SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 14

X

VICTORIA WESOLKO, an infant by her Mother and Natural Guardian, MEGAN WESOLKO, and MEEGAN WESOLKO, Individually,

Plaintiffs,

-against-

MERRICK UNION FREE SCHOOL DISTRICT and BIRCH ELEMENTARY SCHOOL,

Defendants.

X

Index No.: 010090/10
Motion Sequence...02
Motion Date...11/22/11
XXX

Papers Submitted:
Notice of Motion.....x
Affirmation in Opposition.....x
Reply Affirmation.....x

Upon the foregoing papers, the Defendants, MERRICK UNION FREE SCHOOL DISTRICT ("DISTRICT") and BIRCH ELEMENTARY SCHOOL's motion, pursuant to CPLR § 3212, seeking an order awarding them summary judgment and dismissing the complaint of the Plaintiffs, VICTORIA WESOLKO ("Victoria"), an infant by her Mother and Natural Guardian, MEGAN WESOLKO ("Megan"), and MEEGAN WESOLKO, Individually, is decided as hereinafter provided.

The Plaintiffs commenced this action seeking damages for personal injuries

allegedly sustained by the infant Plaintiff on September 30, 2009, while playing on monkey bars located in the playground area of the Birch Elementary School. Specifically, the injury occurred when the infant Plaintiff attempted to jump from the platform to the fourth monkey bar ring and missed. The Plaintiff duly served a Notice of Claim, dated November 18, 2009, prior to commencing this action by the service of a summons and complaint, dated May 20, 2010. Issue was joined by service of an Answer, dated June 11, 2010, on behalf of the Defendants.

According to the Plaintiffs' Bill of Particulars, the Defendants were allegedly negligent in that: the infant Plaintiff was at a height unsafe for her age and ability; there were no persons nearby supervising the activities; the Defendants were improperly trained and supervised; the Defendants were negligent in failing to supervise and failing to take proper safeguards. (*See* Plaintiffs' Bill of Particulars, dated October 19, 2010, ¶¶ 3-4) It is further alleged that the Defendants were on notice, both actual and constructive, of the defective condition of the property, to wit, the unsafe equipment. (*Id.* at ¶ 6) It is alleged in the Bill of Particulars that, as a result of the accident, the infant Plaintiff suffered a nasal fracture, deviated septum in both nasal cavities, fractured nasal bones with associated nasal dorsal displacement and possible future surgery.

The infant Plaintiff, Victoria, testified at a hearing pursuant to General Municipal Law, § 50-h on February 18, 2010. Victoria testified that Miss Price, an assistant teacher at Birch, had given her the rules about pushing and shoving on the playground. (*See*

50-h Transcript at pg. 7) She testified that the monitors at the monkey bars were two teachers, Miss Kravitz, Miss W. ("Miss Weiner"), and another assistant teacher. According to Victoria, Miss Price, Miss Godfrey, Miss Freeman and one other adult were on the other side of the playground. (*See* 50-h Transcript, pg. 9)

Victoria testified that she had played on the monkey bars at the playground of the Birch Elementary School everyday prior to the date of the accident. (*Id.* at pgs. 10-11) At the time of the accident, she was standing on one of two platforms near the monkey bars. (*Id.*) She stated that her friend, Gina, jumped to the fourth monkey bar from the platform and made it. (*Id.*) She further stated that, next, she attempted to jump to the fourth monkey bar. (*Id.*) Victoria stated that she missed the fourth monkey bar, with her finger only touching it, and her nose hit the platform. (*Id.* at 11, 17) According to Victoria, that was the first time she attempted to jump to the fourth monkey bar from the platform. Prior to the date of the accident, she had made it to the third monkey bar from the platform without falling. (*Id.* at 11) According to Victoria, about one week after school started in September, Miss Weiner saw her jump to the third monkey bar from the platform and did not say anything. (*Id.* at 20)

The infant Plaintiff also testified at an Examination Before Trial on April 12, 2011, wherein she testified that immediately after she fell from the platform of the monkey bars, her friends went to get Miss Weiner who was turned around at the time Victoria fell. (*See* EBT Transcript, pg. 23)

Miss Weiner testified at an Examination Before Trial on April 12, 2011, on

behalf of the Defendants. As adduced from her deposition transcript, Miss Weiner was in charge of the playground area on the date of the accident. She testified that each teaching assistant was responsible for a different area of the playground. (*See* Weiner EBT Transcript, pg. 8) There were four third grade classes and four fourth grade classes with approximately 20 students per class during recess. (*Id.* at 11) Miss Weiner testified that there was one teaching assistant for each class and there were about three or four one-on-one aides. The one-on-one aides were responsible for watching one student but they would also watch the other students as well. (*Id.* at 12)

On the day of the accident, Miss Weiner testified that she was near the playground where the monkey bars were located. She further testified that she witnessed the accident. At the time she witnessed the accident, Miss Cravitz was with her. (*Id.* at 26) Prior to the accident, Miss Weiner observed the students using the monkey bars. She testified that sometimes they would lean out and get the second ring or they were allowed to jump to the third ring of the monkey bars. (*Id.* at 29) Prior to the accident, Miss Weiner had observed students jump to the third ring of the monkey bars from the platform and she never voiced any objection to it. (*Id.* at 30) Miss Weiner did not hear any other teacher's assistants voice any objections to students jumping to the third ring of the monkey bars. (*Id.*) Miss Weiner testified that she neither made any complaints nor heard of any complaints being made regarding the monkey bars. She also never witnessed any other accidents on the monkey bars. (*Id.* at 34)

In support of the motion for summary judgment, the Defendants submitted the expert Affidavit of Margaret A. Payne, a Certified Public Playground Safety Inspector, co-owner of Peggy Payne & Associates, Inc., Total Recreation Management Services and Playground Medic, a business specializing in playground safety. (*See* Payne Affidavit, sworn to on September 15, 2011, attached to the Defendants' Notice of Motion as Exhibit "M") Ms. Payne states that, according to the American Society for Testing and Materials (ASTM), the height of the monkey bars was compliant with the standards set forth therein. Ms. Payne further testified that the surface under the monkey bars was likewise compliant with applicable ASTM standards. (*Id.*) According to Ms. Payne, the ratio of students to teacher's assistants was within the recommendations of the National Program for Playground Safety. (*Id.*) Ms. Payne opined that, based on her professional opinion, education, experience, a review of the materials and a site visit, "there was no negligence on the part of the Merrick UFSD in the equipment at the Birch Elementary School in connection with the claim of VICTORIA WESOLKO for the incident on September 30, 2009". (*Id.*)

Based on the foregoing, the Defendants contend that they are entitled to summary judgment as a matter of law as there was no evidence of defective equipment on the playground and no evidence of improper supervision of the infant Plaintiff. In support of this conclusion, the Defendants analogize the facts of the instant case with *Reardon v. Carle Place UFSD*, 27 A.D.3d 635 (2d Dept. 2006). In *Reardon*, the parents of an 11–year–old student, who was allegedly injured on the school playground when he jumped

off a swing in midair, sued the school district, alleging that the accident was proximately caused by the negligent supervision on the part of the school monitors assigned to the playground area. The Supreme Court, Appellate Division, held that any lack of supervision of the school playground by school monitors was not a proximate cause of student's injuries.

In opposition to the motion for summary judgment, the Plaintiffs' counsel states that Miss Weiner had previously observed students, including Victoria, jump from the platform to the third monkey bar and failed to say anything to the students. The Plaintiffs' counsel states that this behavior had already resulted in a student falling and hurting themselves, citing to Victoria's Examination Before Trial pages 30-31. Based on the aforementioned testimony, the Plaintiffs' counsel avers that the proximate cause of the injury was the Defendants' lack of supervision. Counsel further states that this was not an instantaneous incident and that any reasonable parent could have foreseen the teacher's inaction, or lack of supervision, leading toward the infant Plaintiff's injury.

Schools have a duty to adequately supervise the students in their charge and are subject to liability for foreseeable injuries proximately related to the absence of adequate supervision. *Mirand v. City of New York*, 84 N.Y.2d 44 (1994). To prevail under a theory of negligent supervision, the Plaintiff must show that the injury was foreseeable and proximately caused by the school district's negligence. The test for causation is whether under all the circumstances, the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the school's negligence.

Mirand, 84 N.Y.2d at 50. These issues, the adequacy of supervision and proximate cause, are generally factual questions for the trier of fact.

"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 a proximate cause of the injury" *Convey v. City of Rye School Dist.*, 271 A.D.2d 154, 160 (2d Dept. 2000); *see Siegell v. Herricks Union Free School Dist.*, 7 A.D.3d 607 (2d Dept. 2004); *Tanon v. Eppler*, 5 A.D.3d 667, 668 (2d Dept. 2004).

Summary judgment must be granted if the proponent makes "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," and the opponent fails to rebut that showing. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986).

In the case at bar, the Defendants established their prima facie entitlement to judgment as a matter of law by showing that the accident occurred suddenly and without warning, and could not have been prevented by any reasonable degree of supervision. *See Cerrato v. Carapella*, 22 A.D.3d 701 (2d Dept. 2005); *Berdecia v. City of New York*, 289 A.D.2d 354 (2d Dept. 2001). The Defendants also met their burden with respect to the Plaintiffs' claim that the equipment located at the Birch Elementary School playground was defective. Specifically, the Defendants proffered sufficient evidence that the height of the monkey bars and the floor covering of the playground area were within the standards set forth in the ASTM. Further, sufficient evidence was presented that the student to teacher

ratio was within the recommendations of the National Program for Playground Safety. Moreover, Miss Weiner, the assistant teacher on duty at the time of the accident, stated that she was nearby with a total of eight monitors at the recess on September 30, 2009.

In opposition, the Plaintiffs failed to raise an issue of fact. Preliminarily, the Plaintiff failed to rebut the defective condition argument and failed to rebut, in any way, the expert Affidavit submitted by the Defendants. Further, the statement made by the Plaintiffs' counsel that a student was previously injured on the monkey bars was a mis-characterization of the infant Plaintiff's testimony. As such, the Plaintiffs failed to show that the infant Plaintiff's injuries were foreseeable and proximately caused by the District's negligence.

The test for causation is satisfied where, under all the circumstances, the chain of events that followed the negligent act or omission was normal or a foreseeable consequence of the situation created by the school's negligence. Here, as in *Reardon*, any lack of supervision of the students on the playground by the school monitors was not a proximate cause of injuries allegedly sustained by the infant Plaintiff who jumped from the platform to the fourth monkey bar ring. Even if the student had successfully jumped off from the platform to the third monkey bar ring prior to the accident, the evidence, including the testimony of the Miss Weiner who was nearby, showed that the accident occurred in so short of a span of time that even the most intense supervision could not have prevented it. *Reardon v. Carle Place UFSD*, *supra*, 27 A.D.3d 635 (2d Dept. 2006).

Accordingly, it is hereby

ORDERED, that the Defendants' motion for summary judgment, pursuant to CPLR § 3212, is **GRANTED**.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
February 2, 2012

Hon. Randy Sue Marber, J.S.C.
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ENTERED
FEB 06 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE