Ortiz v Brentwood Union Free Sch. Dist.
2018 NY Slip Op 33395(U)
December 20, 2018
Supreme Court, Suffolk County
Docket Number: 3439/2013
Judge: Jr., Paul J. Baisley
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Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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JF, an infant by his parent and natural guardian, JESSICA ORTIZ,

Plaintiff,

-against-

BRENTWOOD UNION FREE SCHOOL DISTRICT,

Defendant.

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INDEX NO.: 3439/2013
MOTION DATE: 3/21/18
MOTION SEQ. NO.: 001 MG; CASEDISP

PLAINTIFF'S ATTORNEY:
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Upon the following papers numbered 1 to 30 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 -26 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 27-28 ; Replying Affidavits and supporting papers 29-30 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 001) of defendant Brentwood Union Free School District for summary judgment dismissing the complaint against it is granted.

On November 9, 2001, infant JF was allegedly injured when he fell from playground equipment during lunch recess at the Pine Park Elementary School located within defendant Brentwood Union Free School District. Subsequently, plaintiff Jessica Ortiz, his mother, commenced this action seeking damages for the injuries allegedly suffered as a result of the fall. By the bill of particulars, plaintiff alleges, among other things, that the School District was negligent in failing to adequately supervise the students during recess and in having a "defective condition" on the large playground.

Defendant now moves for summary judgment dismissing the complaint against it on the grounds that it properly supervised its students and that the monkey bar area was properly maintained. Defendant's submissions in support of its motion for summary judgment include copies of the pleadings, the General Municipal Law §50-h hearing and deposition testimony of JF and Jessica Ortiz, the deposition testimony of Rosemary Greenhaus and Migdalia Garcia, photographs of the slide and playground, an affidavit of expert Margaret Payne, and the IME report of Dr. Bruce Meinhard.

Plaintiff opposes the motion, arguing that defendant failed to meet its burden for entitlement to summary judgment and that it was negligent in failing to properly supervise JF. In

addition, plaintiff argues for the first time that if defendant had given JF a "time-out" after he was reprimanded for his behavior on the playground, then JF would not have been hurt, and that the playground equipment was not age appropriate and the playground surface did not contain enough wood chips.

In reply, defendant argues that plaintiff failed to rebut, address or distinguish all of their arguments, or any of the case law they cited, thereby conceding same, and that plaintiff failed to raise an issue of fact. In addition, defendant argues that plaintiff offered a new theory of liability which was not alleged in their notice of claim or bill of particulars; and having failed to identify the alleged defective condition in their initial pleadings, plaintiff cannot raise it now.

At his General Municipal Law §50-h hearing, JF testified that on the incident date he was playing on the school slide at recess when he was suddenly pushed and fell off the slide onto the ground. At his deposition hearing, JF testified that he was seated on the slide when someone pushed him in his back, causing him to fall to the ground on the right side of the slide. He testified that there was a school monitor walking around watching the students, and that she brought him to the nurse after he fell. JF testified that if the students pushed each other, the monitor would tell them to stop, and that they could have a recess taken away.

At her General Municipal Law §50-h hearing, Jessica Ortiz testified that she is JF's mother, and that on the incident date she received a call that her son was hurt and needed to go to the hospital. She testified that prior to the accident, she had not yet seen the school playground nor made any complaints about it. Ms. Ortiz testified that her son told her that he was at the top of the slide, felt a push and then was on the "floor." She testified that he did not know who pushed him. At her deposition, Ms. Ortiz offered the same testimony as at her 50-h hearing, except she testified that she had been to the school's playground over the summer prior to her son's accident, but that she did not know if it was the same playground because of new additions.

Rosemarie Greenhaus testified at her deposition that she was employed as a teacher's assistant and witnessed JF's accident. She testified that the accident took place on the Grant playground near the roller slide. Ms. Greenhaus testified that her job was to supervise, monitor and assist children that day while in school and during recess. She testified that at the time of the incident she had about 10 to 12 children with her and she was walking backwards when she reprimanded JF. She testified that she heard children's voices shouting "stop, stop, stop, give me a break, stop, stop, stop," and that she told JF to take his turn and slow down. Ms. Greenhaus testified that she observed JF hopping and jumping over the platform at the roller slide pushing other students while the rest of the children were standing in line or "playing hands to themselves." She testified that there were approximately 18 to 25 children on the Grant playground and that another adult, Migdalia Garcia, also was supervising the students. She testified that she loudly told JF to calm his body, and he looked at her and stopped what he was doing for a moment. Ms. Greenhaus testified that she walked forward a few steps, that she was not watching JF when she again heard children saying, "stop," and that she then turned back and

looked at the slide. She testified that she saw JF ignore her directive, grab a red bar from the slide, and leap over two children already seated on the slide. She testified that she said, "Wait your turn" but that she did not look to see if he listened because she was called by her other students. She testified that she looked back again because the students said that someone fell, and at that point she saw JF on the ground and Ms. Garcia standing near him. Ms. Greenhaus testified that Ms. Garcia asked her to take her class because she was taking JF to the nurse. She testified further that Ms. Garcia was supervising closer to the roller slide and that as monitors they roamed the playground constantly.

At her deposition, Migdalia Garcia testified that she was a monitor at Pine Park Elementary School on the incident date, and that as part of her duties that day she was required to take students to lunch and recess. She testified that this school is just for Kindergarten students, that there are four playgrounds, and that on the incident date only her class was playing on the Grant playground at recess. Ms. Garcia testified that in addition to Ms. Greenhaus another monitor was also present. She testified she lined the children up to take them to recess and reviewed the playground rules with the children. Ms. Garcia testified that prior to the accident, she reprimanded a few children about three times for inappropriately playing on or by the roller slide. She testified that on the incident date, she had to speak to JF approximately two times because she did not like the way he was behaving since one time he went down the slide sideways and another time he swung on the bar. She testified that she had never before reprimanded JF about how he behaved on the roller slide, and that she was unaware that Ms. Greenhaus had also reprimanded him that day. Ms. Garcia testified that on the incident date she and the other monitor walked on opposite sides of the playground and constantly walked the perimeter watching the children. She testified that she was at the slide when she heard the children yell that JF fell and that it was not even seconds from the last time she looked at the area on top of the roller slide when he fell. Ms. Garcia further testified that she ran over to JF, used her walkie talkie to call the school nurse, and picked JF up and carried him to the nurse herself.

Margaret Payne, who is certified as a playground safety inspector by the National Recreation and Park Association and is a member of the American Society for Testing and Materials (ATSM) Committees for Public Use Playground Equipment Safety and Public Playground Surfacing Materials, stated in her affidavit that on June 25, 2013 she inspected the playground site at the Pine Park Elementary School, that she reviewed the deposition transcripts of JF and Ms. Ortiz, and met with the director of facilities, Frank Scimeca, and the head custodian, Charles Aviles, Jr. She stated that the playground equipment was installed in 2011, that there was a sign posted regarding age appropriateness for the equipment, and that since JF was over 5 at the time of the incident, his use of it was appropriate for his age. Ms. Payne stated that according to the records, no repairs were ever requested for the roller slide since its installation. She stated that the playground surface is engineered with wood fiber with a depth of 12 inches and a critical fall height of 12 feet, and that JF's fall was, at most, 40 inches. She stated that this was in accordance with the voluntary standards by both the ASTM and the Consumer Product Safety Commission (CPSC). Ms. Payne stated that the specifications

pertaining to playground ground covers are specific to the risk of head injury. As a result of her inspection, she concluded that there was no negligence on the part of the defendant in equipment surfacing of the playground at Pine Park Elementary School, that the equipment was new and in good condition, that the equipment was intended for the use of children ages 5 to 12 years, and that JF was over the age of 5 on the incident date.

On a motion for summary judgment, the movant bears the initial burden of establishing entitlement to judgment as a matter of law (*see 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, who must demonstrate evidence of the existence of a material 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]). The movant's failure to make this *prima facie* showing requires denial of the motion (*Winegrad v New York Univ. Med. Ctr., supra*).

A school district is under a duty to adequately supervise the students in its care and may be held liable for foreseeable injuries proximately related to the absence of adequate supervision (*see Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 907 NYS2d 735 [2010]; *Mirand v City of New York*, 84 NY2d 44, 49, 614 NYS2d 372 [1994]; *Timothy Mc. v Beacon City School Dist.*, 127 AD3d 826, 7 NYS3d 348 [2d Dept 2015]; *Oldham v Eastport Union Free School Dist.*, 26 AD3d 480, 809 NYS2d 461 [2d Dept 2006]). However, a school district is not an insurer of the safety of its students (*see Mirand v City of New York*, 84 NY2d 44, 614 NYS2d 372; *Doe v Orange-Ulster Bd. of Coop. Educ. Servs.*, 4 AD3d 387, 771 NYS2d 389 [2d Dept 2004]). Rather, it is expected to exercise the same degree of care towards them as would a reasonably prudent parent placed under the same circumstances and armed with the same information (*Mirand v City of New York*, 84 NY2d 44, 49, 614 NYS2d 372 [1994]; *see Timothy Mc. v Beacon City School Dist.*, 127 AD3d 826, 7 NYS3d 348; *Kelly G. v Board of Educ. of City of Yonkers*, 99 AD3d 756, 758, 952 NYS2d 229 [2d Dept 2012]).

In order to sustain a negligent supervision claim, the plaintiff must demonstrate that the breach of the duty to provide adequate supervision was a proximate cause of the injuries he or she sustained (*Mirand v City of New York*, 84 NY2d at 50). However, when 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 a proximate cause of the incident (*see Simonides v Eastchester Union Free School District*, 140 AD3d 728, 31NYS3d 210 [2d Dept 2016]; *Charles v City of Yonkers*, 103 AD3d 765, 962 NYS3d 199 [2d Dept 2016]; *Calcagno v John F Kennedy Intermediate School*, 61 AD3d 911, 877 NYS2d 455 [2d Dept 2009]). Here, the School District has met its burden both in establishing that adequate supervision was present during recess, and that JF's injury could not have been prevented even with the most intense supervision with the evidence showing that plaintiff's fall, whether it was either by his own volition or by having been pushed, happened in a matter of seconds despite the presence of recess monitors in the playground.

The burden, therefore, shifted to plaintiffs to establish the existence of a material issue of

fact requiring a trial (*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]). Plaintiffs' opposition failed to include evidence raising a triable issue of fact as to whether a lack of supervision was a proximate cause of JF's injuries (*see Perez v Comsewogue School District*, 141 AD3d 577, 36 NYS3d 159 [2d Dept 2016]; *Gomez v Our Lady of Fatima Church,* 117 AD3d 987, 986 NYS2d 550 [2d Dept 2014]). Rather, plaintiff simply argues that JF was "out of control," and that if JF was given a "time out" the accident would not have happened since the lunch monitors believed JF jumped off the equipment after having been told to properly use the equipment. This theory of liability was never alleged in plaintiff's notice of claim or bill of particulars. Plaintiff may not raise a new theory of negligence for the first time in its summary judgment opposition papers (*see Johnston v City of New York*, 17 AD3d 534, 793 NYS2d 192 [2d Dept 2005]; *Winters v St. Vincent's Med. Ctr. Richmond*, 273 AD2d 465, 711 NYS2d 892 [2d Dept 2000]).

Facts appearing in the movant's papers which the opposing party does not controvert may be deemed admitted (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also Madeline D'Anthony Enters, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 888 [1st Dept 2012]). By failing to oppose the School District's arguments that plaintiff failed to particularize any "defective condition" in either its notice of claim or bill of particulars; that the School District's expert statement that the playground was age appropriate and level of wood chips was adequate; that the care given to JF was appropriate; that JF jumped off the equipment; and JF's testimony that he was pushed off the equipment in a sudden manner such that no amount of supervision could have prevented the accident, plaintiff has in effect, conceded all legal arguments defendant has set forth.

Even if this court were to address the arguments alluded to in plaintiff's motion, but not specifically pleaded, such as insufficient woodchips under the slide, defendant has again established its *prima facie* entitlement to summary judgment by demonstrating that it maintained the ground cover in a reasonably safe condition (*see Sobti v Lindenhurst School Dist.*, 35 AD3d 439, 825 NYS2d 251 [2d Dept 2006]; *Swan v Town of Brookhaven,* 32 AD3d 1012, 821 NYS2d 265 [2d Dept 2006]). Plaintiffs' self serving and conclusory opposition is insufficient 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])]. Accordingly, as plaintiff failed to raise a triable issue, defendant's motion for summary judgment dismissing the complaint against it is granted.

Dated: December 20, 2018

HON. PAUL J. BAISLEY, JR.

J.S.C.