Araujo v New York City Mission Socy.
2018 NY Slip Op 30854(U)
May 4, 2018
Supreme Court, New York County
Docket Number: 159081/2014
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. KALISH **PART 29**
Justice

LEAH ARAUJO, infant by her Mother and Natural Guardian ELAINA PARRA et ano.,

Plaintiffs,

- v -

NEW YORK CITY MISSION SOCIETY et al.,

Defendants.

INDEX NO. 159081/2014

MOTION DATE 4/9/2018

MOTION SEQ. NO. 001–003

NYSCEF Doc Nos. 57–70, 110, 112, 116–121, and 124, were read on motion seq. 001 for summary judgment.

NYSCEF Doc Nos. 72–84, 111, 113–114, and 122, were read on motion seq. 002 for summary judgment.

NYSCEF Doc Nos. 86–109, 115, and 123, were read on motion seq. 003 for summary judgment.

Motion seq. 001 by defendant AMC Entertainment Holdings, Inc. ("AMC") pursuant to CPLR 3212 for summary judgment against Plaintiffs Leah Araujo ("L.A.") and Elaina Parra ("Parra") is granted.

Motion seq. 002 by defendants New York City Mission Society ("Mission") and the City of New York (the "City") pursuant to CPLR 3212 for summary judgment against L.A. and Parra is also granted.

Motion seq. 003 by defendants Commonwealth Local Development Corp. ("Commonwealth") and HUSA Management Company, LLC ("HUSA") pursuant to CPLR 3212 for summary judgment against L.A. and Parra is also granted.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

BACKGROUND

This is a trip-and-fall action. Plaintiff L.A. is an infant who brings the instant action by her mother and natural guardian Parra, who is also a plaintiff in the instant action in her individual capacity. Plaintiffs are suing Defendants Mission, AMC, Commonwealth, HUSA, and the City to recover for injuries L.A. allegedly suffered due to their negligence on July 23, 2013, when she tripped and fell while on a descending escalator.

Mission runs a summer camp out of P.S. 33 and is allegedly under the control and supervision of the City. L.A. was ten years old at the time and was attending Mission in the summer of 2013 and the campers were on a field trip to the Magic Johnson theater, which is located on the corner of West 124th Street and Fredrick Douglass Boulevard in Harlem (the "Premises"). Commonwealth is the landowner of the Premises. HUSA is the landlord of the

Premises. AMC ran the Magic Johnson theater, which was primarily located on the third and fourth floors of the Premises (there was also a ticket booth on the first floor). L.A. was allegedly on an escalator going from the second floor to the first floor of the Premises when she fell.

Plaintiffs allege in the complaint that Defendants were negligent in their ownership, operation, management, maintenance, and control of the Premises. Plaintiffs further allege negligence in the supervision, direction, instruction, care, and custody of L.A. Aside from Parra's derivative suit, there is no cause of action other than the negligence of Defendants.

In Plaintiffs' verified bills of particulars, it is alleged that the campers were descending the escalator to leave the movie theater when a large crowd formed at the base of the escalator because the doors leading to the street were locked or not operating.

L.A. was the only eyewitness to the accident who was deposed in this case. At L.A.'s EBT, L.A. stated that Mission took almost the entire camp—about 75 to 100 kids—to Magic Johnson theater that day to see Despicable Me. L.A. further stated that there was a total of 10–15 supervisors from Mission with the campers that day. L.A. further stated that she was a part of the fifth-grade group, which had about 15–20 campers in it, at the theater. L.A. further stated that her counselors, Mr. Ty and Mr. Mustafa, supervised the fifth-grade group on the Mission field trip to the theater that day.

L.A. stated that, after the movie, the group was in a double-file line (a line of two campers side-by-side) as Mr. Ty had instructed. L.A. further stated that the fifth-grade group was being led outside from the movie theater with Mr. Ty in the front of the group and Mr. Mustafa in the back of the group. L.A. further stated that she was in the very back of the line, with only Mr. Mustafa behind her, as the group proceeded from the theater and toward the building exits.

L.A. stated that she began riding the down escalator from the second floor to the first floor with another girl, Chelsea, on the same step as her and standing to her right, and with Mr. Mustafa on the step directly behind her. Chelsea was L.A.'s buddy, or partner, on the day of the alleged incident. Mission had instructed the campers to stay with their respective buddies during the field trip. L.A. further stated that she was holding onto the left rail as the escalator descended. L.A. further stated that she kept both feet on the same step the entire time she was on the escalator (i.e., did not walk down it as it went). L.A. further stated that she was looking forward while riding down and could see in front of her. L.A. further stated that she did not see what was going on at the end of the escalator until she was about to get off, which was when she was "about seven steps up from the bottom of the escalator." (L.A. tr, at 19, lines 9–10.) L.A. marked the "seven steps up" on the escalator where she "noticed something going on" on EBT exhibit B (the higher of two horizontal lines initialed by L.A. at her EBT).

L.A.'s initial statement at her EBT about what caused her to fall was that "[t]here was a pileup on the escalator because the door was jammed and kids were moving back." (*Id.* at 19, lines 13–15.) L.A. said "[i]t was a big group of kids moving back pretty much, like a big circle . . . [of] . . . [m]aybe about five to eight [kids]." (*Id.* at 19, lines 22–25.) L.A. marked the door which she described as "jammed" with a "J" in EBT exhibit C. She also marked three other

adjacent doors with a "C" to indicate that those doors were closed at the time of the alleged incident. L.A. stated at her EBT that the campers came in and out of the "J" door on all previous field trips without incident and rode the escalator up and down without incident. L.A. further stated that the campers came into the building through the "J" door on the day of the alleged incident without incident.

Further describing her alleged fall, L.A. stated that "[s]ince there was a pileup at the bottom and kids were moving back, back on the escalator to go up and there was a big pile, I tripped." (L.A. tr, at 30, lines 8–11.) L.A. further stated that "[t]he door was opening towards [us] which is right by the escalator. And the kids were on the escalator going out, the kids had to move back because the door got jammed and there was a big pile. And they were going on the escalator to go back up, which caused me to trip since there was a lot of people." (*Id.* at 30, lines 14–22.)

L.A. indicated on exhibit B that she fell about three or four steps from the bottom of the escalator (the lower of two horizontal lines initialed by L.A. at her EBT). L.A. said that she thought she tripped on a foot from all the feet on the escalator. L.A. stated that both she and Chelsea fell, but did not remember if it was at the same time. L.A. further stated that she did not know if Mr. Mustafa saw L.A. fall or if L.A. spoke to him immediately afterward. L.A. further stated that "Ms. Carolina" came inside to help L.A. and Mr. Ty helped Chelsea.

Regarding the "jammed" door, L.A. stated that the "assistant principal" of Mission, Ms. Carolina, had already led the entire kindergarten through fourth-grade groups of campers, along with their supervisors, out of the Premises through the "jammed" door before the fifth-grade group began going down the escalator. L.A. further stated that there were about eight or nine supervisors and more than thirty campers who were led out of the theater through the "jammed" door prior to her fifth-grade group.

L.A. stated that Ms. Carolina had exited through that door before it was "jammed." L.A. further stated of the "jammed" door that "[w]hile it was opening, I guess it got stuck and it locked." (L.A. tr, at 61, lines 22–23.) L.A. further stated that Mr. Ty "tried to open the door and [] couldn't." (*Id.* at 62, lines 5–6.) L.A. further stated that she saw Mr. Ty trying to open the door before her alleged accident while she was still on the escalator and did not hear Mr. Ty saying anything during that attempt. When asked, "[w]as Mr. Ty trying to open the door, that jammed door, when the accident happened?" L.A. replied, "I don't recall." (*Id.* at 63, lines 6–8.)

L.A. stated that there were *no campers* near Mr. Ty in the lobby when Mr. Ty was trying to open the "jammed" door, that Mr. Ty had "told all of them to exit," and that they had all exited through "[t]he door that was jammed *because it was open halfway*." (*Id.* at 64, lines 24–25 [emphasis added].) In response to the question, "[s]o did the kids squeeze through the door or something else? I'm trying to understand (*id.* at 65, lines 2–4), L.A. stated that there were fifteen kids by Mr. Ty and that none of those fifteen kids exited onto the sidewalk. L.A. further stated that those fifteen kids "were moving towards the center of the lobby so they could exit out on the sidewalk where the other groups were." (*Id.* at 66, lines 7–9.) L.A. further stated that, in fact, about "twelve of them were [] kids [from her] class[] [a]nd the others were teachers that were

taking their group outside to the sidewalk." (*Id.* at 94 lines 17–20.) L.A. further stated that she could see those teachers exiting as she was descending on the escalator. L.A. further stated that she could see that the lobby was empty at the time she was going down the escalator to leave. L.A. further stated that Mr. Ty "was at the front of the line and then he came back in when he saw that we fell." (*Id.* at 33, lines 19–20.)

L.A. stated that the chaperones from Mission had previously, prior to the day's field trip, instructed the campers "not to play around on [the escalators]." (*Id.* at 88, lines 21–24.) When L.A. was asked, "[d]id [the chaperones] ever say that when you get to the bottom of the escalator, [] continue moving away from the bottom of the escalator?" L.A. replied, "[y]es." (*Id.* at 89, lines 3–6.) L.A. further stated that they said this "[w]hen we were in the school getting ready to leave[;] they go over rules about where we are going and how to behave." (*Id.* at 89, lines 8–10.) L.A. further replied in the affirmative that this was done every morning when Mission has a field trip and that, on the morning of her accident, the chaperones said generally to be careful when using escalators.

Upon further questioning, L.A. stated that, "when [she was] seven steps from the bottom and [] noticed Mr. Ty trying to open the jammed door," there were "five campers and one chaperone" on the ground level of the Premises. (*Id.* at 95, lines 5–19.) L.A. then answered in the affirmative when asked whether, "[a]t the moment that [she] w[as] seven steps from the bottom of the escalator, there was no one else in the lobby besides those five campers and one chaperone." (*Id.* at 95, lines 20–24.) L.A. further stated that "[t]hree kids were in – sorry, maybe five kids were in front of me getting off the escalator and then I had Chelsea next to me." (*Id.* at 96, lines 5–7.) L.A. further stated that one of them was on the step immediately in front of her. L.A. further stated that she did not see any of those five kids get hurt from this accident.

L.A. then stated that she saw one of them, named Joshua, fall on the floor as he was exiting the escalator. When L.A. was asked, "did you see Joshua fall?" L.A. replied, "[a]fter the kids started moving back because the door got jammed when we were trying to go down, I saw when he was getting off the escalator again he fell on the tile floor, not the escalator." (*Id.* at 97, lines 13–17.) L.A. indicated that Joshua fell on the metal grating that is on the floor at the foot of the escalator. When L.A. was asked, "[w]hat caused Joshua to fall?" L.A. replied, "I don't know." (*Id.* at 99, lines 3–6.)

L.A. was asked "[d]o you know why it was crowded in the area where Joshua fell and – do you know why it became crowded in that area?" L.A. replied, "[b]ecause when we were trying to exit the movie theater to get on the sidewalk, *the door opened towards you and it got jammed.* And it was all of the – mostly all of the kids in my group were on the floor moving towards the escalator and it got into a big circle." (*Id.* at 100, lines 13–23 [emphasis added].)

In further regard to the "jammed" door, L.A. stated that "[i]t was open halfway until – when it was open halfway, that's when the door got jammed." (*Id.* at 129, lines 2–4.) L.A. was then asked "did it remain jammed [] halfway? and replied, "[n]o. . . . After it got jammed they closed it and then when it opened back up it opened all the way." (*Id.* at 129, lines 5–11.) L.A. further stated that she did not know how much time passed between when the door was closed

and when it was opened again, but that it was Mr. Ty who closed the door before it was reopened. L.A. further stated that the doors were "pull doors," not "push doors," and that Mr. Ty was pulling the door open. (*Id.* at 131.) L.A. further stated that another student was with Mr. Ty and was also acting to close and open the door. L.A. further stated that the door as it appears in EBT exhibit C looks the same as it appeared on the date of the alleged accident.

After being asked why the kids did not move into the open area of the lobby, L.A. answered, "[w]e were already in the two lines order and *some of the kids in the front were talking, so they didn't see when Mr. Ty was opening the door*." (*Id.* at 103, lines 12–15 [emphasis added].) L.A. further answered in the affirmative that nothing was barricading the open area of the lobby that would prevent the kids from moving into that section of the lobby.

L.A. was asked, "[i]s there any reason, in your opinion, that the kids didn't use the other doors to exit the building?" L.A.'s attorney forbade her to answer. (*Id.* at 103–104.) L.A. stated that the "pileup" caused her to fall because there were a lot of kids on the escalator and there wasn't a lot of space and the teacher behind her, Mr. Mustafa, didn't let her back up. (*Id.* at 112, lines 15–22.) L.A. further stated that Mr. Mustafa didn't let her back up because he thought she was playing around on the escalator. L.A. further stated that Mr. Mustafa "blocked his hands on the rails on the escalator . . . [b]efore . . . [w]hen the kids were starting to go back on the escalator." (*Id.* at 112, line 25; at 113, lines 2–8.) L.A. further stated that "about five" of the kids "were at first [] walking backwards, turning around to go up." (*Id.* at 113, lines 15–19.) L.A. further stated that she did not see or hear the chaperones say anything when the kids began doing this and that she herself didn't say anything to the kids who were doing this.

L.A. was asked, "did all five of those kids who turned to go up the escalator actually make it onto any of the steps or were they simply in the landing area?" L.A. answered, "I don't know." (*Id.* at 114, lines 14–18.) Regarding her fall, L.A. stated "[w]hen I was on the fourth step and the stairs were getting flat, I put my foot forward so I could walk off and that's when the kid started to move back and I tripped." (*Id.* at 116, lines 14–17.) L.A. further stated that her "foot came into contact [with another foot] before [she] could touch the ground [as she took that step down], [and] [t]hat's when the other five kids came on the escalator and we started to move back and then I tripped." (*Id.* at 117, lines 6–18.)

L.A. was asked, "[t[he five kids that turned to go up the escalator, where were they when your foot came into contact with another's foot?" L.A. replied, [t]hey were almost [] on the escalator and one of their f[ee]t was [] reaching out to get on it when I touched one of the f[ee]t." (*Id.* at 118, lines 16–22.) L.A. stated that she did not remember any of the kids laughing or giggling as they approached the escalator and that she did not know if the kids were engaged in horseplay as they approached the escalator, although she did say that she knew horseplay meant playing around.

L.A. further stated that making contact with someone else's foot did not cause her to lose her balance. L.A. further stated that she then turned her head back and to the right to look behind her to see if there was space behind her to back up. L.A. further stated that she saw Mr. Mustafa there on the step behind her and that he was looking down at the lobby and blocking the escalator

to go up by having his left arm on the left railing and his right arm on the right railing. L.A. further stated that she thought Mr. Mustafa was doing this purposefully to block the campers from going up the down escalator. L.A. further said she did not remember if any of those kids who went to go up the down escalator actually took steps on the escalator in the wrong direction. L.A. further stated that she did not remember if any of them were disciplined.

L.A. then stated that the kids in front of her started to lean back and came into contact with both of her legs, which caused her to trip and fall at that moment. L.A. further stated that she did not remember if anybody was saying anything in the 30 seconds before she fell. L.A. further stated that, when she fell, the escalator carried her about three steps to the end of the escalator.

The AMC opening manager stated at her EBT that she remembered that all the doors were working and unlocked on the day of the accident. (Tr at 50, 51, 65.) The HUSA representative at the HUSA EBT stated that there was no report of broken doors but did not know when they were last maintained or inspected. (Tr at 25.)

The lease between HUSA and AMC specifies that AMC is required to maintain the "demised premises." This is a defined term in the lease insofar as Exhibit A shows the demised premises on a map of the Premises. The escalators are not marked as being part of the demised premises. The landings immediately next to the escalators are marked as being "Common Area." The lease specifies that HUSA is responsible for all common areas. The lease does specify that AMC is responsible for escalators that are in the demised premises, if any.

ARGUMENT

***Motion 001*—AMC**

AMC argues, in sum and substance, that the testimony at the EBTs and the lease by its terms indicate that AMC had no duty to Plaintiffs. AMC argues, critically, that the location where the accident allegedly occurred was outside of the demised premises.

Plaintiffs argue in opposition that there is an ambiguity as to who has control of the escalators based upon the lease. Plaintiffs concede that the escalators are not part of the demised premises but argue that AMC is responsible for their repair and replacement. Plaintiffs then argue (with no support) that a HUSA security guard and AMC box office workers saw the Plaintiff's camp group "piling into the lobby" and took no action to control the situation, stop the escalator, etc.

AMC argues in reply that Plaintiffs concede AMC had neither actual or constructive notice of a dangerous condition. AMC further argues that it bore no responsibility for common areas at the Premises, of which the escalators were a part. AMC further argues that, even if there is an ambiguity in the lease, because the theater is on the third and fourth floors, AMC had no responsibility for the escalator between the first and second floors. AMC then argues that the cross claims against it must be dismissed as no defendants opposed AMC's motion.

***Motion 002*—The City and Mission**

The City and Mission assert three main points in support of their motion for summary judgment. First, they argue that neither the City nor Mission owned, occupied, controlled, or made special use of the Premises. Second, they argue that the level of supervision was unrelated to the alleged accident. Third, they argue that the City is not a proper defendant as it owes no duty to Plaintiffs.

As to the second point, they argue that schools and summer camps owe a duty of reasonable care to the children in their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision. They argue further that summer camps are not expected to insure the safety of campers or to continuously supervise them and control all their movements and activities.

In sum and substance, they argue that nothing about Mission's level of supervision proximately caused L.A.'s injuries because her alleged accident happened so suddenly and quickly that, as a matter of law, greater supervision would not have prevented it from occurring. They further argue that the entirety of the incident took place in the amount of time it took the escalator to descend three steps—a few seconds. They further argue that, regardless, Mission fulfilled its duty to supervise because Mission had 15–20 supervisors overseeing approximately 75 children—with three supervisors assigned to L.A.'s group of 20 campers—because Mr. Mustafa was directly behind L.A., and because there was no horseplay. Specifically, because of Mr. Mustafa's proximity, they argue that more intense supervision could not have prevented this.

As to the third point, they argue that the City did not own, operate, supervise, or control any of the action of Mission, which is separate and distinct from the City, and that the City did not contract with Mission to operate or supervise a summer camp on its behalf. They further argue that the Notice of Claim states that Mission was a subcontractor of the City, but the City through "undisputed evidence" has shown that Mission, a not-for-profit domestic corporation, is separate and distinct from the City. The City provides funding to Mission through the NYC Department of Youth & Community Development. But, they argue, the City owes no duty of care to L.A.

Plaintiffs argue in opposition, in sum and substance, that there are material issues of fact as to the supervision provided by Mission. Plaintiffs further argue that there was a pileup of children and that Mission focused on a "jammed" door—the door closest to the escalator—as campers crowded around Mr. Ty. Plaintiffs further argue that Mr. Mustafa did not take any steps to instruct the campers to move away from the landing to somewhere else in the lobby and in fact blocked L.A.'s path. Plaintiffs further argue that the accident happened because of Mission's instructions to stay in line. Plaintiffs then argue that campers trying to retreat from a pileup is a reasonable and foreseeable consequence of Mission not providing sufficient supervision to the campers to move away from the landing despite the "jammed" door blocking their exit.

At oral argument, Plaintiffs' counsel confirmed that L.A. first saw Mr. Ty by the door when she was seven steps from the escalator landing. (Tr at 20, lines 23–26; at 21, line 2.)

Plaintiffs make no argument as to the City.

The City and Mission argue in reply, as to Mission, that case precedent indicates that Mission is not an insurer of L.A.'s safety and that Mission did provide adequate supervision under the circumstances. They further argue that Plaintiffs never addressed that the alleged incident took place in the amount of time it took the escalator to descend three steps. In that time, L.A. claims that the door "jammed," Joshua fell, and someone tripped her. Under such circumstances, it cannot be said that more intense supervision would have prevented this. They argue, critically, that because the entire set of events claimed by plaintiff to be the proximate cause of her accident took place in a matter of seconds, Mission is entitled to summary judgment.

As to the City, they argue that Plaintiffs did not even offer token opposition.

***Motion 003*—Commonwealth and HUSA**

Commonwealth and HUSA argue that there is no evidence the entrance/exit doors were dangerous or defective and that the doors are not inherently dangerous. They further argue that they did not have actual or constructive notice of any alleged defect. They further argue that Mission negligently supervised L.A. and that there were 8–10 doors and a large lobby available for everyone to descend safely. They further argue that the only evidence shows that the doors were unlocked and opened on the day of the accident and that there were no complaints. They then state that the doors open out to the street, not inward as L.A. stated at her EBT. They further argue that they received no reports of any issues with the doors. They then argue that Parra (L.A.'s mother) said L.A. said that she did not know what caused her to fall, and that L.A. told Parra that she tried to walk back up the escalator, but Mr. Mustafa told her to turn around and face the rest of the kids.

Plaintiffs argue in opposition that there is an ambiguity as to who has control of the escalators based upon the lease. Plaintiffs concede that the escalators are not part of the demised premises but argue that AMC is responsible for their repair and replacement. Plaintiffs then argue (with no support) that a HUSA security guard and AMC box office workers saw the Plaintiff's camp group "piling into the lobby" and took no action to control the situation, stop the escalator, etc.

Plaintiffs make no argument as to Commonwealth.

Commonwealth and HUSA argue in reply, in sum and substance, that Plaintiffs have submitted no affidavits, experts, or any competent evidence to indicate the door was defective or hazardous, or that they had actual or constructive notice of a dangerous or defective condition. They argue that the Mission chaperone was trying to open the door the wrong way and that Mission made choices which led to L.A.'s injuries. They further argue that Plaintiffs said nothing in their opposition which refutes that dozens of others had been able to safely exit the door which "jammed" immediately prior to L.A.'s alleged accident. HUSA and Commonwealth generally reiterate their points made in their moving papers.

DISCUSSION

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980] [internal quotation marks and citation omitted].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 N.Y.2d 72, 81 [2003].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 [1st Dept 2002].)

***Motion 001*—AMC**

The Court finds that AMC did not have responsibility for the escalators (or the door(s)) based upon the lease, which is not ambiguous. The lease shows that the escalators/doors, and the areas around them, were "common areas" for which HUSA is responsible. As such, the Court finds that AMC has shown prima facie its entitlement to judgment as a matter of law. In response, Plaintiffs fail to raise a triable issue of fact with any affidavits, expert testimony, etc. Plaintiffs' other arguments, such as that one of the ticket booth tellers should have intervened, are not persuasive.

***Motion 002*—The City**

The Court granted summary judgment in favor of the City and against Plaintiffs at the March 20, 2017 oral argument, when Plaintiffs conceded the motion as to the City. (Tr at 18, lines 18–24.)

***Motion 002*—Mission**

In a negligent supervision action, a "[d]efendant must exercise the same degree of care in supervising its students as a reasonably prudent person would under comparable circumstances. As such, defendant will be held liable if it breached its duty to provide such care and the child's injuries were proximately caused by the inadequate supervision." (*Wagner v Oneonta School Dist.*, 68 AD3d 1516, 1516–1517 [3d Dept 2009] [internal citations omitted].) "A school is not liable for every careless act of one pupil who injures another; thus, when a spontaneous and unintentional accident happens in just a few moments, . . . no amount of supervision, however intense, can prevent a resulting injury." (*Id.*) In *Wagner*, one aide was monitoring two elementary school classes in a single classroom at the time of an accident. The *Wagner* Court found that this was adequate supervision under the circumstances. The *Wagner* Court found further that any breach could not have been the proximate cause of the injuries. In *Wagner*, a child bent down to get an item from the floor and put her hand out onto a door to balance herself

when some students walked out and crushed her fingers in the door. The court found that, as the students had no prior disciplinary issues and were not involved in horseplay, even though the children in the bathroom were disobeying the rules, the accident was "spontaneous and unintentional" and thus liability for the school did not lie. (*Id.*)

In *Esponda v City of New York* (62 AD3d 458 [1st Dept 2009]), the court granted defendants' motion for summary judgment in a negligent supervision action. The plaintiff was walking in line during a fire drill with her teacher leading the third-grade class. While walking, two students from a different class were running, which was against the rules, and bumped into the plaintiff, causing injury. The plaintiff alleged that the teacher was negligent in that she should have been in the middle or back of the line to see her students. The court found that this was unreasonable under the circumstances and that it would have meant third graders would have been leading the line. The court found further that "the alleged lack of supervision . . . could not have been the proximate cause of the injury. Supervision would not have prevented the larger pupils from coming into contact with plaintiff. Where an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not the proximate cause of the injury and summary judgment in favor of the [defendant] is warranted." (*Id.* at 460 [internal quotation marks and emendation omitted].)

In *Elbadwi* ex rel. *Green v Saugerties Cent. School Dist.* (141 AD3d 805 [3d Dept 2016]), the plaintiff, an elementary school student, was playing on a playground during recess after having been told not to go onto it because it was icy after a snowstorm. "Less than one minute after exiting the school for the scheduled outdoor recess, plaintiff, in an effort to avoid a collision with a fellow classmate, jumped onto a double slide located on the playground, slipped, [and] fell [causing injury]." (*Id.* at 806.) The court found that negligent supervision, if any, was not the proximate cause of the injury because it "occur[red] in so short a span of time that even the most intense supervision could not have prevented it." (*Id.* at 807.)

In *Goldschmidt v City of New York* (123 AD3d 1087 [2d Dept 2014]), the court found that negligent supervision was not the proximate cause of injuries where a ninth-grader tripped on the strap from his own backpack during recess. The court cited the law relating to incidents transpiring in a short span of time.

In *Chynna A.* ex rel *Nitoscha A. v City of New York* (143 AD3d 623 [1st Dept 2016]), the court found that defendants established their entitlement to judgment as a matter of law by submitting evidence showing that the infant plaintiff's thumb injury during a school tag game was proximately caused by a sudden and unexpected collision with a fellow student. The court found that "[n]o amount of supervision could have guarded against the injurious event, and as such, the alleged inadequacy of the gym teacher's supervision of the [game] was not a substantial factor in the cause of the injury." (*Id.* at 624.) The court further found that "[t]here was no evidence indicating that infant plaintiff was injured due to crowded conditions, or due to the gym's size, or because of any unchecked, unruly student activity. Furthermore, there was no evidence of any prior injuries sustained during the tag game that was regularly played in the school gym." (*Id.*)

In *David v City of New York* (40 AD3d 572 [2d Dept 2007]), the court found that the school did not breach its duty of supervision where, despite providing 14 supervisors for 40 students, where one supervisor was right next to the plaintiff, plaintiff was nevertheless injured during a hay ride when a bump threw her from her seat. The student-to-teacher ratio was found to be adequate under the circumstances, despite that an injury occurred. The court found it persuasive that no prior incident had occurred during other hay rides.

In *Ronan v School Dist. Of City of New Rochelle* (35 AD3d 429 [2d Dept 2006]), one student was running in a gym class when he fell, causing plaintiff to trip over him and sustain injuries. The court found that this was "a spontaneous and unforeseen act which could not have been prevented by any reasonable degree of supervision."

In *Siegell v Herricks Union Free School Dist.* (7 AD3d 607 [2d Dept 2004]), one student pushed another during a frisbee relay race. The court found that the plaintiff's injuries were caused by a spontaneous and unforeseeable act committed by a fellow student.

In the instant action, L.A.'s own testimony regarding her first-hand account, viewing all her statements, and all the other evidence, in the light most favorable to Plaintiffs, has eliminated all issues of fact relating to Mission's allegedly negligent supervision. It is undisputed and unambiguous from the EBT of L.A. that the entirety of the events which proximately caused her injuries took place in the span of a few seconds. From the time she was seven steps from the bottom on her descent while on the escalator to the time she was three steps from the bottom, L.A. noticed that the door was "jammed," that Mr. Ty closed it and opened it again all the way, that Joshua fell, that other students were backing up toward her, and that Mr. Mustafa's arms were on the escalator rails. That the door may have been "jammed" for a short time and open only halfway is of no moment. Further, L.A.'s statements as to why other students were standing in the lobby, or backing up toward the escalator, are speculative and conclusory. Further, L.A. does not know why Joshua fell, only that he fell first, and then other students backed up toward the down escalator. This occurred despite Mission's clear warnings, as recounted by L.A., to be careful going down the escalator and to keep moving after reaching the bottom so that others could come down safely.

With two counselors and a chaperone in charge of L.A.'s group of approximately 15–20 students, Mission's supervision was reasonable under the circumstances. Nearly the entire camp had exited the theater safely. L.A. stated at the EBT that the students in front of her were "talking, so they didn't see when Mr. Ty was opening the door." (*Id.* at 103, lines 14–15.) The entirety of students and supervisors for kindergarten through fourth grade left the theater. The lobby was a large, open space, and the campers coming down the escalator before L.A.—by L.A.'s own admission, despite ambiguities in her testimony, such as if there were "fifteen" still in the lobby—were in fact moving toward the open lobby space.

It was a smaller group of five or five to eight students who did not move forward and away from the bottom of the escalator because, in L.A.'s words, they were not paying attention. Then, Joshua fell. After that, the students at the bottom of the escalator backed up. Whether the door was "jammed" or opened is of no moment because there is no causal link between the door

and the students not moving from the escalator landing, or the door and Joshua falling. Further, even if Mr. Mustafa did put his hands on the rails or tell L.A. to look forward in response to what was happening in front of him, it was a matter of moments from when Joshua fell to when students backed up and tripped L.A.

Even if there was something in front of Mr. Mustafa that he could have seen, reacted to, or done anything about in the moments that encapsulate the events which proximately caused L.A.'s injuries, courts as a matter of law have not held teachers or counselors to be liable for similar, fleeting occurrences. Further, the account that Mr. Mustafa was deliberately blocking L.A. is speculative and conclusory, and any statements by Parra to the contrary are hearsay and likely inadmissible. L.A.'s EBT is the only first-hand account of L.A.'s accident that is before the Court.

The Court finds that the the amount of supervision provided by Mr. Ty, at the front of the fifth-grade group, and Mr. Mustafa, at the back of the fifth-grade group, was reasonable under the circumstances. As such, Mission has shown prima facie entitlement to judgment as a matter of law against Plaintiffs, and Plaintiffs have failed to raise a genuine issue of material fact in response.

***Motion 003*—Commonwealth**

The Court granted summary judgment in favor of Commonwealth and against Plaintiffs at the March 20, 2017 oral argument. There, Plaintiffs indicated they would not contest that Commonwealth was not liable to Plaintiffs. (Tr at 39, lines 25–26; at 40, lines 2–13.)

***Motion 003*—HUSA**

HUSA has shown prima facie that it had no actual or constructive notice of a dangerous or defective condition at the door, that the door is not inherently dangerous, and that it did not create a dangerous condition. By first-hand testimony from the Tuman EBT, the doors were unlocked and functioning normally on the day of the alleged accident. L.A. characterizes the door's behavior as a "jam," but, viewing all the evidence in the light most favorable to Plaintiffs, the door was in a state of being "jammed" while it was halfway open, and students were passing through it, and it was then closed and then opened all the way by Mr. Ty.

HUSA indicates that the door operated normally at all times other than fleetingly when Mr. Ty may have been pulling instead of pushing on it. Further, L.A. states that she did not hear Mr. Ty say anything regarding the door and did not hear any sound coming from him or from the door at the time it was allegedly "jammed." What happened at the door was at best intermittent, if anything, and was not reported at all to the building on the day of the incident. Further, other testimony indicates all the doors were unlocked and functioning normally that day. Further, Mission used the door to come into and out of the theater without incident, save the alleged intermittent "jam" with Mr. Ty.

Moreover, the movants have shown that nothing to do with the door was the proximate cause of the alleged fall. Defendants have further shown that Mission was not negligent in its supervision of L.A. or the other campers. Defendants have further shown that, even if there was any negligent supervision, it was not the proximate cause of L.A.'s injuries. L.A.'s injuries were caused by an unforeseen, spontaneous, unexplained fall from Joshua, which then led four (or so) students nearby to decide to walk backward—instead of forward, over, or around Joshua—and into L.A., causing L.A. to fall, causing injuries.

Plaintiffs have failed to raise a genuine issue of material fact in response. The door being opened only half way for a time is, at best, but-for causation—just as was the supervisors' decision to take the escalator instead of an elevator—not proximate cause.

Further, there is no support in the record for overcrowding, a pileup, or an obstruction to the campers as to their way of safety caused by any defendant. All campers at the kindergarten through fourth grade levels had previously exited the building safely, the lobby has a capacity for 550 people and is 2000 square feet, there were, at most, 15 people in the lobby ahead of L.A., and the people in the lobby were not obstructed by anything or overly crowded in. (*See, e.g., Palmieri v Ringling Bros. & Barnum & Bailey Combined Shows*, 237 AD2d 589 [2d Dept 1997].)

L.A.'s own testimony is that up to five children who were already off the escalator were not paying attention to Mr. Ty, who had the door open for them. Further, the lobby was clear, and the campers' paths were unobstructed, per L.A.'s testimony. Further, L.A. does not know why Joshua fell, only that subsequently, other children walked backward toward her, eventually making contact with her and causing her to fall. Further, all of L.A.'s observations regarding these happenings on the day of the incident occurred with a matter of moments—three seconds, at most (based, in part, on the dimensions of the escalator, the rated speed of the escalator—all of which are in the base building plan in the lease—and the distance L.A. indicated she traveled based upon the marked EBT exhibit B).

The events in the proximate causal chain which led to L.A.'s injuries occurred in so short a time that no further or more intense amount or quality of supervision could have prevented them. L.A.'s injuries were proximately caused in a span of three seconds by the campers in front of her who did not move, go through an open door, or go forward or around a camper who had fallen in front of them. Instead, they walked backward toward L.A. and a descending escalator, leading to an unintentional, spontaneous, unforeseen accident which could not have been prevented by any reasonable degree of supervision.

(THIS SPACE IS INTENTIONALLY LEFT BLANK.)

CONCLUSION

Accordingly, it is

ORDERED that motion seq. 001 by defendant AMC Entertainment Holdings, Inc. pursuant to CPLR 3212 for summary judgment against Plaintiffs Leah Araujo and Elaina Parra is granted; and it is further

ORDERED that motion seq. 002 by defendants New York City Mission Society and the City of New York pursuant to CPLR 3212 for summary judgment against L.A. and Parra is granted; and it is further

ORDERED that motion seq. 003 by defendants Commonwealth Local Development Corp. and HUSA Management Company, LLC pursuant to CPLR 3212 for summary judgment against L.A. and Parra is granted; and it is further

ORDERED that the complaint is dismissed as against all defendants, with costs and disbursements to the defendants as taxed by the Clerk upon the submission of an appropriate bill or bills of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

Dated: May 4, 2018
New York, New York

J.S.C.
HON. ROBERT D. KALISH
J.S.C.

1. Check one:..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE