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Short Form Order

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

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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ROXY KNOWLES, an infant by her mother and natural guardian, TIA KNOWLES and TIA KNOWLES, individually,

Plaintiff,

-against-

THE WYANDANCH UNION FREE SCHOOL DISTRICT and MARTIN LUTHER KING ELEMENTARY SCHOOL,

Defendants.

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INDEX NO.: 7788/11
CALENDAR NO.: 201201158OT
MOTION DATE: 1/17/13
MOTION NO.: 001 MD

PLAINTIFF'S ATTORNEY:
MARTIN L. GINSBERG, P.C.
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Kew Gardens, New York 11415

DEFENDANTS' ATTORNEY:
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Upon the following papers numbered 1 to 16 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-11 ; ~~Notice of Cross Motion and supporting papers~~ ___ ; Answering Affidavits and supporting papers 12-16 ; ~~Replying Affidavits and supporting papers~~ ____; ~~Other~~ ___ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 001) of defendants for an order pursuant to CPLR R. 3212 granting summary judgment dismissing the complaint is denied.

This is an action to recover damages, personally and derivatively, from the defendants Wyandanch Union Free School District (the "District") and Martin Luther King Elementary School (the "School") for injuries allegedly sustained by the infant plaintiff on November 17, 2010, when she fell from the monkey bars in the playground of the defendant School.

Defendants now move for summary judgment dismissing plaintiffs' complaint, alleging that they were not negligent; that the cause of the accident is vague, unclear and purely speculative; and that there was an assumption of risk by the infant plaintiff. In support of the motion defendants submit, *inter alia*, their attorney's affirmation, the transcripts of the depositions of the infant plaintiff, plaintiff Tia Knowles, and Peter J. Noto on behalf of the defendants, together with the pleadings and the bill of particulars. In opposition, plaintiffs submit, *inter alia*, their attorney's affirmation, a certified weather report, and the Public Playground Safety Handbook.

The infant plaintiff first testified at a hearing held pursuant to §50-h of the General Municipal Law. At the time of her testimony, she was in third grade and had just turned nine years old. A second deposition took place about six months later. Plaintiff testified to the following: The accident took place on November 17, 2010, at approximately 10:00 a.m., about five minutes into a school recess. The weather that day was wet, it having rained heavily earlier

and during the night. The infant plaintiff heard rain and thunder throughout the night before. The rain left the ground and grass wet. The playground equipment included two sets of monkey bars. Both sets of monkey bars have only grass beneath them, while other areas had wood chips. There were five other classes at recess. Most days when her class was at recess at the playground, the children were supervised by two adults, Mr. Noto, a gym teacher and Ms. Baldini, a recess teacher. On the day of the accident Ms. Baldini was out sick and Mr. Noto was the only one supervising the students on the playground. At the time of the accident, Mr. Noto was on the other playground. The playground equipment was wet. In order to sit on a swing, the infant plaintiff had to pour water off the swing. The accident took place when the infant plaintiff was playing on one of the sets of monkey bars, which were green and made of metal and had approximately eight bars across. When the infant plaintiff hung from the bars, her feet were about three feet off the ground. The infant plaintiff was never taught how to use the monkey bars in gym class. She had been on the monkey bars about twenty-five times prior to the accident, but she did not play on them every day. The infant plaintiff used to have a playground in her back yard, but she did not use the monkey bars because they were too high. When the accident occurred, the infant plaintiff was able to grab the first and second bars. When the infant plaintiff attempted to grab the third bar, she could not because the bar was wet. When her hands slipped off the bar, she fell and heard something crack in her right arm. At the second deposition, the infant plaintiff testified that the first bar was dry, the second bar was a little bit wet and the third was wet. Mr. Noto came over and said he would call the hospital. The infant plaintiff was taken to the school nurse's office. The school nurse called plaintiff's grandmother. Her mother met her at the school. An ambulance came and took her to the hospital.

The plaintiff Tia Knowles also testified at two depositions. She testified that the night before the accident it rained. At 5:00 a.m., there was heavy rain for about twenty minutes. In the morning, the rain left puddles on the ground. The ground in the yard was wet. It had stopped raining by the time the infant plaintiff left for school. When the infant plaintiff first described the accident to her mother, she said she slipped because the monkey bars were wet.

Peter J. Noto testified on behalf of the defendants. He is employed as a physical education teacher at the Martin Luther King Elementary School. In November 2011, there were six or seven third-grade classes at the school. He was assigned to the third-grade lunch hour each day. Half of the third-grade class would go into lunch at one time and half would go to the playground. At some point they would switch. There were two playgrounds, one assigned to the boys and one assigned to the girls. Normally there was another teacher, Denise Baldina, with him at the playground. He could not recall the date of the accident, but he was there on that day. He could not recall the weather that day. It was not his responsibility to decide if the children should go outside to the playground on a given day; that decision was made by one of the principals. He first became aware of the injury to the infant plaintiff when a student came over to him. He could not recall how far they were into the lunch period before the accident occurred. Normally one teacher would go to one of the playgrounds and the other would take the second playground. Ms. Baldina was absent the day of the accident. Normally there would be a substitute, but he could not recall if he was the only teacher on the playground that day. He could not recall what he was doing or who he was with when he was informed about the accident. When he got to the infant plaintiff she was lying on the ground, on the wood chips, under the monkey bars and she said she

hurt her arm. Her arm was misshaped. The school nurse brought out a wheelchair and he pushed the infant plaintiff to the nurse's office. He did not make any observation of the monkey bars as to whether they were wet or not. He believed it was warm the day of the accident. At least one fourth grader had fallen off the monkey bars and been injured prior to this accident.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form.

A landowner has a duty to maintain its premises in a reasonably safe condition and to warn of a dangerous condition that is not readily observable with the reasonable use of one's senses (*DiVietro v Gould Palisades Corp.*, 4 AD3d 324, 325, 771 NYS2d 527 [2004]). Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends upon the particular circumstances of each case and generally is a question of fact (*Surujnaraine v Valley Stream Central School District*, 88AD3d 866, 931 NYS2d 119 [2d Dept 2011]; *Shalamayeva v Park 83rd St. Corp.*, 32 AD3d 387, 388, 820 NYS2d 607 [2006]).

The standard for determining whether a school was negligent in executing its supervisory responsibility is whether a parent of ordinary prudence, placed in the same situation and armed with the same information, would have provided greater supervision (*Mirand v City of New York*, 84 NY2d 44, 614 NYS2d 372 [1994]). Schools are under a duty to adequately supervise the students in their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (*Mirand v City of New York*, *id.*). Schools are not, however, the insurers of their students' safety, and there is no duty to provide constant supervision, as the level and degree thereof is measured by the reasonableness thereof under the circumstances (*see MacNiven v East Hampton Union Free School Dist.*, 62 AD3d 760, 878 NYS2d 449 [2d Dept 2009]; *Legette v City of New York*, 38 AD3d 853, 832 NYS2d 669 [2d Dept 2007]).

Further, the plaintiffs must demonstrate not only that the school was negligent in its supervision, but also that such lack of supervision was the proximate cause of the injury (*see Mirand v City of New York, supra*; *Lopez v Freeport Union Free School Dist.*, 288 AD2d 355, 734 NYS2d 97 [2d Dept 2001]; *Schlecker v Connetquot Cent. School Dist. of Islip*, 150 AD2d 548, 541 NYS2d 127 [2d Dept 1989]).

It is well settled that by engaging in a sport, a 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, 484-486, 662 NYS2d 421 [1997]; *see Anand v Kapoor*, 61 AD3d 787, 877 NYS2d 425 [2d Dept 2009]; *Fithian v Sag Harbor Union Free School Dist.*, 54 AD3d 719, 864 NYS2d 456 [2d Dept 2008]; *Mendoza v Village of Greenport*, 52 AD3d 788, 861 NYS2d 738 [2d Dept 2008]; *Joseph v New York Racing Assn.*, 28 AD3d 105, 809 NYS2d 526 [2d Dept 2006]). The assumption of risk doctrine is not an absolute defense to liability, but a measure of the duty of care owed by the defendant (*Turcotte v Fell*, 68 NY2d 432, 439, 510 NYS2d 49 [1986]; *Taylor v Massapequa Intl. Little League*, 261 AD2d 396, 397, 689 NYS2d 523 [2d Dept 1999]). Under the doctrine, a plaintiff will be barred from recovering damages for injuries sustained during a voluntary sporting activity if it is established that the injury-causing conduct, event or condition was known, apparent or reasonably foreseeable (*see Morgan v State of New York*, *supra*; *Turcotte v Fell*, *supra*; *Maddox v City of New York*, 66 NY2d 270, 496 NYS2d 726 [1985]). Thus, a defendant seeking to be relieved from liability based on the assumption of risk doctrine must establish that the injured plaintiff was aware of the risks, appreciated the nature of the risks, and voluntarily assumed the risks (*Morgan v State of New York*, *supra*, at 484, 662 NYS2d 421; *see Turcotte v Fell*, *supra*; *Carracino v Town of Oyster Bay*, 247 AD2d 501, 669 NYS2d 328 [2d Dept], *lv denied* 92 NY2d 809, 680 NYS2d 54 [1998]).

The defendants have failed to establish their entitlement to summary judgment based upon the evidence they have submitted. They allege that there was no negligence and there was proper supervision of the students on the playground. However, there is testimony that it rained heavily the night before and into the morning of the day of the accident. There is nothing submitted to show that anyone inspected the playground or the equipment thereon prior to deciding the students should be allowed on the playground that day. The defendant presented no evidence with respect to the safety of the subject playground equipment at the time of the accident (*see*, *Butler v City of Gloversville*, 12 NY3d 902, 885 NYS2d 245 [2009] *Rice v University of Rochester Med. Ctr.*, 55 AD3d 1325, 865 NYS2d 463 [4th Dept 2008]; *Peuplie v Longwood Cent. Sch. Dist.*, 49 AD3d 837, 854 NYS2d 491 [2d Dept 2008]). Nor did the defendant present any admissible evidence with respect to whether the equipment at issue complied with relevant safety guidelines, unlike the cases cited in their moving papers (*see Newman v Oceanside Union Free School Dist.*, 23 AD3d 631, 805 NYS2d 100 [2d Dept 2005]). The testimony presented also raises a triable issue as to whether the amount of supervision provided by the school at the time of the accident (a single teacher to supervise at least three third grade classes playing on two separate, but adjoining, playgrounds) was reasonable and adequate under the circumstances and was not a proximate cause of the accident (*see, Doxtader v Middle Country Central School District*, 81AD3d 68, 916 NYS2d 215 [2d Dept 2011; *Oliverio v Lawrence Public Schools*, 23 AD3d 633, 805 NYS2d 638 [2d Dept 2005]; *Rivera v Board of Educ.*, 19 AD3d 394, 796 NYS2d 182 [2d Dept 2005]; *Douglas v John Hus Moravian Church*, 8 AD3d 327, 778 NYS2d 77 [2d Dept 2004]).

Defendants also argue that the alleged cause of the accident is vague, unclear and purely speculative. However, the plaintiff's negligence allegations are straightforward, that the infant plaintiff was injured because she slipped due to the wet condition of the monkey bars. In effect, the defendants have pointed out another issue of fact which cannot be resolved upon a motion for summary judgment.

In light of the infant plaintiff's age and experience, it cannot be determined as a matter of law that she was fully aware of and appreciated the risks involved in the activity in which she was engaged (*see*, *Leonard v County of Suffolk*, 21 AD3d 1065, 801 NYS2d 157 [2d Dept 2005]; *Rivera v Board of Educ.*, *supra*; *Douglas v John Hus Moravian Church of Brooklyn*, *supra*). The infant plaintiff was eight years old at the time of the accident. Although there is testimony that the infant plaintiff had previously used the monkey bars on a casual basis, up to twenty-five times, she had no training on the use of the monkey bars and there is no evidence that she had previous experience when they were wet such that she would be aware of any potential risk. The cases cited by defendants involve organized activities (cheerleading, gymnastics) with experienced participants and are not relevant to the issues before the Court.

Based upon the foregoing, the Court need not consider whether the plaintiffs' papers in opposition are sufficient to raise a triable issue of fact (*see Leonard v County of Suffolk*, *supra*).

Accordingly, the instant motion is denied.

Dated: April 3, ~~2012~~ 2013

PAUL J. BAISLEY, JR.
J.S.C.