S

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

Present: **HON. WILLIAM R. LaMARCA**
Justice

ANDREW WADE, by his Mother and Natural Guardian, NOREEN WADE, and NOREEN WADE, individually,

Plaintiffs,

-against-

NICHOLAS AVEDISSIAN, JOSEPHINE AVEDISSIAN, LEVON A. AVEDISSIAN, "JOHN DOE" - ISR SECURITY GUARDS, INTEGRATED SAFETY RESOURCES, INC., and SUNRISE MALL ASSOCIATES,

Defendants.

Motion Sequence # 002, # 3
Submitted August 10, 2007

INDEX NO: 3472/05

The following papers were read on these motions:

SUNRISE MALL Notice of Motion.....1
ISR Affirmation in Opposition.....2
AVEDISSIAN Affirmation in Opposition.....3
Reply Affirmation.....4
AVEDISSIAN Notice of Motion.....5
Plaintiff's Affirmation in Opposition.....6
Reply Affirmation 7

Requested Relief

Defendant, SUNRISE MALL ASSOCIATES (hereinafter referred to as "SUNRISE MALL"), moves for an order, pursuant to CPLR §3212 granting it summary judgment dismissing the complaint and all cross-claims against it or, in the alternative, for an order

granting it summary judgment on its cross-claim against co-defendant, INTEGRATED SAFETY RESOURCES, INC. (hereinafter referred to as "ISR") , which seeks common law indemnification. In a companion motion, defendants, JOSEPHINE AVEDISSIAN and LEVON A. AVEDISSIAN, move for an order, pursuant to CPLR §3212, granting them summary judgment dismissing the complaint against them. The motions are determined as follows:

Background

In this action, plaintiffs, ANDREW WADE, by his mother and natural guardian, NOREEN WADE, and NOREEN WADE, individually, seek to recover damages for personal injuries sustained by the infant plaintiff, ANDREW (age 14), as a result of an alleged assault by the infant defendant, NICHOLAS AVEDISSIAN (age 12), which occurred on April 3, 2004 at the SUNRISE MALL in Massapequa, New York. The plaintiffs allege that NICHOLAS assaulted ANDREW and that he sustained a traumatic brain injury with serious cognitive disorder, multiple fractures of the face, eye socket and nose requiring surgery, and multiple facial lacerations requiring surgery. Plaintiffs also allege that NICHOLAS' parents, defendants JOSEPHINE AVEDISSIAN and LEVON A. AVEDISSIAN, negligently supervised NICHOLAS. Plaintiffs further allege that the property owner, SUNRISE MALL, and ISR, which SUNRISE MALL hired for security services, provided inadequate security.

The plaintiffs allege that NICHOLAS "carelessly, recklessly, negligently and intentionally struck and assaulted Andrew causing [him] serious personal injuries". The plaintiffs also allege that defendants, LEVON and JOSEPHINE AVEDISSIAN, "knew or had reason to know that their son had vicious propensities and a predisposition to assault

and batter other persons". More specifically, the plaintiffs allege that NICHOLAS' parents knew or had reason to know of the specific instances of their son's "prior vicious and assaultive behavior" and, nevertheless, negligently allowed him "to remain constantly in contact with members of the public, more particularly the infant plaintiff herein".

As for the defendant, SUNRISE MALL, the plaintiffs allege that it was negligent, reckless and culpable in its ownership, operation and control of the mall; in allowing the infant plaintiff to be assaulted in an area of the mall open to the general public; in being made aware of the continuing assault on the infant plaintiff and in not intervening but, instead, placing the infant plaintiff in a position of increased susceptibility to further assault; in failing to keep the mall property in a reasonably safe condition; and, in hiring an inept and incompetent security company which was unable to properly safeguard the plaintiff from physical attack.

The defendants, SUNRISE MALL and NICHOLAS AVEDISSIAN's parents, JOSPEHINE and LEVON, seek summary judgment dismissing the complaint against them. In the alternative, SUNRISE MALL seeks common law indemnification from ISR.

SUNRISE MALL owned the property and contracted with ISR to provide security services. The infant plaintiff testified at his examination-before-trial (EBT) that, while he was shopping at the Footlocker store, NICHOLAS, who he did not know, tapped on the glass and "gave him the finger". Although ANDREW turned away, NICHOLAS came into the store and firmly tapped him on his shoulder and punched him in the stomach, knocking the wind out of him. ANDREW testified that he left the store but, as he was walking in the mall, NICHOLAS stepped in front of him and blocked him, telling him to come outside and fight him. ANDREW testified that when he asked NICHOLAS "why?", NICHOLAS said "I

want to fight you", whereupon ANDREW responded "okay", but did not mean it because he did not want to fight. ANDREW testified that NICHOLAS then spit in his face and declared, "I come to the mall every weekend and fight kids and you are the kid today, so let's go outside". ANDREW testified that his friend Mike suggested that they leave but the girls who were with them asked NICHOLAS why he wanted to fight ANDREW. NICHOLAS responded that he comes to the mall to fight and he wanted "to beat ANDREW up". ANDREW testified that NICHOLAS kept asking him to fight and ultimately punched him near his left eye, which swelled up.

ANDREW further testified that, after NICHOLAS and his friends moved along, Mike found three of his friends who, when they were told what had happened, told ANDREW and his friends to "stick with them". ANDREW testified that, as they approached the Food Court to get ice for his eye, they saw NICHOLAS and his friends. It appears that, with ANDREW's permission, Mike's friends went over to ask NICHOLAS why he wanted to fight ANDREW, whereupon NICHOLAS went into the cell phone/candy store. ANDREW testified that Mike's friends told NICHOLAS that ANDREW was not going to fight him. ANDREW stated that he then saw NICHOLAS exit the cell phone/candy store with a security guard, who, along with NICHOLAS and his two (2) friends, approached ANDREW and his friends and told them that they would have to leave the mall.

ANDREW testified that, although he repeatedly told the security guard that he was afraid to go outside because NICHOLAS was outside and wanted to fight him, the security guard told him and his friends that they had to leave the mall or he would call the police. ANDREW further testified that he told the security guard that the kids wanted to fight him and even showed him his swollen eye, but the security guard told them that they had to

leave the mall immediately. He stated that the security guard even refused to let Mike get ice for ANDREW's swollen eye. ANDREW testified that the security guard walked them to the exit door and forced them to exit the mall.

ANDREW testified that the fight happened almost immediately after he was forced to exit the mall where NICHOLAS attacked him. A gentleman broke up the fight and summoned the security guards, the police and ambulances. ANDREW was taken by ambulance to a hospital for medical attention.

In contrast, NICHOLAS AVEDISSIAN testified at his EBT that, while he was in the Footlocker store, a girl who he knew from school came into the store with ANDREW and "gave him the finger". He stated that ANDREW then approached him and pushed him and said he wanted to fight him. NICHOLAS testified that he said "no", but pushed ANDREW back when he got too close to him. NICHOLAS testified that when he left the Footlocker store and headed towards McDonalds, ANDREW's friend, Mike, stepped in front of him and blocked his way. He stated that ANDREW then stepped up along side of him and the girl, who had "given him the finger" in the Footlocker store, came running up, cursing, saying "he wants to fight you". NICHOLAS testified that the girl spit at him and ANDREW pushed him, saying "fight me", so he pushed ANDREW back. NICHOLAS testified that, as he tried to leave, ANDREW continued shoving him, but he and his friends eventually were able to head toward the Food Court. NICHOLAS testified that he intended to exit the mall via the Food Court and head home, however, the girl yelled out, "I am getting Vinnie, bitch!" and, while he and his friends were on their way up the stairs near Wal-Mart, the girl called him on his cell phone and told him to meet them outside Macy's for a fight. NICHOLAS stated that he said "no" and hung up. He testified that he went to a cell

phone/candy store in the Food Court to get a drink and, when he came out, he saw ANDREW, along with Mike, the girl and "three black kids" pointing at him and running toward him. He testified that although he and his friends headed for the exit, ANDREW and his friends surrounded him and they told him that he was going to fight. NICHOLAS testified that, when he said "no", a "black kid" told him that if he did not fight, the kid was going to "kill him". He stated that the girl kept urging NICHOLAS to fight ANDREW.

NICHOLAS testified that he returned to the cell phone/candy store and told the manager that ANDREW and his friends wanted to fight him but he did not want to fight. He testified that the manager told him to wait in the store and that the manager went outside into the Food Court and told ANDREW and his friends to leave the mall and they did. NICHOLAS testified that, as instructed by the cell phone/candy store manager, he waited ten minutes but, when he was in the entranceway of the store, he saw that ANDREW and his friends had returned. NICHOLAS testified that the "black kid" again said "you are going to fight him or I am going to kill you". He stated that ANDREW said "fight me" and batted at his soda can. NICHOLAS testified that he returned to the cell phone/candy store and told the manager that the kids were back and again daring him to fight them. He testified that the cell phone store manager alerted a security guard and informed him that NICHOLAS needed his help. NICHOLAS told the security guard that the "kids" were following him around and wanted to fight him and that he needed help. NICHOLAS testified that the security guard told ANDREW and his friends several times that they had to leave the mall or he would call the police. NICHOLAS stated that he saw ANDREW and his friends leave the mall via the Food Court exit. NICHOLAS further testified that the security guard waited five minutes and then left the cell phone/candy store

and that he himself waited about ten minutes and then left the mall. He testified that, when he walked outside, he was surrounded by ANDREW, his friends and others, and the fight ensued. He testified that the "black kid" continued to threaten to kill him if he did not fight ANDREW, and that ANDREW threw the first punch. NICHOLAS was taken away from the mall by ambulance. His friends, Andrew Tagliarino and Justin Cupola, testified to similar facts at their EBT's.

As for prior incidents, NICHOLAS testified at his EBT that he had only two (2) prior incidents of misbehavior. In October 2003, he was suspended from school for one (1) day on account of a fight on the school bus and, in September 2004, he was suspended from school for one (1) day for name-calling. His parents, defendants JOSEPHINE and LEVON AVEDISSIAN, confirmed these facts at their EBT's.

Applicable Law

"On a motion for summary judgment pursuant to CPLR §3212, the proponent 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." *Sheppard-Mobley v King,* 10 AD3d 70, 778 NYS2d 98 (2d Dept. 2004), aff'd. as mod., 4 NY3d 627, 797 NYS2d 403, 830 NE2d 301 (C.A.2005), *citing Alvarez v Prospect Hosp.,* 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 (C.A.1986); *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 (C.A.1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers". *Sheppard-Mobley v King, supra,* at p. 74; *Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra.* Once the movant's burden is met, the

burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v Prospect Hosp., supra,* at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See, Demishick v Community Housing Management Corp.,* 34 AD3d 518, 824 NYS2d 166 (2nd Dept. 2006), citing *Secof v Greens Condominium,* 158 AD2d 591, 551 NYS2d 563 (2nd Dept. 1990).

"To establish a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty owed by the defendant to plaintiff, a breach of that duty, and that the breach was the proximate cause of the plaintiff's injury". *Demishick v Community Housing Management Corp., supra; see also, Warfel v Edgewater Park Owners Co-Op, Inc.,* 13 Misc3d 1219(A), 831 NYS2d 351 (Supreme Bronx Co. 2006), citing *Solomon by Solomon v City of New York,* 66 NY2d 1026, 499 NYS2d 392, 489 NE2d 1294 (C.A.1985); *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 724 NYS2d 34 (1st Dept. 2001). Absent a duty, liability cannot lie. *Palsgraf v Long Island R.R. Co.,* 248 NY 349, 162 NE 99 (C.A.1928). Whether a duty exists is a question of law for the court. *DeAngelis v Lutheran Med. Ctr.*, 58 NY2d 1053, 462 NYS2d 626, 449 NE2d 406 (C.A.1983). To establish a *prima facie* case of proximate cause, a plaintiff must show "that the defendant's negligence was a substantial cause of the events which produced the injury". *Derdiarian v Felix Contr. Corp.,* 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 (C.A. 1980). "Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence". *Derdiarian v Kelly Contr. Corp., supra* at p. 315. An intervening

act may break the causal nexus when it is "extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct". *Derdiarian v Kelly Contr. Corp., supra* at p. 315.

"Under the common law, the owner or possessor of property has the general duty to take reasonable measures to maintain his or her property in a reasonably safe condition". *Novikova v Greenbriar Owners Corp.*, 258 AD2d 149, 694 NYS2d 445 (2nd Dept. 1999), citing *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606, 407 NE2d 451 (C.A.1980); *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868 (C.A.1976). "In *Nallan v Helmsley-Spear, Inc.*, the Court of Appeals . . . held that a 'natural corollary' of the above-stated general common-law duty to maintain property in a reasonably safe condition was the 'obligation to take reasonable precautionary measures to minimize the risk [of criminal acts] and make the premises safe for the visiting public'". *Novikova v Greenbriar Owners Corp., supra,* citing *Nallan v Helmsley-Spear, Inc., supra*, at 519-520; *see also, Jenkins v Ehmer,* 272 AD2d 976, 707 NYS2d 738 (4th Dept. 2000), citing *Burgos v Aqueduct Realty Corp.*, 97 NY2d 544, 684 NYS2d 139, 706 NE2d 1163 (C.A. 1998). "While landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property, an owner's duty to control the conduct of persons on its premises arises only when it has the opportunity to control such persons and is reasonably aware of the need for such control". *Millan v AMF Bowling Centers, Inc.*, 38 AD3d 860, 833 NYS2d 173 (2nd Dept. 2007), citing *D'Amico v Christie*, 71 NY2d 76, 524 NYS2d 1, 518 NE2d 896 (C.A. 1987); *Petras v Saci, Inc.*, 18 AD3d 848, 796 NYS2d 673 (2nd Dept. 2005); *Cutrone v Monarch Holding Corp.*, 299 AD2d 388, 749 NYS2d 280 (2nd Dept. 2002).

Discussion

After a careful reading of the submissions herein, it is the judgment of the Court that SUNRISE MALL has failed to establish its entitlement to summary judgment. The evidence establishes that an employee of the security company hired by SUNRISE MALL was well aware of the ongoing dispute between ANDREW and NICHOLAS. The circumstances under which the youths ended up in the parking lot are not entirely clear. There is a question of fact for a jury to decide whether SUNRISE MALL failed to take adequate security measures as well as whether that failure was the proximate cause of NICHOLAS' attack on ANDREW. *See, Warfel v Edgewater Park Owners Co-op, Inc., supra; compare, Millan v AMF Bowling Centers, Inc., supra.*

Additionally, SUNRISE MALL's alternate request for for summary judgment on its cross-claim for common law indemnification against ISR is denied. "Where one who has committed no actual wrong is held vicariously liable for the wrongdoing of another, he has a right to indemnification from the actual wrongdoer". *Westchester County v Welton Becket Associates*, 102 AD2d 34, 478 NYS2d 305 (2nd Dept. 1984), *app dism.* 64 NY2d 734, 485 NYS2d 752, 475 NE2d 123 (C.A.1984), *aff'd.* 66 NY2d 642, 495 NYS2d 364, 485 NE2d 1029 (C.A.1985), citing *D'Ambrosio v City of New York,* 55 NY2d 454, 450 NYS2d 149, 435 NE2d 366 (C.A.1982); *McDermott v City of New York,* 50 NY2d 21, 428 NYS2d 643, 406 NE2d 460 (C.A.1982); *Rock v Reed-Prentice Div. of Package Machinery Co.,* 39 NY2d 34, 382 NYS2d 720, 346 NE2d 520 (C.A.1976); *Garrett v Holiday Inns, Inc.,* 86 AD2d 469, 450 NYS2d 619 (4th Dept. 1982), *mod. on other grounds,* 58 NY2d 253, 460 NYS2d 774, 447 NE2d 717 (C.A.1983); *Smith v Hooker Chem. & Plastics Corp.*, 83 AD2d 199, 443 NYS2d 922 (4th Dept. 1981). However, "[i]f there is actual wrongdoing by the

person seeking to assert an indemnification claim, that claim is not viable". *Westchester County v Welton Becket Associates, supra* at p. 47. SUNRISE MALL has not established that its liability, if any, would be based purely on its vicarious liability for ISR's conduct and would not be based upon its own actual wrongdoing. *See, Corley v Country Squire Apartments, Inc.,* 32 AD3d 978, 820 NYS2d 900 (2nd Dept. 2006); *see also, Keshavary v Murphy,* 242 AD2d 680, 662 NYS2d 795 (2nd Dept. 1997); *Warfel v Edgewater Park Owners Corp., Inc., supra.*

With respect to the AVEDISSIAN's motion, "[w]hile, as a general rule, parents are not liable for the torts of their child, a parent may be held liable, *inter alia*, 'where the parent[s]' negligence consists entirely of his [or her] failure reasonably to restrain the child from vicious conduct imperiling others, when the parent has knowledge of the child's propensity toward such conduct'". *Davies v Incorporated Village of E. Rockaway*, 272 AD2d 503, 708 NYS2d 147 (2nd Dept. 2000), quoting *Steinberg v Cauchois,* 249 AD 518, 293 NYS 147 (2nd Dept. 1937); *see also, Rivers v Murray,* 29 AD3d 884, 815 NYS2d 708 (2nd Dept. 2006); *Feinerman v Kaplan,* 290 AD2d 480, 736 NYS2d 680 (2nd Dept. 2002).

The Court finds that the AVEDISSIAN's knowledge of their son's incident on the bus and the name-calling at school does not establish notice of the vicious propensities allegedly displayed by NICHOLAS at the mall. *See, Rivers v Murray, supra; DiCarlo v City of New York,* 286 AD2d 363, 729 NYS2d 176 (2nd Dept. 2001). The defendants, JOSEPHINE and LEVON AVEDISSIAN, are granted summary judgment and the complaint against them is dismissed.

Conclusion

Based on the foregoing, it is

ORDERED, that SUNRISE MALL's motion for summary judgment dismissing the complaint and all cross-claims against it or, in the alternative, for an order granting it summary judgment on its cross-claim against co-defendant, INTEGRATED SAFETY RESOURCES, INC., based upon common law indemnification, is denied; and it is further

ORDERED, that JOSEPHINE and LEVON AVEDISSIAN's motion for summary judgment dismissing the complaint against them is granted; and it is further

ORDERED, that the action is severed and continued against the remaining defendants and the caption shall henceforth read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

ANDREW WADE, by his Mother and Natural Guardian, NOREEN WADE, and NOREEN WADE, individually,

Plaintiffs,

-against- **INDEX NO: 3472/05**

NICHOLAS AVEDISSIAN, "JOHN DOE"-ISR SECURITY GUARDS, INTEGRATED SAFETY RESOURCES, INC., and SUNRISE MALL ASSOCIATES,

Defendants.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: November 5, 2007

WILLIAM R. LaMARCA, J.S.C.

TO: Foley, Griffin, Jacobson & Faria, LLP
Attorneys for Plaintiffs
1205 Franklin Avenue, Suite 390
Garden City, NY 11530

Milber Makris Plousadis & Seiden, LLP
Attorneys for Defendants Nicholas Avedissian, Josephine Avedissian and Levon A. Avedissian
100 Woodbury Road, Suite 402
Woodbury, NY 11797

Stewart H. Friedman, Esq.
Attorneys for Defendant Sunrise Mall Associates
One Hollow Lane, Suite 316
Lake Success, NY 11042

Steinberg & Symer, LLP
Attorneys for Defendants "John Doe" - Security Guards and Integrated Safety Resources, Inc.
27 Garden Street
Poughkeepsie, NY 12601

wade-avedissian,#2,#02/sumjudg