

**Villatoro v Town of Babylon**

2013 NY Slip Op 31640(U)

July 12, 2013

Sup Ct, Suffolk County

Docket Number: 09-46612

Judge: W. Gerard Asher

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 32 - SUFFOLK COUNTY

**PRESENT:**

Hon. W. GERARD ASHER  
Justice of the Supreme Court

MOTION DATE 10-17-12 (#006 & #007)  
MOTION DATE 10-23-12 (#008)  
ADJ. DATE 2-5-13  
Mot. Seq. # 006 - MG  
          # 007 - XMG  
          # 008 - MG; CASEDISP

-----X  
SEBASTIAN VILLATORO, by his parent and :  
natural guardian, JOANNA VILLATORO, and :  
JOANNA VILLATORO, Individually, :  
: :

Plaintiffs, :  
: :

- against - :  
: :

THE TOWN OF BABYLON, RY-LECIA CORP. :  
d/b/a AMERICAN RECREATIONAL :  
PRODUCTS, PS COMMERCIAL PLAY, LLC :  
d/b/a PLAY AND PARK STRUCTURES and :  
TL CONTRACTING, INC., :  
Defendants. :  
-----X

TREIF & OLK  
Attorneys for Plaintiffs  
150 East 58<sup>th</sup> Street  
New York, New York 10155

BESEN & TROP, LLP  
Attorneys for Town of Babylon  
825 East Gate Boulevard, S-306  
Garden City, New York 11530

JONES MORRISON LLP  
Attorneys for Ry-Lecia Corp.  
670 White Plains Road  
Scarsdale, New York 10583

McANDREW, CONBOY & PRISCO  
Attorneys for PS Commercial Play  
1860 Walt Whitman Road, S-800  
Melville, New York 11747

EPSTEIN HARMS & McDONALD  
Attorneys for TL Contracting  
1 Whitehall Street, 13<sup>th</sup> Floor  
New York, New York 10004

Upon the following papers numbered 1 to 129 read on these motions and this cross motion for summary judgment :  
Notice of Motion/ Order to Show Cause and supporting papers 1 - 51; 61 - 79 ; Notice of Cross Motion and supporting papers  
52 - 60 ; Answering Affidavits and supporting papers 80 - 91; 92 - 103; 104 - 113; 114 - 115; 116 - 117 ; Replying Affidavits  
and supporting papers 118 - 125; 126 - 127; 128 - 129 ; Other     ; (and after hearing counsel in support and opposed to the  
motion) it is,

Villatoro v Town of Babylon  
Index No. 09-46612  
Page No. 2

**ORDERED** that the motion by defendants PS Commercial Play, LLC, the cross motion by defendant Town of Babylon, and the motion by Ry-Lecia Corp. are consolidated for the purposes of this determination; and it is

**ORDERED** that the motion by defendant PS Commercial Play, LLC, for summary judgment dismissing the complaint against it is granted; and it is

**ORDERED** that the cross motion by defendant Town of Babylon for summary judgment dismissing the complaint against it is granted; and it is

**ORDERED** that the motion by defendant Ry-Lecia Corp. for summary judgment dismissing the complaint against it is granted; and it is further

**ORDERED** that the Court, sua sponte, hereby grants summary judgment dismissing the complaint against defendant TL Contracting, Inc.

On July 27, 2009, infant plaintiff Sebastian Villatoro, who was almost three years old at the time, suffered injuries when he fell off a playground apparatus located at a park owned by defendant Town of Babylon. Subsequently, his mother, plaintiff Joanna Villatoro, suing individually and on behalf of her son, commenced this action against defendants. The complaint alleges that Ry-Lecia Corp., d/b/a American Recreational Products (hereinafter American Recreational Products), PS Commercial Play, LLC, d/b/a Play and Park Structures (hereinafter Park and Play), and TL Contracting, Inc., allegedly designed and installed the subject playground. The first cause of action alleges that defendants were negligent, among other things, in failing to install sufficient signs to notify users as to the age appropriateness of the playground. The second cause of action against American Recreational Products and Park and Play alleges that they defectively designed and manufactured the subject playground equipment in that it lacked sufficient signs and lacked proper parts.

Play and Park now moves for summary judgment dismissing the complaint and cross claims against it on the ground that it did not breach any duty to plaintiffs. In support of its motion, Play and Park submits copies of the pleadings, transcripts of the parties' deposition testimony, photographs of the subject playground, and an affidavit of William Shannon. Plaintiff opposes Play and Park's motion, arguing that its failure to provide sufficient age appropriateness stickers created the alleged dangerous condition which was a proximate cause of the accident. In opposition, plaintiffs submits, among other things, an affidavit of Joanna Villatoro, an expert affidavit of Steve Bernheim, transcripts of the parties' deposition testimony, copies of the age appropriateness stickers in English and Spanish, warning label instructions, and a layout of the playground.

Town of Babylon cross-moves for summary judgment dismissing the complaint and cross claims against it on the grounds that it never received written notice of any defect and that it did not have any notice of the alleged defective condition. In support of its motion, the Town submits an affidavit of Jennifer Taus and a copy of its amended answer. Plaintiff opposes the Town's cross motion, arguing that it failed to provide age appropriateness signs for the playground, and that the subject apparatus was defective because it was missing a grease fitting, causing it to rotate at an excessive speed. Plaintiffs

Villatoro v Town of Babylon

Index No. 09-46612

Page No. 3

also argue that triable issues of fact remain as to whether the Town had notice of the alleged defect, and whether it failed to properly maintain the playground. In opposition, plaintiff submits, among other things, an affidavit of Joanna Villatoro, an expert affidavit of Steve Bernheim, transcripts of the parties' deposition testimony, photographs of the subject playground, and a copy of the warning label instructions.

American Recreational Products moves for summary judgment dismissing the complaint and cross claims against it on the grounds that there is no evidence that it was negligent and that it did not owe a duty to plaintiff. In support of its motion, American Recreational Products submits a copy of the pleadings and transcripts of the parties' deposition testimony. Plaintiff opposes American Recreational Products' motion, arguing that a triable issue of fact remains as to whether American designed the subject playground. In opposition, plaintiff submits, among other things, an affidavit of Joanna Villatoro, an expert affidavit of Bernheim, and transcripts of the parties' deposition testimony. Play and Park opposes the portion of the motion which seeks implied common law indemnification against it, arguing that the it did not negligently design or manufacture the subject playground.

TL Contracting opposes all three motions for summary judgment and adopts the arguments set forth in plaintiff's opposition papers.

At her 50-h hearing and examination before trial, plaintiff Joanna Villatoro testified that she has brought infant plaintiff to the subject playground many times, and that at the time of the accident infant plaintiff was playing on a spinning wheel when he fell and broke his arm. She stated that there was a small platform which infant plaintiff stepped on and that there was a wheel above him. She explained that he stepped off of the platform after grabbing the wheel, which starts spinning. She testified that infant plaintiff spun around for half a circle and fell to the ground. She testified that she did not see any signs on the playground which indicated there was an age restriction, but that she saw a sticker which had Spanish words and the numbers "5" and "12."

At his examination before trial, Leo Sottile, who is employed by the Town as the public works coordinator, testified that he oversees the Town's parks. He testified that there is no set inspection schedule of the parks, but that if employees of the fence crew find a dangerous condition, they would repair it. He testified that a cleaning crew cleans the playground every morning. He further testified that he is not aware of any complaints regarding the wheel apparatus or of any accidents which involved that apparatus.

At his examination before trial, Thomas Lafauci, owner of TL Contracting, testified that his company is in the business of installing playground equipment. He testified that American Recreational Products contracted with his company to install the subject playground. He stated that when the playground components were delivered to the park, there were no missing parts, and if there were issues with parts, he would contact American Recreational Products. He testified that there were two age appropriateness decals included with the instruction manual for the playground: one decal was written in English and the other one was written in Spanish. He testified that he placed the decals, which stated that the playground equipment was recommended for children ages 5 to 12 years old, at one of the entry points to the playground. He testified that when he went to the playground recently, he observed the

Villatoro v Town of Babylon  
Index No. 09-46612  
Page No. 4

English decal had been partially torn off. He further testified that the wheel apparatus which is the subject of this action is called a “twister,” and that it is 64 inches above the ground. He stated that he is not aware of any complaints regarding the apparatus.

At his examination before trial, Robert Brown, an owner of American Recreational Products, testified that his company is in the business of selling playground equipment, benches and tables to municipal governments and schools. He testified that American Recreational Products does not manufacture, design or install playgrounds. He explained that American Recreational Products purchases playground equipment from Play and Park, which manufactures playground equipment, and then contracts the installation of the playgrounds to TL Contracting. He testified that the Town of Babylon did not order age appropriateness signs for the subject playground, but that age appropriateness stickers were included in its purchase of the playground equipment.

Plaintiff’s expert affidavit of Bernheim, President of Sports & Recreation Consultants, Inc., states that he visited the subject playground in September 2009 and observed only one age appropriateness sign in Spanish, which is impossible to observe when using the wheel apparatus. It states that after an examination of the wheel apparatus, he determined that a grease fitting was missing from the apparatus. He explains that a missing grease fitting is a metal component that cannot be broken by hand or by wear and tear, and that there was a failure to install this component onto the equipment. He opines that the wheel apparatus requires the grease fitting to be reasonably safe.

Shannon’s affidavit states that he is a consultant for Gametime, Playcore and Play and Park Structures. It states that Play and Park is a holding company that is owned by Playcore, and that Play and Park is a marketing company that sells playground equipment manufactured by Gametime. It states that the Consumer Product Safety Information Guidelines (CPSC) and the American Society of Testing and Materials (ASTM) standards are guidelines or recommendations in the industry, but not requirements. The affidavit states that the installation/owner’s manual for the subject playground equipment contained warning labels in both English and Spanish indicating that the equipment was appropriate for use by children ages 5 to 12 years old. It further states that a minimum of two sets of labels, each containing two stickers, are provided to the end user for this particular product. As to the affidavit of plaintiff’s expert, Shannon states that the allegation that the grease fitting caused the wheel to turn at an unnecessarily rapid speed is without merit. It states that the wheel assembly has an oil impregnated bronze bushing to provide free turning of the wheel on its spindle which requires no additional lubrication. He opines that the grease fitting was not included in the design of the wheel because it was unnecessary due to the oil impregnated bronze bushing.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court’s function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for

Villatoro v Town of Babylon  
Index No. 09-46612  
Page No. 5

summary judgment, 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 Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Here, Play and Park met its prima facie entitlement to summary judgment by showing that the subject playground apparatus was not unsafe or defective (*see Charles v City of Yonkers*, 103 AD3d 765, 962 NYS2d 199 [2d Dept 2013]; *Davidson v Sachem Cent. School Dist.*, 300 AD2d 276, 751 NYS2d 300 [2d Dept 20002]). Shannon states in his affidavit that a grease fitting is not necessary for the subject apparatus, as the wheel assembly already has an impregnated bronze bushing. Moreover, the affidavit and deposition testimony of Shannon indicates that age appropriate stickers were provided in the instruction manual, and the deposition testimony of Lafauci states that the stickers were placed on the playground equipment when it was installed. Likewise, American Recreational Productions also established its prima facie entitlement to judgment in its favor, as the evidence demonstrates that the subject playground apparatus was not defective.

In opposition, the affidavit of plaintiff's expert is insufficient to raise a triable issue of fact as to whether the playground apparatus was improperly designed and manufactured (*see Merson v Syosset Cent. School Dist.*, 286 AD2d 668, 730 NYS2d 132 [2d Dept 2001]). To create a material issue of fact through the use of an expert's affidavit, the expert must base his or her opinions upon some "empirical data or foundational facts (*Bellinger v Ballston Spa Cent. School Dist.*, 57 AD3d 1296, 871 NYS2d 432 [3d Dept 2008]). Bernheim's assertion that a missing grease fitting in the apparatus, which allowed the wheel to rotate at an excessive speed is conclusory and speculative as he does not explain why a grease fitting would make the apparatus unsafe (*see Harris v Debbie's Creative Child Care, Inc.*, 87 AD3d 615, 928 NYS2d 583 [2d Dept 2011]; *Gray v South Colonie Cent. School Dist.*, 64 AD3d 1125, 883 NYS2d 647 [3d Dept 2009]). Moreover, the affidavit of plaintiff's expert did not establish that he possessed the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable (*see Milligan v Harborfields Cent. School Dist.*, \_\_ AD3d \_\_, 2013 NY Slip Op 2383 [2d Dept 2013]; *O'Boy v Motor Coach Indus., Inc.*, 39 AD3d 512, 834 NYS2d 231 [2d Dept 2007]). Furthermore, Bernheim's affidavit states that he is the president of Sports & Recreation Consultants and a member of various professional organizations, but his credentials do not indicate whether he has knowledge or an understanding of the mechanics of playground equipment. The Court notes that his affidavit does not include a curriculum vitae. Accordingly, the motions for summary judgment by defendants Play and Park and American Recreational Products are granted.

As to the cross motion by the Town of Babylon, a municipality has a duty to maintain its parks and playground facilities in a reasonably safe condition (*see Marino v State of New York*, 16 AD3d 386, 790 NYS2d 553 [2d Dept 2005]; *Garcia v City of New York*, 205 AD2d 49, 617 NYS2d 462 [1st Dept 1994]). However, a municipality is not an insurer of the safety of those who use its facilities, and its only duty is to exercise ordinary care in the supervision, construction and maintenance of those facilities (*see Garcia v City of New York, supra*).

The Town established that the playground was in a reasonably safe condition, and that it breached no duty to infant plaintiff (*see Bergin v Town of Oyster Bay*, 51 AD3d 698, 858 NYS2d 318

Villatoro v Town of Babylon  
Index No. 09-46612  
Page No. 6

[2d Dept 2008]; *Rygel v 8750 Bay Parkway, LLC*, 16 AD3d 572, 792 NYS2d 160 [2d Dept 2005]; *Lopez v Freeport Union Free School Dist.*, 288 AD2d 355, 734 NYS2d 97 [2d Dept 2001]). While plaintiffs allege that there was no age appropriateness signs warning them that the apparatus would be inappropriate for infant plaintiff, there is no duty to warn against a condition which is readily observable by the reasonable use of one's senses (see *Weiss v Half Hollow Hills Cent. School Dist.*, 70 AD3d 932, 893 NYS2d 877 [2d Dept 2010]; *Pirie v Krasinski*, 18 AD3d 848, 796 NYS2d 671 [2d Dept 2005]; *Cimino v Hempstead*, 110 AD2d 805, 488 NYS2d 68 [2d Dept 1985]). The evidence establishes that infant plaintiff's mother was present at the subject playground apparatus at the time of the accident and was watching infant plaintiff. It was readily observable to infant plaintiff's mother that there was an inherent risk posed by use of the wheel apparatus, which is approximately 64 inches above the ground.

In opposition, Bernheim's affidavit is insufficient to meet plaintiffs' burden and provides no evidentiary basis to create any factual issues as a matter of law (see *Butler v City of Gloversville*, 52 AD3d 896, 859 NYS2d 284 [3d Dept 2008]). Significantly, Bernheim relied upon alleged violations of guidelines promulgated by the ASTM and the CPSC, which are nonmandatory and not meant to be the exclusive standards for playground safety (see *Miller v Kings Park Cent. School Dist.*, 54 AD3d 314, 863 NYS2d 232 [2d Dept 2008]; *Bergin v Town of Oyster Bay*, *supra*; *Swan v Town of Brookhaven*, 32 A.D.3d 1012, 821 N.Y.S.2d 265 (2d Dept. 2006)). Moreover, plaintiffs failed to raise a triable issue of fact as to whether the alleged departures from these guidelines were a proximate cause of the accident.

Accordingly, the cross motion for summary judgment by the Town is granted. Further, having determined that the alleged missing grease fitting and lack of age appropriateness signs were not defective conditions, the Court, sua sponte, grants summary judgment dismissing the complaint as against TL Contracting.

Dated: July 12, 2013

  
J.S.C.

X  FINAL DISPOSITION        NON-FINAL DISPOSITION