At an IAS Term, Part 81 (MOA) of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 8th of May 2023.

PRESENT:

CARL J. LANDICINO, J.S.C.

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NECHAMA DINA LIPSKIER,

Plaintiff,

-against-

DOMINO PARK CONSERVANCY LLC, SKATEBOARD SUPERCROSS LLC, VELOSOLUTIONS USA LLC, TWO TREES MANAGEMENT CO, INC., DOMINO A LLC and DOMINO B LLC,

Defendants.

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Index No. 500779/2019

DECISION AND ORDER

Motion Sequence #5

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	114-129,
Opposing Affidavits (Affirmations)	134,
Reply Affirmation or Affidavit	135-137,
Memorandum of Law	130

After a review of the papers and oral argument, the Court finds as follows:

Plaintiff, Nechama Dina Lipskier, (the "Plaintiff") commenced this action against Defendants Domino Park Conservancy, LLC, Skateboard Supercross, LLC, Velosolutions USA, LLC, Two Trees Mamagements Co., Inc., Domino A, LLC and Domino B, LLC (the "Defendants") alleging injury as a result of a trip and fall suffered by the Plaintiff on August 12, 2018. The Plaintiff contends that she and her son were at a sporting/recreational track in Domino Park (Brooklyn) (the "Track") when the Plaintiff was injured as she took steps down a slope in response to her son falling off his bicycle, that he had been riding on the Track.

The Defendants now move (motion sequence #5) for an order, pursuant to CPLR 3212, granting them summary judgment, and dismissing all claims against it. The Defendants contend

that the complaint should be dismissed as the condition complained of by the plaintiff is both open and obvious and not inherently dangerous.

The Plaintiff opposes the motion. The Plaintiff argues that the Defendants have failed to meet their *prima facie* burden in as much as the Complaint alleges that the Defendants were negligent in the supervision of the Track and it was that negligence that was a proximate cause of the Plaintiff's injuries. More specifically, the Plaintiff contends that the Defendants' negligent supervision of the Track put the her son in imminent peril after he fell from his bicycle and that the Plaintiff was injured while attempting to respond to an emergency situation. The Plaintiff points to the "danger invites rescue" doctrine and argues that the Defendants have failed to address this doctrine, or theory of liability, in their motion.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "should only be employed when there is no doubt as to the absence of triable issues of material fact." *Kolivas v. Kirchoff*, 14 AD3d 493, 787 N.Y.S2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent for summary judgment 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. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 610 N.Y.S.2d 50 [2d Dept 1994]. However, "[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case..." if they can show "...that the defendant's negligence was a proximate cause of the alleged injuries." *Tsyganash v. Auto Mall Fleet Mgmt., Inc.*, 163 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2d Dept 2018]; *Rodriguez v. City of New York*, 31 NY3d 312, 320, 101 N.E.3d 366, 371 [2018].

Turning to the merits of the motion by the Defendants (motion sequence #5), the Court finds that the Defendants have failed to meet their *prima facie* burden. The Defendants rely primarily on the deposition of the Plaintiff. The Plaintiff was deposed on June 2, 2021 (NYSCEF Doc. 125). When asked what she did after she paid the admission fee, the Plaintiff stated "[t]here was an area for parents to sit, so, I sat there with my two youngest and watched my eight year old bike." (Page 22). When asked how many other people were using the track, the Plaintiff stated "[p]robably, approximately, 10 children." (Page 23). The Plaintiff also stated that "at one point one of the workers who were the ones that collected the money went on his bike and was speeding through those tracks cutoff I don't know how fast." (Page 23). When asked if any other employees were present, the Plaintiff stated "[n]o." (Page 24). When asked to explain her accident, the Plaintiff stated that, "[w]ell I when my son came to a curb, which was almost right in front of me, he fell down the slope of grass which was right on the side of the track." (Page 30). The Plaintiff

then stated that, "[s]o, I quickly went to him. I went down cautiously it is a little slope. I wanted to make sure he was okay I wanted to make sure no other kid will fall on top of him, too. The same way it happened to him. As I went down, I took like one or two steps and I fell down." The Plaintiff then stated that "I told him to quickly move because I didn't want him to get hurt. And end up being [sic] another boy fell down on top of us with his bike." (Page 30).

The testimony of the Plaintiff relates to more than the nature of the slope and her fall. The Plaintiff has indicated that she needed to immediately attend to her son because of the alleged unsupervised and dangerous nature of the Track she perceived put him in imminent peril after he fell. She argues that this dangerous condition was a product of a negligent lack of supervision on the Track in relation to the activity of the other Track participants. *See Encompass Indem. Co. v. Rich*, 131 AD3d 476, 478, 14 N.Y.S.3d 491, 493 [2d Dept 2015]; *see also Raldiris v. Enlarged City Sch. Dist. of Middletown,* 179 AD3d 1111, 1114, 118 N.Y.S.3d 696, 701 [2d Dept 2020]. Accordingly, the Defendants have failed to address the theory of negligence put forward by the Plaintiff and as a result have failed to meet their *prima facie* burden.

Since the Defendants failed to meet their *prima facie* burden, we need not consider the sufficiency of the Plaintiff's opposition papers. *See Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 476 N.E.2d 642, 643 [1985]; *Ortiz v. Town of Islip*, 175 A.D.3d 699, 700, 107 N.Y.S.3d 394, 395 [2d Dept 2019].

Based on the foregoing, it is hereby ORDERED as follows:

Plaintiff's motion (Motion Sequence #5) for summary judgment is denied.

This Constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.