SHORT FORM ORDER

INDEX No. 05-1030
CAL. No. 06-01887-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 11-27-06
ADJ. DATE 2-6-07
Mot. Seq. # 004 - MG; CASEDISP

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JOSEPH PARENTE, an infant, by his mother and natural guardian, MARILYN JERUE, and MARILYN JERUE, individually,

Plaintiffs,

- against -

COMMUNITY HOUSING INNOVATIONS, INC.

Defendant.

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Upon the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 13 - 17; Replying Affidavits and supporting papers 18 - 19; Other 20 - 21 (copies of the reply); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for an order pursuant to CPLR 3212 granting defendant summary judgment dismissing the complaint with prejudice is granted.

This is an action to recover damages, personally and derivatively, for chin laceration injuries sustained on September 18, 2004 by the then 6 year old infant plaintiff when he fell from a bicycle, allegedly owned and maintained by defendant, which the infant plaintiff had been riding in the back yard of defendant's shelter where the infant plaintiff resided with plaintiff, his mother, located at 2 Marie Lane in Coram, New York. By her verified complaint, plaintiff alleges that the subject bicycle was owned and maintained by defendant and constituted a dangerous and defective condition of which defendant had actual and constructive notice.

By her verified bills of particulars, plaintiff claims that defendant was negligent in, among other things, furnishing for the infant plaintiff's use a defective bicycle; failing to properly maintain,

repair and inspect the subject bicycle; failing to properly cover the exposed metal piping of the bicycle's handlebars, which had sharp and jagged edges; failing to restrict access to and to warn of the subject defective bicycle; failing to supervise the use of the subject bicycle; failing to provide a safe riding surface to ride bicycles that were provided or furnished by defendant; and causing or permitting the yard area of defendant's premises to be rutted and uneven. The Court's computer records indicate the note of issue in this action was filed on August 11, 2006.

Defendant now moves for summary judgment dismissing the complaint with prejudice on the grounds that it did not own or maintain the subject bicycle, did not furnish the infant plaintiff with the subject bicycle and that its rules prohibited the use of any bicycle on its premises. Defendants also assert that the subject incident was the direct result of plaintiff's failure to abide by the shelter's rules requiring her to supervise her own child and her granting of permission to the infant plaintiff to ride the bicycle even though it was too big for him and he was an inexperienced bicycle rider. In addition, defendant asserts that it did not create or have actual or constructive notice of the alleged dangerous condition of the bump in the dirt in the yard which, defendant argues, was not a proximate cause of this incident. Defendant points to the actions of plaintiff's adult friend Mia who was watching the infant plaintiff and according to the infant plaintiff's testimony was holding onto the bicycle to help him get onto the bicycle to ride, of letting go of the bicycle to allow the infant plaintiff to ride by himself was the proximate cause of the infant plaintiff's fall. In support of the motion, defendant submits, among other things, plaintiff's verified complaint and defendant's answer; plaintiff's verified bill of particulars and verified first supplemental bill of particulars; the deposition transcripts of the infant plaintiff, plaintiff, and Christine Sadousky (Ms. Sadousky) on behalf of defendant; and a copy of the Housing Program Rules and Regulations provided to clients at the shelter.

The mere fact that an accident occurs does not mean that a defendant is liable unless the plaintiff can show how the defendant's breach of some duty caused or contributed to the plaintiff's mishap (*see*, ***Braithwaite v Equitable Life Assur. Soc. of U.S.***, 232 AD2d 352, 648 NYS2d 628 [2d Dept 1996]). A landowner or lessee has a duty to exercise reasonable care in order to maintain its property in a safe condition (***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Tagle v Jakob***, 97 NY2d 165, 737 NYS2d 331 [2001]). It is, however, well established that while a defendant is liable for all natural and foreseeable consequences of its acts, an intervening act will constitute a superseding cause and will serve to relieve a defendant of liability when the act is of such an extraordinary nature or so attenuated from the defendant's conduct that responsibility for the injury should not reasonably be attributed to the defendant (***Gordon v Eastern Ry. Supply***, 82 NY2d 555, 606 NYS2d 127 [1993]; ***Kush v City of Buffalo***, 59 NY2d 26, 33, 462 NYS2d 831[1983]; ***Elardo v Town of Oyster Bay***, 176 AD2d 912, 575 NYS2d 526 [2d Dept 1991]).

The six year old infant plaintiff testified at the deposition that he had ridden the subject bicycle twice before this incident, that the bicycle was in the back yard at the side of the fence, and that on the day of the incident his mother's friend Mia was watching him as he played in the side yard. In addition, plaintiff testified that he was helped onto the bicycle by his mother's friend who then let go of the bicycle and the infant plaintiff rode for a couple of minutes and then he felt a bump in the dirt

in the middle of the back yard and fell off the bicycle. According to the infant plaintiff, he fell on his right side and the bicycle fell on top of him on his face. In addition, the infant plaintiff described the bicycle as blue, with a pink seat, lacking hand grips on the handlebars and "all rusty."

Plaintiff, the infant plaintiff's mother, testified at her deposition that she did not witness the subject incident but knew that her friend Mia, another resident of the shelter, was watching the infant plaintiff in the yard. Plaintiff testified that she had seen the subject bicycle, a girl's blue bicycle with a pink seat and no hand grips, on the property, in the back yard, every time she went outside prior to this incident. In addition, plaintiff testified that she knew that the infant plaintiff had ridden the bicycle before the incident and that the infant plaintiff had asked her permission to ride it and she had given permission. Plaintiff also testified that she had never seen defendant's employees servicing the subject bicycle or bringing it inside or handing out helmets or safety equipment.

At her deposition, Ms. Sadousky testified that at the time of the subject incident, she was the supervisor of the case managers and social workers at ten of defendant's locations including, defendant's satellite office located at 2 Marie Lane in Coram. Ms. Sadousky described the nature of defendant's business as providing emergency or low income housing to individuals throughout New York. According to Ms. Sadousky, 2 Marie Lane was a house in use as an emergency shelter and defendant owned the house and the land. Ms. Sadousky also testified that there were donated toys for common use by the children who were clients at the house, that bicycles were not donated to defendant but were donated to specific clients. She added that defendant did not furnish bicycles to the clients nor maintain them, that clients could bring bicycles with them only for storage purposes, and that bicycles could not be stored in the units but could be stored in the common area side yard. According to Ms. Sadousky, clients were not permitted to ride bicycles on the premises and to her knowledge no one from defendant advised the clients that there were bicycles from defendant for common use. Ms. Sadousky further testified that prior to the subject incident, she had seen two bicycles on the premises but she could not remember what they looked like. Ms. Sadousky pointed out that the Housing Program Rules and Regulations expressly stated that it was the responsibility of each guest to provide adequate care, control and protection to his or her minor children.

Here, defendant established its position by evidentiary proof in admissible form sufficient to warrant judgment for defendant as a matter of law (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The Appellate Division, Second Department has held that bicycles are not "dangerous instruments" (*see*, ***Sorto v Flores***, 241 AD2d 446, 660 NYS2d 60 [2d Dept 1997]; ***Young v Dalidowicz***, 92 AD2d 242, 460 NYS2d 82 [2d Dept1983] *appeal dismissed* 59 NY2d 967 [1983]). Defendant demonstrated through its proffered proof that it did not own or maintain or repair the subject bicycle and that its employees were not involved in assisting the infant plaintiff in its use nor did they have any duty to supervise the infant plaintiff. Instead, defendant's submissions revealed that the subject incident arose from negligent parental supervision where plaintiff and the adult friend whom plaintiff entrusted to watch the infant plaintiff were aware of the bicycle and its condition and were capable of controlling its use yet plaintiff gave her express consent to the infant plaintiff for his use of the bicycle despite his lack of experience riding bicycles without training wheels (*see*, ***Nolechek***

v Gesuale, 46 NY2d 332, 413 NYS2d 340 [1978]; ***Holodook v Spencer***, 36 NY2d 35, 364 NYS2d 859 [1974]; ***Parsons v Wham-O, Inc.***, 150 AD2d 435, 541 NYS2d 44 [2d Dept 1989]). Negligent parental supervision is a legally non-existent tort, meaning that the infant plaintiff cannot recover from plaintiff for injuries sustained as a result of plaintiff's negligence (*see*, ***Nolechek v Gesuale***, *supra*). Contrary to plaintiff's counsel's position, it does not mean that negligent parental supervision is non-existent as a defense, rather it means that it is not actionable by the infant plaintiff. It so follows that plaintiff cannot recover against defendant for her own negligence. Moreover, even assuming defendant negligently left the bicycle in the yard and the yard had a bump in the dirt, defendant carried its burden as a matter of law, since the actions of plaintiff's adult friend, who was supervising the infant plaintiff with plaintiff's knowledge, in assisting the infant plaintiff to get on the bicycle in the yard and then letting go of the bicycle as the inexperienced infant plaintiff was riding it was a superseding cause of the infant plaintiff's injury (*see*, ***Cruz v City of New York***, 6 AD3d 644, 775 NYS2d 549 [2d Dept 2004]; ***Barth v City of New York,*** 307 AD2d 943, 763 NYS2d 101 [2d Dept 2003]).

In opposition to the motion, plaintiff submitted her own affidavit, photographs of the subject bicycle, the deposition transcript of non-party witness Rosemary Sanchez (Ms. Sanchez) and attached photographs of said yard to support her position that defendant's employees permitted the subject bicycle's use with the restriction that it be used in the yard and that the subject bicycle and the yard where the bicycle was located were both dangerous.

Here, plaintiff failed to raise a triable issue of fact (*see*, *id.*). Plaintiff submitted a hearsay affidavit to the effect that a former employee of defendant, Michael Carruba, had told plaintiff and her son that riding the subject bicycle, which had been on defendant's property during their entire stay from April 2004 to January 2005, was permitted in the yard. Said affidavit is insufficient to raise a triable issue of fact, particularly in light of the above determination (*see*, ***Agoglia v Sterling Foster & Co. Inc.***, 237 AD2d 549, 655 NYS2d 636 [2d Dept 1997]). In addition, the deposition testimony of Ms. Sanchez, defendant's Coordinator of the supervised residences, as to the appearance of the yard and what she would have done if she had seen a bicycle in the yard is insufficient to defeat a motion for summary judgment inasmuch as the testimony fails to raise an issue of fact and is purely speculative (*see*, ***Zuckerman v City of New York***, *supra*). Plaintiff's remaining contentions lack merit. Inasmuch as the first cause of action on behalf of the infant plaintiff must be dismissed, the second derivative cause of action on behalf of the plaintiff must also be dismissed (*see*, ***Cabri v Park***, 260 AD2d 525, 688 NYS2d 248 [2d Dept 1999]).

Accordingly, the instant motion is granted and the complaint is dismissed with prejudice.

Dated: APR 23 2007

J.S.C.

__X__ FINAL DISPOSITION ___ NON-FINAL DISPOSITION