

Torsiello v Green

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Supreme Court, Suffolk County

Docket Number: 0016286/2005

Judge: Emily Pines

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This is an action for damages for personal injuries sustained by plaintiff Bryan Torsiello on February 28, 2004 at approximately 11:00 p.m. while at the home of Kevin Broderick and Jackie Broderick located at 7 Quart Street, East Islip, New York. The defendant Kevin Broderick, Jr., their son, was hosting a party in the recreation room under construction in the detached garage. At the time of the occurrence, defendants George Greene and Jason Gut were engaged in a game of "beer bottle cap baseball" using a four (4) inch wide piece of wood and beer bottle caps. Gut was pitching beer caps to Greene when the wood "bat" flew out Greene's hand and struck plaintiff in his left eye causing serious physical injury.

Defendants Kevin Broderick, Jr., Kevin Broderick, and Jackie Broderick ("the Brodericks") have moved for summary judgment on the grounds they did not permit their son to host an underage drinking party in an unsafe environment. In support, they rely on the pleadings, certain photographs, and the deposition testimony of plaintiff and defendants.

Defendant Jason Gut has cross-moved for summary judgment on the grounds he was not a proximate cause of plaintiff's injuries. In support, he offers the pleadings, the deposition testimony of plaintiff and of defendants George Greene and Jason Gut.

Plaintiff testified that he arrived at defendants' home, specifically the garage, at approximately 8:00 to 9:00 p.m. with Amanda Barrett, George Greene, and Kristen Kopp. He testified that prior to arriving there he had spoken with Kevin, Jr. who told him that his parents gave him permission to have some friends over for a party in the new garage which was being renovated. He testified that the group stopped to pick up some beer but he does not recall who actually made the purchase. When he arrived at defendants' home (the garage area) he testified there were other people already there, as well as a quantity of beer. He stated that Mr. and Mrs. Broderick were home at the time but that he had no conversation with them. On his way to the garage, he observed the Brodericks in the house. No effort was made to hide the beer from them. He testified that everyone at the party was drinking beer and that he was there for about two to three hours before the accident occurred. He estimated that both defendant George Greene and defendant Kevin Broderick, Jr. each had about five to seven beers. Defendant Jason Gut arrived later and plaintiff was unaware whether he had brought any alcohol with him. At some point during the evening, plaintiff was struck by a two by four. He testified that he was watching a dart game and when he turned around, he was struck in the eye with a board. He further testified that he was present at the Brodericks' home on five or six occasions prior to February 28, 2004 when the defendants and others were drinking beer and that Mr. and Mrs. Broderick were home at those times.

Cindi Torsiello, plaintiff's mother, testified that when she arrived at defendants' home, defendant Kevin Broderick (Sr.) apologized to her for the injury to Bryan's eye and stated that he knew the kids were drinking beer, but they never got out of hand or rowdy. While in the kitchen of defendants' home, Cindi Torsiello testified that approximately 8-10 kids came into the Broderick's home to check on Bryan; most of them holding or drinking a beer.

Kevin Broderick, Jr. testified that this was a spontaneous gathering and that his parents had permitted him to have a few friends over, however, they specifically told him that no alcoholic beverages were permitted. Three to four twelve packs of beer were brought to the party. At one point,

he and plaintiff were playing darts and defendant Greene was standing with a piece of wood that had fallen from the top of the television. He testified that Greene became engaged in a baseball type game where he would hit beer caps that were being thrown to him with the piece of wood. Plaintiff was injured when Greene went to swing at one of the caps and the piece of wood flew out of his hands striking plaintiff in the eye. He did not know if Greene had any beers that evening. He testified he did not know about the bottle cap game until the board flew by him.

Kevin Broderick testified that his son had gatherings on at least ten prior occasions and there had not been any alcohol at these parties. He and his wife had never given permission to their son to serve alcohol. He first became aware there was beer at the party after plaintiff was injured.

Jackie Broderick testified that her son asked permission to have a party that evening. She told him she was going out shopping and that he should check with his father, who ultimately gave permission for the party. Soon after she arrived home from shopping, she heard her son telling her husband that Bryan had been hurt.

George Greene testified that he has known the Brodericks for the last five to six years. He testified there was between ten to fifteen people at the party that night and that the beer was already there when he arrived. He testified this was the first time there was beer at the Brodericks. He stated he had two beers before the incident. He picked up a piece of wood that had fallen off a speaker and Jason Gut began shooting beer caps toward him. On the third attempt to hit the bottle cap, he hit it and the wood flew out of his hand and hit plaintiff in the left eye.

Jason Gut testified he drove to the party with Danny Brown and James Hoffman. None of them brought any beer to the party but there were about two cases of beer there when they arrived. He had never attended any gatherings at Kevin's house prior to February 28, 2004, and never drank any alcoholic beverages at Kevin's house prior to February 28, 2004. He also testified he did not consume any beer prior to this occurrence. He stated that George consumed approximately a six-pack and that no one appeared inebriated. He did not notice Kevin's father at any point during the evening. He stated that he and others tossed bottle caps at George who was hitting them with a wood two by four. At one point, the wood "slipped" out of George's hand and struck plaintiff in the eye.

Non-party witness Daniel Brown testified that, prior to the incident, he had been at Kevin's house approximately a dozen times and had never drank beer or alcohol on the premises. Before being picked up by Jason Gut, James Hoffman came to Brown's home with a twelve pack of beer. Brown testified that James then drove he and Hoffman to a location where Brown picked up an additional six pack of beer. Jason did not purchase beer at that location. Brown testified that when he arrived at the Broderick home he observed people drinking beer. It was his understanding that everyone there that evening brought beer with the exception of Jason Gut. He testified he remembers seeing Mr. and Mrs. Broderick in the kitchen because there was a sliding glass door approximately 40 to 50 feet away. Prior to the incident he testified he had consumed about four beers. He testified that Jason Gut was throwing bottle caps to George Greene to hit with the two by four when the wood flew out of Greene's hand and hit Bryan in the eye. Brown did not feel anyone was intoxicated that evening; Greene, he felt, may have been "buzzed".

Non-party witness Amanda Barrett testified that she did not see Mr. and Mrs. Broderick until after the accident. She testified that when she arrived Jason Gut and Kevin Broderick were drinking beer and that everyone was drinking from 10:15 until 11:00 p.m. She did not think anyone was intoxicated. She did not witness the accident.

To sustain a claim under General Obligations Law § 11-100, a plaintiff who has been damaged by reason of the intoxication or impairment of ability of an underage person must demonstrate that the defendant knowingly furnished or unlawfully assisted the underage person in procuring alcoholic beverages (*see*, General Obligations Law § 11-101; ***Sherman by Sherman v Robinson***, 80 NY2d 483, 591 NYS2d 974 [1992]; ***Johnson v Verona Oil, Inc.***, 36 AD3d 991, 827 NYS2d 747 [2007]; ***Nehme v Joseph***, 160 AD2d 915, 554 NYS2d 642 [1990]). However, a defendant who was nothing more than an unknowing bystander or an innocent dupe whose premises were used by other minors seeking to drink (*see*, ***Dodge v Victory Mkts.***, 199 AD2d 917, 606 NYS2d 345 [1993]; ***Reickert v Misciagna***, 183 AD2d 151, 590 NYS2d 100 [1992]), or, defendants who were passive participants that merely knew of the underage drinking and did nothing to encourage it, will not be liable under General Obligations Law § 11-100 (*see*, ***Lane v Barker***, 241 AD2d 739, 660 NYS2d 194 [1997]; ***MacGilvray v Denino***, 149 AD2d 571, 540 NYS2d 449 [1989]; *see also*, ***Pelinsky v Rockensies***, 209 AD2d 392, 618 NYS2d 103 [1994]). Moreover, General Obligations Law § 11-100 requires a showing that the very minor to whom the intoxicant was sold or furnished became intoxicated and in his or her intoxicated state injured a third party (*see*, ***Dodge v Victory Markets Inc.***, 199 AD2d 917, 606 NYS2d 345 [1993]). Nevertheless, the defendant will not avoid liability under the statute where the defendant played an indispensable role in a deliberate scheme to make the alcohol available to the under age party guests (*see*, ***Rust v Reyer***, 91 NY2d 355, 670 NYS2d 822 [1998]).

Here, although there is testimony that nearly everyone at the party had alcohol in his/her possession and consumed alcohol, there is no evidence that defendants Kevin and Jackie Broderick had given permission for the consumption of alcoholic beverages on their premises by underage people. Further, there is no evidence that these defendants furnished or procured alcoholic beverages for any of the people who attended the party. The testimony demonstrates that Kevin and Jackie Broderick were nothing more than mere passive participants that, at most, knew of the underage drinking and did nothing to encourage it (*see*, ***Guercia v Carter***, 274 AD2d 553, 712 NYS2d 143 [2000]; ***Lane v Barker***, *supra*). Moreover, there is no evidence that Gut and Greene were intoxicated at the time of the alleged assault (*see*, ***Guercia v Carter***, *supra*). Under the circumstances, defendants have established their prima facie entitlement to summary judgment dismissing the complaint insofar as it was based on General Obligations Law § 11-100. Accordingly, this branch of the motion by defendant for summary judgment dismissing the complaint based upon General Obligations Law § 11-100 is granted.

Defendants also seeks summary judgment in their favor dismissing plaintiffs' claim for common-law negligence.

It is settled that homeowners have a duty to act in a reasonable manner to prevent harm to those on their property, which includes the duty to control the conduct of third persons on their premises when the homeowners have the opportunity to control such persons and are reasonably aware of the need for such control (*see*, ***D'Amico v Christe***, 71 NY2d 76, 524 NYS2d 1 [1987]; ***Chalu v Hariraj***, 304 AD2d 515, 758 NYS2d 132 [2003]).

Here, the adduced evidence indicates that defendant Kevin Broderick was present at his home when plaintiff was injured, and that Jackie Broderick was aware that her son had planned a gathering for that evening. The evidence shows that defendants knew or should have known that most guests at the party were minors, and plaintiff has raised an issue of fact as to whether defendants knew or should have known that underage drinking was taking place in an area of the home under construction. There is a question of fact as to whether defendants acted reasonably in permitting the minors to gather on the premises under the circumstances (*see, Fantuzzo v Attridge*, 291 AD2d 871, 737 NYS2d 192 [2002]). Thus, defendant has failed to sustain the initial burden of establishing a prima facie entitlement to judgment as a matter of law. Accordingly, this branch of the motion by defendant for summary judgment on the issue of common-law negligence is denied.

With respect to defendant Gut's cross motion for summary judgment, to prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see, Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]; *Engelhart v County of Orange*, 16 AD3d 369, 790 NYS2d 704, *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). Proving that an accident occurred, or that the conditions existed for such an accident, is insufficient to establish negligence. "'Proof of negligence in the air, so to speak, will not do'" (*Martin v Herzog*, 228 NY 164, 170, 126 NE 814 [1920], *quoting* Pollock, Torts [10 th Ed.], p. 472). And while proximate cause generally is a matter for the jury, a plaintiff who brings a negligence action must establish prima facie that the defendant's negligence was a substantial cause of the event which produced his or her injury (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, 434 NYS2d 166 [1980]; *see, Maheshwari v City of New York*, 2 NY3d 288, 778 NYS2d 442 [2004]; *Forman v City of White Plains*, 5 AD3d 434, 773 NYS2d 102 [2004]).

At bar, the evidence demonstrates that defendant Gut threw a bottle cap or caps at the defendant, George Greene, who was holding a piece of wood, and who attempted to hit the bottle caps with this piece of wood. It is undisputed that a cap did not hit plaintiff. It is also undisputed that the piece of wood flew out of defendant Greene's hand striking plaintiff in the eye.

Where the acts of third persons intervene between the defendants' conduct and the plaintiff's injury, liability turns on whether the intervening act is a normal or foreseeable consequence of the situation created by the defendants' negligence (*see, Derdiarian v Felix Contr. Corp.*, *supra* at 315, 434 NYS2d 166; *Parvi v City of Kingston*, 41 NY2d 553, 560, 394 NYS2d 161 [1977]; *Smith v County of Nassau*, 232 AD2d 474, 648 NYS2d 343 [2d Dept 1996]). If the intervening act is extraordinary under the circumstances, unforeseeable in the normal course of events, or independent of the defendants' conduct, it may be a superseding act which breaks the causal nexus (*see, Di Ponzio v Riordan*, *supra*; *Derdiarian v Felix Contr. Corp.*, *supra*). Moreover, while proximate causation generally presents an issue of fact for a jury's determination (*see, Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 543 NYS2d 29 [1989]), where only one conclusion may be drawn from the established facts, proximate causation may be determined as a matter of law (*see, Derdiarian v Felix Contr. Corp.*, *supra*; *Gomez v City of New York*, 249 AD2d 362, 671 NYS2d 108 [1998]; *Wright v New York City Tr. Auth.*, 221 AD2d 431, 633 NYS2d 393 [1995]; *see also, Megally v LaPorta*, 253 AD2d 35, 679 NYS2d 649 [1998]).

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Here, defendant Gut has established his entitlement to summary judgment. While Gut, at most, contributed to the creation of the occurrence, his actions did not cause either the accident or plaintiff's injury. Moreover, Greene's throwing of the board was not a foreseeable consequence of the situation created. Accordingly, plaintiff's complaint, together with all cross claims, is dismissed against defendant Gut.

Dated: 10/19/08

Emily Pines
HON. EMILY PINES J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION