Harris v Live, Play & Bounce Corp.
2016 NY Slip Op 32566(U)
November 30, 2016
Supreme Court, Suffolk County
Docket Number: 12-35283
Judge: Denise F. Molia

[* 1]

SHORT FORM ORDER

INDEX No. 12-35283
CAL. No. 15-00960OT

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 9-25-15 (001)
MOTION DATE 10-6-15 (002)
ADJ. DATE 2-26-16
Mot. Seq. #001 - MG
Mot. Seq. #002 - MD; CASEDISP

DEBRA HARRIS, as Mother and Natural Guardian of SOPHIE HARRIS, and DEBRA HARRIS, Individually,

Plaintiff,

- against -

LIVE, PLAY AND BOUNCE CORP., BU HOLDINGS, LLC and BU MANAGEMENT LLC,

Defendants.

LAW OFFICES OF KENNETH J. READY
Attorney for Plaintiffs
1565 Franklin Avenue
Mineola, New York 11501

BARRY, McTIERNAN & MOORE LLC
Attorney for Defendant IBOUNCE YOU
2 Rector Street, 14th Floor
New York, New York 10006

Upon the following papers numbered 1 to 51 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; Notice of Cross Motion and supporting papers 29 - 47; Answering Affidavits and supporting papers 22 - 26; 48 - 49; Replying Affidavits and supporting papers 27 - 28; 50 - 51; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant IBOUNCE YOU Corp., and the motion by plaintiff Debra Harris are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant IBOUNCE YOU Corp. for summary judgment in its favor is granted; and it is further

ORDERED that the motion by plaintiff Debra Harris for summary judgment in her favor on the issue of liability is denied.

Plaintiff Debra Harris commenced this action on behalf of her daughter, infant Sophie Harris, to recover damages for personal injuries allegedly sustained by Sophie on October 11, 2011 as a result of

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an accident that occurred on the premises of defendant IBOUNCE YOU Corp., improperly sued herein as Live, Play and Bounce Corp. The accident allegedly occurred when Sophie, then four-years-old, was sliding down the slide of the "Ultimate Modular Challenge," an inflatable attraction, while a guest at a birthday party held at defendant's premises in Oceanside, New York. Plaintiff alleges, in part, that defendant was negligent in the ownership, maintenance, and supervision of the premises in that it utilized a defective inflatable slide and failed to provide adequate supervision.

Defendant now moves for summary judgment dismissing the complaint, arguing that plaintiff executed a liability waiver in defendant's favor prior to the accident, that plaintiff cannot establish how Sophie's accident occurred or identify the cause, and that plaintiff assumed the risk of injury. In support of the motion, defendant submits copies of the pleadings; a copy of plaintiff's executed liability waiver; the transcripts of the deposition testimony of plaintiff, Kyle Breetveld, Andrew Reminick, and Lawrence Harris; and photographs of the IBOUNCE YOU facility. In opposition, plaintiff argues that defendant's waiver agreement violates General Obligations Law § 5-326, that Sophie did not have capacity to assume the risk, that defendant did not provide sufficient supervision of the children at the facility, and that triable issues exist as to the cause of the accident. Plaintiff submits, in opposition, unsworn statements of Sophie Harris, and the affidavit of Brian Avery, a purported amusement ride and device safety expert.

Plaintiff Debra Harris also moves for summary judgment on the issue of liability, arguing that defendant was negligent in failing to maintain the subject inflatable slide in a reasonably safe condition, and in failing to properly supervise and monitor such slide. In support of the motion, plaintiff submits copies of the pleadings; the transcripts of the deposition testimony of herself, Sophie Harris, Andrew Reminick, and Lawrence Harris; photographs of the IBOUNCE YOU facility; and the affidavit of Brian Avery. In opposition, defendant argues that plaintiff cannot establish how the accident occurred, that the affidavit of Brian Avery is inadmissible, that Sophie's unsworn statements are inadmissible, that the iability waiver is valid and enforceable, and that it was not in loco parentis.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The court's function on a motion for summary judgment is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, so 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 Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

A plaintiff seeking damages for personal injuries in a premises liability action must first establish, as a matter of law, that the defendant owed him or her a duty of reasonable care in maintaining the property (*see* ***Rivera v Nelson Realty, LLC***, 7 NY3d 530, 825 NYS2d 422 [2006]; ***Tagle v Jakob***, 97 NY2d 165, 737 NYS2d 331 [2001]; ***Alnashmi v Certified Analytical Group, Inc.***, 89 AD3d 10, 929 NYS2d 620 [2d Dept 2011]). Without this duty of reasonable care on the part of a defendant, there can be no breach of such duty and, therefore, no proximate cause of plaintiff's injuries as a result of the breach (*see* ***Conneally v Diocese of Rockville Ctr.***, 116 AD3d 905, 984 NYS2d 127 [2d Dept 2014]; ***Ortega v Liberty Holdings, LLC***, 111 AD3d 904, 976 NYS2d 147 [2d Dept 2013]; ***Nappi v Inc. Vill. of Lynbrook***, 19 AD3d 565, 796 NYS2d 537 [2d Dept 2005]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Frank v JS Hempstead Realty, LLC***, 136 AD3d 742, 24 NYS3d 714 [2d Dept 2015]; ***Guzman v State of New York***, 129 AD3d 775, 10 NYS3d 598 [2d Dept 2015]). Property owners, however, are not insurers of the safety of people on the premises (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Donohue v Seaman's Furniture Corp.***, 270 AD2d 451, 705 NYS2d 291 [2d Dept 2000]). To establish liability in a premises liability action, a plaintiff must establish that a dangerous or defective condition caused his or her injuries, and that the defendant owner or possessor created the condition or had actual or constructive notice of it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Giantomaso v T. Weiss Realty Corp.***, 142 AD3d 950, 37 NYS3d 313 [2d Dept 2016]; ***Davis v Sutton***, 136 AD3d 731 [2d Dept 2016]; ***Sermos v Gruppuso***, 95 AD3d 985, 944 NYS2d 245 [2d Dept 2012]; ***Starling v Suffolk County Water Auth.***, 63 AD3d 822, 881 NYS2d 149 [2d Dept 2009]; ***Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.***, 61 AD3d 629, 876 NYS2d 512 [2d Dept 2009]).

In a premises liability case, a defendant moving for summary judgment must show, prima facie, that he or she did not create the alleged defective condition, or have actual or constructive notice of the alleged dangerous or defective condition for a sufficient length of time to discovery and remedy it (*see* ***Witkowski v Island Trees Pub. Lib.***, 125 AD3d 768, 4 NYS3d 65 [2d Dept 2015]; ***Sinclair v Chau***, 117 AD3d 713, 985 NYS2d 267 [2d Dept 2014]; ***Ingram v Long Is. Coll. Hosp.***, 101 AD3d 814, 956 NYS2d 107 [2d Dept 2012]; ***Shindler v Warf***, 66 AD3d 762, 887 NYS2d 193 [2d Dept 2009]; ***Lezama v 34-15 Parsons Blvd, LLC***, 16 AD3d 560, 792 NYS2d 123 [2d Dept 2005]). In order to constitute constructive notice, a defect must be visible and apparent and must exist for a sufficient length of time prior to the accident to permit the landowner to remedy it, and it will not be imputed where the defect is latent or would not, upon reasonable inspection, be discovered (*see* ***Gordon v American Museum of Natural History***, *supra*; ***Schnell v Fitzgerald***, 95 AD3d, 945 NYS2d 390 [2d Dept 2012]; ***Applegate v Long Is. Power Auth.***, 53 AD3d 515, 862 NYS2d 86 [2d Dept 2008]; ***Curiale v Sharrotts Woods, Inc.***, 9 AD3d 473, 781 NYS2d 47 [2d Dept 2004]). A defendant can also establish its prima facie entitlement to summary judgment by showing that plaintiff cannot identify the cause of the accident (*see* ***Viviano v KeyCorp***, 128 AD3d 811, 9 NYS3d 154 [2d Dept 2015]; ***Mitgang v PJ Venture HG, LLC***, 126 AD3d 863, 5 NYS3d 302 [2d Dept 2015]; ***DeForte v Greenwood Cemetery***, 114 AD3d 718, 980 NYS2d 499

[2d Dept 2014]; ***Antelope v Saint Aidan's Church, Inc.***, 110 AD3d 1020, 973 NYS2d 769 [2d Dept 2013]; ***Kudrina v 82-04 Lefferts Tenants Corp.***, 110 AD3d 963, 973 NYS2d 364 [2d Dept 2013]; ***Califano v Maple Lanes***, 91 AD3d 896, 938 NYS2d 140 [2d Dept 2012]). "Where it is just as likely that some factor other than negligence by the defendant, such as a misstep or loss of balance, could have caused an accident, any determination by the trier of fact as to causation would be based upon sheer speculation" (***Califano v Maple Lanes***, *supra* at 898; *see* ***Costantino v Webel***, 57 AD3d 472, 869 NYS2d 179 [2d Dept 2008]).

To establish negligence, prima facie, based on circumstantial negligence, a plaintiff must show facts and conditions from which the defendant's negligence and the causation of the accident by that negligence may be reasonably inferred (*see* ***Quiroz v 176 N. Main, LLC***, 125 AD3d 628, 3 NYS3d 103 [2d Dept 2015]; ***Costantino v Webel***, *supra*; ***Secof v Greens Condominium***, 158 AD2d 591, 551 NYS2d 563 [2d Dept 1990]). However, the plaintiff need not exclude every other possible cause of the injury other than the alleged defects, but the evidence must be sufficient to permit a finding of proximate cause based on logical inferences, not speculation (*see* ***Quiroz v 176 N. Main, LLC***, *supra*; ***Reed v Piran Realty Corp.***, 30 AD3d 319, 818 NYS2d 58 [1st Dept 2006]; ***Secof v Greens Condominium***, *supra*). A plaintiff need only show that it was more likely or more reasonable that the injury was caused by the defendant's negligence than by some other cause *(see* ***Gayle v City of New York***, 92 NY2d 936, 680 NYS2d 900 [1998]; ***Hernandez v Alstom Transp., Inc.***, 130 AD3d 681, 13 NYS3d 232 [2d Dept 2015]; ***Quiroz v 176 N. Main, LLC***, *supra*).

Defendant made a prima facie entitlement to summary judgment as a matter of law by establishing that plaintiff is not able to identify the cause of Sophie's accident (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Center***, *supra*; ***Viviano v KeyCorp***, *supra*; ***Mitgang v PJ Venture HG, LLC***, *supra*). Defendant submits the testimony of Sophie's parents, Debra and Lawrence, who did not witness the accident, but testified as to what Sophie told them after the accident. Plaintiff testified that Sophie told her that she "fell on the slide" and that she "banged it...on the slide" immediately after the incident occurred. A few days later, Sophie told her mother that "she went down the slide...she slid down...[h]er right arm was up, she landed." Lawrence Harris testified that Sophie told him that she "hit [her] elbow at the bottom of the slide." Andrew Reminick, owner of defendant company, testified that he did not know how the accident occurred, but his general understanding is that Sophie "came down the slide with one arm tucked behind her back and one arm underneath her." Kyle Breetveld, desk manager of defendant company, testified that he had no firsthand knowledge as to how Sophie was injured nor received any indication of same. Plaintiff and Lawrence Harris also testified that the slide looked "under-inflated" after the accident. Such testimony demonstrates plaintiff's inability to identify the cause of the accident without resorting to speculation that defendant's negligence proximately caused the accident (*see* ***Mitgang v PJ Venture HG, LLC***, *supra*; ***DeForte v Greenwood Cemetery***, *supra*; ***Antelope v Saint Aidan's Church, Inc.***, *supra*; ***Kudrina v 82-04 Lefferts Tenants Corp.***, *supra*; ***Califano v Maple Lanes***, *supra*).

In opposition, plaintiff failed to raise a triable issue of fact as to the cause of the accident. Here, plaintiff has not submitted any admissible evidence showing exactly how the accident occurred (*see* ***Cormack v Cross Sound Ferry Servs.***, 273 AD2d 433, 710 NYS2d 380 [2d Dept 2000]), and plaintiff's

circumstantial evidence is insufficient to infer proximate cause (*see* ***Alayo v City of New York***, 217 AD2d 567, 629 NYS2d 286 [2d Dept 1995]). Although Sophie's unsworn statements indicate that she put her right arm down and her left arm up when she went down the slide, and that she hit her arm on the ground, such unsworn statements are inadmissible (*see* ***Municipal Testing Laboratory, Inc. v Brom***, 38 AD3d 862, 833 NYS2d 562 [2d Dept 2007]; ***Briggs v 2244 Morris L.P.***, 30 AD3d 216, 817 NYS2d 239 [1st Dept 2006]; ***Napiearlski v Pickering***, 278 AD 456, 106 NYS2d 28 [4d Dept 1951]; ***Stutsman v Black***, 244 AD 764, 279 NYS 770 [4d Dept 1935]; ***Stoppick v Goldstein***, 174 AD 306 [2d Dept 1916]). Even if plaintiff's submissions were admissible, the circumstantial evidence that Sophie's accident was caused by the slide's under-inflation failed to render the other possible causes of the injury sufficiently remote to logically infer that defendant's negligence was the proximate cause of Sophie's accident (*see* ***Gayle v City of New York***, *supra*; ***Hernandez v Alstom Transp., Inc.***, *supra*; ***Quiroz v 176 N. Main, LLC***, *supra*; ***Alayo v City of New York***, *supra*).

Accordingly, defendant's motion for summary judgment in its favor is granted. In light of the Court's grant of summary judgment on the issue of liability in favor of defendant, plaintiff's motion for summary judgment in her favor on the issue of liability is denied as moot.

Dated: 11-30-16

Hon. Denise F. Molia
A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION