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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

DOROTHY CHIZZONITI, Plaintiff, - against - CHRISTOPHER MCGRAW, an infant under the age of Fourteen years, by his father and natural guardian GERALD MCGRAW, and GERALD MCGRAW, Individually, Defendants.	TRIAL / IAS PART 32 NASSAU COUNTY Index No. 4008/06 Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1
Answering Affidavits 2, 3
Replying Affidavits . . . . . ____
Briefs: Plaintiff's / Petitioner's . . . . . ____
Defendant's / Respondent's . . . . . ____

The defendants move for summary judgment pursuant to CPLR 3212 on the grounds the plaintiff cannot make out a *prima facie* case against the 14 year defendant and his defendant father. The plaintiff opposes the motion. The underlying personal injury action arises from an alleged incident on February 4, 2004, when the youthful defendant allegedly pulled a chair out from under the plaintiff resulting in personal injuries to the plaintiff when the plaintiff fell to the floor. The parties were deposed on March 8, 2007.

The defense attorney states, in a supporting affirmation dated August 13, 2007, the

plaintiff has not established the youth had a propensity for violent or vicious acts so as to charge the defendant parent with negligent supervision. The defense attorney contends the plaintiff has failed to proffer any evidence of negligence as against the infant defendant, but instead has only proffered speculation and conclusory statements.

The plaintiff's attorney states, in an opposing affirmation dated September 24, 2007, the plaintiff, who worked in the dentist office where the incident occurred, fell solely as a result of the defendants' negligence. The plaintiff's attorney retorts the youth sneaked into the secretarial bay uninvited behind the plaintiff, while his younger brother stood on the couch in the waiting room peaking in through the open glass partition window while their father spoke to the dentist in the interior office space immediately adjacent to the half wall of the plaintiff's secretarial bay. The plaintiff's attorney indicates the plaintiff's injuries include multiple disc herniation requiring an anterior cervical discectomy at two levels with allografting together with a spinal fusion. The plaintiff's attorney concedes there is no cause of action against the defendant father, and consent to dismissal of that claim, however the plaintiff's attorney takes issue with the defense position that the plaintiff cannot prove to a certainty the youth pulled out the chair since neither the plaintiff nor the dentist saw that defendant do so arguing the chair rolled out, and the youth was pulling it afterwards. The plaintiff's attorney avers circumstantial evidence demonstrates the youth pulled out the chair perhaps as a practical joke, and the chair could not have rolled as it was set on a rug, and there was no plastic matting under

it.

The defense attorney states, in a reply affirmation dated October 4, 2007, there has been no evidence adduced which would the plaintiff to make out a *prima facie* case of negligence against the defendant youth for negligence. The defense attorney states there is also no evidence adduced which would the plaintiff to make out a *prima facie* case of negligence against the defendant father for negligence. The defense attorney reiterates the plaintiff has not established the youth had a propensity for violent or vicious acts so as to charge the defendant parent with negligent supervision. The defense attorney reprises has failed to proffer any evidence of negligence as against the infant defendant, but instead has only proffered speculation and conclusory statements. The defense attorney contends the accounts of the accident from the parties when compared are in the very least equally likely, if not the defendants' version being more likely and reasonable resulting in the granting of the motion for summary judgment, and dismissing the complaint.

"Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination" (***Ugarriza v. Schmieder***, 46 N.Y.2d 471, 474). Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof

submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 325; ***Andre v. Pomeroy***, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (***see, Whelen v. G.T.E. Sylvania Inc.***, 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (***see, e.g., Sillman v. Twentieth Century-Fox Film Corp.***, 3 N.Y.2d 395; ***Gervasio v. Di Napoli***, 134 A.D.2d 235, 236; ***Assing v. United Rubber Supply Co.***, 126 A.D.2d 590). Nevertheless, "the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (***Gervasio v. Di Napoli, supra***, 134 A.D.2d at 236, quoting from ***Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo***, 110 A.D.2d 616, ***aff'd*** 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (***see, Andre v. Pomeroy***, 35 N.Y.2d at 364; ***Assing v. United Rubber Supply Co., supra***). This Court has carefully reviewed and considered all of the papers submitted by the parties on this motion. The Court finds there is a triable issue of fact which requires resolution by the trier of fact.

Accordingly, the motion is granted as to the defendant father, Gerald McGraw, individually, and denied as to the defendant Christopher McGraw, an infant under the age of fourteen years, by his father and natural guardian Gerald McGraw.

So ordered.

Dated: **December 3, 2007**

ENTER:

J. S. C.

HON. ANTONIO I. BRANDVEEN

FINAL DISPOSITION NON FINAL DISPOSITION XXX