

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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G/kmg

_____AD3d_____

Argued - March 8, 2010

WILLIAM F. MASTRO, J.P.
HOWARD MILLER
LEONARD B. AUSTIN
SHERI S. ROMAN, JJ.

2009-04810

DECISION & ORDER

Tyshon Vailes, etc., et al., appellants, v Nassau County
Police Activity League, Inc., Roosevelt Unit, respondent.

(Index No. 2654/07)

Decolator, Cohen & DiPrisco, LLP, Garden City, N.Y. (John V. Decolator of counsel), for appellants.

French & Casey, LLP, New York, N.Y. (Rosalyn Maldonado and Susan Romano of counsel), for respondent.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Nassau County (Phelan, J.), entered April 22, 2009, which granted the defendant's motion for summary judgment dismissing the complaint.

ORDERED that the order is reversed, on the law, with costs, and the defendant's motion for summary judgment dismissing the complaint is denied.

We agree with the defendant that the Supreme Court providently exercised its discretion in declining to consider the affidavit of the plaintiffs' purported expert, since that expert was not identified by the plaintiffs until after the note of issue and certificate of readiness had been filed attesting to the completion of discovery (*see Gerardi v Verizon N.Y., Inc.*, 66 AD3d 960, 961). Nonetheless, even without considering that affidavit, in response to the defendant's prima facie showing of its entitlement to judgment as a matter of law based upon its defense that the infant plaintiff assumed the risk of his injury (*see Morgan v State of New York*, 90 NY2d 471; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320), the plaintiffs raised triable issues of fact as to whether the

April 13, 2010

Page 1.

VAILES v NASSAU COUNTY POLICE ACTIVITY LEAGUE, INC., ROOSEVELT UNIT

defendant unreasonably increased the risk of injury to him (*see Karr v Brant Lake Camp*, 261 AD2d 342; *Maurer v Feinstein*, 213 AD2d 383; *see also Egan v Clark*, 2005 WL 1415720 [SD NY] [applying New York law]).

The defendant's remaining contentions are without merit.

MASTRO, J.P., MILLER, AUSTIN and ROMAN, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court