SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present: HON. ZELDA JONAS
Justice

TRIAL/IAS PART 25

JENNIFER SCHMIDT and FREDERICK R. SCHMIDT, Individually and as Parents and Natural Guardians of JONATHAN R. SCHMIDT, an Infant,

Plaintiffs,

Index No. 4718/01

- against -

Sequence No. 2, 3, 4
Motion Date: May 21, 2003

FARMINGDALE UNION FREE SCHOOL DISTRICT, LANDSCAPE STRUCTURES, INC., RECREATION EQUIPMENT SPECIALISTS, INC., BETH ANNE GARVEY and MARY LOUISE EFFINGER, as presidents of the SALTZMAN EAST MEMORIAL PTA,

Defendants.

The following papers read of these motions:

Notice of Motion 1
Notice of Motion 2
Affidavit of Beth Ann Garvey 3
Notice of Motion 4
Affirmation in Opposition 5
Reply Affirmations .....6 - 7
Affirmation of Barbara A. Sheehan.....8
Memorandum of Law .....9 - 11

Motion pursuant to CPLR 3212 by the defendants, Beth Anne Garvey and Mary Louise Effinger, as co-presidents of the Saltzman East Memorial PTA, dismissing the complaint and all cross-claims insofar as asserted against them.

Cross-motion pursuant to CPLR 3212 by the defendant, Farmingdale Union Free School District, for summary judgment dismissing the complaint and all cross-claims insofar as asserted against it.

Cross-motion pursuant to CPLR 3212 by the defendants, Landscape Structures, Inc., and Recreation Equipment Specialists, Inc., for summary judgment dismissing the complaint.

On March 30, 2000, at approximately 6:00 p.m., the then 8 year-old plaintiff, Jonathan R. Schmidt, fell and lacerated his kidney while playing on a piece of school playground equipment located on the grounds of the Saltzman East Memorial School in Farmingdale.

The playground equipment, known as the "Play Venture System," was manufactured by codefendant, Landscape Structures, Inc. ("LSI").

The portion of the Play Venture System on which Jonathan's accident occurred resembles an "undulating" or arched ladder, also known as "snake climber."

Prior to the accident, the plaintiff's mother parked her car in the school lot, and Jonathan ran ahead to the playground. He then climbed up on the Play Venture playground and fell as he was attempting to step onto to the snake climber ladder rungs from an adjacent, elevated platform area. The accident took place while his mother was still getting out of her car.

Although the plaintiff's mother previously advised Jonathan not to run down playground equipment and/or the ladders, he nevertheless stated that he intended to "run down the * * * [snake climber] ladder" because he thought he had "really good grippy shoes" (J. Schmidt Dep., 17 [RES Exh., "H" *see also*, Exh., "I," 27-29).

The Saltzman PTA purchased the playground equipment at issue several years earlier, in 1993 or 1994, with money generated by a PTA fundraiser, and then donated the apparatus to the Saltzman School.

The PTA apparently ordered the playground system from LSI through LSI's local sales representative, codefendant, Recreation Equipment Specialists ("RES").

Although the playground was installed by local community members with the assistance of the Saltzman school custodian, an independent contractor retained by RES was on-site at the time and provided advice and guidance as the apparatus was constructed.

Neither RES nor LIS was responsible for maintaining the playground after the installation process was completed. Notably, there was a sign posted at the playground advising, "play at your own risk after school hours."

At his deposition, the District's head custodian testified, *inter alia*, that he conducted daily inspections of the playground and was not aware of any accidents on or problems with the snake climber equipment.

Thereafter, the plaintiffs commenced the instant action against the Saltzman PTA (and its two current co-presidents, Beth Anne Garvey and Mary Louise Effinger), the Farmingdale Union Free School District ("the District"), RES, and LIS.

The plaintiffs' amended complaint contains causes of action sounding in, *inter alia*, negligence, strict products liability, failure to warn, and breach of warranty, based on allegations that the snake climber was unfit for its intended use and improperly constructed and designed (Cmplt.,¶¶ 27-29, 34).

Upon the instant notices, the District, RES, LIS, and the PTA move for summary judgment dismissing the complaint. The motions are granted to the extent indicated below.

Preliminarily, the Court rejects the plaintiffs' contention that the motions to dismiss are premature because additional discovery is warranted at this juncture of the proceeding, *i.e.*, subsequent to the plaintiffs' filing of a note of issue.

Absent special, unusual, or extraordinary circumstances – not established here – a "'motion court lacks discretion to permit further discovery after the note of issue and statement of readiness have been filed'" (*Marks v. Morrison*, 275 A.D.2d 1027, *quoting from*, *Gould v. Marone*, 197 A.D.2d 862; *see also*, *Laudisio v. Diamond D Const. Corp.*, 281 A.D.2d 942, *quoting from*, *Gould v. Marone*, 197A.D.2d 862; *see also*, *Rodriguez v. Sau Wo Lau*, 298 A.D.2d 376; *James v. New York City Transit Authority*, 294 A.D.2d 471; *Francis v. Board of Educ. of the City of Mount Vernon*, 278 A.D.2d 449). Counsel's reliance upon undocumented oral statements allegedly made to him during a

conference concerning his right to further discovery is unavailing (*e.g., Don Buchwald & Associates, Inc. v. Marber-Rich*, ___A.D.2d___ [1st Dept. 2003]) (Persons Aff., ¶54).

That branch of the LSI/RES motion which is to dismiss the plaintiffs' strict products and negligent design causes of action is denied.

Although LSI has submitted the sparsely framed expert affidavit of its own principal, who contends, *inter alia*, that the snake climber was in all respects safe and properly designed for its intended purpose, the plaintiffs have opposed the motion with their own expert affidavit which describes in detail alleged design defects and the potential hazards to user of the snake climber flowing therefrom.

The conflicting affidavits submitted, "presented a credibility battle between the parties' experts" with respect to whether the snake climber was unsafe, defective and/or negligently designed, thereby implicating "issues * * * properly left to a jury for * * * resolution" (*Barbuto v. Winthrop Univ. Hosp.*, __A.D.2d__ [2nd Dept. 2003] *see also, Ganter v. Makita U.S.A., Inc.*, 291 A.D.2d 847, 848; *cf., Fotinas v. Westchester County Medical Center*, 300 A.D.2d 437, 439).

Further, the Court rejects the contention that the plaintiffs should be barred from offering expert evidence in opposition to the motion because plaintiffs' counsel responded to an earlier request for expert witness information by advising that he had not, to date, retained an expert for trial (RES Mot., Exh. "G").

However, since the plaintiffs have failed to address or oppose that branch of the LSI/RES motion which is to dismiss their claims alleging breach of warranty and the

alleged loss of the infant plaintiff's society and services, those causes of action are dismissed (*Catalano v. Heraeus Kulzer, Inc.*, 759 N.Y.S.2d 159, 161 [2nd Dept. 2003]; *Levine v. Canon U.S.A., Inc.*, 303 A.D.2d 275, 755; *see also*, *Dunphy v. J & I Sports Enterprises, Inc.*, 297 A.D.2d 23, 27).

The plaintiffs' claims sounding in breach of an alleged duty to warn should also be dismissed.

Although a manufacturer has a duty to warn against certain dangers associated with its products (*e.g., Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 237 [1998]; *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 297-298 [1998]), "a plaintiff whose claim is based on inadequate warnings must prove causation" (*Banks v. Makita, U.S.A., Inc.*, 226 A.D.2d 659, 660). The required proof must also include evidence "that the user of a product would have read and heeded a warning had one been given" (*Sosna v. American Home Products*, 298 A.D.2d 158).

Further, while "the adequacy of a warning generally is a question of fact, in a proper case the court can decide the issue as a matter of law (*Passante v. Agway Consumer Products, Inc.*, 294 A.D.2d 831, 833, *quoting from*, *Alessandrini v. Weyerhauser Co.*, 207 A.D.2d 996 *see*, *Sosna v. American Home Products, supra*).

Here, the operative facts establish that Jonathan ran from parking lot and entered upon the equipment before his mother arrived at the playground to supervise him or examine any warnings relating to the use of the snake climber. Moreover, Jonathan

testified that despite being warned, *inter alia*, not to run down the ladder, he intended to do so anyway.

Upon these facts, and assuming, *arguendo,* that a duty to warn exists (*cf.*, *Auwarter v. Malverne Union Free School Dist.*, 274 A.D.2d 528), the record belies the theory that a warning or instruction relating to, *inter alia*, to the use or method of dismounting the snake climber would have been heeded – or more significantly – would have prevented the occurrence of the subject.

The motions of codefendants, Beth Anne Garvey, Mary Louise Effinger, as Presidents of the Saltzman PTA, are granted.

The plaintiffs have failed to oppose the motion insofar as made by these movants – or to otherwise identify any basis for imposing liability upon them as individually named parties.

Moreover, and upon the papers presented, the defendants, Saltzman East Memorial PTA and the School District, have established their *prima facie* entitlement to judgment as a matter of law (*e.g.*, *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]).

The PTA's submissions demonstrate that it purchased the subject equipment after conducting a fundraiser several years earlier and then donated the playground to the school. It is undisputed that at the time the accident occurred the PTA did not own or maintain the playground equipment or the property on which it was situated.

The plaintiffs' opposing papers contain neither factual support nor relevant legal authority establishing that the PTA owed a duty of care to the injured plaintiff – or possessed notice of any alleged defect or danger – merely because it donated playground equipment to a school district some seven years prior to the accident. Significantly, "[t]he mere fact that an accident occurs does not mean that a defendant is liable unless the plaintiff can show how the defendant's breach of some duty caused or contributed to the plaintiff's mishap" (*Georgas v. Mays Dept. Stores, Inc.*, 299 A.D.2d 314; *see, Ramo v. Serrano*, 301 A.D.2d 640; *Cole v. Fun 4 All, Inc.*, 293 A.D.2d 439, 440; *Candelier v. City of New York*, 129 A.D.2d 145, 148; *cf., Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 584 [1994]).

Similarly, there is nothing of a probative nature in the record suggesting that the defendant School District violated any duty of care to the plaintiff by acquiring and then maintaining the snake climber on school premises. Nor is there evidentiary support for the speculative allegation that the District was – or should have been – on notice or aware or any purported dangers and deficiencies in snake climber apparatus (*e.g., Davidson v. Sachem Cent. School Dist.*, 300 A.D.2d 276, 277; *Sinto v. City of Long Beach*, 290 A.D.2d 550; *see, Goetz v. Town of Smithtown*, 303 A.D.2d 367; *see, Prosser v. County of Erie, supra*).

Finally, to the extent that the plaintiffs' opposition papers can be read as suggesting that the District breached a duty to secure, enclose, or to otherwise supervise

the playground location after school hours – when the subject accident occurred – that claim is lacking in merit (*see*, *Ramo v. Serrano*, *supra*) (Persons Aff.,¶ 12).

The Court has considered the parties' remaining contentions and concludes that none warrants the granting of relief beyond that awarded above.

The foregoing constitutes the decision and order of the Court.

Dated: 7/17/03

J.S.C.

ENTERED

JUL 21 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE