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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JAMES P. McCORMACK,
Acting Supreme Court Justice

JILLIAN WEINCLAW, AN INFANT UNDER THE AGE OF 18 YEARS OLD BY HER MOTHER AND NATURAL GUARDIAN, JACQUELINE KNELL, Plaintiff, -against- EAST ROCKAWAY SCHOOL DISTRICT AND INC. VILLAGE OF EAST ROCKAWAY, Defendants.	TRIAL/IAS, PART 43 NASSAU COUNTY INDEX NO.: 008249/10 MOTION SUBMISSION DATE: 5/11/12 MOTION SEQUENCE NO. 2

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Affirmation in Opposition and Exhibit	X
Reply Affirmation	X

Defendant, East Rockaway School District, moves pursuant to CPLR §3212, for an order granting summary judgment in favor of defendant and dismissing plaintiff's complaint, alleging that the District is not responsible for the injuries because the condition was open and obvious and not inherently dangerous; the proximate cause of the plaintiff's injury was her decision to jump over the bar; there is no evidence that a hazardous or dangerous condition existed and that the district had notice of it; and that the district was not negligent in its supervision.

During lunch time recess on September 22, 2009, third-grade student plaintiff, Jillian Weinclaw, is alleged to have sustained serious physical injuries when she fell

while jumping over a broken bench on the playground at the Rhame Avenue Elementary School ("School"), which is located within the defendant East Rockaway School District ("District").

Prior to the commencement of the suit the plaintiff's served a timely notice of claim upon the District which was sworn on September 25, 2009. On April 28, 2010, plaintiffs commenced the instant action against the District. The issued was joined when the District filed an answer on June 1, 2010. Having completed discovery, plaintiffs filed their note of issue and certificate of readiness on November 16, 2011 and November 18, 2011.

In a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he is entitled to summary judgment as a matter of law, by submitting sufficient evidence to demonstrate the absence of a material issue of fact *(see Sillman v. Twentieth Century Fox Film Corp.,* 3 NY2D 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.,* 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Alvarez V. Prospect Hospital,* 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center,* 64 NY2d 851 [1985]). 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 Zuckerman,* 49 NY2d 557 [1980]). The primary purpose of a summary judgment motion is issue finding not issue

determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 [1st Dept. 1992], and it should only be granted when there are no triable issues of fact (*see Andre v. Pomeroy*, 35 NY2d 361 [1974]).

Within the context of a summary judgment motion that seeks dismissal of a personal injury action the court must give the plaintiff the benefit of every favorable inference which can reasonably be drawn from the evidence (*see Anderson v. Bee Line*, 1 N Y 2d 169 [1956]).

"A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk" (*Giulini v. Union free School Dist. # 1*, 70 AD3d 632 [2d Dept. 2010]; *Basso v Miller*, 40 NY2d 233, 241 [1976]). In order to recover damages for injuries caused by the failure of a landowner to maintain its property in a reasonably safe condition, a plaintiff must establish that the landowner created or had actual or constructive notice of any hazardous condition which caused the injury claimed by that party (*see Giulini v. Union free School Dist. # 1*, 70 AD3d 632 [2d Dept. 2010]; *Williams v Long Is. R.R.*, 29 AD3d 900 [2d Dept. 2006]; *DeGruccio v 863 Jericho Turnpike Corp.*, 1 AD3d 472 [2003]; *Castellitto v Atlantic & Pac. Co.*, 244 AD2d 379, 380 [2d Dept. 1997]). In order to establish constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the owner or its employees to discover and remedy it (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Where evidence exists that a dangerous condition is present on the property, the burden is on the landowner to demonstrate that he or she exercised reasonable care under the circumstances to remedy the condition and to make the property safe, based on such factors as the likelihood of injury to those entering the property and the burden of avoiding the risk. Evidence that the dangerous condition was open and obvious cannot relieve the landowner of this burden. The fact that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence (*see Cupo v. Karfunkel*, 1 AD3d 48 [2d Dept. 2003]).

The law recognizes that "a landowner or lessee has a duty to exercise reasonable care in order to maintain its property in a safe condition." (Barth v. City of New York, 307 A.D.2d 943 [2d Dept 2003]). However, an exception to the landowner's duty arises when an occurrence is "so exceptional in nature that it does not suggest itself to a reasonably prudent person as one which should be guarded against'." (*Elardo v. Town of Oyster Bay*, 176 A.D.2d 912 [2d Dept 1991] quoting *Fellis v. Old Oaks Country Club*, 163 A.D.2d 509 [2d Dept. 1999], quoting *Silver v. Sheraton–Smithtown Inn*, 121 A.D.2d 711 [2d Dept. 1986]).

In this particular case, the District owed a duty to keep the playground in a reasonably safe condition. This duty included "consideration of the known propensities of children to climb about and play" (*Lynch v. Sports Leisure & Entertainment RPG,* 71 AD3d 641 [2d Dept. 2010]; *Cappel v Board of Educ., Union Free School Dist. No. 4, Northport, 40* AD2d 848, 848 [2d Dept. 1972]; *see also Collentine v City of New York*,

279 NY 119, 125 [1938]).

Here, triable issues of fact exist as to whether the District, in allowing the broken bench to remain in the playground, knowing the children frequently made a game of jumping it, discharged this duty. The infant plaintiff testified regarding the apparent frequency with which many of the second, third, fourth and fifth grade students were jumping this exposed pipe, without an authority figure telling them to stop or closing off the hazard to prevent them from gaining access. This creates the impression that this is not the type of activity "so exceptional in nature that it does not suggest itself to a reasonably prudent person as one which should be guarded against" (*see Elardo v. Town of Oyster Bay*, 176 A.D.2d 912 [2d Dept 1991] quoting *Fellis v. Old Oaks Country Club, 163 A.D.2d 509* [2d Dept. 1999], quoting *Silver v. Sheraton–Smithtown Inn*, 121 A.D.2d 711 [2d Dept. 1986]).

Here, the defendant District failed to satisfy its *prima facie* burden of establishing its entitlement to judgment as a matter of law on the issues of notice and creation of the alleged defect and, thus, on the issue of whether it maintained the subject playground in reasonably safe condition (*see Gray v South Colonie Cent. School Dist.*, 64 AD3d 1125, 1126-1127 [3d Dept. 2009]; *Padden v County of Suffolk*, 52 AD3d 663, 664 [2d Dept. 2008]; *Banks v Freeport Union Free School Dist.*, 302 AD2d 341 [2d Dept. 2003]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Schools 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 Gonzales v Munchkinland,* 89 AD3d 987 [2d Dept. 2011]; *Luciano v*

Our Lady of Sorrows School, 79 AD3d 705 [2d Dept. 2010]). "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 . . . defendants is warranted" (*Convey v City of Rye School Dist.*, 271 AD2d 154, 160 [2d Dept. 2000]; *see 730 Luciano v Our Lady of Sorrows School,* 79 AD3d 705 [2d Dept. 2010]).

"While schools are not insurers of their students' safety since they cannot reasonably be expected to continuously supervise and control all of their movements and activities (see *Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *Hernandez v Christopher Robin Academy*, 276 AD2d 592 [2d Dept. 2000]), they have a duty to provide supervision to ensure the safety of those students in their charge, and are liable for foreseeable injuries proximately caused by the absence of adequate supervision" (*Kandkhorov v Pinkhasov*, 302 AD2d 432, 433 [2d Dept. 2003]; *Capotosto v Roman Catholic Diocese of Rockville Ctr.*, 2 AD3d 384 [2d Dept. 2003]).

Here, the District failed to establish, as a matter of law, that the infant plaintiff was adequately supervised at the time of the accident or that the incident occurred in such a short span of time that it could not have been prevented by the most intense supervision (*see Luciano v Our Lady of Sorrows School*, 79 AD3d 705 [2d Dept. 2010]; *Convey v City of Rye School Dist.*, 271 AD2d 154, 160 [2d Dept. 2000]).

According to the testimony of the third grade plaintiff, she contends that she was injured when she attempted to jump over the exposed metal bar attached to the chairs at the playground and that a chair had been missing, and the bar exposed, since she

was in the second grade. She recalled that she and her friends used to play on the playground and jump or walk over the exposed metal bar. The child stated that she was never told by a lunch monitor that the bench was dangerous or that she should not play on or near it. In fact, she had seen many other kids in the second, third, fourth and fifth grades jumping the bar during recess and she had never heard of anyone being told not to do such things. She also testified that there were at least four lunch monitors present on the playground each day.

The District, designated Jorge Salazar as their witness with knowledge of the facts surrounding this accident. Mr. Salazar has been employed by the District for eight years as a maintenance worker. He identified the gap between the chairs with the exposed metal pipe and recognized the particular place on the playground where this bank of chairs is located. He knew the chair was missing and the pipe was exposed, but he did not know how long it was in that condition. Mr. Salazar was not present at the time of the accident, nor was he responsible for monitoring the children on the playground.

The defendant failed to make a *prima facie* showing of entitlement to judgment as a matter of law by establishing that it provided adequate supervision (*see Navarra v Lynbrook Pub. Schools, Lynbrook Union Free School Dist.*, 289 AD2d 211 [2d Dept. 2001]), and that the level of supervision was not a proximate cause of the infant plaintiff's accident (*see Davidson v Sachem Cent. School Dist.*, 300 AD2d 276 [2d Dept. 2002]; *Lopez v Freeport Union Free School Dist.*, 288 AD2d 355, 356 [2d Dept. 2001]; *Ascher v Scarsdale School Dist.*, 267 AD2d 339 [2d Dept.1999]). As such, a triable

issue of fact as to the adequacy of the supervision, whether inadequate supervision was a proximate cause of the infant plaintiff's injuries and whether closer supervision would have prevented the accident *(see Douglas v. John Hus Moravian Church of Brooklyn, Inc.*, 8 AD3d 321 [2d Dept. 2004])

The testimony suggests that the defendants should have been aware that the children engaged in this behavior of jumping this broken bench on the playground for approximately a year. Here the broken bench may be considered some type of attractive nuisance, factors which must be considered in analyzing whether the District maintained its property in a safe condition for hundreds of children to play every day and whether they properly monitored the children to prevent them from jumping over this obstacle that was not part of the regulation playground equipment.

Defendant argues the proximate cause of the third grade plaintiff's injury was her decision to jump over the bar. This argument amounts to a comparative negligence argument and such a contention is always an issue of fact for the jury. The issue of whether the infant plaintiff's own conduct, in failing to avoid an open and obvious defect, is a matter for jury resolution (*Adsmond v. City of Poughkeepsie*, 283 A.D.2d 598, 599 [2d Dept 2001].)

Inasmuch as defendant failed to establish its *prima facie* entitlement to judgment as a matter of law, it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact (*see Pfeiffer v. New York Cent. Mut. Fire Ins. Co.*, 71 A.D.3d 971[2d Dept 2010]; *McKenzie v Redl,* 47 AD3d 775 [2d Dept. 2008]).

Here the defendant has failed to demonstrate that the condition complained of was open and obvious and not inherently dangerous and that there was adequate supervision, as such triable issues of fact remain.

Accordingly, defendant's motion for summary judgment is DENIED.

This constitutes the Decision and Order of the Court.

Dated: July 19, 2011

JAMES P. McCORMACK, A.J.S.C.