

**Roberts v Boys and Girls Republic, Inc.**

2006 NY Slip Op 30334(U)

September 21, 2006

Supreme Court, New York County

Docket Number: 0106708/2004

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JANE S. SOLOMON

PRESENT: Index Number : 106708/2004

PART 55

ROBERTS, LINDA

vs

BOYS & GIRLS REPUBLIC INC

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE 6/26/06

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1-3

Answering Affidavits — Exhibits \_\_\_\_\_

4-9

Replying Affidavits \_\_\_\_\_

10-12

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed memorandum decision and order.*

**FILED**

SEP 25 2006

NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/21/06

*J.S.*  
JANE S. SOLOMON J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 55

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LINDA ROBERTS and KHALEEQ SHEPPARD, an  
infant under the age of eighteen by his  
mother and natural guardian, LINDA ROBERTS,

Index No.: 106708/04

Plaintiffs,

-against-

**DECISION and ORDER**

BOYS AND GIRLS REPUBLIC, INC., HENRY STREET  
SETTLEMENT, FRANK ALAMEDA, RUBEN MORALES,  
BOYS' CLUB OF NEW YORK, FRANK "DOE", last  
name being fictitious and unknown, intended  
to be that party, who while a volunteer  
and/or employee for BOYS' CLUB OF NEW YORK  
coached a certain baseball team(s) on or about  
May 1, 2002 and prior thereto, and ORLANDO  
"DOE", last name being fictitious and unknown,  
intended to be that party who while a volunteer  
and/or employee for BOYS' CLUB OF NEW YORK,  
coached a certain baseball team(s) on or about  
May 1, 2002 and prior thereto,

**FILED**  
SEP 25 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Defendants.

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SOLOMON, J.:

This is a personal injury action brought by Linda  
Roberts (Roberts) and her son Khaleeq Sheppard (Khaleeq) against  
Boys and Girls Republic, Inc. (BGR), Henry Street Settlement  
(HSS), The Boys' Club of New York (BCNY), and others.<sup>1</sup> The  
action against BGR and its affiliate HSS (collectively, BGR/HSS)  
was commenced by plaintiffs on or about April 30, 2004 (index no.  
106708/04). A separate action against BCNY was commenced by

<sup>1</sup> The papers indicate that defendants Ruben Morales and those with fictitious or unknown last names were not served with process. Defendant Frank Alameda, though served, has defaulted.

plaintiffs on or about March 11, 2005 (index no. 103407/05). Pursuant to a so-ordered stipulation of this court, these two actions have been consolidated for all purposes.

Subsequent to the submission of answers to their respective complaints, defendants BCNY and BGR/HSS filed cross-claims against each other (and other co-defendants). The cross-claims are based on indemnification and contribution. After the parties conducted discovery, BCNY and BGR/HSS each move for summary judgment seeking dismissal of the complaint (and all cross-claims) pursuant to CPLR 3212.

#### Background

Roberts is the mother and guardian of Khaleeq, who was twelve years old at the time of the alleged accident. Khaleeq joined BCNY and its baseball program in February 2002. On May 1, 2002, Roberts was accidentally struck in the face with a baseball bat swung by Ruben Morales (Morales), while she was attending Khaleeq's baseball practice in the East River Park, located on the Lower East Side of New York City. Morales was a member of a baseball team organized by Frank Alameda (Alameda), who, according to the allegations of the complaint, was either an employee or a volunteer of BGR/HSS and BCNY.

HSS is a non-profit organization founded in 1893. Located on the Lower East Side, HSS provides services to the neighborhood residents, and receives funding primarily from

grants and public donations. BGR is a not-for-profit youth program founded in the 1930s, which became a full program of HSS in or about 1988. BCNY is a charitable organization founded in 1876, which offers a variety of services and activities to the youth of New York City. BCNY has no relationship or affiliation with BGR/HSS.

The relationship of co-defendant Alameda, as a volunteer, with BGR/HSS and BCNY is not entirely clear due to conflicting testimonies of the parties.<sup>2</sup> However, the following facts generally appear undisputed. Alameda was an organizer of community youth sports activities, including basketball and baseball, on the Lower East Side. In February 2002, Alameda and his friend Orlando Perez (Perez) approached several BGR/HSS executives, including Dan Kromerfeld, Nilsa Pietri and Richard Ravinsky, to inquire whether BGR/HSS would be interested in forming and funding a baseball program. Because of budgetary concerns, BGR/HSS did not agree to provide any funding, but permitted Alameda to use an office phone, an exercise room and a storage room in BGR's premises. Through his own efforts, Alameda

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<sup>2</sup> Witness testimonies, however, indicated that Alameda was not an employee of BGR/HSS or BCNY at the time of the accident (May 1, 2002) or in the early part of 2002. In September 2002, Alameda was employed by BGR/HSS as an assistant for its evening gym program, and his employment was terminated in January 2004.

raised funds to purchase baseball equipment,<sup>3</sup> which was stored at BGR. Alameda and Perez used BGR's facilities for baseball recruitment and try-outs, and in the spring of 2002, they organized two baseball teams and named them "Senior Bulldogs" and "Junior Bulldogs." Perez was the coach of the Senior Bulldogs (of which Morales, who was then sixteen years old, was a member), and Alameda was the coach of the Junior Bulldogs.

Because BCNY's baseball team (named "Tigers") did not have enough members, Pablo Figueroa (Figueroa), who was then a director of BCNY's athletic programs, spoke with Alameda about combining the Tigers with the Junior Bulldogs. The two teams were later merged (and named "Tigers") during a baseball practice held at the East River Park about a week before the accident. Khaleeq was a member of the Tigers, and he was given a schedule of the baseball games with a BGR logo on it; Alameda testified that he had no authority to use BGR's logo but did so to give the schedule a professional look.

On the day of the accident, Roberts arrived at the ball field at approximately 6:40 p.m. to attend Khaleeq's baseball practice. After Khaleeq's team practice ended at 8:00 p.m., he and his teammates (as well as Roberts) were getting ready to leave the ball park. However, Khaleeq then decided to stay and

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<sup>3</sup> Several of the public donation checks were made payable to BGR/HSS, the proceeds of which were given to Alameda.

run laps with several teammates. Feeling chilly, but deciding to also stay, Roberts was offered Alameda's jacket, which was inside a duffle bag on the bleachers located off the third baseline behind a tall chain-linked fence. When Roberts was walking toward the bleachers, she was accidentally struck in the face by the baseball bat swung by Morales, who was then taking practice swings in the on-deck circle, as he prepared to bat for the Senior Bulldogs. In baseball, the next player to bat generally takes practice swings to warm up in an area near the playing field called the on-deck circle. In this case, the on-deck circle was located just outside of the playing field along the path from the park's entrance to the third base bleachers.

Roberts alleges that her injuries were caused by the failure of BGR/HSS and BCNY to properly supervise and control the activities of their baseball teams, and more specifically they failed to supervise Morales in permitting him to swing a baseball bat outside of the playing field. The complaint also alleges that Khaleeq sustained damages because he was in the "zone of danger" at the time of the accident.<sup>4</sup>

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<sup>4</sup> In plaintiffs' affirmation in opposition to defendants' summary judgment motions (Pl. Brief), plaintiffs concede that they "do not oppose" BCNY's request for dismissal of Khaleeq's "zone of danger" claim. Pl. Brief, ¶ 3. Because the undisputed facts and applicable law for this claim and defense apply equally to BCNY and BGR/HSS, this claim shall be dismissed as against both BCNY and BGR/HSS, even though BGR/HSS and plaintiffs did not address such claim and defense in their briefs.

BGR/HSS and BCNY seek summary judgment pursuant to CPLR 3212 on the grounds that they did not owe plaintiffs a duty of care because they neither own or designed the ball field, nor employ the coaches or sponsor the baseball teams. They also assert the affirmative defense that Roberts assumed the risk of injury.

### Discussion

#### Duty of Care/Vicarious Liability

It is axiomatic that the "threshold question in any negligence action is: does defendant owe a legally recognized duty to plaintiff?" *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232 (2001). Traditionally, the courts "fix the duty point by balancing factors, including the reasonable expectation of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability ... and the public policies affecting the expansion or limitation of new channels of liability [citation omitted]." *Id.*

In this case, plaintiffs allege that, because Alameda was a volunteer of BCNY and BGR/HSS, and because Alameda negligently allowed Morales to practice warm-up swings in the on-deck circle near the spectators area, BCNY and BGR/HSS owed a duty of care to Roberts, and thus are liable for the injuries she sustained under the theory of respondent superior or vicarious liability.

Relationship With BCNY

With respect to BCNY, the following witnesses' testimonies are relevant. Figueroa, a BCNY director who was responsible for hiring baseball coaches in 2002, testified that Alameda was not an employee or a volunteer of BCNY in 2002. Alameda also testified that, even though he had been a BCNY volunteer for many years, at the time of the accident he was not officially a volunteer of BCNY, because he was then involved with the BGR program. Moreover, there is undisputed testimony by Figueroa, Alameda and Morales himself, that Morales was not a member of BCNY or the Tigers, but was a member of the Senior Bulldogs, a baseball team that was not affiliated with BCNY. There is no allegation that Perez was ever an employee, volunteer or coach of BCNY and/or its baseball team.

Plaintiffs argue, however, that because Alameda received a \$300 stipend from BCNY in 2002, the stipend might be deemed compensation for Alameda's services as a volunteer or coach of BCNY's baseball team. Assuming, arguendo, that Alameda were a BCNY volunteer or coach of the Tigers, his purported status and relation to BCNY and/or the Tigers is irrelevant to the accident. Specifically, because it is undisputed that Morales was not a member of the Tigers and/or BCNY, and BCNY did not sponsor or promote the Senior Bulldogs, BCNY owed no duty of care to Roberts, and should not be held liable on the theories of

respondeat superior, vicarious liability or otherwise, for her injuries accidentally caused by Morales. *Blake v Gardino*, 35 AD2d 1022, 1023 (3d Dept 1970) ("[w]hile summary judgment is granted infrequently in negligence actions, the remedy should be granted without hesitation where there is no merit to the cause of action"), *affd*, 29 NY2d 876 (1972)

Because BCNY is not involved with or related to Morales or the team in which he played, BCNY's summary judgment motion should be granted pursuant to CPLR 3212, and the complaint and all cross-claims as against BCNY should be dismissed.

#### Relationship With BGR/HSS

With respect to BGR/HSS, although there is no evidence that Alameda was an employee of BGR/HSS at the time of the accident, there are conflicting testimonies as to whether he and/or Perez was a volunteer at that time. In addition, even though it is undisputed that BGR/HSS did not provide funding for the Junior and Senior Bulldogs, there is controversy as to whether BGR/HSS, indirectly or directly, sponsored and/or promoted these teams, with the hopes of recruiting members for its various youth programs. Further, there is evidence that the Bulldogs were organized and coached by Alameda and Perez, but there is conflicting evidence as to whether BGR/HSS authorized the formation or organization of these baseball teams.

Objecting to plaintiffs' allegation that Alameda and

Perez were volunteers, BGR/HSS argues that, even if they could be deemed volunteers, BGR/HSS should not be held accountable for their alleged acts or omissions with respect to the baseball teams and Roberts' injury. Citing *Garcia v Herald Tribune Fresh Air Fund, Inc.*, 51 AD2d 897 (1<sup>st</sup> Dept 1976), for the proposition that a principal-agency relationship depends on the right of the principal to direct and control the activities of its agent, BGR/HSS contends that it cannot be held vicariously liable for the alleged negligence of Alameda or Perez, because there is no evidence that BGR/HSS retained any direction or control over these individuals and their baseball teams.

BGR/HSS reliance on *Garcia* is misplaced. In that case, while stating that "a principal-agency relationship exists where one retains a degree of direction and control over another," the First Department pointed out that "[w]hether a sufficient degree of direction and control ... sufficiently to constitute an agency relationship was [a question of fact for] the jury." *Id.* at 897. The court explained that: "[i]f the question of agency is not open to doubt, it is one for the court. But where no written authority of the agent has been proven, questions of agency and of its nature and scope ... are questions of fact to be submitted to the jury ... ." *Id.* (internal citations omitted).

Here, the issue of principal and agency (and of its nature and scope) between BGR/HSS and Alameda or Perez is

disputed by the parties, and according to *Garcia*, such issue should be decided by a jury rather than the court. In effect, BGR/HSS seeks to put the "cart before the horse" in arguing that the issue of direction and control should trump or dispense with the issue of principal and agency. This is unpersuasive, particularly where, as here, BGR/HSS could or should have exercised direction and control over Alameda and Perez, if these individuals were in fact volunteers of BGR/HSS. Hence, summary judgment cannot be granted as to these issues.

#### Assumption of Risk

It has been long recognized that the doctrine of assumption of risk applies "not only to participants of sporting events, but [also] to spectators and bystanders who are not actively engaged in watching the event at the time of their injury." *Sutton v Eastern New York Youth Soccer Association, Inc.*, 8 AD3d 855, 857 (3<sup>rd</sup> Dept 2004) (citations omitted); see also *Bereswill v National Basketball Association*, 279 AD2d 292, 293 (1<sup>st</sup> Dept 2001) (granting defendant summary judgment and holding that "[e]ven as a non-participant, plaintiff is subject to a defense based on the doctrine of assumed risk."). Moreover, "[t]he doctrine of assumption of risk connotes an absence of duty [of care] to plaintiff on the part of defendant, i.e. plaintiff's consent to and acceptance of the risk, and is distinct from the doctrine which CPLR 1411 requires to be considered as a component

of plaintiff's contributory fault." *Sutfin v Scheuer*, 145 AD2d 946, 947 (4<sup>th</sup> Dept 1988), *affd*, 74 NY2d 697 (1989).

Plaintiffs argue that the assumption of risk doctrine should not bar their claims. Relying on *Morgan v State of New York*, 90 NY2d 471 (1997), plaintiffs submitted an "expert affidavit" by Francis Cosgrove (Cosgrove), who opined, among other things, that the manner in which Roberts was injured was not a risk inherent in the sport of baseball, and that the place where Roberts was struck should not be used as an on-deck circle, because it was outside of the playing field and on the path to the bleachers.

Plaintiffs' reliance on *Morgan* is misplaced. First, *Morgan* involved four separate personal injury actions that were appealed to the Court of Appeals where the appellate divisions had granted summary judgment in favor of defendants, who were owners and operators of sports facilities in which appellant-plaintiffs were participants in various athletic sports.<sup>5</sup> In the instant case, it is undisputed that BGR/HSS and BCNY are/were not owners and operators (or designers) of the baseball field in which Roberts was injured. Thus, any liability, as a sports

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<sup>5</sup> The Court of Appeals affirmed three of the four summary judgments. As to the fourth, the court reversed because it found that the facility owner had a duty to players to keep the tennis net in good repair, and plaintiff's injury caused by tripping over the torn net was not an inherent part of the game of tennis, and should not be deemed to have assumed the risk of injury.

knew or reasonably should have known (particularly due to her familiarity with the game of baseball) that such an area could well be an on-deck circle. Moreover, Alameda and Figueroa testified that the subject area has been used regularly by players for warm-up swings for many years, and there were never complaints about players swinging bats in such area. Morales, whose team was playing a game of scrimmage on the field when Roberts was struck, also testified that he was shocked when he accidentally struck Roberts because he did not expect anyone to be in the on-deck circle. Finally, the court takes judicial notice of the fact that the game of baseball inherently involves players who swing a bat, and that these players routinely take practice swings near the playing field. A player or spectator walking on or near the field of play must be alert to this hazard.

Courts have granted summary judgments in favor of defendants in personal injury actions having facts similar to the instant case. For example, in *Sutton v Eastern New York Youth Soccer Association, Inc.*, 8 AD3d 855 (3<sup>rd</sup> Dept 2004), plaintiff was a spectator and had finished watching his son's soccer game. When walking from the sidelines to a tent erected for his son's team at some 40 yards behind the goal line, he noticed several players warming up for the next game. Once under the tent, he was struck accidentally by a ball kicked by one of the players.

Plaintiff sued defendant soccer association for negligence, asserting that defendant "unreasonably enhanced the risk of injury ... by essentially inviting him to stand at the end of the field through their placement of the team tent." *Id.* at 858. Finding that the plaintiff had assumed the risk, the Third Department upheld the summary judgment in favor of defendant, and stated:

[j]ust as the owner of a baseball park is not responsible for the spectator who leaves his or her seat and walks through a potentially more hazardous zone ... thereby assuming the open and obvious risk of being hit by a ball, defendant here cannot be held responsible for the risk assumed by plaintiff when he, aware that players were active on the field, left the sidelines and stood in the tent positioned in the arguably more dangerous zone behind the goal line [citation omitted.]

*Id.* at 859. The court also rejected plaintiff's contention that the risk of being struck while some 40 yards from the field where no formal game was in progress was not open and obvious. The court reasoned that, in a sporting event where "the risks were fully comprehended or perfectly obvious," a participant or spectator would be deemed to have consented to such risk. *Id.*

Likewise, in *Honohan v Turrone*, 297 AD2d 705 (2<sup>nd</sup> Dept 2002), plaintiff was a spectator at a soccer game involving her daughter that was organized by the defendant township. While standing on the sidelines watching the game, she was struck in the head by a ball kicked by a player who was warming up near the

spectators area. In affirming the grant of summary judgment in favor of defendant, the Second Department found that the risk of being hit by balls kicked by players beyond the playing field was an open and obvious condition to plaintiff and, thus, plaintiff had assumed the risk of injury. The court held for defendant, notwithstanding plaintiff's submission of an expert affidavit, which opined that allowing players to warm up near the sidelines in the vicinity of spectators did not meet with "the custom and practice followed by youth soccer leagues in the State of New York." *Id.* at 705. The court, citing *Morgan*, concluded that defendants "established their entitlement to judgment as a matter of law based upon the doctrine of assumption of the risk of an open and obvious condition." *Id.* Accord *Koenig v Town of Huntington*, 10 AD3d 632 (2<sup>nd</sup> Dept 2004) (court granted defendant summary judgment where plaintiff spectator was struck by a baseball from an adjacent field, and discredited conclusory affidavit of plaintiff's expert that defendant's design of the ball fields increased the inherent risk of injury to spectators); *Sutfin v Scheuer*, 145 AD2d 946, *supra* (holding that plaintiff, as bystander, assumed the risk of injury of being hit by a baseball by placing himself near a game in progress, and noting that persons who stand near games in progress, but who do not pay attention, are deemed spectators to whom no duty is owed).

Based on uncontested testimonies in this case as to how

the accident occurred and applicable caselaw, this court finds that the risk of being hit near the on-deck circle where players took warm-up swings is a "danger inherent in the sport" of baseball that is not "obscure" or "unobserved" (in the words of *Morgan*), and that Roberts assumed the risk of injury when she, without paying attention to what was readily observable, walked through the on-deck circle and was hit by Morales' bat.

Plaintiffs' reliance on the "expert affidavit" submitted by Cosgrove is also misplaced. Cosgrove opines that, because the on-deck circle was in an area where spectators traverse, it permitted co-mingling of spectators with players, thus creating "unreasonably increased risk" of injury to spectators. Pl. Brief, ¶ 59. This contention is unpersuasive. While the on-deck circle was along the path to the bleachers and might pose risks to spectators who walk pass it, Roberts *unreasonably* increased the risk of injury because she voluntarily chose to walk through the subject area even though she had previously observed many games and practices, and had been present for nearly ninety minutes on the day of the accident while the subject on-deck circle was in use.

Plaintiffs argue that this "would only go to any comparative negligence on part of the plaintiff and would not support summary judgment based on assumption of risk." Pl. Brief, ¶ 59. This argument also is without merit. As noted by

the Court of Appeals in *Morgan*, 90 NY2d 471, *supra*, "assumption of risk ... is really a *principle of no duty*, or no negligence and so *denies the existence of any underlying cause of action*. Without a breach of duty by the defendant, there is thus logically nothing to compare with any misconduct of the plaintiff [citations omitted; emphasis in original]." *Id.* at 485.

Further, Cosgrove's affidavit is insufficient to create an issue of fact to defeat a summary judgment motion. Notably, the affidavit does not indicate that he is an expert in baseball safety or baseball field design. As such, his affidavit is of limited value. *Hong v County of Nassau*, 139 AD2d 566 (2<sup>nd</sup> Dept 1988) (ruling that the trial court properly limited the scope of testimony of plaintiff's expert because of his lack of expertise in the specialized area). Also, although Cosgrove quoted a short excerpt from the Official Little League's safety guideline on "pre-game warm-ups," he has not established that such guideline is the applicable standard of care in New York.

Moreover, there is no allegation or evidence that the subject baseball teams organized by Alameda and Perez were registered with or approved members of the Little League, such that the League's guideline would be applicable to, and should be followed by, these teams. Thus, Cosgrove's conclusory personal opinion with respect to the standard of care for the placement of the on-deck circle in the instant case is neither supported by

applicable rules and regulations, nor by generally accepted practices and standards in the New York City area. Therefore, Cosgrove's affidavit, and his opinions expressed therein, are insufficient to withstand summary judgment. *Diaz v New York Downtown Hospital*, 99 NY2d 542, 544 (2002) ("[w]here the expert's ultimate assertions are ... unsupported by any evidentiary foundation ... the opinion should be given no probative force and is insufficient to withstand summary judgment").

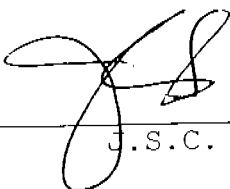
Based on the foregoing, this court finds that plaintiffs have not established the existence of material issues of fact with respect to the defense of assumption of risk to preclude the entry of a summary judgment in favor of BGR/HSS and BCNY. Upon searching the record, the court finds no basis for liability against Alameda individually, or against any other defendant. CPLR 3212(b). Accordingly, it hereby is

ORDERED that the motions for summary judgment, by defendants Boys and Girls Republic, Inc., Henry Street Settlement and The Boys' Club of New York, to dismiss the complaints and all cross-claims are hereby granted with costs and disbursements to these defendants as taxed by the Clerk of the Court; and it is further

ORDERED that upon searching the record, the complaint also is dismissed as against all other defendants, and the Clerk of the Court is directed to enter judgment accordingly.

Dated: September 21, 2006

ENTER:

  
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J.S.C.

**JANE S. SOLOMON**

**FILED**  
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