**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF RICHMOND**

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**JASON CROOME and YASMENE CROOME,** **Part C-2**

**Plaintiffs,** **Present:**

**HON. THOMAS P. ALIOTTA**

**-against-**

**DECISION AND ORDER**

**THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION and THE NEW YORK CITY DEPARTMENT OF EDUCATION,** **Index No. 104147/11**

**Motion No. 3684-001**

**Defendants.**

**----------X**

The following papers numbered 1 to 3 were marked fully submitted on the 31st day of January, 2013:

| | Papers Numbered |
|---|---|
| Notice of Motion for Summary Judgment of Defendants (Affirmation in Support) (Dated December 18, 2012) | 1 |
| Affirmation in Opposition (Dated January 9, 2013) | 2 |
| Affirmation in Reply and in Further Support of Motion for Summary Judgment (Dated January 25, 2013) | 3 |

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Upon the foregoing papers, the motion for summary judgment of defendants The City of New York, the New York City Department of Parks and Recreation (hereinafter the "City") and The New York City Department of Education is granted as to the Department of Education and is otherwise denied.

This matter arises out of a slip and fall which occurred on May 1, 2011, on the basketball court of the Stapleton Playground located on Tompkins Avenue between Broad Street and Hill Street on Staten Island (*see* June 21, 2011 Notice of Claim, City's Exhibit

"A"). To the extent relevant, plaintiff Jason Croome (hereinafter "plaintiff") claims to have sustained extensive personal injuries when his foot slipped into a gravel-filled hole while demonstrating a three-point jump shot for his stepson and a friend. Co-plaintiff Yasmine Croome asserts a derivative cause of action for the loss of her husband's services.

At his General Municipal Law §50-h hearing, plaintiff described the overall condition of the basketball court at the time of his injury as containing "cracks everywhere" (*see* City's Exhibit "D", p 27) which appeared to have been "patched" (*id.* at 31). After safely executing two shots from different parts of the court, plaintiff allegedly "slipped...[forward]...into the hole" while attempting the three-point jump shot. According to plaintiff, the hole in question was three inches deep by six inches wide in size, and was filled with "a bunch of gravel" (*id.* at 29-30). Plaintiff claimed that his feet never left the court while attempting this third shot; rather, his left foot slipped into the hole as he attempted to jump (*id.* at 56).

It is well settled that a municipal defendant has a duty to maintain its property "in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (Basso v Miller, 40 NY2d 233, 241 [internal question marks omitted]). In order to establish a prima facie case of

negligence against the City in a slip and fall case, a plaintiff must demonstrate (1) the presence of a dangerous condition; (2) that the City either created or possessed actual or constructive notice of said condition and failed to remedy it within a reasonable time period; and (3) that the dangerous condition was a substantial factor in the events that caused plaintiff's injury (*see* Gordon v American Museum of Natural History, 67 NY2d 836, 837). Where, as here, the injury arises in the context of a sporting activity, the doctrine of primary assumption of risk must also be considered. Under this doctrine, a defendant is duty-bound "to exercise care to make the conditions as safe as they appear to be" (Turcotte v Fell, 68 NY2d 432, 437)[1]. Conversely, the "participants in such an activity are not deemed to have assumed the risks of reckless or intentional conduct or concealed or unreasonably increased risk" (Joseph v New York Racing Assn., 28 AD3d 105, 108 [Opinion by Mastro, J.]).

Here, the copies of the City's work orders, district log book entries and record of "311" complaints which were furnished during

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[1]There are two categories of assumption of risk: (1) primary assumption of risk, wherein the voluntary participant "consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (Morgan v State of New York, 90 NY2d 471, 484), including "those risks associated with the construction of the [playing surface]and its open and obvious condition" (Sykes v County of Erie, 263 AD2d 947, *affd* 94 NY2d 912; *see* Maddox v City of New York, 66 NY2d 270), and (2) that category of assumption of risk which "is akin to comparative negligence; it does not bar recovery, but diminishes recovery in the proportion to which [the culpable conduct attributable to a claimant] contributed to the injures" sustained (Lamey v Foley, 188 AD2d 157, 163; CPLR 1411).

discovery (*see* Plaintiffs' Affirmation in Opposition, Exhibit B) are replete with notations of the poor condition of the subject basketball court (*i.e.*, "20% of asphalt cracked, patched & uplifted through out site"), and served to provide the City with constructive if not actual notice of its defective condition (*see* Gordon v. American Museum of Natural History, 67 NY2d at 837; Deveau v. CF Galleria at White Plains, LP., 18 AD3d 695]). In this regard, the extent to which the City possessed notice of the *specific* hole which caused plaintiff's injury is of no consequence, since "[t]he law does not apply so unreasonable a requirement of certitude" (Gramm v. State of New York, 28 AD2d 787, 788, *affd* 21 NY2d 1025).

"[D]ismissal of a complaint as a matter of law is warranted when on the evidentiary materials before the court no issue remains for decision by the trier of fact" (Maddox v City of New York, 66 NY2d at 279). Defendants' arguments notwithstanding, this is not such a case, as plaintiff's ability to discern the extent of the risk presented has been drawn into question through the presentation of photographic and testimonial evidence suggesting that the surface defect which caused his injury had been concealed or obscured to some extent by the gravel fill (see Warren v. Town of Hempstead, 246 AD2d 536; Weller v. Colleges of the Senecas, 217 AD2d 280; Brancati v. Bar-U-Farm, Inc., 183 AD2d 1027).

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Summary judgment is a drastic remedy which should only be granted if it is clear that no material issues of fact have been presented (*see* Koliva v Kirchoff, 14 AD3d 493). Here, the presence of an issue of fact as to the "open and obvious" nature of the cited defect in the playing surface renders summary judgment in favor of the City inapposite (*cf.* Sanchez v City of New York, 25 AD3d 776, 777). Nevertheless, the complaint must be dismissed as to The New York City Department of Education, which neither owned nor maintained the subject basketball court, and is a separate and distinct legal entity (*see* McClain v City of New York, 65 AD3d 1020, *lv denied* 14 NY3d 709; Perez v City of New York, 41 AD3d 378).

Welch v Board of Educ. of City of NY (272 AD2d 469) and McKey v City of New York (234 AD2d 114) are distinguishable of their facts, and do not compel a contrary result.

Accordingly, it is

**ORDERED** that defendants' motion for summary judgment is granted as to defendant The New York City Department of Education; and it is further

**ORDERED** that the complaint as against said defendant is severed and dismissed; and it is further

**ORDERED** that the balance of defendants' motion is denied; and it is further

**ORDERED** that the Clerk enter judgment in accordance herewith.

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E N T E R,

__/s/_____
Hon. Thomas P. Aliotta
J.S.C.

Dated: April 1, 2013
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