Rodriguez v Sachem Cent. Sch. Dist.
2017 NY Slip Op 30189(U)
January 31, 2017
Supreme Court, Suffolk County
Docket Number: 13-10610
Judge: Joseph A. Santorelli
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[* 1]

SHORT FORM ORDER

INDEX No. 13-10610
CAL. No. 16-00569OT

PUBLISH

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 9-6-16
ADJ. DATE 11-17-16
Mot. Seq. # 002 - MG; CASEDISP

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ANDREA Rodriguez, an Infant under the Age of Fourteen by her Mother and Natural Guardian, CHRISTINE RODRIGUEZ, and CHRISTINE RODRIGUEZ, Individually,

Plaintiffs,

- against -

SACHEM CENTRAL SCHOOL DISTRICT,

Defendant.

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Upon the following papers numbered 1 to 43 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 31 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 32 - 41 ; Replying Affidavits and supporting papers 42 - 43 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Sachem Central School District for summary judgment in its favor is granted.

This is an action to recover damages for injuries allegedly sustained by infant plaintiff Andrea Rodriguez on September 13, 2012, when she fell off the monkey bars on the playground at Grundy Avenue Elementary School in Holbrook, New York. Plaintiff Christine Rodriguez, suing on behalf of her daughter, Andrea, a kindergarten student at the time of the incident, claims that defendant was negligent, among other things, in failing to properly supervise infant plaintiff and in failing to maintain the playground in a reasonably safe condition.

Defendant now moves for summary judgment in its favor, arguing that infant plaintiff's injury occurred suddenly and spontaneously, that the monkey bars were an appropriate height, and that the ground cover beneath the monkey bars was sufficient. Defendant submits, in support, copies of the

pleadings; photographs; the transcripts of the 50-h hearing testimony of plaintiff and infant plaintiff; the transcripts of the deposition testimony of plaintiff, infant plaintiff, Robert Rodriguez, Lisa Mazziotti, and Michael Defontes; medical records of Dr. Mark Harary; the independent medical examination of Dr. David Weissberg; and the affidavit of Margaret Payne. Initially, the Court notes the uncertified medical records and unsworn medical reports of Dr. Harary were not in admissible form and, therefore, were not considered in the determination of defendant's motion (*see* ***D'Orsa v Bryan***, 83 AD3d 646, 919 NYS2d 881 [2d Dept 2011]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]; ***Lozusko v Miller***, 72 AD3d 908, 899 NYS2d 358 [2d Dept 2010]). In opposition, plaintiff argues that the monkey bars were an inappropriate height for infant plaintiff's use, that the ground cover was insufficient, and that defendant did not properly instruct infant plaintiff how to use the monkey bars. Plaintiff submits, in opposition, photographs and the affidavits of plaintiff, Robert Rodriguez, Brianna Belt, and Peter Sarich.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The court's function on a motion for summary judgment is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, so the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]; ***Frank v JS Hempstead Realty, LLC***, 136 AD3d 742, 24 NYS3d 714 [2d Dept 2015]; ***Guzman v State of New York***, 129 AD3d 775, 10 NYS3d 598 [2d Dept 2015]). A defendant moving for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of the condition for a sufficient length of time to discover and remedy it (*see* ***Petersel v Good Samaritan Hosp of Suffern, N.Y.***, 99 AD3d 880, 951 NYS2d 917 [2d Dept 2012]; ***Johnson v Culinary Inst. of Am.***, 95 AD3d 1077, 944 NYS2d 307 [2d Dept 2012]; ***Amendola v City of New York***, 89 AD3d 775, 932 NYS2d 172 [2d Dept 2011]). To constitute constructive notice, the condition must be visible and apparent, and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; *see* ***Schubert-Fanning v Stop & Shop Supermarket Co., LLC***, 118 AD3d 862, 988 NYS2d 245 [2d Dept 2014]; ***Bravo v 564 Seneca Ave. Corp.***, 83 AD3d 633, 922 NYS2d 88 [2d Dept 2011]; ***Bolloli v Waldbaum, Inc.***, 71 AD3d 618, 896 NYS2d 400 [2d Dept 2010]).

Defendant established its prima facie entitlement to summary judgment by demonstrating that the subject playground was inspected and maintained in a reasonably safe condition (*see* ***Lopez v Freeport Union Free School Dist.***, 288 AD2d 355, 734 NYS2d 97 [2d Dept 2001]). Michael Defontes, the head groundskeeper of the Sachem School District, testified that the school's head custodian regularly inspects the playground for "obvious" defects such as glass, sharp objects, and "anything out of place." He also testified that 12 inches of safety fiber mulch covers the ground below the monkey bars, which is replenished yearly and on an as-needed basis when compaction occurs. Defontes and Lisa Mazziotti, infant plaintiff's teacher, testified that they were unaware of any complaints made in regards to the monkey bars or the ground covering below the monkey bars. Infant plaintiff testified at her General Municipal § 50-h hearing that while she was hanging on the monkey bars, she lost her grip on the rung when her hands got tired, and fell to the ground. She further testified at her 50-h hearing and deposition that there was nothing wet, sticky, or slippery on the monkey bars. Such was sufficient to show, prima facie, that the playground was not defective, and that even if it were, defendant had no actual or constructive notice for a sufficient enough time to correct it (*see* ***Hunter v Riverview Towers***, 5 AD3d 249, 773 NYS2d 290 [1st Dept 2004]; ***Aquila v Nathan's Famous***, 284 AD2d 287, 725 NYS2d 371 [2d Dept 2001]).

Furthermore, the expert affidavit of Margaret Payne established that the monkey bars were appropriate for infant plaintiff's age group, and the ground covering was not defective (*see* ***Milligan v Harborfields Cent. School Dist.***, 105 AD3d 825, 962 NYS2d 664 [2d Dept 2013]; ***Troiani v White Plains City Sch. Dist.***, 64 AD3d 701, 882 NYS2d 519 [2d Dept 2009]). Defendant asserts that the monkey bars comply with all requirements of the U.S. Consumer Product Safety Commission (CPSC) and American Society for Testing and Materials (ASTM) standards. Margaret Payne affirmed that the monkey bars were 76 inches in height, eight inches below the ASTM maximum standard for the 5-12 year old age group. She further affirmed that she measured 13 inches of engineered wood fiber material beneath the monkey bars, which was well above the CPSC standards to reduce the likelihood of head injuries. Such engineered wood fiber was topped off on the playground in the month prior to the accident and the measured level would be the same, or slightly lower, than when the accident occurred three months prior to the inspection by Payne. Her affidavit also provided that the CPSC acknowledges that some injuries due to falls, including broken bones, may occur no matter what playground surfacing material is used. Payne also opined that the maintenance routine of the playground was adequate for an elementary school playground.

In opposition, plaintiff failed to raise a triable issue of fact as to whether defendant created a dangerous condition or had actual or constructive notice that the surface beneath the monkey bars was defective (*see* ***Donnelly v St. Agnes Cathedral Sch.***, 106 AD3d 773, 964 NYS2d 262 [2d Dept 2013]). The expert affidavit of Peter Sarich submitted by plaintiff failed to raise a triable issue of fact, as there is no indication as to when he inspected the subject monkey bars and surrounding playground area after plaintiff's accident and he failed to connect its condition at the time of the inspection with its condition at the time of the accident (*see* ***Roberts v United Health Services Hospitals, Inc.***, 128 AD3d 1210, 9 NYS3d 468 [3d Dept 2015]; ***Fallon v Duffy***, 95 AD3d 1416, 943 NYS2d 289 [3d Dept 2012]; ***Gonzalez v State***, 60 AD3d 1193, 875 NYS2d 327 [3d Dept 2009]). Additionally, the affidavits of plaintiff, Robert Rodriguez, and Brianna Belt failed to connect the condition of the ground covering at the time of the accident with its condition at the time of the inspections two to three weeks later wherein they made

visual observations and took measurements (*see* ***Roberts v United Health Services Hospitals, Inc.***, *supra*; ***Fallon v Duffy***, *supra*; ***Gonzalez v State***, *supra*).

Schools have a duty to adequately supervise their students and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (***Troiani v White Plains City Sch. Dist.***, *supra*; *see* ***Mirand v City of New York***, 84 NY2d 44, 614 NYS2d 372 [1994]; ***Staten v City of New York***, 90 AD3d 893, 935 NYS2d 80 [2d Dept 2011]; ***Nash v Port Wash. Union Free School Dist.***, 83 AD3d 136, 922 NYS2d 408 [2d Dept 2011]). Schools are obligated to exercise such care of their students as a parent of ordinary prudence would observe in comparable circumstances (***David v County of Suffolk***, 1 NY3d 525, 775 NYS2d 229 [2003]; ***Mirand v City of New York***, *supra*). A plaintiff alleging negligent supervision must demonstrate both that the defendant breached its duty to provide adequate supervision, and that this failure was the proximate cause of the plaintiff's injuries (*see* ***Harris Five Point Mission Camp Olmstedt***, 73 AD3d 1127, 901 NYS2d 678 [2d Dept 2010]; ***Tanenbaum v Minnesauke Elementary School***, 73 AD3d 743, 901 NYS2d 102 [2d Dept 2010]) ***MacCormack v Hudson City School Dist. Bd. of Educ.***, 51 AD3d 1121, 856 NYS2d 712 [3d Dept 2008]; ***Paca v City of New York***, 51 AD3d 991, 858 NYS2d 772 [2d Dept 2008]). Furthermore, "[w]here 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 . . . defendants is warranted" (***Convey v City of Rye Sch. Dist.***, 271 AD2d 154, 160, 710 NYS2d 641 [2d Dept 2000]; *see* ***Gilman v Oceanside Free Union Sch. Dist.***, 106 AD3d 952, 966 NYS2d 460 [2d Dept 2013]; ***Jackson v Out East Family Fun, LLC***, 79 AD3d 817, 913 NYS2d 712 [2d Dept 2010]; ***Ronan v School Dist. of City of New Rochelle***, 35 AD3d 429, 825 NYS2d 249 [2d Dept 2006]; ***Soldano v Bayport-Blue Point Union Free School Dist.***, 29 AD3d 891, 815 NYS2d 712 [2d Dept 2006]; ***Reardon v Carle Place Union Free School Dist.***, 27 AD3d 635, 813 NYS2d 150 [2d Dept 2006]; ***Cerrato v Carapella***, 22 AD3d 701, 804 NYS2d 402 [2d Dept 2005]).

Defendant met its prima facie burden of demonstrating that there was adequate supervision on the playground and that any alleged inadequate supervision was not the proximate cause of the infant plaintiff's injuries (*see* ***Charles v City of Yonkers***, 103 AD3d 765, 962 NYS2d 199 [2d Dept 2013]; ***Reardon v Carle Place Union Free School Dist.***, *supra*; ***Botti v Seaford Harbor Elementary School Dist.*** 24 AD3d 486, 808 NYS2d 236 [2d Dept 2005]; ***Weinblatt v Eastchester Union Free School Dist.***, 303 AD2d 581, 756 NYS2d 766 [2d Dept 2003]; ***Navarra v Lynbrook Pub. Schools, Lynbrook Union Free School Dist.***, 289 AD2d 211, 733 NYS2d 730 [2d Dept 2001]), and that the accident could not have been prevented by any reasonable degree of supervision (*see* ***Calcagno v John F. Kennedy Intermediate School***, 61 AD3d 911, 877 NYS2d 455 [2d Dept 2009]; ***Ronan v School Dist. of City of New Rochelle***, *supra*; ***Lopez v Freeport Union Free School Dist.***, *supra*). Infant plaintiff testified at her 50-h hearing that there were five teachers outside standing near the school building at the time of her accident. Infant plaintiff testified at her deposition that Ms. Davey, Ms. Mazziotti's helper, was standing by the nearby swings at the time of her accident. Ms. Mazziotti testified that more than one class uses the playground at a time and it is customary for the classroom teachers to spread out so that the entire playground is visible. Although she could not remember the amount, Mazziotti testified that there were other teachers supervising the playground at the time of infant plaintiff's accident. Infant plaintiff testified at her 50-h hearing that her hands became tired and she "just fell down." She also testified at her deposition that she slipped off of the monkey bars after her hands became sweaty. The evidence

indicates that there was adequate supervision of the children on the playground and that the accident could not have been prevented by supervision as it happened when infant plaintiff was engaged in normal play on the monkey bars and slipped off due to hand fatigue (*see* ***Troiani v White Plains City School Dist.***, *supra*; ***Berdecia v City of New York***, 289 AD2d 354, 735 NYS2d 554 [2d Dept 2001]).

In opposition, the plaintiffs failed to raise a triable issue of fact as to whether the supervision provided by the defendants was inadequate or that the alleged lack of supervision was the proximate cause of the accident (*see* ***Carbonnier v Board of Educ. of the City of N.Y.***, 112 AD3d 406, 975 NYS2d 676 [1st Dept 2013]). Plaintiff argues that the school district failed to provide reasonable instructions to infant plaintiff on use of the playground. However, parties in opposition to a motion for summary judgment must provide "proof and present evidentiary facts sufficient to raise a genuine triable issue of fact," as mere conclusory assertions, entirely lacking evidentiary facts, are "insufficient for this purpose, as is reliance upon surmise, conjecture, or speculation" (***Morgan v New York Tel.***, 220 AD2d 728, 729, 633 NYS2d 319 [2d Dept 1995]).

Accordingly, the motion by defendant Sachem Central School District for summary judgment in its favor is granted.

Dated: JAN 31 2017

HON. JOSEPH A. SANTORELLI
J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION