A.A. v City of New York
2016 NY Slip Op 32113(U)
September 12, 2016
Supreme Court, Queens County
Docket Number: 701437/14
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IA Part 6**
Justice

A.A. AN INFANT UNDER THE AGE OF FOURTEEN (14) YEARS, BY TENEIKA MCALLISTER-ARTIS HIS MOTHER AND NATURAL GUARDIAN AND TENEIKA MCALLISTER-ARTIS, INDIVIDUALLY, Plaintiffs,	Index Number 701437/14
-against-	Motion Date May 23, 2016
THE CITY OF NEW YORK and NEW YORK CITY BOARD OF EDUCATION, Defendants.	Motion Seq. No. 2
	Motion Cal. No. 9

The following numbered papers read on this motion by defendants for summary judgment dismissing the complaint and a cross motion by plaintiffs for partial summary judgment on the issue of liability.

	Papers Numbered
Notice of Motion-Affs.-Exhibits....	HC A
Cross Motion.....	EF 19
Aff. In Opp. to Motion and in Support of Cross Motion.....	EF 20
Exhibits.....	EF 21
Aff. Of Service.....	EF 22
Opposition.....	HC B
Aff. In Reply.....	EF 23
Exhibits.....	EF 24
Aff. Of Service.....	EF 25
Reply.....	HC C

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by the infant plaintiff when he fell from the slide component of a jungle gym structure located in a playground

adjacent to a New York City public school known as M.S. 53, in Far Rockaway, Queens. The playground is restricted to students at M.S. 53 from 8:00 A.M. until 5:00 P.M. on school days, but is open to the public at all other times. The infant plaintiff, who was six years old at the time of the accident, was not a student at the school. The subject accident occurred at approximately 5:15 P.M. on May 10, 2013.

Defendants served a joint answer to the complaint in which defendant New York City Board of Education was identified as the Board/Department of Education of the City of New York (DOE). In their moving papers, defendants seem to rely on one ground for an award of summary judgment in favor of The City of New York (the City) and to address all of their other arguments only with regard to DOE. Since it is not clear, however, from the other papers submitted hereon whether those arguments are being set forth on behalf of both defendants, the court will consider the DOE contentions to be made on behalf of the City as well.

In support of their motion, defendants rely upon the deposition testimony of David Pareti, the custodial engineer at M.S. 53 who is employed by DOE, as well as certain legal arguments. Defendants have failed to meet their burden of establishing their right to judgment as a matter of law (*see Voss v The Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). The argument that the City is not a proper entity to be sued because the City is a separate entity from DOE and is not responsible for the care and control of M.S. 53 ignores the City's role, testified to by David Pareti, as owner of the property where the playground is located. In addition, it disregards the testimony of Pareti that the playground is open to the public after school hours. A municipality is under a duty to maintain its park or playground facilities in a reasonably safe condition (*see Rhabb v New York City Hous. Auth.*, 41 NY2d 200 [1976]; *Nicholson v Board of Educ. of the City of New York*, 36 NY2d 798 [1975]; *Foreman v Town of Oyster Bay*, 140 AD3d 694 [2016]; *Muzich v Bonomolo*, 209 AD2d 387 [1994]). The use of the facility as a public playground also defeats the City's claimed defense as an out-of-possession landlord.

Despite defendants' extensive discussion of the issue, the duty owed by DOE to students under its control at its schools is not relevant here, where the infant plaintiff was not a student but a member of the public present at the playground after school hours. The duty owed by DOE to the infant plaintiff is based on its responsibility, as related by David Pareti, to maintain the playground.

Plaintiffs allege that the platform at the top of the slide from which the infant plaintiff fell did not have sufficient railings to prevent such a fall from the platform and that the playground equipment did not have any warning signs to advise the public of the age group for which the equipment is intended. Plaintiffs further contend that defendants allowed the material used on the playground's ground surface to age over time and become hard without replacing it, thus leaving the surface unsuitable for providing protection to playground users who fell onto it.

Defendants have not presented evidence demonstrating that they maintained the playground in a reasonably safe condition for use by children of the infant plaintiff's age (*see Angelone v City of New York*, 45 AD3d 513 [2007]). No evidence has been offered to show that the slide was not unreasonably dangerous or that appropriate signage for the apparatus was provided (*Cf. Y.H. Town of Ossining*, 99 AD3d 760 [2012]). Nor has any proof been offered that the surfacing material was maintained in proper condition or that its condition did not contribute to the infant plaintiff's injuries (*see Butler v City of Gloversville*, 12 NY3d 902 [2009]; *cf. Grandeau v South Colonie Cent. School Dist.*, 63 AD3d 1484 [2009]).

Contrary to defendants' contention, this case does not involve an alleged failure by defendants to provide security but a negligent failure to operate and maintain the playground in a safe condition with adequate warnings concerning the use of the facilities. The operation and maintenance of the playground are proprietary functions, not governmental functions as the provision of security would be (*see Caldwell v Village of Is. Park*, 304 NY 268, 274 [1952]; *Vestal v County of Suffolk*, 7 AD3d 613 [2004]; *cf. Salone v Town of Hempstead*, 91 AD3d 746 [2012]; *see also Wittorf v City of New York*, 23 NY3d 473 [2014]; *Valdez v City of New York*, 18 NY3d 69 [2011]). Plaintiffs, thus, need not plead or prove that defendants owed them a special duty in order to impose liability on defendants (*see Vestal*, 7 AD3d at 615; *cf. Salone*, 91 AD3d at 104-105; *see also Wittorf*, 23 NY3d at 479-480). Insofar as plaintiffs' references to the negligent design of the playground with regard to the lack of adequate safety railings for the slide could be viewed as implicating the governmental function immunity defense that affords a full defense for discretionary acts of a state or municipal party engaging in a governmental function, this defense is not established where, as here, there is no evidence that defendants "undertook a study which entertained and passed on the very same question of risk that is at issue." (*see Valdez*, 18 NY3d at 76;

Moskovitz v City of New York, 130 AD3d 991 [2015]; *Mare v City of New York*, 112 AD3d 793 [2013]). In any event, plaintiffs' allegations of negligence are not limited to the issue of design.

Defendants have also failed to demonstrate that they did not have actual or constructive notice of the slide's allegedly dangerous condition. David Pareti, DOE's custodial engineer, testified only to the general practice he and his staff followed to inspect the playground area for purposes of cleaning and any necessary repairs (*see Sperling v Wyckoff Hgts. Hosp.*, 129 AD3d 826, 827 [2015]; *Campbell v New York City Tr. Auth.*, 109 AD3d 455 [2013]). He stated he was not aware of any safety inspections made by the City and that he was not responsible for determining the safety or suitability of the structure. Apart from the issue of actual knowledge, a party will be charged with constructive notice of a dangerous condition which existed for such a length of time that knowledge thereof could have been acquired by reasonable investigation (*see Rhabb*, 41 NY2d at 202).

Since defendants failed to establish a prima facie entitlement to judgment as a matter of law, summary judgment is precluded without regard to the sufficiency of the opposition papers (*see Voss*, 22 NY3d at 734; *Vega*, 18 NY3d at 503).

The cross motion by plaintiffs is untimely and plaintiffs did not seek leave of court, upon good cause shown, to make a late application (CPLR 3212[a]; *see Brill v City of New York*, 2 NY3d 648 [2004]). Even if the court were to consider the cross motion on the basis that it is premised on nearly identical grounds as defendants' timely motion (*see Wernicki v Knipper*, 119 AD3d 775 [2014]; *Grande v Peteroy*, 39 AD3d 590, 591-592 [2007]) as urged by plaintiffs in reply papers, plaintiffs have failed to satisfy their prima facie burden of demonstrating the absence of any triable issues of fact, and summary judgment must be denied (*see Voss*, 22 NY3d at 734; *Vega*, 18 NY3d at 503). Although the expert affidavit submitted by plaintiffs may be considered by the court even though plaintiffs did not furnish an expert exchange pursuant to CPLR 3101(d)(1)(i) prior to filing the note of issue in this matter (*see Rivers v Birnbaum*, 102 AD3d 26 [2012]; *see also* CPLR 3212[b], as amended by L 2015, ch 529), the expert affidavit does not provide a sufficient foundation for the expert's opinion. In addition to failing to base his conclusions on any specified regulation, industry standard, professional practice, or treatise, the expert posits his opinions on a wrong assumption as to the age of the infant plaintiff, asserting that the infant was four years old at the time of the accident when he was six years old. As such, the expert's opinion is without probative value and insufficient to

support summary judgment (*see Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 1 [2005]; *Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]; *Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725 [1984]).

Accordingly, the motion and cross motion are denied.

Dated: September 12, 2016

Howard G. Lane, J.S.C.