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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

SAMANTHA FASSRAINER, an infant under the age of 14 years, by her mother and natural guardian, ROSA FASSRAINER and ROSA FASSRAINER, individually,

Plaintiffs,

- against -

LONG BEACH CITY SCHOOL DISTRICT,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 10529/09
Motion Seq. No.: 01
Motion Date: 05/28/10
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion for Summary Judgment, Affirmation and Exhibits and Memorandum of Law	1
Affirmation in Opposition	2
Reply Affirmation	3

Defendant moves, pursuant to CPLR § 3212, for an order granting summary judgment and dismissing plaintiffs' complaint. Plaintiffs oppose defendant's motion.

This personal injury action arises from a slip and fall accident on October 7, 2008. On said date, plaintiff Samantha Fassrainer ("SF"), a fourth grade student at West Elementary School located in the City of Long Beach, New York, while at lunch recess in the school playground, allegedly fell off of playground equipment known as "monkey bars" sustaining injures to her right wrist as a result of said fall. On or about June 9, 2009, plaintiffs commenced

the action by service of a Summons and Verified Complaint. Issue was joined on June 18, 2009.

Plaintiffs allege that defendant was negligent in the supervision of the activities of the students left in its care, that defendant failed to have an adequate, safe and sufficient landing surface underneath the playground equipment where the alleged accident occurred and that the landing surface underneath the playground equipment did not have sufficient shock absorbing properties.

In its motion for summary judgment, defendant claims that plaintiffs have failed to present any evidence that defendant was negligent in supervising the students using the playground equipment. Defendant further argues that plaintiffs have failed to demonstrate by any competent evidence that plaintiff SF's injury was due to any defect in the playground equipment or ground cover underneath. In support of its motion, defendant submits the pleadings, the plaintiff's Verified Bill of Particulars, the testimony of plaintiff SF from the January 14, 2009 50-H Hearing, the testimony of plaintiff Rosa Fassrainer ("RF") from the January 14, 2009 50-H Hearing, the testimony of plaintiff SF from her December 15, 2009 Examination Before Trial, the testimony of plaintiff RF from her December 15, 2009 Examination Before Trial, the testimony of witness Teresa Naranjo from her December 15, 2009 Examination Before Trial, the testimony of witness Richard Behr from his January 29, 2010 Examination Before Trial, color photographs of the location at issue and the report of Margaret A. Payne, CPSI of Peggy Payne & Associates, Inc. (Playground Design and Safety Consulting/NPSI Certified Staff).

Plaintiff SF was a member of one of the three classes released to an outdoor playground after lunch. There were approximately fifty children on the playground on the date in question

and seven adult supervisors. Ms. Teresa Naranjo, a lunch aide, was assigned to watch the monkey bars area on the date at issue. Another woman, "Miss June", was also allegedly assigned to the monkey bar area. Plaintiff testified that she fell from the monkey bars after she attempted to jump from the platform to the fourth rung of said monkey bars. Ms. Naranjo testified in her Examination Before Trial that the school children were advised in their gym classes of the rules with respect to the playground and its equipment and that jumping from the platform to the fourth bar on the monkey bars was against the rules. Ms. Naranjo further testified that, in her three years working in her capacity as a lunch aide for the West Elementary School, she has never witnessed a student jump to the fourth bar before she witnessed the incident at issue. Plaintiff SF's testimony differs as to the cause of her falling from the fourth bar of the monkey bars. When she testified at the 50-H Hearing on January 14, 2009 (three months after the accident), in response to the question, "[a]t the time of your accident in the playground were you holding onto the monkey bar, were you trying to hold onto the monkey bar, what exactly were you doing?," plaintiff SF replied, "Well, I jumped to the further bar, and was a little bit slipping, right? So I was going to the next bar, my friend Cheyenne ran into me by accident because she did not have her glasses on so she didn't know where she was going but she couldn't have, kind of see not good. And she went bang into me; that's when I slipped and fell." In response to the question, "[y]ou jumped to where?," plaintiff SF replied, "right here (indicating, that fourth bar). This was followed by the next series of questions and answers which were:

Question: "Which is the further bar okay?"

Plaintiff SF Answer: "Yes. Before–after I jumped Chris went past me with glasses, I'm

like never mind I'll just go and I jumped to the fourth bar right I was halfway a little bit slipping so I went to the next bar and."

Question: "So that would be the fifth bar, right?"

Plaintiff SF Answer: "No, my hands was like that. And then Cheyenne came, banged into me because she didn't see me, she was trying to get back at Chris so I fell off and banged my hand like that."

Question: "Chris had her glasses?"

Plaintiff SF Answer: "Yeah."

However, during her examination before trial which occurred on December 15, 2009 (eleven months later), plaintiff SF testified, "Mr. Lopez blew the whistle and said go play. So I went near the monkey bars. And then I was standing on the platform. And I–then Rachel was like there staring at me. I jumped to the fourth bar and jumped back down I was fine. I saw Shari come. I said Shari, I said I can jump to the fourth bar. She said no. And Miss Teresa said you'll get hurt. And I said, no, I'll be okay. I jumped to the fourth bar. I banged my head on the other side of the platform. Everyone backed up. And I guess I jumped all the way to the wood chips. And my back was on my wrist. And my wrist was popped with my bone sticking out (indicating)."

Additionally, the following series of questions and answers took place:

Question: "Now, when you jumped from the platform to the fourth bar–"

Plaintiff SF Answer: "Uh-hum."

Question: "–did you, actually, grab the fourth bar?"

Plaintiff SF Answer: "Yes."

Question: "Did you, actually, grab the fourth bar?"

Plaintiff SF Answer: "Yes."

Question: "With both hands?"

Plaintiff SF Answer: "Yep."

Question: "Now, after you grabbed the fourth bar, what else did you do?

Plaintiff SF Answer: "Umm. I slipped off."

Question: "You fell?"

Plaintiff SF Answer: "Yeah, because my hands were all sweaty."

It is not disputed that the area in which plaintiff fell after slipping off the monkey bars was covered in Engineered Wood Fiber Chips approximately twelve inches deep. These Wood Fiber Chips cover the ground beneath all of the playground equipment.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.,* 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the

non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. S*ee Gilbert Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Summary judgment is a drastic remedy which should not be granted when there is any doubt about the existence of a triable issue of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, *supra*. It is nevertheless an appropriate tool to weed out meritless claims. *See Lewis v. Desmond,* 187 A.D.2d 797, 589 N.Y.S.2d 678 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N.A.,* 82 A.D.2d 168, 442 N.Y.S.2d 610 (3d Dept. 1981).

Based on the record before it, the Court finds that defendant has made a *prima facie* showing that it is entitled to judgment as a matter of law. It has demonstrated that the accident was the result not of inadequate or poor supervision, but rather of a sudden action of a child who was otherwise engaged in normal play. There is nothing offered that would place in issue the showing that the alleged lack of adequate supervision was a proximate cause of the injury. A

school is not liable if there is no indication that more intense supervision could have diverted the accident. *See Navarra v. Lynbrook Public Schools*, 289 A.D.2d 211, 733 N.Y.S.2cd 730 (2d Dept. 2001). *See also Odekirk v. Bellmore-Merrick Central School District*, 70 A.D.3d 910, 895 N.Y.S.2d 184 (2d Dept. 2010) (holding that when an accident occurs in so short a span of time that even the most intense supervision of students in the school's charge could not have prevented it, lack of supervision is not the proximate cause of the injury); *Paragas v. Comsewogue Union Free School District*, 65 A.D.3d 1111, 885 N.Y.S.2d 128 (2d Dept. 2009); *Knightner v. William Floyd Union Free School District*, 51 A.D.3d 876, 857 N.Y.S.2d 726 (2d Dept. 2008); *Ronan v. School District of City of New Rochelle*, 35 A.D.3d 429, 825 N.Y.S.2d 249 (2d Dept. 2006). Defendant has demonstrated that the supervision was indeed adequate.

Further, defendant has provided evidence sufficient to prove that it had an adequate, safe and sufficient landing surface underneath the playground equipment where the alleged accident occurred. *See* Defendant's Exhibit L.

In response, plaintiffs have submitted the affirmation of their attorney. No additional evidence was presented. Plaintiffs argue that school authorities are liable for personal injuries sustained by students resulting from their failure to properly supervise or improperly supervising the conduct of students while under their control and authority. Plaintiffs assert that defendant's own witness, Ms. Naranjo, establishes a question of fact as to the inadequacy of the supervision at the time of accident.

With regard to the negligent supervision claim, there is nothing offering that would place in issue the showing that the alleged lack of supervision was a proximate cause of the accident. Accordingly, the claim based on negligent supervision must be dismissed. *See Lowe v. Meacham Child Care & Learning Center, Inc.*, 74 A.D.3d 1029, 904 N.Y.S.2d 463 (2d Dept.

2010)(holding that when an accident occurs in so short a span of time that even the most intense supervision could not have prevented it and lack of supervision is not the proximate cause of injury); *Troiani v. White Plains City School District*, 64 A.D.3d 701, 882 N.Y.S.2d 519 (2d Dept. 2009)(student's fall from monkey bars could not reasonably have been prevented by closer monitoring and thus any lack of supervision was not the proximate cause of the student's injuries); *Calgagno v. John F. Kennedy Intermediate School*, 61 A.D.3d 911, 877 N.Y.S.2d 455 (2d Dept. 2009)(school fulfilled its duty to provide adequate supervision to fourth-grade student who fell from horizontal gymnastics bars on playground during her recess period as there were at least three teachers in the recess area supervising ten classes of students, there was a supervisor standing just outside the playground area and the student was engaged in normal play rather than a dangerous activity); *Carey v. Commack Union Free School District*, 56 A.D.3d 506, 867 N.Y.S.2d 525 (2d Dept. 2008)(summary judgment granted to defendant in case where student's injuries occurred when he lost his grip on playground equipment); *Botti v. Seaford Harbor Elementary School District 6*, 24 A.D.3d 486, 808 N.Y.S.2d 236 (2d Dept. 2005)(school district established that there was adequate playground supervision when student fell from monkey bars during recess and thus negligent supervision was not proximate cause of the accident); *Berdecia v. City of New York*, 289 A.D.2d 354, 735 N.Y.S.2d 554 (2d Dept. 2001)(holding that child's injury was not proximately caused by lack of supervision as two supervisors were near the child when he slipped and fell from playground apparatus and three other supervisors were on duty).

With respect to plaintiffs' claims that defendant failed to have an adequate, safe and sufficient landing surface underneath the playground equipment where the alleged accident occurred and that the landing surface underneath the playground equipment did not have

sufficient shock absorbing properties, plaintiffs have failed to place in issue defendant's proof that the playground area in which plaintiff SF fell was in reasonably safe condition on the date of the accident and the claims that it was not must be dismissed.

Accordingly, defendant's motion, pursuant to CPLR § 3212, for an order granting summary judgment and dismissing plaintiffs' complaint is hereby granted.

This constitutes the decision and order of this Court.

ENTER:

DENISE L. SHER
A.J.S.C.
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Dated: Mineola, New York
August 26, 2010