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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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K.M., an Infant Under the Age of Eighteen (18) Years, by her Father and Natural Guardian, STEVEN MISTLER, and STEVEN MISTLER, Individually,

Plaintiffs,

-against-

DEER PARK UNION FREE SCHOOL DISTRICT,

Defendant.

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INDEX NO.: 01479/2016
CALENDAR NO.: 201702486OT
MOTION DATE: 6/28/18
MOTION SEQ. NO.: 001 MG; CASEDISP

PLAINTIFF'S ATTORNEY:
Law Offices of Vladimir & Associates, PLLC
2137 Deer Park Avenue
Deer Park, New York 11729

DEFENDANT'S ATTORNEYS:
Congdon, Flaherty, O'Callahan, Reid, Donlon, Travis & Fishlinger, Esqs.
333 Earle Ovington Boulevard, Suite 502
Uniondale, New York 11553-3625

Upon the following papers numbered 1 to 63 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-46 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 47-61 ; Replying Affidavits and supporting papers 62-63 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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

On April 22, 2015, infant plaintiff, KM, was allegedly injured when she fell while on playground equipment during lunch recess at the John Quincy Adams Elementary School located within defendant Deer Park Union Free School District (the "School District"). Subsequently, plaintiff Steven Mistler commenced this action on behalf of infant plaintiff seeking damages for the injuries allegedly suffered as a result of the fall. By their notice of claim, plaintiffs allege that the School District was negligent in its maintenance, control, inspection and supervision of its playground climbing apparatus known as the "Spider," and that the School District was negligent in the supervision of the students during recess. By the bill of particulars, plaintiffs allege, among other things, that the School District was negligent in failing to adequately supervise the students during recess, that the loose-fill ground cover beneath the Spider was insufficient, and that the Spider constituted a dangerous condition on the property as the vertical distance of the lateral bars and the horizontal space between the top two bars of the Spider apparatus were too wide for elementary school children.

The School District now moves for summary judgment dismissing the complaint against it on the grounds that it properly supervised its students, that any supervision or alleged lack thereof was not the proximate cause of plaintiff's injury, that the subject area of the playground

was properly maintained, and that there is no evidence of the existence of a defective or dangerous condition. The School District further argues that plaintiffs' claims not alleged in the notice of claim must be dismissed and that the doctrine of *res ipsa loquitur* is inapplicable. The School District'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 KM and Steven Mistler; the deposition testimony of Annmarie Depre, Joseph Orrechio, and Philip Cortese; photographs of the Spider apparatus; and an affidavit of Margaret Payne.

Plaintiffs oppose the motion, arguing that their complaint and bill of particulars allegations are substantially the same, that their expert's affidavit raises triable issues of fact as to whether the school was on notice the apparatus was dangerous, whether that the School District failed to adequately supervise the students at recess, and whether adequate ground cover underneath the Spider apparatus existed on the accident date. Plaintiffs further allege that the apparatus was defective because the vertical and horizontal spacing of the bars on the spider apparatus was deficient. Plaintiffs' submissions include an affidavit of Richard Robbins, the weekly playground inspection report for the subject playground, and a copy of Richard Robbins' inspection and summary report of the playground.

At her General Municipal Law §50-h hearing, KM testified that on the accident date, she played outside on the Spider apparatus during her lunch recess at school. She testified that she climbed on top of the horizontal bars of the Spider, sat on top of it while holding onto the bars on each side of her, and hung her feet through the opening. KM testified that she then tried to jump down through the open space where her feet had been dangling, hit her teeth on one of the bars on her way down, and then landed on the ground. She testified that at the time she jumped from the Spider, Miss Anne, the lunch aide, was standing just off the rocks on the sidewalk and took her to the school nurse. She testified that prior to the incident date, she never saw any other students get hurt on the Spider. At her subsequent examination before trial, KM testified that there were two aides outside during recess. She testified that she climbed to the top of the Spider and sat on top of the bars for a couple of seconds before she fell. KM testified that she fell when she tried to move to the center of the Spider and that no one pushed her or touched her before she fell. She testified that she did not know what caused her to fall, but that when she tried to get to the other side of the apparatus she slipped and fell, hit her mouth on one of the metal bars, and then hit the rocks beneath the apparatus.

At his General Municipal Law §50-h hearing, Steven Mistler testified that prior to the accident date he never made any complaints about the Spider apparatus, the ground cover, or about the recess supervision at the John Quincy Adams Elementary School nor was he aware of anyone else ever having made any such complaints. He testified that he was not aware of any other children getting hurt on the Spider or the subject playground.

At her examination before trial, Annmarie Depre ("Depre") testified that she has been

employed as a cafeteria aide at the John Quincy Adams school for the past 6 years; and as part of her duties, she takes the children to recess during lunch. She testified that on the accident date she saw KM playing on the Spider but did not see her get hurt, and that KM came up to her after she fell. Depre testified that there were three aides outside at recess and each aide took a section of the playground to watch. Depre testified that on the accident date she was watching the blacktop right next to the subject playground and that she did not have to yell out to any of the students for misbehaving. She testified that she instructed the children not to horse around on the Spider. Depre testified that to the best of her knowledge the Spider was never repaired, painted, or renovated during the time she worked at the school.

Joseph Orechio ("Orechio") testified at his examination before trial that he has been employed by the School District for 23 years and that he has been the head custodian at the John Quincy Adams Elementary School for approximately 18 years. He testified that, as head custodian, part of his duties include basic inspection of the playground equipment, including the Spider. Orecchio testified that when he inspected the Spider, he checked to see if anything was loose; and he also checked the level of the pea gravel. He testified that he did this every couple of weeks in the warmer months. He testified that he would rake the pea gravel to make it level; and that if it needed replenishing, he would notify the Grounds Department, which would then replenish it. Orecchio testified that the Spider has been at the school in the same location for the duration of his employment, and that he believed it was last painted more than 15 years ago. He testified that the pea gravel in the subject area is replenished annually over the summer, before the start of the school year. Orecchio testified that he never received any notices from CPSC or any other federal government agency about updating or retrofitting the Spider, and that he was not aware of any other incidents or accidents where the Spider is located.

At his examination before trial, Philip Cortese ("Cortese") testified that he has been employed by the School District since 1988; and that since 2006, he has been the head groundsman. He testified that in April 2015 he supervised four groundsmen, whose duties include inspecting the playground equipment every Monday. Cortese testified that inspections consisted of checking for debris or damage, ensuring enough mulch or pea stone is under the slide, and checking the railroad ties and borders. Orecchio testified that they also inspected the pea gravel by the Spider and kept a record of the inspections in a playground log. He testified that last inspection before the accident was on the previous Monday and that he was familiar with the CPSC guidelines. He testified that since 2006 the School District never received notices to update or retrofit any of the playground equipment. In his sworn affidavit, Orecchio avers that Margaret Payne inspected the site July 15, 2015, and that in between the incident date and July 15, 2015, no additional surfacing material was applied to the subject playground nor were any repairs or alterations made to the Spider apparatus. He further avers that there were no prior incidents of any injuries sustained as a result of falling or jumping from the Spider apparatus nor had the district ever received any complaints or notices of a either a defective condition on the apparatus or the groundcover beneath it.

Margaret Payne ("Payne"), a playground safety inspector certified by the National Recreation and Park Association and a member of the American Society for Testing and Materials (ATSM) Committees for Public Use Playground Equipment Safety and Public Playground Surfacing Materials, avers in her affidavit that on July 15, 2015 she inspected the Spider apparatus at the John Quincy Adams Elementary School playground, that she spoke with the school facilities manager, and that she reviewed the notice of claim, bill of particulars, and the parties' deposition transcripts. At the time of her inspection, the highest rung on the Spider was 51 inches, comprised of galvanized metal, and the apparatus predated 1997, the date of the first CPSC handbook. Payne's affidavit stated that the ground cover in the area of KM's fall was comprised of un-compacted pea stone over a sand base, and was measured at a depth of seven inches. Her affidavit stated that the 1997 CPSC handbook provided that a 6-inch depth of uncompressed medium gravel would be adequate to prevent a life threatening head injury from a fall height of five feet. Payne's affidavit stated that pursuant to the CPSC handbook, the standards for ground cover do not protect against all types of injuries; rather, the purpose is for reducing the likelihood of life-threatening head injuries. In her affidavit, Payne stated that both sand and pea stone are recognized as acceptable impact absorbing materials. Payne further averred that plaintiffs' allegations that the horizontal spacing between the top two bars exceeded the CPSC recommended 12 inches maximum distance are inapplicable here because the CPSC guidelines were first published in 1991 prior to both the manufacture of the subject apparatus and any promulgated guidelines for spacing.

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64NY2d 851, 487 NYS2d 316 [1985]). If the moving party 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]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, 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 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]).

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 Sch. Dist.*, 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]). The School District has met its burden with evidence showing that it provided adequate supervision of the playground and that, in any event, a lack of supervision was not a proximate cause of infant plaintiff's accident (*see Ponzi v Sag Harbor Union Free Sch. Dist.*, 166 AD3d 914, 87 NYS3d 566 [2d Dept 2018]; *Troiani v White Plains City School Dist.*, 64 AD3d 701, 882 NYS2d 519 [2d Dept 2009]). 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; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595). Plaintiffs' opposition failed to raise a triable issue of fact as to whether a lack of supervision was a proximate cause of KM's injuries (*see Perez v Comsewogue Sch. Dist.*, 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]).

A defendant moving for summary judgment in a negligence case has the initial burden of making 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 and remedy it (*see Petersel v Good Samaritan Hosp. of Suffern, N.Y.*, 99 AD3d 880, 951 NYS2d 917 [2d Dept 2012]; *Johnson v Culinary Inst. of Am.*, 95 AD3d 1077, 944 NYS2d 307 [2d Dept 2012]; *Amendola v City of New York*, 89 AD3d 775, 932 NYS2d 172 [2d Dept 2011]). Here, KM allegedly fell on the Spider apparatus while playing outside during recess. KM first testified that, while playing on the Spider, she fell when she attempted to jump through the middle of the bars and hit her mouth on a metal bar. On a subsequent date, KM testified that she did not know what caused her to fall while she attempted to move toward the center of the apparatus. "The mere happening of an accident, in and of itself, does not establish liability of a defendant" (*Scavelli v Town of Carmel*, 131 AD3d 688, 690, 15 NYS3d 214 [2d Dept 2015]; *see Foley v Golub Corp.*, 252 AD2d 905, 676 NYS2d 308 [3d Dept 1998]). Mere speculation as to the cause of the fall is insufficient to raise a triable issue of fact (*see Zuckerman v City of New York, supra).*

It has long been held that "[c]auses of action for which a notice of claim is required which are not listed in the plaintiff's original notice of claim may not be interposed" (*Mazzilli v City of New York*, 154 AD2d 355, 357, 545 NYS2d 833 [2d Dept 1989]. The addition of such causes of action would substantially alter the nature and theory of plaintiffs claims (*see Garcia v O'Keefe*, 34 AD3d 334, 825 NYS2d 38 [2d Dept 2006]; *Harrington v City of New York*, 6 AD3d 662, 776 NYS2d 592 [2d Dept 2004]; *Demorcy v City of New York*, 137 AD2d 650, 524 NYS2d 742 [2d Dept 1988]). Similarly the bill of particulars may not set forth a new theory of liability (*see Mazilli v City of New York, supra).* Here, plaintiffs failed to set forth allegations in their amended notice of claim pertaining to either inadequate ground cover or to the alleged defects in the Spider apparatus based on the vertical distance between the lateral bars or the horizontal space between the top two bars. Rather, plaintiffs' notice of claim stated that the Spider apparatus was dangerous due to the metal bars being worn and that it was poorly maintained. Even if this court were to address the arguments alluded to in plaintiffs' motion, but not specifically set forth in the notice of claim, such as insufficient pea gravel ground cover and defective spacing of the metal bars on the apparatus, the School District established its *prima facie* entitlement to summary judgment by demonstrating that it maintained the pea gravel ground cover in a reasonably safe condition and the apparatus was not defective (*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]).

Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]). The School District established that it did not create or have notice of the alleged defective condition of the Spider apparatus (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *Gallais-Pradal v YWCA of Brooklyn*, 33 AD3d 660, 822 NYS2d 314 [2d Dept 2006]). The Payne affidavit established that the Spider apparatus was appropriate for infant plaintiff's age, and was not defective (*see Troiani v White Plains City School Dist.* 64 AD3d 701, 882 NYS2d 519 [2d Dept 2009]). Thus, the burden shifted to plaintiffs to come forth with sufficient admissible evidence 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]).

Plaintiffs' opposition failed to raise a triable issue of fact. Plaintiffs' reliance on the CPSC handbook is insufficient to raise a triable issue of fact because the Spider apparatus' manufacture and installation predated the publication of the handbook and because the promulgated standards by CPSC are not mandatory but, rather merely suggested guidelines (*see Von Ohlen v East Meadow Union Free School Dist.*, 114 AD3d 668, 979 NYS2d 699 [2d Dept 2014]; *Miller v Kings Park Cent. School Dist.*, 54 AD3d 314, 863 NYS2d 232 [2d Dept 2008]). Additionally, the affidavit submitted by plaintiffs' expert fails to set forth what, if any, specialized training or education regarding playground equipment qualifies him to render an opinion as to whether a hazardous condition existed, whether the spacing of the bars is

'especially difficult for elementary-school-aged-children to traverse' and whether 'individuals responsible for supervising the school children have not been trained in the basics of playground safety' (*see Von Ohlen v East Meadow Union Free School Dist.*, *supra*).

Thus, since there is no evidence from which a jury could rationally conclude that infant plaintiff's fall was more likely due to the alleged dangerous condition of the Spider apparatus than to a sudden loss of balance or grip, the motion by the School District for summary judgment dismissing the complaint against it is granted (*see Manning v 6638 18th Ave. Realty Corp.*, 28 AD3d 434, 814 NYS2d 178 [2d Dept 2006]; *Hennington v Ellington*, 22 AD3d 721, 804 NYS2d 395 [2d Dept 2005]).

Dated: February 13, 2019

HON. PAUL J. BAISLEY, JR.

J.S.C.