

**Luppens v Sperruzzi**

2007 NY Slip Op 32719(U)

August 29, 2007

Supreme Court, Suffolk County

Docket Number: 0029898/2004

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 23 - SUFFOLK COUNTY

**PRESENT:**

Hon. EMILY PINES  
Justice of the Supreme Court

MOTION DATE 11-8-06  
ADJ. DATE 7-11-07  
Mot. Seq. # ~~003 - MCG CASEDISP~~  
004 - XMG CASEDISP

-----X		
DANIEL LUPPENS, an infant under the age of	:	JOHN L. JULIANO, P.C.
fourteen years, by his natural guardians,	:	Attorneys for Plaintiffs
LILIANNE LUPPENS and JAMES LUPPENS	:	30 Doyle Court
and LILIANNE LUPPENS and JAMES LUPPENS,	:	East Northport, New York 11731
individually,	:	
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	:	
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	:	
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Upon the following papers numbered 1 to 35 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers 14 - 25; Answering Affidavits and supporting papers 26 - 31; Replying Affidavits and supporting papers 32 - 35; Other     ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (#003) by defendants Christopher Valentine and Margaret Valentine for summary judgment is granted.

**ORDERED** that the cross-motion (#004) by co-defendant Richard Sperruzzi for summary judgment is granted.

This is an action for personal injuries allegedly sustained by the infant plaintiff Daniel Luppens as a result of an accident that occurred during a wiffle ball game at the residence of the defendants Christopher Valentine and Margaret Valentine (“the Valentines”) on May 26, 2002. Plaintiffs claim that defendant Richard Sperruzzi engaged in “aggressive play” during the game, causing plaintiff’s injuries, and that the Valentines allowed dangerous conduct on their premises, and failed to exercise reasonable care and supervision.

The Valentines have moved for summary judgment on the grounds there can be no finding of actionable negligence on their part which proximately caused the plaintiff’s injuries during the ball game. In support, they offer the pleadings, the deposition testimony of plaintiffs Daniel Luppens and James Luppens, and of defendants’ representatives, Margaret Valentine, James Valentine, and of co-defendant

Richard Sperruzzi has cross-moved for summary judgment on the grounds there is no evidence to support plaintiffs' claim that he caused the accident. He relies on essentially the same evidence offered by the co-defendants.

Plaintiff Daniel Luppens testified he was 8 years old at the time of the accident which occurred at a barbeque at the Valentines residence. He testified he joined in a game of wiffle ball with the other children and defendant Sperruzzi. Prior to the accident, he had played Little League and had been coached by Sperruzzi. Daniel was playing on the opposite team from defendant Sperruzzi, who had joined because there were not enough children to make even numbered teams. Both girls and boys were playing; both young and older children. Daniel Luppens and Christopher Valentine were watching the game from chairs near the field. The grass was wet. Defendant Sperruzzi was pitching. The accident occurred about ten minutes into the game, as plaintiff was heading to second base. Plaintiff testified he was about three-quarters of the way to second base when he saw Sperruzzi running toward second base, so plaintiff ran harder and tried to beat him there. He slid into second base. His forehead hit Sperruzzi's knee. Plaintiff did not remember whether he slid with his feet or face first. He did not know how far he was from second base when he started to slide or how soon afterward he saw Mr. Sperruzzi going there. Daniel did not remember his father or Mr. Sperruzzi saying anything to defendant during the game.

Lilianne Luppens, wife of plaintiff James Luppens and mother of plaintiff Daniel Luppens testified that she and her children arrived at the barbeque at approximately 2:00 p.m. Her husband came around 5:30 p.m. Hors d'ourves, dinner and dessert were served. The adults helped themselves to beer and wine. She observed Sperruzzi playing wiffle ball with the children but did not witness the accident. She did not know how much alcohol had been consumed and by whom. After the accident, she drove with Sperruzzi to the hospital. She asked him if he was o.k. to drive, he said yes, and they proceeded to the hospital without incident.

James Luppens testified he is a Suffolk County police officer . He arrived at the barbeque after his shift ended at 4:00 p.m. After eating dinner, he joined Sperruzzi, Valentine, and another guest, Gregg Mazzone on the deck. He observed Sperruzzi join the wiffle ball game after drinking two beers. They moved to chairs on the grass, which he described as wet, to watch the game. Prior to his son's accident, Luppens testified he saw Sperruzzi knock down one of the children at home plate when he tagged him. Luppens cautioned Sperruzzi to "take it easy". Just before the accident, he saw Daniel sliding into second base feet first on his side. He was about 3 feet away from second base. He saw Sperruzzi running toward the ball, heard Chris Valentine yell "watch out", then saw the collision. Luppens testified Sperruzzi appeared to be intoxicated.

Co-defendant Sperruzzi testified he was a Suffolk County police officer and had been a Little League coach since 2000. He had been Daniel's coach in the 2001 and 2002 seasons. He arrived at the barbeque at about 2:00 p.m. and had consumed three beers and had eaten dinner before the wiffle ball game which began around 6:00 p.m. During the game, he pitched and played the field. He testified that when the accident happened, he was in the field behind second base and Daniel was playing in the right field area. The grass was wet. He testified they were about 50-60 feet apart. He testified that when a ball was hit over his head, he turned and began jogging towards the ball. He did not see Daniel prior to the collision. Daniel's left forehead struck his right knee. Sperruzzi denied knocking down any other children before the accident or being cautioned by any of the other parents.

Margaret Valentine testified that Daniel and Sperruzzi were on the same team because she saw them in the field together. She did not witness the accident but testified that both her husband and James Luppens told her that Sperruzzi went to catch the ball and Daniel went into his knee. She testified that she saw Sperruzzi with a beer and James Luppens with a Mike's Hard Lemonade, but she did not know how many they had during the course of the day.

Christopher Valentine witnessed the accident between Sperruzzi and Daniel. He testified he saw the ball hit toward second base, at which time Rick went to his left, and Daniel went to his right, both trying to catch the ball, and Daniel's head hit Sperruzzi's knee. Valentine testified that Sperruzzi was not inebriated when he was playing ball.

Property owners have a general duty to act in a reasonable manner to prevent harm to those on their property. In particular they have a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are aware of the need for such control (*D'Amico v Christie*, 71 NY2d 76, 524 NYS2d 1 [1987]; *Chalu v Hariraj*, 304 AD2d 515, 758 NYS2d 132 [2003]). Although there is no duty to protect against an occurrence which is extraordinary in nature, and as such would not suggest itself to a reasonably prudent person as one which should be guarded against (*Lindskog v Southland Rest .*, 160 AD2d 842, 554 NYS2d 276 [1990]; *Silver v Sheraton-Smith Town Inn*; 121 AD2d 711, 504 NYS2d 56 [1986]), if the property owner knows or has reason to know that he has the ability to control the third person, and knows or should know of the necessity and opportunity for exercising such control but fails to do so, he may be liable for the injuries of his licensees or invitees (*De Ryss v New York Cent. R.R. Co.*, 275 NY 85 [1937]; *Mangione v Dimino*, 39 AD2d 128, 322 NYS2d 683 [1972]; *see also, Carmona v Padilla*, 4 AD2d 181, 163 NYS2d 741 [1957]).

With respect to the Valentines' motion for summary judgment, there has been no evidence submitted to warrant a determination that the Valentines had a duty or the opportunity to control Sperruzzi, or were reasonably aware of the need for such control on the date of the incident (*see, Ash v Fern*, 295 AD2d 869, 744 NYS2d 559 [2002]; *Heavlin v Gush*, 197 AD2d 773, 602 NYS2d 721 [1993]; *Comeau v Lucas*, 90 AD2d 674, 455 NYS2d 871 [1982]). The adduced evidence shows that Sperruzzi had been a guest of the Valentines on prior occasions, had frequently played ball with the neighborhood children, and was a Little League coach to some of the children at the barbeque. At no time prior to the accident did anyone ever complain to the Valentines about his conduct with respect to the children or toward any of the guests, his wiffle ball playing style, or his consumption of alcohol. There was no evidence to suggest that Sperruzzi had acted inappropriately or aggressively at any point so as to put the Valentines on notice he presented a danger to any of their guests. Plaintiff James Luppens own affidavit establishes that he neither pulled his own children from the game or complained to the Valentines about any inappropriate behavior on the part of Sperruzzi. Accordingly, the Valentines have established their entitlement to summary judgment.

With respect to defendant Sperruzzi, there is nothing in the record to support the plaintiffs' claims of aggressive behavior and intoxication on the part of Sperruzzi other than their own conclusory allegations. James Luppens did not say anything to anyone on the date of his son's accident regarding Sperruzzi's consumption of alcohol or that he thought he was intoxicated. Further, no where in the Verified Bill of Particulars or the Complaint is there any mention of Sperruzzi being intoxicated. At his deposition, James Luppens testified that based on his training as a Suffolk County police officer, Sperruzzi did not

