SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NICHOLAS W. MOYNE** **PART 52**

Justice

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XIAO WEN ZHEN, D. L.,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE CITY OF NEW YORK, THE CITY OF NEW YORK, NEW EXPLORATIONS INTO SCIENCE, TECHNOLOGY & MATH HIGH SCHOOL

Defendant.

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INDEX NO. 151491/2019

MOTION DATE 12/23/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

This is an action to recover for personal injuries allegedly sustained by the then 11-year-old infant-plaintiff D.L. on the afternoon of December 12, 2017. At the time of the accident, D.L. was a 7th grade student attending New Explorations Into Science, Technology + Math High School ("NEST+M") when it is alleged that he slipped and fell on snow and ice during a supervised recess period in the school's courtyard. Plaintiff, Xiao Wen Zhen as parent and guardian of infant plaintiff D.L., and individually, has alleged a claim of negligence based on a dangerous condition and a claim of negligent supervision.

Plaintiffs now move pursuant to CPLR § 3212, for partial summary judgment on the issue of liability against defendants The City of New York, Board of Education of the

City of New York, and New York City Department of Education, ("DOE" or "defendants").

DOE cross-moves, seeking an order pursuant to 22 NYCRR § 202.21(e) to vacate the plaintiffs' Note of Issue or in the alternative, pursuant to CPLR § 3124, to compel plaintiff to exchange outstanding HIPAA Authorizations, appear for a further deposition and Independent Medical Examination ("IME"), and denying plaintiffs' motion for summary judgment on liability.

Plaintiffs' Note of Issue will not be vacated, and further discovery is not warranted.

Defendants contend that service of the Supplemental Bill of Particulars warrants vacating the Note of Issue ("NOI") to allow further discovery, pursuant to 22 NYCRR § 202.21(e). Defendants further allege that if the court declines to vacate, they are entitled to post-note of issue discovery and seek to compel plaintiffs' response, pursuant to CPLR § 3124.

Plaintiffs oppose the motion, alleging that discovery is complete and no further discovery is needed as the Supplemental Bill of Particulars was based entirely on discovery already within defendants' possession (*see Pauling v Glickman*, 232 AD2d 465, 466 [2d Dept 1996] [to supplement a bill of particulars with respect to continuing damages, continuing damages must be the anticipated sequalae of the original injuries and the supplemental bill must not set forth any new legal theories or new injuries]).

A party may move to vacate the note of issue upon the ground the case is not ready for trial but must do so within 20 days after service and after such period no motion shall be allowed except for good cause shown (*Schroeder v IESI NY Corp.*, 24 AD3d 180, 181 [1st Dept 2005]; see 22 NYCRR 202.21[e]). A party may move outside

the 20-day timeframe to vacate if there is an unusual or unanticipated circumstance that develops that would otherwise cause substantial prejudice (*Id.*; *Pannone v Silberstein*, 40 AD3d 327, 328 [1st Dept 2007]; see 22 NYCRR 202.21[d]).

DOE contends that after the NOI was filed, plaintiffs served the Supplemental Bill of Particulars alleging new injuries. DOE contends that they had no opportunity to move within the 20-day period as it expired prior to service of the Supplemental Bill, and it was not apparent that plaintiffs would be asserting new injuries. Defendants allege that in light of the newly alleged and unanticipated injuries, the certificate erroneously states that necessary discovery is complete and vacatur is warranted.

Plaintiffs filed their Note of Issue on October 26, 2022, and their Supplemental Bill of Particulars on December 19, 2022. Defendants' motion, filed over two months after the NOI, is untimely. Furthermore, defendants have failed to establish unanticipated or unusual circumstances that would justify vacatur. The injuries in the Supplemental Bill were included in the plaintiffs' orthopedic expert narrative report, provided to the defendants prior to the filing of the NOI. Each of the continuing injuries, limitations, and expenses alleged in the Supplemental Bill may be found directly in a narrative report section entitled "Current Condition, Physical Examination, and Prognosis sections" (See Exh. C at 5-7). Plaintiffs established that a copy of the narrative report was sent to defendants via email September 21, 2021, with receipt indicated on September 27, 2021, and subsequently exchanged again on June 1, 2022, as part of the plaintiffs' 3101(d) expert exchange.

Given that defendants were in possession of this report with the relevant information prior to the filing of the Note, these supplemental pleadings do not constitute

an unusual or unanticipated circumstance (*see Schroeder v IESI NY Corp.*, 24 AD3d 180, 181 [1st Dept 2005] [additional shoulder injuries alleged in plaintiff's supplemental bill were not new and unusual circumstances when they were disclosed to defendants prior to filing the note]).

In the alternative, defendants request that should the court decline to vacate, they be entitled to post-note-of-issue discovery. Specifically, defendants are requesting that plaintiffs be compelled to exchange HIPAA authorizations for any additional treatment, appear for a further deposition, and appear for a further IME regarding the new injuries. Defendants contend, "[t]rial courts are authorized, as a matter of discretion, to permit post-note-of-issue discovery without vacating the note of issue, so long as neither party will be prejudiced" (*Cuprill v Citywide Towing and Auto Repair Servs.*, 149 AD3d 442, 443 [1st Dept 2017]; *Cabrera v Abaev,* 150 AD 3d 588, 588 [1st Dept 2017]). Defendants contend there would be no prejudice in allowing this additional discovery as the case would stay on the trial calendar.

However, post-note discovery is unwarranted as the sought-after discovery is in defendants' possession and was even before the filing of the Note of Issue. As established, the "new" injuries are those that were asserted in the expert narrative report, exchanged prior to the Note's filing. Plaintiffs provided medical authorizations in October 2019 and assert that D.L. has not treated with any medical providers other than those disclosed nor has had any treatment since. Defendants were in possession of relevant medical records when conducting their deposition and physical examination. The two medical examinations took place 90 days apart with no treatment occurring within that time-period. When defendant prepared their report, the plaintiffs' expert

report had already been exchanged (Exh. D, E). Plaintiffs have established that there is no need for further discovery.

Accordingly, the Court declines to permit the defendants to obtain post-note discovery or compel the plaintiffs to provide it. Defendants' motion seeking post-note discovery is therefore denied.

Summary Judgment:

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Defendants have raised issues of fact on whether the playground was reasonably safe.

A property owner has a duty to maintain the premises in a reasonably safe condition and may be held liable for a dangerous condition that exists on the property (*Conneally v Diocese of Rockville Ctr.*, 116 AD3d 905, 906 [2d Dept 2014]). Plaintiffs have established that the defendants owned and operated NEST+M school and were responsible for maintaining the premises. Therefore, DOE had a duty to maintain the schoolyard premises in a reasonably safe condition and free and clear of dangerous conditions.

Plaintiffs contend they have established that defendants breached their duty as a dangerous snow and ice condition existed on the premises, thereby making it unreasonably unsafe, and the defendants had knowledge of the unsafe condition. Plaintiffs offer both the testimony of the infant-plaintiff D.L. and the meteorological analysis of expert Mr. Wright to establish the existence of the condition. Submission of an expert meteorologist opinion, based on meteorological data, may be evidence to establish the origin of an ice patch and the length of time it was present before the accident occurred (*Santiago v New York City Health and Hosps. Corp.*, 66 AD3d 435 [1st Dept 2009]).

Further, plaintiffs contend that this evidence establishes that the defendants had constructive notice of the condition, which may be established when the condition is visible, apparent, and has existed for a sufficient period of time to allow the defendant to discover and remedy it (*Harrison v New York City Tr. Auth.*, 113 AD3d 472, 473 [1st Dept 2014]).

However, partial summary judgment is unwarranted as plaintiffs have not made a *prima facie* showing that the playground was not in reasonably safe condition (*Tropper v Henry St. Settlement*, 190 AD3d 623, 624 [1st Dept 2021]). Specifically, defendants allege there are triable issues of fact regarding whether the dangerous snow and ice condition existed at the time of the accident as the plaintiff said it did. Whether a dangerous condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*Camara v Costco Wholesale Corp.*, 199 AD3d 509 [1st Dept 2021]; *Curry v*

E. Extension, LLC, 202 AD3d 907, 908 [2d Dept 2022];*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]).

Defendants rely on the testimony of the infant-plaintiff D.L. who testified that there was no ice anywhere else on the playground or if there was, he did not know about it. D.L. also testified that he did not see the alleged snow and ice condition before he fell. Defendants also offer testimony from a Mr. Domicello, a school aide, who was tasked with looking for unsafe conditions such as the one alleged by plaintiffs. During recess, he would walk the playground in a circular formation and if a dangerous condition was noticed, he would notify students and the administration. Mr. Domicello testified that he had not seen the condition prior to the incident. This testimony raises a question as to both the existence of the condition and whether it was as visible and apparent as plaintiffs contend it was.

Additionally, Mr. Marinaro, the school custodian in charge of removing snow and ice, testified that he could not remember if he observed the condition during his morning inspection. Mr. Marinaro testified regarding the process for clearing snow and marking snow and ice conditions with caution tape. If unsafe snow and ice conditions were found, they would be marked with caution tape and the students would not be able to use the equipment. Mr. Marinaro's testimony established that there was no caution tape at the time of the accident- which could indicate that an examination of the equipment found that it was appropriate for use, or, alternatively, that other children may have torn any caution tape down. Additionally, other children used the playground that day without incident. As defendants contend, this testimony raises factual issues about the existence of the condition and whether it constituted a dangerous condition that the

defendants were required to remedy or remove. There are also questions of fact regarding whether the defendants had constructive notice of the condition , and whether the playground was in areasonably safe condition. As questions of fact exist, the motion for partial summary judgment on the issue of liability is denied (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Conclusion:

For the reasons set in hereinabove, it is

ORDERED that defendants' cross-motion to vacate the Note of Issue and strike the case from the trial calendar is denied; and it is further

ORDERED that defendants' cross-motion to compel is denied; and it is further

ORDERED that the plaintiffs' motion for partial summary judgment on the issue of liability is denied.

This constitutes the decision and order of the court.

5/4/2023
DATE

NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:		CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
		GRANTED	[X] DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE