Komarnytska took approximately 7-8 children to the park that morning (*see* Grynyuk EBT at 50, 53; *see also* Komarnytska EBT at 29). The accident occurred between 10:00 a.m. and 10:15 a.m. (*see id.* at 50, 61). Grynyuk testified that some of the students were all in a line waiting for their turn on the parallel bars when the accident occurred (*see id.* at 61). According to Grynyuk, infant plaintiff’s arm slipped and he fell from the top of the parallel bars onto his arm (*see id.* at 67). After he fell, Grynyuk saw that something was wrong with his arm; she took him back to the day care, where they applied ice, called 911 and called his mother (*see id.* at 74).

Typically, the children “would put the parallel bars under their armpits and slide down” them (*id.* at 68). Neither the teacher nor the teaching assistant held onto the children as they slid down the parallel bars (*see id.*). Grynyuk testified that the reason she did not hold onto the children was that she “thought they’re old enough so they could do it on their own” (*id.* at 71). Komarnytska testified that infant plaintiff had successfully used the parallel bars prior to the incident (*see* Komarnytska EBT at 34). The children had used the entire jungle gym at the park “for a year before” (*id.* at 37). When asked if

she would have done anything differently as related to this incident, Grynyuk testified “[w]e should have held them as they were sliding down” (*id.* at 85).<sup>2</sup>

Plaintiff visited the park two-three weeks after the accident occurred and infant plaintiff pointed to the parallel bars as the location of his fall. He told her that “he was on top. He wanted to go down. He couldn’t hold and he fell” (*id.* at 51, 53). Infant plaintiff was enrolled in Sweet Home for three years prior to the accident. Plaintiff never had any issues with Sweet Home prior to the accident (*see id.* at 25). Plaintiff testified that she was never told that the staff takes the children to the park if the weather is nice (*see id.* at 29; *see also id.* at 33). She never received lists of the child’s scheduled activities at Sweet Home (*see id.* at 59).

Plaintiff testified that she would typically take infant plaintiff to Greenwood Playground and Prospect Park Playground. She would allow him to play on the monkey bars by holding him while he was climbing and playing (*see id.* at 34). He typically played with children around his age and was not permitted to play where the older children played (*see id.* at 36). There are no parallel bars at Greenwood Playground or Prospect Park Playground (*see id.* at 39-40).

#### ***Affidavit of Lisa Thorsen***

In support of their motion, defendants provided the affidavit and report of Lisa Thorsen, Ed.D, C.R.C., C.S.P.I, an associate at Robsen Forensics and a supervised care

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<sup>2</sup> This Court notes that counsel objected to this question at the deposition.

specialist in education, rehabilitation, and adult care settings (*see* NYSCEF Doc. # 97).

In her affidavit, Thorsen opines,

6. On the date of this accident, A.I. was 4 years, 11 months old. It was established by the testimony of A.I.'s supervisors, that he had successfully used this equipment four times that morning and had played on this play equipment during the previous school year.

7. Due to his experience in using the equipment and his observed upper body strength it was reasonable for the supervisors to allow him to use the parallel inclined bars independently.

8. It is my professional opinion that it was reasonable for Sweet Home Day Care to permit A.I. to independently use the incident play equipment while visiting DiGilio playground.

...

12. In conclusion, it is my professional opinion with a reasonable degree of certainty as a Supervised Care Specialist that defendant Sweet Home Day Care Center provided reasonable and active supervision and care to A.I. while at DiGilio playground. This included providing staff to child ratios appropriate to the location having visibility of his actions monitoring his behavior and providing supervisory proximity to his play.

13. For this reason, A.I.'s fall and subsequent injury was not caused by any improper actions on behalf of Sweet Home Day Care.

(*id.* at ¶¶ 7-9, 12-13).

Thorsen further opined that the ratio of staff to children, 2:7, greatly exceeded that required by § 47.23 of the New York City Health and Mental Hygiene Code, which requires a ratio of 1:12.

### *Affidavit of Carl J. Abraham*

In opposition, plaintiff provided an affidavit from Carl J. Abraham, professional engineer specializing in safety, safety engineering and design, who has “been qualified as a specialist in recreational and playground cases and related fields in many courts throughout the United States and Canada” (NYSCEF DOC. # 107 at ¶ 5).<sup>3</sup> Abraham opined that “[a]s a result of not having sufficient finger strength, arm strength, and mobility to navigate the activity, he fell to the rigid ground cover and received an angulated fracture of the left distal radial metaphysis” (*id.* at ¶ 15).

It is the opinion of the undersigned, with a reasonable degree of safety engineering and scientific certainty, that all of the elements relating to the negligence of the defendants are met including, but not limited to, gross negligence:

- a. In the subject case, the defendants owed a duty to [A.I.]. The defendants were required to act in a certain manner toward the plaintiff with reference to his safety and welfare while he participated at the Sweet Home Day Care Center facility. It is more likely than not that a reasonable person would find that a duty existed with reference to the specific set of circumstances that existed prior to and up to the time [A.I.] was injured. The ineptness of the untrained employees was obvious to the undersigned. The employees had no training to oversee or monitor the parallel bar activity.
- b. In the subject case, Sweet Home Day Care Center breached their responsibility and duty to the plaintiff by failing to exercise reasonable care in fulfilling their duty. The defendants, in the opinion of the undersigned, did not exercise reasonable care with reference to the safety and welfare of [A.I.] prior to up to the time he was traumatically and permanently injured. They hired inept, inexperienced, and

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<sup>3</sup> This Court notes that in all quotations cited herein from Abraham’s affidavit, the infant plaintiff’s first name is replaced with his initials “A.I.” pursuant to 22 NYCRR 202.5[e]).

uncertified employees to look after the safety and welfare of young children contrary to the standard in the industry.

c. In addition, Sweet Home Day Care Center's actions or the employee's inaction was the actual cause of [A.I.]'s injuries. But for Sweet Home Day Care Center's inaction and ineptness in the employees, the plaintiff's injuries would not have occurred.

d. The proximate cause of [A.I.]'s injuries related directly to the scope of the Defendants' responsibilities. Sweet Home Day Care Center knew, or should have known, that through their actions or inactions, that there was an inherent risk, known to Sweet Home Day Care Center, that if inept, inexperienced and uncertified assistant teachers that [A.I.] would be exposed to an enhanced risk and hidden danger that was known, or should have been known, to Sweet Home Day Care Center.

e. As a result of the elements of negligence described in A through D, the resulting damage and harm received by [A.I.], was due to the failure of Sweet Home Day Care Center to exercise reasonable care owed to [A.I.]. That negligence resulted in the traumatic injury to [A.I.] involving extreme pain.

34. In this specific case, it is the opinion of the undersigned, with a reasonable degree of safety engineering and scientific certainty, that Sweet Home Day Care Center was grossly negligent because there was a conscious and voluntary disregard of the need to use reasonable care. As a result of their gross negligence, it was foreseeable there would be grave injury or harm to [A.I.]. Their conduct was extreme in comparison to ordinary negligence, which is a mere failure to exercise reasonable care.

(*id.* at ¶¶ 33-34).

Abraham further opined "that the defendants were negligent in their hiring of inept, inexperienced, and uncertified individuals in lieu of experienced and certified teachers.

As a result of their negligence and gross negligence, they exposed [A.I.] to an activity that was known to be beyond his capability” (*id.* at ¶ 37).

### ***Procedural History***

Plaintiffs commenced this action for general negligence, negligent hiring and negligent supervision by filing a summons and complaint on December 8, 2016. Issue was joined by service of an answer on January 25, 2017. In their bill of particulars, plaintiffs allege that defendants were negligent in allowing infant plaintiff “unfettered access” to the play equipment, that the equipment was not “age appropriate”, that the day care did not provide enough employees to properly monitor the infants, and for violation of articles 45.13 and 47.23 of the New York City Health Code (NYC Health Code).

### ***Discussion***

#### ***Summary Judgment***

“[T]he 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 demonstrate absence of any material issues of fact” (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]).

Such a motion must be supported “by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions”. To make a prima facie showing, the moving party must “demonstrate its entitlement to summary judgment by submission of proof in admissible form”. Admissible evidence may include “affidavits by persons having knowledge of the facts [and] reciting the material facts”... “In determining a motion for summary

judgment, the court must view the evidence in the light most favorable to the nonmoving party”. “The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist”. Accordingly, “[t]he court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned”. “[W]here credibility determinations are required, summary judgment must be denied” [internal citations omitted].

(*Bank of N.Y. Mellon v. Gordon*, 171 A.D.3d 197, 97 N.Y.S.3d 286 [2 Dept., 2019]).

Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Fairlane Fin. Corp. v. Longspaugh*, 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra*; *see also Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]). “A motion for summary judgment ‘should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility’” (*Chimbo v. Bolivar*, 142 A.D.3d 944, 37 N.Y.S.3d 339 [2 Dept., 2016], quoting *Ruiz v. Griffin*, 71 A.D.3d 1112, 898 N.Y.S.2d 590 [2 Dept., 2010]).

### ***Negligent Supervision, Hiring & Retention***

“To recover damages pursuant to a cause of action based on negligent supervision, a plaintiff must establish that the defendant's supervision was inadequate, and that the negligent supervision was a proximate cause of the injured plaintiff's injuries” (*Gonzales v. Munchkinland Child Care, LLC*, 89 A.D.3d 987, 933 N.Y.S.2d 710 [2 Dept., 2011], citing *Bloomfield v. Jericho Union Free School Dist.*, 80 A.D.3d 637, 915 N.Y.S.2d 294 [2 Dept., 2011]). “The defendant, as a provider of day care services, was under a duty to adequately supervise the children in its charge and may be held liable for foreseeable injuries proximately related to the absence of adequate supervision” (*A.D.G. v. Children's Ark Daycare Ctr., Inc.*, -- A.D.3d --, 103 N.Y.S.3d 312 [2 Dept., 2019], citing *Mirand v. City of New York*, 84 N.Y.2d 44, 614 N.Y.S.2d 372 [1994]).

However, like a school, a day care/preschool provider is not an insurer of the children's safety... In general, the duty of a day care/preschool provider is to supervise the children in its care with the same degree of care as a parent of ordinary prudence would exercise in comparable circumstances.... 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 day care/preschool is warranted.

(*O'Hanlon v. Kids of Mount Sinai, LLC*, 170 A.D.3d 1187, 94 N.Y.S.3d 869 [2 Dept., 2019] [internal citations omitted]).

In the instant case, defendants met their burden and established that they supervised the infant plaintiff with the same degree of care as a reasonably prudent parent would in comparable circumstances. As stated above, there were two instructors supervising the 7-8 students at the playground. Further, the instructors testified that the

4-5 year old students, including infant plaintiff, had successfully utilized the parallel bars numerous times that morning and on prior occasions. The other children in the group, who were comparably aged, successfully traversed the parallel bars in the past. The instructors decided, based on this, that the students were old enough to use the equipment. There were no rules from the City or the daycare stating that the equipment was inappropriate for that age group. Accordingly, it was not foreseeable that the infant plaintiff would have been injured from use of the equipment. Defendants further provided the affidavit of Lisa Thorsen, who opined that it was reasonable for the supervisors to allow him to use the parallel inclined bars independently, due to his “observed upper body strength” and former experience utilizing that equipment.

In opposition, plaintiffs raised a triable issue of fact. As an initial matter, plaintiffs’ argument that it was not reasonable for the instructors to allow the students to use the parallel bars alone because plaintiff testified that she would have held her son while using the equipment is not compelling. Defendants are held to the standard of a reasonably prudent parent. This is not necessarily the standard of parenting set on a case-by-case basis. Rather, it looks at what is reasonable. As discussed above, the children’s solo use of the equipment appeared to be reasonable. Further, plaintiffs’ reliance on Grynyuk’s testimony that the instructors “should have held them as they were sliding down” is misplaced as they ignore the preceding question which counsel asked “[d]o you think you would have done anything differently?” (Grynyuk EBT at 85). Just as evidence of subsequent remedial measures is inadmissible in a negligence action (*see generally, Soto v. CBS Corporation*, 157 A.D.3d 740, 69 N.Y.S.3d 61 [2 Dept., 2018]),

the instructor's testimony of what she subsequently would have done to prevent the injury is not probative of whether her supervision was adequate at the time. "Since at the heart of such an action is either affirmative conduct in creating a dangerous condition or a failure to perceive a foreseeable risk and take reasonable steps to avert its consequences, proof that goes to hindsight rather than foresight most often is entirely irrelevant and, at best, of low probative value" (*Caprara v. Chrysler Corp.*, 52 N.Y.2d 114, 417 N.E.2d 545 [1981]).

However, plaintiff raised a triable issue of fact by providing the affidavit of Carl J. Abraham, who opined based on his over 45 years' experience in recreation and sports safety that infant plaintiff did not possess finger and arm strength and mobility sufficient to navigate the parallel bars. This contradicts the affidavit of Lisa Thorsen, submitted by defendants in support of their motion. As a result, a question of fact exists as to whether the parallel bars were age-appropriate for four to five year old children to utilize on their own. Based on the foregoing, there is also a question of fact as to whether the level of supervision given by defendants was the proximate cause of infant plaintiff's injuries. Accordingly, defendant's motion for summary judgment on the issue of negligent supervision is denied.

Defendants further moved for summary judgment on the issue of negligent hiring and retention. Defendants failed to meet their burden on this issue as they failed to present any evidence or arguments in support of this portion of their motion (*see* Affirmation in Support at ¶ 56). "On a summary judgment motion, a moving defendant does not meet its burden of affirmatively establishing its entitlement to summary

judgment by merely pointing to gaps in the plaintiff's case; rather, it must affirmatively demonstrate the merit of its defense" (*Vanderhurst v. Nobile*, 130 A.D.3d 716, 13 N.Y.S.3d 231 [2 Dept., 2015], citing *Collado v. Jiacono*, 126 A.D.3d 927, 6 N.Y.S.3d 116 [2 Dept., 2015]).

### *New York City Health Codes*

Plaintiffs alleged in their bill of particulars that defendants violated NYC Health Code §§ 47.23 and 45.13 (*see* NYSCEF Doc # 88 at ¶ 6). Defendants move herein for summary judgment alleging that they did not violate these NYC Health Code sections.

NYC Health Code § 47.23(f) provides,

(f) Minimum staff/child ratios. (1) The staff of a child care program for purposes of staff/child ratios shall include only the teaching staff. The minimum ratios of staff to children in a child care program shall be as follows:

| AGE OF CHILDREN    | MINIMUM STAFF/CHILD RATIO | MAXIMUM GROUP SIZE   |
|--------------------|---------------------------|--|
| under 12 months    | 1:4 or 1:3                | 8 per room/area separated from other rooms/areas by a physical barrier |
| 12 to 24 months    | 1:5                       | 10   |
| 2 years to under 3 | 1:6                       | 12   |
| 3 years to under 4 | 1:10                      | 15   |
| 4 years to under 5 | 1:12                      | 20   |
| 5 years to under 6 | 1:15                      | 25   |

NYC Health Code § 45.13(c) provides:

§45.13 Equipment and furnishings.

(c) In the indoor and outdoor play areas, sufficient play equipment shall be provided which is appropriate to the stage of development of the children and which is designed to foster physical and motor development. The equipment shall be easily accessible to the children, readily washable, clean, in good repair and free from hazards such as sharp or pointed parts, or toxic or poisonous finishes or materials.

In the instant case, defendants met their burden and established that they did not violate §47.23(f). Infant plaintiff was between the age of four to five and therefore required a ratio of one instructor per every 12 students (1:12), with a maximum of 20 students per group. Here, Grynyuk and Komarnytska testified that they worked together and were assigned to plaintiff's group of approximately 7-12 children, which is well within the ratio of 1:12 as required by § 47.23(f). On the date of the incident, both instructors accompanied 7-8 students to the park. In opposition, plaintiffs failed to set forth any arguments or raise a triable issue of fact with respect to these codes. Plaintiffs' arguments speak generally to NYC Health Code articles 47 and 43 but fail to specifically address §§ 47.23(f) and 45.13, the two codes included in the bill of particulars. Further, plaintiffs' expert is silent as to the alleged code violations.<sup>4</sup>

With respect to §45.13(c), defendants provided the affidavit of Lisa Thorsen, Ed.D, C.R.C., C.S.P.I, who opined that the instructors' decision to allow him to play on the parallel bars, based on his experience and prior success on this equipment and his "observed upper body strength" was reasonable. As discussed above, a question of fact

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<sup>4</sup> This Court further notes that plaintiff did not argue that her testimony that the class had 25 students and two instructors raised a question of fact as to classroom ratio.

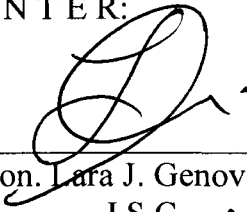
exists as to whether the infant-plaintiff's use of this equipment was age-appropriate. Accordingly, defendant's motion for summary judgment is granted as to NYC Health Code § 47.23(f) and denied as to § 45.13(c).

**Conclusion**

Accordingly, the defendants' motion for summary judgment is granted with respect to alleged violation of NYC Health Code § 47.23(f). The remainder of the motion is denied. Defendants failed to meet their burden and establish entitlement to summary judgment on the issue of negligent hiring and retention. Although defendants met their burden and established entitlement to summary judgment as to negligent supervision, plaintiffs raised a triable issue of fact as to whether the equipment was age-appropriate. For the same reason, defendant's motion is denied with respect to NYC Health Code § 45.13(c).

The foregoing constitutes the decision and order of this Court. Anything not decided herein is denied.

ENTER:

  
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Hon. Lara J. Genovesi  
J.S.C.

**Lara J. Genovesi**  
J.S.C.

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