Short Form Order

Index Number: 29898-2004

Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

Present:

HON. EMILY PINES
Justice Supreme Court

Original Motion Date: 10-26-2007
Motion Submit Date: 12-06-2007
Motion Sequence No.: 005 MOTD

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DANIEL LUPPENS an infant under the age of fourteen years, by his natural parents and guardians, LILIANNE LUPPENS and JAMES LUPPENS, and LILIANNE LUPPENS and JAMES LUPPENS, individually,

Plaintiff,

-against-

RICAHRD SOERUZZI, CHRISTOPHER VALENTINE and MARGARET VALENTINE,

Defendant.

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John Juliano, PC
Hillside Building
39 Doyle Court
East Northport, New York 11731

Neil L. Kanzer, Esq.
1325 Franklin Avenue
Suite 320
Garden City, New York 11530

Epstein, Grammatico, Frankini & Marotta
1393 Veterans Memorial Highway
Suite 414
Hauppauge, New York 11788

Counsel for Plaintiffs moves, by Notice of Motion (motion sequence number 005) for an Order granting Plaintiffs leave to reargue the Defendants' motions for Summary Judgment, which motions were granted by this Court in its Decision and Order dated August 29, 2007. According to counsel for Plaintiffs, the Court misapprehended and/or misapplied key issues of fact and law in granting Summary Judgment, where there exist issues remaining that should be determined by the trier of fact. In essence, counsel for Plaintiffs argue that the Court adopted the Defendants' version of how the accident occurred , while rejecting as conclusory the statements of Plaintiffs both in their Affidavits and in their extensive deposition testimony. The alleged injuries suffered by infant Plaintiff, Daniel Luppens, occurred, according to Plaintiffs, during his participation in a wiffle ball game in which Defendant Sperruzzi participated and which was held at the home of Defendants Christopher and Margaret Valentine.

Counsel for the Valentines asserts that the case against those Defendants must fail as a matter of law, since there exists no evidence nor indeed an allegation that the Valentines , as homeowners, were either reasonably aware of or had the opportunity somehow to control Defendant Sperruzzi's allegedly aggressive behavior during the game. Defendant Sperruzzi's attorney asserts that the Court

was correct in finding Plaintiff James Luppens' statements in opposition to the motion conclusory, since "(o)ut of six parties who testified, he is the only one who says he actually saw this (aggressive play) behavior. Even his own son, the infant Plaintiff, did not see any such behavior or hear Mr. Luppens yell to Mr. Sperruzzi to take it easy."

In view of the significant issues raised in the counsel's motion, the Court grants reargument and , upon reargument, finds as follows.

SUMMARY JUDGMENT

Summary Judgment is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. **Elzer v Nassau County**, 111 AD 2d 212, 489 NYS 2d 246 (2d Dep't 1985); **Steven v Parker**, 99 Ad 2d 649, 472 NYS 2d 225 (2d Dep't 1984); **Gaeta v New York News, Inc**, 95 AD 2d 325, 466 NYS 2d 321 (1st Dep't 1983). As noted in the oft cited case of **Sillman v Twentieth Century Fox**, 3 NY 2d 395, 404 (1956):

"(t)o grant summary judgment it must clearly appear that no material and triable issue of fact is presented (**DiMenna & Sons v City of New York** , 391 NY 118). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (**Braun v Carey**, 280 App Div 1019), or where the issue is arguable' (**Barnett v Jacobs**, 255 NY 520, 522); issue finding rather than issue determination is the key to the procedure' (**Esteve v Avad**, 271 App Div 725, 727)."

It is the function of the court on a motion for Summary judgment to consider all the facts in a light most favorable to the party opposing the motion, **Thomas v Drake**, 145 AD 2d 687, 535 NYS 2d 229 (3d Dep't 1988) and to determine whether there are any material and triable issues of fact presented. The court should not attempt during such consideration, to determine questions of credibility. **S.J. Capelin Assoc v Globe**, 34 NY 2d 338, 357 NYS 2d 478 (1974).

Where injuries are sustained on property owned by another through the act of a third party, the landowner's duty in a negligence context, depends upon knowledge or reason to know from past experience "that there is a likelihood of conduct on the part of third persons . . . which is likely to

endanger the safety of the visitor". **Nallan v Helmsley Spear**, Inc, 59 NY 2d 507, 519, 429 NYS 2d 606, 407 NE 2d 451 (1980), quoting **Restatement (Second) of Torts** § 344, Comment f; **see Maheshwari v City of New York**, 2 NY 3d 288, 294, 778 NYS 2d 442, 810 NE 2d 894 (2004); **Pizzimenti v Henn**, 16 AD 3d 1070, 1072, 791 NYS 2d 240 (2005), **lv den**, 2 NY 3d 713, 806 NYS 2d 164, 840 NE 2d 133 (2005). Accordingly, landowners have the opportunity to control third persons only when they have the opportunity to do so and are reasonably aware of the need for such control. **See, D'Amico v Christie**, 71 NY 2d 76, 85, 524 NYS 2d 1, 518 NE 2d 896 (1987).

THE VALENTINES

Under the circumstances of this case, therefore, the test to be applied is whether the homeowners should have been aware of either the risk of harm to Plaintiff, Daniel Luppens or the threat of harm posed by Defendant Sperruzzi. There simply is no reasonable reading of the evidence presented, even in the light most favorable to Plaintiffs, that allows this Court to draw such an inference. The Court has reviewed the deposition testimony, as well as the pleadings, of all parties in detail. All three Plaintiffs testified that the total amount of playing time at wiffle ball involved ten to fifteen minutes. The only incident described other than the one giving rise to the injuries alleged occurred on the play where the infant Plaintiff hit the ball.

According to James Luppens, he only observed Defendant Sperruzzi pitching for a couple of minutes. He states in his deposition testimony that on the play right before the accident, Defendant Sperruzzi tagged another child out at home base and knocked him down. James Luppens, after telling Sperruzzi to take it easy, then sat back down in his chair next to Mr. Valentine and continued to watch his son play. That is the total basis on which Plaintiffs seek to hold the Valentines liable in this matter on a theory of premises liability. As set forth in this Court's prior decision, this is viewed as agreed by all parties in light of the social relationship of all parties herein, the fact that Defendant Sperruzzi was the coach of for all of James Luppens' children and that the infant was engaged in a pick up sport as a holiday barbeque at the Valentines' home.

The Court's prior determination, granting Summary Judgment in favor of the Valentines was not based on its judgment of their credibility vis a vis the Luppens. Rather, it was a recognition of the fairly strict standard set forth under New York law before our courts will find a landowner liable for the acts of a third person. This Court's review of the record before it discloses no duty on the part of the Valentines to protect Daniel Luppens from the injury allegedly inflicted by Defendant Sperruzzi while the parties were playing pick up wiffle ball at a holiday social gathering, where the parties had

known each other and socialized for years. While the Court accepts, for purposes of the motion, the Plaintiff's version of events, which involved one prior play where a child was tagged and knocked down by Defendant Sperruzzi, the circumstances, especially that of the infant child's father sitting down and watching the continued play for two minutes, do not rise to the level of creating a duty as a matter of law. **See Nallan v Helmsley Spear, Inc., supra.** Accordingly, on reargument, the Court adheres to its prior determination which granted Summary Judgment to Defendants Christopher and Margaret Valentine.

RICHARD SPERRUZZI

However, after reviewing closely the deposition testimony of all parties, the Court finds that Plaintiffs have raised an issue of fact concerning both whether Defendant Sperruzzi was involved, as the only adult on the field, in aggressive play and whether such was the proximate cause of the alleged incident and injuries. The parties tell widely disparate versions of how the incident occurred. According to James Luppens, as well as the child, the Defendant and Plaintiff were on different teams; the child was running and sliding into second base and Defendant Sperruzzi, in an inappropriate effort to prevent the child from reaching the base, knocked his forehead with Sperruzzi's knee. According to Luppens, this occurred just after another play in which Sperruzzi tagged and knocked down another child as he attempted to reach home plate. Sperruzzi and Valentine, who were both watching the wiffle ball game, aver that the two players were on the same team, going after the same ball, and accidently ran into each other - the alleged freak accident. While, counsel for Defendant Sperruzzi is correct in stating that out of six parties only James Luppens saw the so-called prior incident, that alleged incident is not the sole basis for Plaintiffs' claim. Plaintiffs assert that taken as a whole, the facts, as they saw them, could lead a reasonable trier of fact to the conclusion that Defendant Sperruzzi acted in a negligent or reckless manner and that such caused the child's injuries. It is the role of the trier of fact and not this Court, on a motion for Summary Judgment, to decide who is and who is not credible. Accordingly, upon reargument, the Court vacates its prior determination and denies Defendant Sperruzzi's motion for Summary Judgment.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: December 19, 2007
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.