

SCAW

SHORT FORM ORDER

MD

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

JENNIFER GAFFNEY, an infant by her mother and natural guardian DOROTHY GAFFNEY and DOROTHY GAFFNEY individually,

Plaintiff(s),

- against -

JAMES MURPHY and DOROTHY MURPHY,

Defendant(s).

TRIAL/IAS PART 11

INDEX NO. 11191/05

MOTION SEQUENCE NO. 1

MOTION SUBMISSION DATE: November 17, 1006

The following papers read on this motion:

Notice of Motion	X
Affirmation in Opposition	X
Reply Affirmation	X

Upon the foregoing papers, the motion by defendants for an order dismissing the plaintiff's complaint based on the fact that there is no evidence of a dangerous or defective condition, is determined as hereinafter provided:

The personal injury action arises out of an incident that occurred on January 13, 2005 at approximately 12:30 pm at the defendants' residence located at 34 Franklin Street, Islip, New York. The defendants are the parents of the plaintiff Dorothy Gaffney and the grandparents of the infant plaintiff Jennifer Gaffney. On the date in issue the defendant Dorothy Murphy was babysitting for her five grandchildren including the plaintiff Dorothy Gaffney.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562,

427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

Amongst other things, the plaintiffs in the plaintiffs' Verified Bill of Particulars set forth:

"5. The defendants JAMES MURPHY and DOROTHY MURPHY were careless and negligent in failing to warn the plaintiff of the aforesaid dangerous, hazardous and unsafe condition; in permitting carpets, rugs and vases to remain in a defective and dangerous condition; in failing to properly, carefully and safely care for the infant plaintiff in their care; in failing to provide a safe place for plaintiff to walk and play; in failing to properly supervise plaintiff and activities taking place on said premises; in failing to know of said condition which existed for an unreasonable period of time and could have been known upon reasonable and proper inspection."

In describing the incident, the defendant Dorothy Murphy set forth at her deposition:

"Q. Where were you facing at the time you were feeding Thomas?

A. I was facing Thomas in the highchair.

Q. Were you facing the opening, the entrance of the kitchen?

A. No.

Q. Where were you facing?

A. I was facing away from the opening.

Q. While you were feeding Thomas, were you looking at Thomas?

A. No.

Q. Explain that to me, please.

A. I was checking the children, feeding Thomas a spoonful of food, looking and checking the children and feeding Thomas.

Q. While you were feeding Thomas, were you able to see the children?

MS. ADLER: She just answered your question.

A. Yes.

Q. Where were the children in relation to where Thomas was sitting in the highchair?

A. In the foyer.

Q. Where was the foyer in relation to where you were sitting.

A. Between the kitchen and the dining room.

Q. Were you facing them while they were playing in the foyer or did you have your back to them?

A. No, I was sitting in a slanted position.

Q. While you were feeding Thomas, where were the four other children located?

A. The three year old Alisandra was taking a nap.

Q. Where was that?

A. One of the bedrooms, the first one on the right side. Nicholas and Dorothy and Jennifer were in the foyer.

Q. How old was Nicholas?

A. Five.

MS. ALDER: Now or then?

THE WITNESS: Then.

Q. Alisandra, you indicated, was taking a nap in the bedroom?

A. Yes.

Q. Where was the bedroom in relation to where the kitchen was?

A. Down the hall. She was in the bedroom down the hall.

Q. On the same side of the house that the kitchen was in?

A. No, away from the kitchen.

Q. On the other side of the house?

A. Not the other side. If you're sitting in the kitchen and looking down the hall, you could see the door to the bedroom.

Q. Was she sleeping at the time?

A. No, she just went in.

Q. Was she taking a nap in a bed?

A. Yes, a bed.

Q. Not a crib?

A. No, a bed.

Q. Did you take her in to take a nap or did she go herself?

A. I took her.

Q. Were you feeding Thomas at the time you brought her in to take a nap?

MS. ADLER: Objection to the form. You can't be in two places at once.

Q. Had you started feeding Thomas when you took her down to take a nap? Describe the procedure you use to take her for a nap.

A. Nicholas, Jennifer and Dorothy were all sitting at the kitchen table. The kitchen table is a bench and they all sat around having their lunch. I don't recall if I had Thomas in the highchair or not or if he was still sleeping.

The children had their lunch. They got up to play and Alisandra got up to take a nap. I think I walked her into the bedroom and then put Thomas into the highchair - - I picked him up and put him in the highchair. Afterwards, I believe, I don't remember because it's a year ago, I proceeded to get his lunch ready and the other children stepped away from the table because they were finished. I said, no running.

They decided to play Tweety Bird where they were doing a skit and flapping their arms like a bird. I proceeded to feed Thomas.

Q. Did they ever play Tweety Bird on prior occasions?

A. Not really.

Q. Did you ever tell them not to play Tweety Bird before?

A. It did not appear to look dangerous.

Q. Did you ever see them play that before?

A. No.

Q. What is Tweety Bird?

A. A little skit and flapping of the arm.

- Q. Were all three children, Dorothy Jennifer and Nicholas playing that game?
A. Yes.
Q. For how long a period of time had they been playing Tweety Bird before Jennifer's accident?
A. A short period of time. They just basically started to play it.
Q. Then what happened?
A. The children, I heard a crash. I turned around and Jennifer had fallen into the ceramic umbrella stand.
Q. Did the children say anything to you at that time?
A. They said Jennifer tripped on the rug.
Q. Who said that to you?
A. The children, both Dorothy and Nicholas."

A review of the respective submissions establishes that there is no submission in admissible form that sets forth the manner in which the accident in issue occurred. Although the respective parties contend that the incident was caused by a throw-rug that had been placed upon the defendants' wall to wall carpeting and became bunched-up leading to a trip and fall by the infant plaintiff into the ceramic umbrella stand such a contention is not substantiated by admissible evidence. The Court observes that the only witnesses to the occurrence were the infant plaintiff's siblings and their ability to understand an oath and offer admissible evidence is best determined at the time of trial. Based upon all of the foregoing, the defendants application for an Order dismissing the plaintiff's complaint based on the fact that there is no evidence of a dangerous or defective condition, is denied.

SO ORDERED.

DATED: 1/30/2007

.....*Roy S. Walker*.....
J.S.C.

ENTERED

FEB 02 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**