SHORT FORM ORDER

INDEX No. 15-9706
CAL. No. 17-01968OT

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

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice Supreme Court

MOTION DATE 3-6-18
ADJ. DATE 6-7-18
Mot. Seq. # 001 - MG; CASEDISP

SAMANTHA PELLEGRINO, an Infant Under the Age of 14 Years, by Her Father and Natural Guardian, JASON PELLEGRINO, and JASON PELLEGRINO, Individually,

Plaintiff,

- against -

TOWN OF BABYLON,

Defendant.

JOHN L. JULIANO, P.C.
Attorney for Plaintiffs
39 Doyle Court
East Northport, New York 11731

MILBER MAKRIS PLOUSADIS & SEIDEN
Attorney for Defendant
1000 Woodbury Road, Suite 402
Woodbury, New York 11797

Upon the following papers numbered 1 to 34 read on this motion for summary judgment: (1) Notice of Motion/ Order to Show Cause and supporting papers 1- 16; (2) Affirmation in Opposition and supporting papers 17- 32 ; (3) Reply Affirmation 33- 34 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for summary judgment dismissing the complaint is granted.

This is an action to recover damages for personal injuries allegedly sustained by infant plaintiff on September 6, 2014, when she slipped and fell from a climbing rock apparatus at Phelps Lane Park (the park)located at 151 Phelps Lane, North Babylon, which is owned and operated by defendant Town of Babylon. Infant plaintiff's father, plaintiff Jason Pelligrino, also seeks damages for medical expenses and for loss of services. Plaintiffs allege that the defendant was negligent, inter alia, in maintaining the climbing rock and the surface beneath the climbing rock, and in allowing a dangerous condition to exist at the park.

The Town now moves for summary judgment dismissing the complaint against it, alleging that it did did not create or have constructive notice of the alleged dangerous condition, and that infant

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plaintiff assumed the risk inherent in rock climbing. In support, the Town submits, inter alia, copies of the pleadings, the bill of particulars, the transcript of plaintiff's testimony at a General Municipal Law 50-h hearing, the transcripts of the parties' deposition testimony, and the affidavit of Town employee Jennifer Taus. In opposition, plaintiff argues, inter alia, that defendant failed to establish a prima facie case of entitlement to summary judgment.

At her General Municipal Law §50-h hearing and deposition, infant plaintiff testified that on the day of her accident she was in the fourth grade, and that she met her friends at the playground before the start of their soccer game. Infant plaintiff testified that approximately five minutes after she arrived at the park, she climbed to the top of a rock apparatus, her foot slipped, and she fell. Infant plaintiff described the climbing rock as approximately five feet in height, with slanted steps used for climbing. She testified that she climbed to the top of the rock, held onto the bars of another playground apparatus, slipped, and fell onto the ground with her leg landing in a crack on the surface of the playground. Infant plaintiff testified that the temperature outside was hot, and that there was no rain or "wetness" on the climbing rock prior to her accident. She testified that she fell when her foot "slipped" on the climbing rock. Infant plaintiff testified that it was her first time climbing the rock apparatus, and that she did not recall any sticky or slippery debris on the surface of the climbing rock. She testified that the photographs offered at her deposition testimony accurately depicted the climbing rock, and the playground on the day of her accident. Plaintiff further testified that she was unaware of anyone who had previously slipped and fell on the climbing rock prior to her accident.

At her General Municipal Law §50-h hearing and deposition, Rae Marie Pellegrino, infant plaintiff's mother, testified that on the day of the accident she was at the park with infant plaintiff, and that she gave her permission to play on the playground apparatus. Rae Marie testified that she was informed by infant plaintiff that she climbed to the top of the climbing rock and fell. She testified that she was unaware of anyone who previously complained about the climbing rock apparatus prior to the incident.

At his General Municipal Law §50-h hearing and deposition, Jason Pellegrino, infant plaintiff's father, testified that on the day of the accident he was informed by Debbie Foss, a soccer parent, that plaintiff fell and hurt her leg at the park. Jason testified that when he arrived at the park, he observed infant plaintiff on the ground, and that she informed him that she climbed the rock and fell. He testified that the photographs offered at the deposition accurately depicted the climbing rock, and the area where he observed infant plaintiff on the playground. Jason testified that he had no complaints about the condition of the climbing rock, and was unaware of any injuries or complaints about the rock apparatus prior to plaintiff's accident. He also testified that a few days later, he returned to the park, took photographs of the subject area, and observed that the padded floor surface in the area surrounding the climbing rock was torn and missing sections of padding.

At his deposition, Leo Sottile testified that he was employed by the Town as a public works coordinator, and that his duties included maintenance, and overseeing the foremen and the fence and playground maintenance mechanics in the Building and Grounds Department. He testified that the fence and playground mechanics were responsible, among others things, for repairing the playground equipment. Sottile testified that approximately 10 years ago, nonparty Barbado Contracting installed the

playground apparatus, including the climbing rock and flooring surface in the Park. He testified that he was unaware of the dimensions of the climbing rock, and that there was no paint or spray substance applied to the climbing rock. Sottile further testified that he was unaware of anyone who made repairs to the climbing rock prior to infant plaintiff's accident. He testified that the photograph offered at plaintiff's deposition accurately depicted the climbing rock and playground apparatus at the park.

According to Sottile there were no maintenance records, and no written or verbal procedures for inspections, repairs, or maintenance of the playground equipment. Sottile testified that the fence and playground department replaced and repaired portions of the flooring surface in different areas of the playground when notified of any damage, and that he was unaware of the last inspection of the playground prior to infant plaintiff's accident. He described the playground surface as having two layers of granule rubber, and that each layer measured one inch in height around the climbing rock apparatus. He testified that he did not receive any written or verbal complaints about the climbing rock or playground apparatus at the park prior to this incident.

In her affidavit, Jennifer Taus states that she is employed by the office of the Town Clerk, and that her duties include keeping and searching for records of prior written notice of claims of defective and dangerous condition in the Town. Taus testified that she conducted a search of the Town records, which revealed no complaints of any defective condition regarding the climbing rock, the bottom surface surrounding the climbing rock or the playground for a period of five years prior to plaintiff's accident.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). 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.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Upon the proponent establishing a prima facie showing of entitlement to a summary judgment, the burden then shifts to the opponent to proffer evidence in admissible form sufficient to establish a material issue of fact requiring a trial of action (***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In a slip and fall case, a plaintiff must demonstrate that the defendant either created the condition which caused the accident or had actual or constructive notice of the condition (*see* ***Guilini v Union Free Sch. Dist. No. 1***, 70 AD3d 632, 895 NYS2d 452 [2d Dept 2010]; ***Joseph v New York CityTr. Auth.***, 66 AD3d 842, 888 NYS2d 533 [2d Dept 2009]). In addition to notice, the plaintiff must also demonstrate that the alleged dangerous condition was the proximate cause of his or her injury (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 837, 501 NYS2d 646, 647 [1986]). A landowner has a duty to maintain its property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]). However, a municipality has a duty to maintain its parks and playground in a reasonable safe condition (*see* ***Y.H. v Town of Ossining***, 99 AD3d 760, 952 NYS2d 579 [2d Dept 2012]); ***Garcia v City of New York***, 205 AD2d 49, 617 NYS2d 462 [2d Dept 1994]). "To constitute constructive notice, the dangerous condition must be visible and apparent and it must exist, for a sufficient length of time prior to the accident to permit defendant to discover and remedy it" (***Gordon v American Museum of Natural***

History, *supra*). However, when a defendant moves for summary judgment in a slip and fall case, it is the defendant's burden to make a prima facie showing that it neither created the alleged hazardous condition nor had actual or constructive notice of the condition for a sufficient length of time to discover or remedy it (*see* ***Davidson v Sachem Cent. Sch. Dist.***, 300 AD2d 276, 751 NYS2d 300 [2d Dept 2002]; ***Guilini v Union Free Sch. Dist. No. 1***, *supra*)

Here, the Town established its prima facie entitlement to summary judgment with evidence demonstrating that infant plaintiff's injury was not caused by a dangerous condition, and that it did not create or have notice of the alleged dangerous condition of the climbing rock and the surface of the playground (*see* ***Gao v City of New York***, 145 AD3d 939, 43 NYS3d 493 [2d Dept 2016]; ***Padden v County of Suffolk***, 52 AD3d 663, 860 NYS2d 604 [2d Dept 2008]; ***Bergin v Town of Oyster Bay***, 51 AD3d 698, 858 NYS2d 318 [2d Dept 2008]; ***Sobti v Lindenhurst Sch. Dist.***, 35 AD3d 439, 825 NYS2d 251 [2d Dept 2006]). The Town's submissions demonstrated that they maintained the playground, and that they did not receive any notice of a dangerous condition relating to the climbing rock or the playground surface prior to infant plaintiff's accident. Infant plaintiff testified that there was not anything sticky or slippery on the climbing rock that caused her to fall, and that her foot just slipped at the top of the rock.

In response to defendant's prima facie showing, plaintiffs failed to raise a triable issue of fact as to whether infant plaintiff's accident was due to a dangerous condition at the park. Infant plaintiff's submission in opposition include, inter alia, a sworn affidavit of infant plaintiff, the affidavit of Robert L. Schwartzberg, a professional engineer, and photographs of the climbing rock apparatus and the surface of the playground. In her affidavit, infant plaintiff states that on the day of her accident she climbed to the top of the rock apparatus, and that her foot slipped off of the "worn and smooth" surface, causing her to fall. She states that there was no sticky or slippery debris on the climbing rock. Infant plaintiff states that as her foot slipped, she lost grip on the handles at the top of the climbing rock. She avers that after she fell, she noticed the rubber flooring was "hard," worn, and several pieces of the flooring was missing.

The unsworn expert's report by Mr. Schwartzberg was not submitted in admissible form and, therefore, is insufficient to defeat defendant's motion (*see* ***Banco Popular N. Am. v Victory Taxi Mgt.***, 1 NY3d 381, 774 NYS2d 480 [2002]; ***Grasso v Angerami***, 79 NY2d 813, 588 NS2d 76 [1991]). In any event, even if the court considered the report, it is clear that Mr. Schwartzberg improperly relied on evidence not in the record when making his findings (*see* ***Cassano v Hagstrom***, 5 NY2d 643, 187 NYS2d 1 [1959]; ***Wright v New York City Hous. Auth.***, 208 AD2d 327, 624 NYS2d 144 [2d Dept 1995]). Furthermore, the affidavit of infant plaintiff's expert did not establish that he posses the requisite skill, training, education and knowledge or understanding of play ground apparatus or playground surfaces (***O'Boy v Motor Coach Indus., Inc.***, 39 AD3d 512, 834 NYS2d 231 [2d Dept 2007]; ***Shea v Sky Bounce Ball Co.***, 294 AD2d 486, 742 NYS2d 343 [2d Dept 2002]). Even if considered, Mr. Schwartzberg's vague, speculative conclusion that the "somewhat" resilient surface ground cover did not provide sufficient cushioning to "eliminate" the probability of a child falling from a climbing rock being injured upon impacting the ground does not raise a triable issue of fact. Schwartzberg also failed to show that the alleged violations of the United States Consumer Product Safety Commissions guidelines, which set forth standards, not mandatory requirements, are insufficient

to raise a triable issue as to whether the inadequate playground cover was the proximate cause of infant plaintiff's injury (*see* ***Miller v Kings Park Cent. Sch. Dist.***, 54 AD3d 314, 863 NYS2d 232 [2d Dept 2008]; ***Swan v Town of Brookhaven***, 32 AD3d 1012, 821 NYS2d 265 [2d Dept 2006]).

Accordingly, the motion is granted.

Dated: 11-19-18

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

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION