Dauch v West Babylon Union Free School Dist.
2013 NY Slip Op 32115(U)
September 3, 2013
Sup Ct, Suffolk County
Docket Number: 11-11941
Judge: Denise Molia
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SHORT FORM ORDER

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INDEX No. 11-11941
CAL No. 12-01864OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 2-25-13
ADJ. DATE 5-3-13
Mot. Seq. # 001 - MG

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BRIAN DAUCH, an infant by his mother and natural guardian, ERIN M. DAUCH, and ERIN M. DAUCH, individually,

Plaintiffs,

- against -

WEST BABYLON UNION FREE SCHOOL DISTRICT,

Defendant.

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Upon the following papers numbered 1 to 45 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 24 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 25 - 42 ; Replying Affidavits and supporting papers 43 - 45 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant West Babylon Union Free School District for summary judgment dismissing the complaint against it is granted.

On September 13, 2010, infant plaintiff Brian Dauch, who was in the first grade at the time, suffered injuries when he fell off of metal monkey bars while playing outside on the playground located at the JFK Elementary School in West Babylon, New York. Subsequently, his mother, plaintiff Erin Dauch, suing individually and on behalf of her son, commenced this action against defendant West Babylon Union Free School District. By their bill of particulars, plaintiffs allege that defendant School District was negligent, among other things, in failing to supervise infant plaintiff at the playground and in failing to maintain the premises in a reasonably safe condition. Specifically, plaintiffs allege that the low parallel bars that were part of the monkey bars were slippery due to rain, and that the surface beneath the bars was in a dangerous and defective condition in that the wood chips were placed on hardpan or compacted earth.

RST

Defendant now moves for summary judgment dismissing the complaint, arguing that there was adequate supervision of infant plaintiff, and that there is no evidence a dangerous condition existed in the area of the playground where infant plaintiff fell. In support of its motion, defendant submits a copy of the pleadings, transcripts of the parties' deposition testimony, the transcript of plaintiffs' 50-h hearing testimony, photographs of the subject monkey bars, and an expert affidavit of Margaret Payne. Plaintiffs oppose the motion, arguing that there are triable issues of fact as to whether defendant provided adequate supervision of infant plaintiff, and whether there was a dangerous condition on the subject playground. In opposition, plaintiffs submit transcripts of the parties' deposition testimony and their own 50-h hearing testimony, photographs of the subject playground, their own affidavits, and an affidavit of Robert Schwartzberg.

At an examination before trial and a 50-h hearing, infant plaintiff testified that the accident occurred during recess when he went to play by the monkey bars. He testified that he stepped on a metal bar and that when he tried to step onto a second metal bar, he slipped and fell. He testified that Mr. Haug, the gym teacher, and three aides were supervising the children during recess. Infant plaintiff further testified that he was never informed of any rules for playing on the playground.

At his examination before trial, Mr. Haug testified that he is employed as a physical education teacher by the West Babylon School District. He testified that at the time of the accident he was supervising the students during recess, and that he was in charge of the three aides who were also monitoring the students. He testified that each aide was assigned an area to stand and observe the children, and that the aide closest to the monkey bars where infant plaintiff fell was at most 15 feet away. He testified that the students are not allowed to hang upside down from the monkey bars, or to stand or sit on top of the parallel bars. Mr. Haug further stated that while the aides do not instruct the students as to the rules, they would enforce the rules. He testified that he does not recall observing any students walking on the parallel bars prior to the accident. He stated that prior to allowing the students on to the playground, he would inspect it to see if there are broken bottles or other items on the playground. He testified that he does not recall if it was wet outside the day of infant plaintiff's accident, but that if it was, the custodian would go out and dry off the playground equipment. He also stated that there were five to six classes outside in the playground at the time of the accident.

At his examination before trial, Frank Gentilesca, head custodian of the school, testified that his duties include cleaning the classrooms and maintaining the exterior of the school. He described the ground cover underneath the metal monkey bars as sand covered by wood chips. He testified that the playground area is inspected each school morning.

Margaret Payne, a certified playground safety inspector, states in her affidavit that she visited the subject playground on April 5, 2011 to inspect the surface under the subject monkey bars. She states that the playground surface consisted of engineered wood filler with a depth of 3 inches to 4 inches over a layer of sand that was 4 inches to 5 inches. She states that the playground surface met all ASTM and CPSC specifications. She states that the height of infant plaintiff's fall was no more than 3 feet, and that the surfacing depth would have conservatively met specifications for a fall where the height is over 6 feet. Ms. Payne further states that ATSM standard and the CPSC Public Playground Safety Handbook guidelines on surfacing relate only to preventing head injuries and do not claim to prevent other injuries

from falls, including broken limbs. She opines that the equipment was age appropriate and the maintenance of the playground was reasonable and safe for an elementary school. She states that playground supervision and rules were adequate, as there were approximately 125 children with 4 aides and a teacher, which is a ratio of 25 to 1. She states that it was appropriate to allow the children to play on the playground equipment as it was not raining. She concludes that no act or omission by defendant caused or contributed to infant plaintiff's injury.

Robert Schwartzberg, a licensed engineer, states in his affidavit that he visited the subject playground on November 9, 2010 to inspect the playground surface. He states that the surface beneath the metal bars where infant plaintiff fell was comprised of wood chips, which were easily displaced by persons walking on them. He states that the wood chips were spread over the hardpan surface such that the thickness of the wood chips varied from zero to less than once inch in the vertical. He states that the lower horizontal bars which infant plaintiff fell from measured 27 inches in the vertical and that the galvanized finish had worn off where children walk atop the bars. Mr. Schwartzberg states that the metal members of the monkey bars were in a slick and slippery state, because of the failure to maintain and refinish them, and that a wet condition would make the galvanized finish even more slick and slippery. He concludes that a fall from the subject metal bars would result in personal injury due to the failure to provide a sufficiently resilient and absorbent surfacing material beneath the playground apparatus.

In reply, defendant submits an affidavit of Payne, who states that Schwartzberg did not dig holes in the dirt during his inspection and that he only looked at the top layer of the dirt. She states that while Schwartzberg contended that no sand had been added to the playground for 15 years, sand is not added under wood fiber as it is a sub base. Payne states that the assertion by Schwartzberg that the finish had rubbed off the metal equipment causing it to be slick and slippery is incorrect, because if the galvanizing process had been worn off, the bars would have been rusty.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; 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 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, 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]).

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 (*see* ***Mirand v City of New York*** 84 NY2d 44, 614 NYS2d 372 [1994]; ***Swan v Town of Brookhaven***, 32 AD3d 1012, 821 NYS2d 265 [2d Dept 2006]). While schools are not insurers of safety, they are obligated to exercise such care of their students as a parent of ordinary prudence would observe in similar circumstances (*see* ***Mirand v City of New York***, *supra*; ***Swan v Town of Brookhaven***, *supra*).

Moreover, it is fundamental that for a plaintiff to recover against a defendant in a negligence action alleging injury due to a dangerous condition on real property, the plaintiff must prove that the defendant owed the plaintiff a duty and that the breach of that duty resulted in the injuries sustained by the plaintiff (*see* ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]; ***Atkins v Glen Falls City Sch. Dist.***, 53 NY2d 325, 441 NYS2d 644 [1981]; ***Kimbar v Estis***, 1 NY2d 399, 153 NYS2d 197 [1956]). There must be evidence that establishes that the defendant either created the defective condition or had actual or constructive notice of the dangerous condition, such that the defect was apparent, visible and existed for a sufficient length of time to allow the defendant time to discover and remedy the situation (*see* ***Moss v JNK Capital Ltd.***, 85 NY2d 1005, 631 NYS2d 280 [1995]; ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Cafiero v Inserra Supermarkets***, 195 AD2d 681, 599 NYS2d 342 [3d Dept 1993]). Furthermore, the fact that the defendant may have a general awareness that a defective condition may exist is not legally sufficient to constitute notice of the particular condition that caused the plaintiff's injuries (*see* ***Kennedy v Wegmans Food Markets, Inc.***, 90 NY2d 923, 664 NYS2d 259 [1997]; ***Gordon v American Museum of Natural History***, *supra*).

Here, defendant established prima facie that it provided adequate supervision of infant plaintiff during recess, and that a lack of supervision was not a proximate cause of infant plaintiff's injuries (*see* ***Troiani v White Plains School Dist.***, 64 AD3d 701, 882 NYS2d 519 [2d Dept 2009]; ***Arceri v Smithtown Cent. School Dist.***, 82 AD3d 1140, 919 NYS2d 860 [2d Dept 2011]; ***Cimafonte v Levittown Bd. of Educ.***, 299 AD2d 445, 749 NYS2d 735 [2d Dept 2002]). Mr. Haug testified that a lunch aide was no more than 15 feet from where the accident occurred, and the record indicates that the staff to student ratio was appropriate. Moreover, the accident happened so suddenly and unexpectedly, and in such a short space of time, that even the most intense supervision could not have prevented it (*see* ***Reardon v Carle Place Union Free School Dist.***, 27 AD3d 635, 813 NYS2d 150 [2d Dept 2006]; ***Cerrato v Carpella***, 22 AD3d 701, 804 NYS2d 402 [2d Dept 2005]).

As to plaintiff's assertion that there was insufficient ground covering to protect children who fall from the playground equipment, defendant established its prima facie entitlement to summary judgment by demonstrating that it did not create or have any notice of the alleged dangerous condition (*see* ***Savastano v PM Amusements***, 47 AD3d 72, 850 NYS2d 178 [2d Dept 2008]). Moreover, defendant demonstrated that the wood chip ground cover used to cushion an impact under the parallel bars was maintained in a reasonably safe condition (*see* ***Gray v South Colonie Cent. School Dist.***, 64 AD3d 1125, 883 NYS2d 647 [3d Dept 2009]; ***Padden v County of Suffolk***, 52 AD3d 663, 860 NYS2d 604 [2d Dept 2008]; ***Banks v Freeport Union Free School Dist.***, 302 AD2d 341, 753 NYS2d 890 [2d Dept 2003]). Thus, defendant shifted the burden to plaintiffs to come forth with sufficient admissible evidence to raise a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

In opposition, plaintiffs failed to raise a triable issue of fact (*see* ***Russo v Valley Cent. School Dist.***, 33 AD3d 782, 822 NYS2d 607 [2d Dept 2006]; ***Capotosto v Roman Catholic Diocese***, 2 AD3d 384, 767 NYS2d 857 [2d Dept 2003]). As to the assertion that there was a dangerous condition on the playground where the accident occurred, the affidavit of plaintiff's purported 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.***, 105 AD3d 825, 962 NYS2d 664 [2d Dept 2013]; ***O'Boy v Motor Coach Indus., Inc.***, 39 AD3d 512, 834 NYS2d 231 [2d Dept 2007]). Moreover, while Schwartzberg's affidavit states that he is an engineer, who has experience performing work related to safety, structures, facilities systems, buildings and their appurtenances, his credentials do not indicate that he has expertise in playground safety. Furthermore, the Court notes that while his affidavit states that his curriculum vitae is attached, none is found. Schwartzberg's affidavit, therefore, was insufficient to raise a triable issue as to whether there was adequate ground cover and whether the monkeys bars were in a dangerous condition. Finally, plaintiffs failed to present any evidence supporting their allegation that the supervision of infant plaintiff was inadequate (*see* ***Carey v Commack Union Free School Dist. No. 10***, 56 AD3d 506, 867 NYS2d 525 [2d Dept 2008]; ***De Los Santos v New York City Dept. of Educ.***, 42 AD3d 442, 840 NYS2d 91 [2d Dept 2007]). Accordingly, defendant's motion for summary judgement dismissing the complaint against it is granted

Dated: 9-3-2013

Hon. Denise F. Molia

A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION