

**Badamo v Johnson**

2008 NY Slip Op 32815(U)

October 2, 2008

Supreme Court, New York County

Docket Number: 19261/06

Judge: Arthur M. Diamond

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**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. ARTHUR M. DIAMOND**  
**Justice Supreme Court**

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**EDWARD BADAMO, infant by his father and natural guardian, RICHARD BADAMO and RICHARD BADAMO, individually**

**Plaintiff,**

**-against-**

**JOHN S. JOHNSON AND KENNETH T. YANEK, THEODORE YANEK, AND ANN YANEK**  
**Defendant.**

**TRIAL PART: 21**

**NASSAU COUNTY**

**INDEX NO: 19261/06**

**MOTION SEQ. NO: 1& 2**

**SUBMIT DATE:8/26/08**

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**The following papers having been read on this motion:**

**Notice of Motion..... 1,2**  
**Opposition ..... 3,4**  
**Reply..... 5,6**

Motion by defendants, Kenneth T. Yanek, Theodore Yanek and Ann Yanek, and identical motion by defendant, John S. Johnson, both, pursuant to CPLR §3212, for an Order of this Court, granting them each summary judgment dismissal of plaintiffs' complaint; the motions are granted and the complaint is herewith dismissed as against all defendants.

This action for personal injuries arises from a motor vehicle accident that occurred on October 9, 2005 at the intersection of Ascan Road and Robin Road in Franklin Square, New York. The infant plaintiff, Edward Badamo ("Edward"), 14 years old at the time of the accident, was riding a motorized scooter when he came in contact with a 1994 Jeep Cherokee owned and operated by defendant John S. Johnson ("Johnson"). The accident occurred at a "T" intersection where Ascan Road ended at Robin Road. There was stop sign on Ascan Road. There were no traffic controls on Robin Road at this intersection. Defendants, Kenneth and Theodore Yanek, own the corner premises at 1076 Robin Road at the subject intersection; their mother, defendant Ann Yanek, has a life estate

in the premises and lives there alone.

It is undisputed that the infant was in the roadway at the time of the accident; he was not on the abutting sidewalk. At his deposition, Edward testified that the scooter he was riding could either be driven in a seated or a standing position. He stated that he was standing while operating the scooter at approximately 20 miles per hour. Edward testified that prior to entering the roadway, he was traveling on the sidewalk at Ascan Road. He then used the "sidewalk cut out" to enter the roadway. The infant plaintiff collided with the Johnson vehicle as he was turning left from one road to another. He testified that though he was aware of the stop sign on Ascan Road, he did not stop at the stop sign controlling his direction of traffic prior to turning left.

Defendant Johnson testified that he was driving past Ascan Road when the front quarter panel of his Jeep was struck by the plaintiff on his scooter. Johnson testified that he only saw the scooter out of the corner of his eye. Plaintiffs assert that Johnson negligently operated his vehicle. In moving for summary judgment dismissal of plaintiffs' complaint, defendant Johnson maintains that as the operator of a motor vehicle under the New York Vehicle and Traffic Law, the plaintiff was obligated to comply with the vehicle and traffic laws of this state. He states that as there is no evidence that he negligently operated his vehicle and ample evidence that the infant plaintiff disobeyed the vehicle and traffic regulations, he is entitled to summary judgment dismissal of plaintiffs' complaint.

In opposition, plaintiffs maintain that, based upon defendant Johnson's own testimony, there is a question of fact as to whether the defendant had time and opportunity to come to a stop. The plaintiffs also contend that defendant's testimony that the neighborhood is primarily residential and that kids are around raises his duty of care under the circumstances.

As a preliminary matter, this Court notes the vehicle operated by the plaintiff has been referred to on this record as either a "moped" or a "goped." As innocuous as this error may appear at first blush, during this Court's review of the Vehicle and Traffic Law (hereinafter, "VTL") as well as information from the New York State Department of Motor Vehicles, it became apparent that these are two different types of vehicles with distinct rules of operation.

A "moped" is a common term for a "limited use motorcycle", described in VTL § 121-b as "a limited use vehicle having two or three wheels with a seat or saddle for the operator" which may be operated upon public streets only with proper registration, a driver's license or learner's permit,

and depending on the type of moped, insurance. A “goped” or “Go-ped” on the other hand, defined by the NYS Department of Motor Vehicles as “a skateboard or scooter with a motor attached and a handlebar for a standing rider”, also requires a driver's license, registration and insurance but may not be operated on any public streets, highways or sidewalks under any circumstances. The terms are used interchangeably by the parties and their respective counsel on this record.

Nevertheless, for purposes of this Court’s determination it makes no difference whether the vehicle at issue is characterized as a “moped” or a “goped”. What is significant is that the motor scooter operated by the plaintiff at the time of the incident, described by the infant himself as “a metal scooter with one brake and a throttle...a shut off, an engine shut off button, and it has a small motor on the back with a place to stand...also a seat that you could remove” (*Badamo Tr.*, p. 16) clearly falls within the general definition of a motor vehicle. According to VTL §125, a motor vehicle is defined as “every vehicle operated or driven upon a public highway which is propelled by any power other than muscular power.”

Having established that the infant plaintiff was operating a motor vehicle, this Court notes that generally, whenever a child engages in an activity which is normally one for adults, such as driving an automobile, the public interest and safety require that any consequences due to his incapacity shall fall upon him rather than the innocent victim, and that he must be held to the adult standard without any allowance for his age (*Smedley v. Piazzolla*, 59 AD2d 940 [2<sup>nd</sup> Dept. 1977] citing *Reiszel v Fontana*, 35 AD2d 74; Prosser, Torts [4th ed], § 32, p 156). Having said that, this Court finds that the defendant, Johnson, has fully established his entitlement to judgment as a matter of law. There is simply no evidence that Johnson negligently operated his vehicle. In opposing Johnson’s motion for summary judgment, the plaintiffs rely solely upon the affirmation of their attorney, who is clearly without personal knowledge of the facts. This does not supply the evidentiary showing necessary to successfully resist the motion (CPLR §3212[b]; *Rotuba Extruders v Ceppos*, 46 NY2d 223, 229, n 4 [1978]). An affirmation of counsel is of no evidentiary value or effect (*Roche v. Hearst Corp.*, 53 NY2d 767 [1981]; *Columbia Ribbon & Carton Mfg. Co. v. A-1-A Corp.*, 42 NY2d 496 [1977]). Moreover, plaintiffs’ argument that defendant, Johnson’s duty of care was elevated in this case is entirely unsupported and meritless. To the extent that plaintiff himself testified that Johnson was operating his vehicle in a safe and responsible manner at 15 miles per hour, there is no evidence that defendant violated his duty of care.

Accordingly, defendant Johnson's motion for summary judgment dismissal of plaintiff's complaint is granted and the complaint is herewith dismissed.

As against the Yanek defendants, plaintiffs claim that the shrubbery at the corner premises obstructed vision of roadway as well as use of the abutting sidewalk. Plaintiffs also assert that the Yanek defendants made special use of the sidewalk and thus they are liable to the plaintiffs.

The law is well settled that an abutting landowner will be liable to a pedestrian injured by a defect in a public sidewalk only when the owner either created the condition or caused the defect to occur because of a special use, or when a statute or ordinance places on the owner an obligation to maintain the sidewalk, and expressly makes the owner liable for injuries caused by a breach of that duty (*Pich v Krupp*, 272 AD2d 459 [2<sup>nd</sup> Dept. 2000]; *Meyer v Guinta*, 262 AD2d 463 [2<sup>nd</sup> Dept. 1999]). Additionally, "there is no common-law duty [on] a landowner to control the vegetation on his or her property for the benefit of users of a public highway" (*Ingenito v Robert M. Rosen, P. C.*, 187 AD2d 487, 488 [2<sup>nd</sup> Dept. 1992]; *see also, Kolkmeier v Westhampton Taxi & Limo Serv.*, 261 AD2d 587 [2<sup>nd</sup> Dept. 1999]). Plaintiffs do not advance any claim that there is a statute or ordinance imposing liability upon the Yanek defendants.

The concept of special use is a narrow exception to the general rule of no liability, and exists only when an abutting landowner derives some special benefit from his or her use of the public sidewalk, such as a driveway or a vault (*Blum v City of New York*, 267 AD2d 341 [2<sup>nd</sup> Dept. 1999]). There is no evidence on this record that the Yanek defendants put the sidewalk to a special use. In light of the Yanek defendants' showing of entitlement to judgment as a matter of law, the burden shifts to the plaintiffs, as the party opposing the motion, to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]).

Plaintiffs' sole submission in opposition to the Yanek defendants' motion is the infant plaintiff's affidavit wherein he states that the "scratchy and thorny" bushes obscured the sidewalk upon which he was riding. He states that he specifically left the sidewalk to avoid his legs being cut by the bushes. This evidence does not present an issue of fact. To find a special use in this case would abrogate the settled rule that there is no common-law duty to control vegetation for the benefit of users of the public sidewalk.

Accordingly, the Yanek defendants' motion for summary judgment dismissal of plaintiffs'

complaint is granted and the complaint as against them is also dismissed.

Settle Judgment on Notice.

This constitutes the decision and order of this Court.

DATED: October 2, 2008

**ENTERED**  
OCT-08 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE  
ARTHUR DIAMOND  
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