STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

ANITA BRIDGHAM, as Guardian Ad Litem
Of LAWRENCE OSBORN, an infant,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 07-0742
RJI 19-07-3220

GARY KISTINGER, CARSON CITY, NY, INC., GREENE COUNTY CHAMBER OF COMMERCE, INC., and GREENE COUNTY CHAMBER OF COMMERCE d/b/a GREENE COUNTY FAIR,

Defendants.

Supreme Court Greene County All Purpose Term, October 24, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Kara L. Campbell, Esq.
Finkelstein & Partners
Attorneys for Plaintiff
436 Robinson Avenue
Newburgh, New York 12550

Matthew J. Kelly, Esq.
Roemer, Wallens & Mineaux, L.L.P.
Attorneys for Defendants Greene County Chamber of Commerce d/b/a Greene County Fair.
13 Columbia Circle
Albany, New York 12203

TERESI, J.:

Defendant ("Greene County Fair"), brings this motion seeking summary judgment, pursuant to CPLR § 3212. Plaintiff ("Lawrence Osborn") opposes the motion.

This is an action arising out of alleged injuries sustained by Plaintiff on July 18,

2003. At the time of the alleged accident, Plaintiff was eleven years old and working for Gary Kistinger and Greene County Fair doing lawn mowing and trash pick-up. Plaintiff was riding a Cub Cadet International Tractor while doing trash pick-up in the parking lot, when the tractor wheel allegedly became caught and the vehicle tipped over onto Plaintiff. Plaintiff sustained a fractured leg as a result of the alleged accident.

Defendant Greene County Fair proffers that there is no basis for any claim against them because the accident occurred on property owned by Carson City to an employee of Carson City, not Greene County Fair. In addition, Greene County Fair argues that they are not title holders of any vehicles, including the tractor, and that no certificate of title or motor vehicle abstract has been presented to the contrary. Greene County Fair also argues that they did not hire infant Osborn to work at the fair, did not provide any supervision, and had no knowledge of what activities he was undertaking. Finally, Defendant argues that the opposing party has failed to set forth proof in evidentiary form from a person with personal knowledge.

Plaintiff argues that Osborn sustained "serious and diverse personal injuries" as a result of the alleged accident while working at the fair, and that Osborn was employed by both Gary Kistinger and the Greene County Fair at that time. Additionally, Plaintiff states that although discovery has commenced, it has not been completed and no preliminary conference or depositions have taken place to date. Therefore, Plaintiff argues that the Defendant's motion for summary judgment is premature and should be denied based on CPLR §3212 (f).

"Summary judgment is a drastic remedy and 'should not be granted where there is any doubt as to the existence of a triable issue.'" Napierski v. Finn 229 A.D.2d 869, 870 (3d Dept. 1996) (quoting Moskowitz v. Garlock, 23 A.D.2d 943, 944 (1965)). In deciding whether summary judgment is warranted, the court's primary function is issue identification, not issue

determination. See Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law by establishing the nonexistence of material issues of fact. See Winegrad v. New York Univ. Med. Ctr., 64 N.Y. 2d 851, 853 (1985). The evidence must be construed in a light most favorable to the party opposing the motion. See Dykstra v. Winridge Condominium One, 175 A.D.2d 482, 483 (3d Dept. 1991). In order to defeat a motion for summary judgment, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. See Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).

CPLR 3212 (f) provides that if it appears from the motion "that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion." "[The] Supreme Court is afforded discretion when presented with a request for further disclosure pursuant to CPLR 3212 (f)." Svoboda v. Our Lady of Lourdes Memorial Hosp., Inc., 20 A.D. 3d 805 (3d Dep't 2005). The party seeking such relief must "demonstrate how further discovery might reveal material facts . . . [and] mere speculation will be insufficient." Id. (Quoting Scofield v. Trustees of Union Colllege, 267 A.D.2d 651 (3d Dep't 1999). Where an affidavit "recites matters that are exclusively within defendant's knowledge, it should not, without more, form the basis for an award of summary judgment before the opposing party has had an opportunity to conduct discovery." Reohr v. Golub Corp., 242 A.D.2d 850 (3d Dep't 1997).

Defendant's affidavits indicate that they did not employ Plaintiff and that they did not own the tractor on which the alleged incident occurred. These facts are within the exclusive knowledge of the Defendant, and they have failed to set forth more than the affidavit to prove

such facts. Therefore, further discovery is needed before a motion for summary judgment may be entertained.

After full review of the record, this Court denies Defendant's motion for summary judgment without prejudice. This motion is premature in light of the fact that discovery is incomplete and depositions have not been scheduled.

This case is now scheduled for a preliminary conference for Friday January 11, 2008 at 8:30 A.M. in Catskill NY. Due to the age of the case and the fact that in involves a infant postponement of the conference can not be accommodated. Counsel may have local counsel, familiar with the case appear, if they can not or counsel may deliver to the Court a stipulated scheduling order on the courts form which is available on the website of the Third Judicial District (ww.ny courts.gov/courts/3jd). That stipulation must be delivered to the court before January 11, 2008.

All papers, including this Decision and Order, are being returned to the attorney for the Plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED

Dated: Albany, New York
~~November~~ December 18, ~~2007~~ 2007

Joseph C. Teresi

PAPERS CONSIDERED:
1. Notice of Motion, dated August 15, 2007.
2. Affidavit of Matthew J. Kelly, dated August 15, 2007.

3. Supplemental Affidavit of Tom Fucito, dated September 20, 2007.
4. Affirmation in Opposition, dated October 10, 2007.
5. Affidavit of Lawrence Osborn, dated October 16, 2007.
6. Affidavit of Robert Link, dated October 23, 2007.