SHORT FORM ORDER

INDEX No. 10-4037
CAL. No. 11-01988OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 12-12-11
ADJ. DATE 3-27-12
Mot. Seq. # 001 - MG; CASEDISP

THAI BINH PELLICCI, an infant under the age of fourteen (14) years by his mother and natural guardian, SALLY ANN PELLICCI, and SALLY ANN PELLICCI, Individually,

Plaintiffs,

- against -

SMART START, INC.,

Defendant.

SURIS & ASSOCIATES, P.C.
Attorney for Plaintiffs
999 Walt Whitman, Suite 201
Melville, New York 11747

SOBEL & SCHLEIER, L.L.C.
Attorney for Defendant
464 New York Avenue, Suite 100
Huntington, New York 11743

Upon the following papers numbered 1 to 26 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 - 24 ; Replying Affidavits and supporting papers 25 - 26 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant for summary judgment dismissing the complaint is granted.

In this action, the plaintiffs seek to recover damages for personal injuries which were purportedly sustained by the infant plaintiff on January 10, 2008, at approximately two years of age, while he was at the defendant's daycare facility. In the complaint, the plaintiffs allege that the infant plaintiff was caused to sustain severe personal injuries, while he was under the care and supervision of the defendant's daycare program, when he fell from an oversized slide that was present in the outside playground of the facility. The complaint alleges that these injuries resulted from the defendant's negligent ownership, operation, management, control and supervision of the daycare facility and program in which the infant plaintiff was enrolled. Specifically, by way of the complaint and bill of particulars, the plaintiffs allege that the defendant was negligent in, *inter alia*, supervising the infant plaintiff; allowing the infant plaintiff to participate in activities which were beyond his skill level; failing to hire efficient and sufficient personnel in connection

with the supervision of the daycare program; failing to train its employees to enable them to control children on the playground; failing to properly and adequately supervise the activities engaged in at the daycare facility; failing to promulgate proper and adequate rules and regulations governing proper supervision; failing to properly and adequately monitor the activities in which the infant plaintiff was involved; failing to prevent and/or stop inappropriate activity; failing to ensure that the daycare provided those in its charge, and utilizing its facilities, with a safe and proper environment; and failing to take minimal safety precautions to have prevented the infant plaintiff's injuries.

The defendant now moves for summary judgment dismissing the complaint. The defendant contends that it is entitled to summary judgment because there was adequate supervision at the time of the incident and, in any event, the infant plaintiff's accident occurred in such a manner that it could not reasonably have been prevented by closer monitoring. The defendant further argues that summary judgment is appropriate where the plaintiffs' cannot establish the cause of the accident or that a dangerous or defective condition was such cause.

The 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 the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Center***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Center***, *supra*). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment 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* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In support of the motion, the defendant submits, *inter alia*, the deposition testimony of the infant plaintiff's mother Sally Ann Pellicci, the deposition testimony of Lisa Stewart on behalf of the defendant, and the deposition testimony of Danielle Burnett on behalf of the defendant. As is relevant to this motion, the infant plaintiff's mother testified that, at the time of the accident, the infant plaintiff had been attending the defendant's daycare facility for approximately one and a half years, since he was 6 months old. She generally dropped him off and picked him up. She never toured the playground area of the facility, but observed it from the parking lot where she parked her car. Although she did not recall the exact set up of the playground, she believed that it contained slides and typical playground toys. It appeared to her that the playground was divided into two sections, one for older children with a larger slide and one for smaller children with a smaller slide. On at least ten occasions when she picked up the infant plaintiff, he appeared to be on the side of the playground for older children. She admitted that she never observed the infant plaintiff on any of the playground equipment. The infant plaintiff's mother testified that she first became aware of the infant plaintiff's injury, when one of his teachers called her and said there was an incident and that it appeared the infant plaintiff had dislocated his shoulder. The teacher told her that she believed the incident may have occurred when the infant plaintiff fell off the larger slide. The infant plaintiff's mother testified that she was not aware of any prior complaints regarding the subject slide or of any prior accidents at that location. She admitted that she had no personal knowledge of how the infant plaintiff's injury occurred.

Lisa Stewart, the owner and director of the defendant daycare facility, testified that the defendant daycare facility cared for children that were 6 months of age to 2.9 years of age. At the time of the incident, there were 36 infants and toddlers enrolled in the daycare program with a maximum of 26 children present on any given day. There were four separate classes, which were divided by the children's age and development. The ratio of children to caretakers, as required by the State, depended on the age group of the children. The ratio for children 18 months to 36 months was 5 children per 1 adult caretaker. There were 8 other children in the infant plaintiff's class and there were two adult caretakers, a teacher and an assistant teacher. At approximately 3:30 p.m., shortly prior to the purported incident, the infant plaintiff's class and another class went outside to play on the playground. There were two or three small "Little Tyke" slides present on the defendant's playground. No equipment was ever purchased for the playground for children over the age of 2.9 years. There were approximately 8 children on the playground total because several children had been picked up throughout the day. The teacher and assistant teacher from each class were also on the playground for a total of 4 adults. Stewart testified that it is the defendant's policy that all adults present on the playground were responsible for all of the children on the playground. According to Stewart, a "four point system" was utilized when the children were playing on the playground. Pursuant to this system, an adult would stand at each of the four corners around where the children were playing. This helps the caretakers to cross sight between each other and best oversee the children. This system, which was learned in safety classes, was taught to the defendant's new caretakers and was discussed at every meeting. Stewart testified that she first learned of the infant plaintiff's injury when Burnett, the teacher's assistant assigned to the infant plaintiff's class, called her. Burnett told her that when she last observed the infant plaintiff he was going up and down the slide and seemed fine. She next looked in the direction of the infant plaintiff because she heard another teacher on the playground telling him not to roll around on the ground in the bark chips. Neither Burnett nor the other teacher ever indicated to Stewart that the infant plaintiff was injured on the slide. Burnett told Stewart that when she heard the infant plaintiff whimper she brought him inside, and when she took off his coat she realized something was wrong and that he was not moving his arm well. Stewart admitted that she was aware that the plaintiff would sometimes walk with his head turned and without looking where he was going. She did not recall if she told her employees to take additional measures or extra precautions because of this tendency.

Danielle Burnett testified that she was employed by the defendant daycare at the time of the incident as a teacher and assistant teacher, and that the infant plaintiff was in her assigned class. Burnett's duties as a teacher and assistant teacher for the daycare facility included taking care of the children, making sure the children were safe, and teaching and feeding the children. Burnett testified that daycare teachers have to take a certain number of courses each year to obtain a certain number of credits on certain matters including nutrition and playground safety. Burnett testified that there were 6 children in the infant plaintiff's class at the beginning of each day including the infant plaintiff, and that this number would decrease throughout the day. A teacher and an assistant teacher were assigned to the class. According to Burnett, the State requirements dictated that there be 1 adult present for every 5 students in her class. At the time of the incident, approximately 4 p.m., there were 5 children remaining in the infant plaintiff's class. The infant plaintiff's two year old class and the three year old class were out in the playground. There were four adults on the playground, including herself, two teachers and two assistant teachers. The four point system was in effect while they were on the playground. This system was where each adult would stand in the four corners around where the children were playing and would watch the children from different angles. Burnett testified that Stewart trained her to monitor the students with the four point system when she first

commenced employment with the defendant daycare. Burnett testified that she had been attending to another crying child for approximately four minutes when the infant plaintiff approached her whimpering and covered in wood chips. She asked the other teacher assigned to the class what happened, and was told that he was rolling around in the wood chips. Burnett did not see anything wrong with the infant plaintiff at that time, dusted him off, and the infant plaintiff, who appeared to be normal, went back to play. Burnett kept the infant plaintiff, and every child on the playground, under constant observation. She was not "absolutely studying" the infant plaintiff because he was not crying. She testified that after going back to play, the infant plaintiff continued to play for a couple of minutes before he came back to her whimpering. Burnett decided to go inside at that time to further assess the situation. After taking the infant plaintiff's coat off inside, she observed that his arm appeared to be limp and called her supervisor to tell her he was hurt. When her supervisor asked her how the infant plaintiff hurt himself she stated that she did not see how he had hurt himself. Burnett testified that she did not observe how the infant plaintiff was injured and, to her knowledge, neither did any of the other adults on the playground. Burnett testified that the subject playground has several slides attached to climbers and that several minutes prior to the time the infant plaintiff first came over to her she had observed him playing on the slide. Thus, although she did not witness how the infant plaintiff was injured, she assumed that it was playing on the slide. Burnett admitted that she had witnessed the infant plaintiff's tendency all of the time to turn his head as he was moving and to not look where he was going. She did not think that this was normal behavior, but she did not take any additional measures in observing him because of it.

The evidence submitted demonstrates the defendant's prima facie entitlement to summary judgment dismissing the complaint. The evidence submitted demonstrates that the plaintiffs' cannot identify a defective or dangerous condition on the playground that caused the infant plaintiff's injury (*see* ***Daefler v Briarcliff Manor Union Free School Dist.***, 72 AD3d 872, 898 NYS2d 263 [2d Dept 2010]; ***Miller v Kings Park Cent. School Dist.***, 54 AD3d 314, 863 NYS2d 232 [2d Dept 2008]). Indeed, the evidence submitted establishes that the plaintiffs' cannot identify the cause of the infant plaintiff's injury. A plaintiffs' inability to identify the cause of a fall is fatal to the action, since, in that instance, the trier of fact would be required to base a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries upon nothing more than speculation (*see* ***Bernardo v 444 Route 111, LLC***, 83 AD3d 753, 921 NYS2d 274 [2d Dept 2011]; ***Louman v Town of Greenburgh***, 67 NY2d 836, 916, 876 NYS2d 112 [2d Dept 2009]; *see e.g.* ***Spagnola v Staten Is. Hosp.***, *supra*; ***Kwitny v Westchester Towers Owners Corp.***, 47 AD3d 495, 850 NYS2d 68 [1st Dept 2008]).

The evidence submitted also demonstrates the defendant's prima facie entitlement to summary judgment dismissing the plaintiff's claim to recover damages for inadequate supervision. Daycare programs have a duty to adequately supervise children in their charge, and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (*see* ***Lowe v Meacham Child Care & Learning Ctr.***, 74 AD3d 1029, 904 NYS2d 463 [2d Dept 2010]; ***Shaw v Metro Missions, Inc.***, 47 AD3d 802, 850 NYS2d 518 [2d Dept 2008]; *see also* ***Mirand v City of New York***, 84 NY2d 44, 614 NYS2d 372 [1994]; ***Harris v Five Point Mission Camp Olmstedt***, 73 AD3d 1127, 901 NYS2d 678 [2d Dept 2010]; ***Troiani v White Plains City Sch. Dist.***, 64 AD3d 701, 882 NYS2d 519 [2d Dept 2009]; ***Guzman v New York City Dept. of Educ.***, 49 AD3d 601, 852 NYS2d 789 [2008]; ***Swan v Town of Brookhaven***, 32 AD3d 1012, 821 NYS2d 265 [2006]; ***Shoemaker v Whitney Point Cent. Sch. Dist.***, 299 AD2d 719, 750 NYS2d 355 [2002]; ***Walsh v City Sch. Dist.***, 237 AD2d 811, 654 NYS2d 859 [1997]). However, like schools, daycare programs

are not insurers of the children's safety, as they cannot reasonably be expected to continuously supervise and control all of their movements and activities (*see* ***Lowe v Meacham Child Care & Learning Ctr.***, *supra*; ***Harris v Five Point Mission Camp Olmstedt***, *supra*; ***Troiani v White Plains City Sch. Dist.***, *supra*). Rather, they are obligated to exercise such care of their students "as a parent of ordinary prudence would observe in comparable circumstances" (***Mirand v City of New York***, *supra* at 49; ***Swan v Town of Brookhaven***, *supra*). Moreover, even if an issue of fact exists as to negligent supervision, liability does not lie absent a showing that such negligence proximately caused the injuries sustained (*see* ***Harris v Five Point Mission Camp Olmstedt***, *supra*). 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 defendant school is warranted (***Lowe v Meacham Child Care & Learning Ctr.***, *supra*; ***Harris v Five Point Mission Camp Olmstedt***, *supra*; ***Swan v Town of Brookhaven***, *supra*).

Here, the defendant demonstrated by admissible proof that it provided adequate playground supervision and that, in any event, the level of supervision was not a proximate cause of the infant plaintiff's purported fall from the slide as such purported accident could not reasonably have been prevented by closer monitoring of the playground (*see* ***Benavides v Uniondale Union Free School Dist.***, __AD3d__ [2d Dept May 1, 2012]; ***Lowe v Meacham Child Care & Learning Ctr.***, *supra*; ***Conte v Minnesauke Elementary School***, 56 AD3d 511, 866 NYS2d 872 [2d Dept 2008]; ***Swan v Town of Brookhaven***, *supra*; ***Botti v Seaford Harbor Elementary School Dist. 6***, 24 AD3d 486, 808 NYS2d 236 [2d Dept 2005]; ***Biondolillo v City of New York***, 13 AD3d 568, 786 NYS2d 323 [2d Dept 2004]; *compare* ***Commisso v Greenleaf***, 82 AD3d 1684, 919 NYS2d 682 [4th Dept 2011]; ***Doxtader v Middle Country Cent. School Dist. at Centereach***, 81 AD3d 685, 916 NYS2d 215 [2d Dept 2011]; ***Oliverio v Lawrence Pub. Schools***, 23 AD3d 633, 805 NYS2d 638 [2d Dept 2005]; ***Douglas v John Hus Moravian Church of Brooklyn, Inc.***, 8 AD3d 327, 778 NYS2d 77 [2d Dept 2004]; ***Kandkhorov v Pinkhasov***, 302 AD2d 432, 756 NYS2d 65 [2d Dept 2003]). The defendant's purported awareness of the infant plaintiff's tendency to not look where he was walking does not support a different finding (*cf.* ***Benson v Union Free School Dist. #23***, 37 AD3d 748, 830 NYS2d 757 [2d Dept 2007]).

In opposition to the motion, the plaintiffs submit, *inter alia*, the deposition testimony of Sally Ann Pellicci, the deposition testimony of Lisa Stewart, the deposition testimony of Danielle Burnett, the deposition testimony of the infant plaintiff, and the affidavits of Sally Ann Pellicci and Robert Pellicci. This evidence was insufficient to raise a triable issue of fact as to the defendant's liability for the infant plaintiff's injury. Assuming, *arguendo*, that the evidence submitted, including the infant plaintiff's deposition testimony, is sufficient to raise a triable issue of fact as to whether he was injured when he fell from the slide on the playground, it was nonetheless insufficient to raise a triable issue of fact as to the defendant's liability for the accident. In this regard, the evidence submitted fails to demonstrate a defective or dangerous condition associated with the infant plaintiff's use of the slide, that the supervision he was provided on the playground was inadequate or that such inadequate supervision was a proximate cause of his injuries (*cf.* ***Botti v Seaford Harbor Elementary School Dist. 6***, *supra*; *see generally* ***Benavides v Uniondale Union Free School Dist.***, *supra*). Contrary to the plaintiffs' contention, the affidavits of Sally Ann Pellicci and Robert Pellicci were insufficient for this purpose (*see generally* ***Mallen v Farmingdale Lanes, LLC***, 89 AD3d 996, 933 NYS2d 338 [2d Dept 2011]; ***New York Trenchless, Inc. v Hallen Constr. Co., Inc.***, 82 AD3d 850, 918 NYS2d 540 [2d Dept 2011]; ***Arslan v Richmond N. Bellmore Realty, LLC***, 79 AD3d 950,

913 NYS2d 328 [2d Dept 2010]).

Accordingly, the motion by the defendant for summary judgment dismissing the complaint is granted.

Dated: June 29, 2012
Central Islip, NY

HON. HECTOR D. LASALLE, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION