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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOHN DiNOTO,

Justice

**TRIAL/IAS PART 7
NASSAU COUNTY**

**MICHAEL McKEON, an infant by his Mother and natural
guardian, JOANNE McKEON and JOANNE McKEON,
Individually,**

Plaintiff(s),

INDEX NO. 28574/97

-against-

**MOTION DATE: 10/27/00
MOTION SEQ. NO. 002 &
003**

**THE TOWN OF OYSTER BAY and
FORESIGHT SERVICE CENTER,**

Defendant(s).

TOWN OF OYSTER BAY,

Third-Party Plaintiff(s),

-against

**MICHAEL McKEON and JOANNE McKEON, as parents
and natural guardians of STEVEN McKEON, and
MICHAEL McKEON and JOANNE McKEON, Individually,**

Third-Party Defendant(s).

The following papers read on this motion and cross-motion.

**Notice of Motion/Order to Show Cause.....1-2
Answering Affidavits.....3
Replying Affidavits.....4-5
Briefs: Plaintiff's/Petitioner's.....6-7
Defendant's/Respondent's.....**

**The motion brought by the Defendant, Foresight Service Center, in the above captioned
action, for summary judgment dismissing the Plaintiffs' Complaint and all cross-claims as against
this moving Defendant is denied.**

The cross-motion by the Defendant Third-Party Plaintiff, Town of Oyster Bay, for summary judgment dismissing the Plaintiffs' Complaint and all cross-claims as against the Town is denied.

This personal injury action arises out of an accident occurring on September 15, 1996, at approximately 12:45 P.M., on or about the premises known as the Theodore Roosevelt Boat Basin, located in the Town of Oyster Bay. The infant Plaintiff was allegedly injured when his pinky finger became stuck in the cable and pulley mechanism of the dinghy launch located at the Theodore Roosevelt Boat Basin. The infant Plaintiff testified at his deposition that the accident occurred when his father and brother were using the launch to lower a dinghy. (Transcript, p. 12). The infant Plaintiff further testified that his brother Steven pushed the button to start the machine. (Transcript, p. 15). The accident happened when the infant Plaintiff observed that the dinghy was stopping and going and he tried to pull it down by pulling on the cable. (Transcript, pp. 16-17, 20). He testified that his finger got stuck when he attempted to let go of the cable. (Transcript, pp. 17-18).

The Plaintiffs' Amended Complaint alleges, upon information and belief, that "on or about October 15, 1994, the Defendant, Town of Oyster Bay, entered into an agreement with Foresight Service Center, to repair dinghy launches at Theodore Roosevelt Boat Basin on Bay Avenue in Oyster Bay." Further that "at all times hereinafter mentioned, the Defendant, Foresight Service Center maintained and repaired the afore described launch." The Defendant, Foresight Service Center, now moves for summary judgment on the grounds that "no competent evidence has been produced that the Movant, Foresight Service Center owed any duty of reasonable care independent of their verbal contractual obligations to the Town of Oyster Bay." Counsel for Foresight Service Center contends that "all testimony by the witness produced on behalf of the Town of Oyster Bay indicates that Foresight Service Center completed its contractual obligations in a satisfactory manner." And that "no evidence has been set forth reflecting that Foresight Service Center failed to make the repairs requested or did so in a negligent manner."

With respect to the Town of Oyster Bay, the Plaintiffs' Amended Complaint alleges that "at all times hereinafter mentioned, the Defendant, the Town of Oyster Bay, was the owner of the premises known as the Theodore Roosevelt Boat Basin...wherein it operated and/or operates a boat launch." The Town of Oyster Bay cross-moves for summary judgment, inter alia, on the grounds that "the Town's negligence, if any, was not the proximate cause of Michael's injuries and as it did not have notice of any allegedly defective condition." Counsel for the Town of Oyster Bay contends that: "The accident was caused by the unsupervised actions of [Steven McKeon] in activating the dinghy launch without checking if it was clear and by [Michael McKeon] in grabbing the launch cable while the launch was in use."

It is the rule that "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 vs. Prospect Hosp., 68 NY2d 320, 324). The Defendants have not met this burden. The Defendant, Foresight Service Center, has not established exactly what duties it owed to the Town of Oyster Bay under their verbal

agreement. While Mr. Michael Cucci, the owner of Foresight Service Center testified at his examination before trial that the Town of Oyster Bay would call him when work had to be done (Transcript, p. 7), Mr. John Lala, who was the dockmaster at the Theodore Roosevelt Boat Basin on the date of the accident, testified that Foresight Service Center "would come in the beginning of [the] year, hook it up [i.e., the dinghy launch] and make sure it was working." (Transcript, pp. 30-31). Mr. Lala further testified that: "Actually, Mike [i.e., Mr. Cucci] would come down pretty much on a regular basis just to check things out." (Transcript, p. 31). This raises a triable issue as to whether Foresight Service Center had or voluntarily assumed a duty to inspect and maintain the dinghy launch.

Foresight Service Center has furthermore not established that the electric motor, dinghy launch and alarm bell were properly operating after they were set up at the start of the season or after the electric motor was repaired on July 11, 1996, or during any of Mr. Cucci's subsequent visits. There is, however, testimony to the contrary. The infant Plaintiff testified at his examination before trial that the dinghy launch was not operating properly. Specifically, he testified that the launch repeatedly stopped and started and that the alarm bell, which usually sounds when the launch is in operation, failed to sound. (Transcript, pp. 14-16). He further testified that on many occasions prior to the accident the bell did not operate. (Transcript, pp. 43-44). The infant Plaintiff's father likewise testified that on prior occasions the launch would stop and start. (Transcript, pp. 21-22). The infant's mother also testified that sometimes "the bell would stop ringing while the dinghy was still moving." (Transcript, pp. 61-62).

The Court disagrees with Counsel for the Plaintiffs that there exist genuine issues of material fact as to whether Foresight Service Center properly set the limit switches (i.e., switches that cut the power to the electric motor when the dolly on the dinghy launch reached the bottom of the ramp). Further, as to whether Foresight Service Center was negligent in failing to warn the Town of Oyster Bay that the exposed pulley on the dinghy launch was a danger to the public; that there was no emergency cutoff switch at the bottom of the ramp; that the dinghy launch was a dangerous instrumentality and that signs should be posted warning the public that children should not operate the dinghy launch. The Plaintiffs have furnished no proof, expert or otherwise, that any of these measures were necessary.

Undoubtedly, the dinghy launch is a piece of machinery capable of causing injury if improperly used. "The question of '[what] safety precautions may reasonably be required of a landowner is almost always a question of fact for the jury'." (*Arena vs. Ostrin*, 134 AD2d 306, quoting *Nallan v Helmsley-Spears, Inc.*, 50 NY2d 507, 520, n 8). Such is the case here. Likewise for the jury in this case are all questions relating to proximate cause and foreseeability. There is also a triable issue of fact as to whether Mr. Lala had actual notice of the allegedly malfunctioning alarm bell. Mr. Lala testified that his office was 30 to 40 feet from the dinghy launch and that he could hear the bell from his office. (Transcript, pp. 7, 20).

Accordingly, the motion and cross-motion are denied.

Dated: December 11, 2000

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NASSAU COUNTY
COUNTY CLERKS OFFICE

J.S.C.