

Fairbanks v Kushner

2009 NY Slip Op 32382(U)

October 7, 2009

Supreme Court, Suffolk County

Docket Number: 05-25268

Judge: Joseph Farneti

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INDEX No. 05-25268
CAL. No. 08-02222-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 3-18-09
ADJ. DATE 5-7-09
Mot. Seq. # 001 - MD

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JORDAN FAIRBANKS, an infant under the age of :	SURIS & ASSOCIATES, P.C.
fourteen (14) years, by his mother and natural :	Attorneys for Plaintiffs
guardian, JUDITH FAIRBANKS, and JUDITH :	999 Walt Whitman Road, Suite 201
FAIRBANKS, individually, :	Melville, New York 11747
Plaintiffs, :	
- against - :	MINTZER SAROWITZ ZERIS LEDVA
	& MEYERS
RICHARD KUSHNER and LINDA KUSHNER, :	Attorneys for Defendants
	39 Broadway, Suite 950
Defendants. :	New York, New York 10006
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Upon the following papers numbered 1 to 16 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 13 - 14; Replying Affidavits and supporting papers 15 - 16; Other ; it is,

ORDERED that this motion by the defendants Richard Kushner and Linda Kushner seeking summary judgment dismissing the plaintiffs' complaint is denied.

The plaintiff Judith Fairbanks commenced this action, both individually and on behalf of the infant plaintiff Jordan Fairbanks, to recover damages for injuries allegedly sustained by the infant plaintiff on November 1, 2003 as a result of an assault. The infant plaintiff allegedly was struck in the face by another guest, DeShawn McNeil ("Didi"), while attending the defendants' son's birthday party at the defendants' home.

The defendants now move for summary judgment on the basis that the injuries sustained by the infant plaintiff were the result of an intervening act, thereby relieving the defendants of any liability. In particular, the defendants assert that the infant plaintiff was struck in the face by Didi after the infant plaintiff called Didi a "nigger," and that the punch was an unforeseen and unanticipated intentional act by a third-party. In support of the motion, the defendants submit a copy of the pleadings, copies of the parties' deposition transcripts, and the affidavit of Everett Kushner. The plaintiffs oppose the instant motion on the ground that the defendants' negligence in supervising the children at the birthday was the proximate cause of the infant plaintiff's injuries. In opposition to the motion, the plaintiffs submit the affidavit of the infant plaintiff Jordan Fairbanks.

On a motion for summary judgment the court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [1990]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]). The failure of the moving party to make such a prima facie showing requires denial of the motion regardless of the insufficiency of the opposing papers (*see Sheppard-Mobley v King*, 10 AD3d 70, 778 NYS2d 98 [2004]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v New York*, 49 NYS2d 557, 427 NYS2d 595 [1980]). However, mere allegations, unsubstantiated conclusions, expressions of hope or assertions are insufficient to defeat a motion for summary judgment (*see Zuckerman v City of New York, supra*; *Blake v Guardino*, 35 AD2d 1022, 315 NYS2d 973 [1970]).

Generally, a person to whom the custody and care of a child is entrusted by a parent is required to use reasonable care to protect the child that he or she has assumed temporary custody or control, and such a person may be held liable for any injuries sustained by the infant resulting from his or her negligence (*see Appell v Mandel*, 296 AD2d 514, 745 NYS2d 491 [2002]; *Mary A. ZZ. v Blasen*, 284 AD2d 773, 774, 726 NYS2d 767 [2001]). Although the person caring for the child is not the insurer of the child's safety, such an individual "is obliged to provide adequate supervision and may be held liable for foreseeable injuries proximately resulting from the negligent failure to do so" (*Appell v Mandel, supra* at 514; *see also Brennan v Sinski*, 31 AD3d 1108, 1109, 817 NYS2d 833 [2006]; *Singh v Persaud*, 269 AD2d 381, 702 NYS2d 628 [2000]; *see generally Mirand v City of New York*, 84 NY2d 44, 614 NYS2d 372 [1994]; *Zalak v Carroll*, 15 NY2d 753, 257 NYS2d 177 [1965]).

Furthermore, a landowner, or one in control or possession of real property, has the duty to take reasonable measures to control the foreseeable conduct of third parties on the property to prevent them from intentionally harming or creating an unreasonable risk of harm to others (*see Jaume v Ry Mgt. Co.*, 2 AD3d 590, 769 NYS2d 303 [2003]; *Murphy v Turian House*, 232 AD2d 535, 649 NYS2d 38 [1996]; *Johnson v Slocum Realty Corp.*, 191 AD2d 613, 595 NYS2d 244 [1993]; *Mangione v Dimino*, 39 AD2d 128, 332 NYS2d 683 [1972]). However, this duty will only arise if the landowner knows that he can and has the opportunity to control the third parties' conduct and is reasonably aware of the necessity for such control (*see D'Amico v Christie*, 71 NY2d 76, 524 NYS2d 1 [1987]; *Hillen v Queens Long Is. Med. Group, P.C.*, 57 AD3d 946, 871 NYS2d 302 [2008]; *Cutrone v Monarch Holding Corp.*, 299 AD2d 388, 749 NYS2d 280 [2002]).

The infant plaintiff testified at an examination before trial that on the day of the incident he was 10 years old and that he had been invited to the defendants' son's birthday/Halloween party. The infant plaintiff testified that his mother dropped him off at the defendants' house at around 7:00 pm. He testified that there were approximately 10 adults, including the defendants, and approximately 14 to 15 children, ranging in age from 9 to 15 years old, at the party. He testified that there were no organized games; instead, the children were engaged in "horseplay." The infant plaintiff testified that he had been playing in the front yard for approximately one hour before the incident happened and that the

defendants, along with the rest of the adults, remained inside of the house entire time. The infant plaintiff testified that he never went inside of the defendants' home until after the incident happened. He testified that some of the adults brought out boxes filled with cans of shaving cream and tube socks filled with talcum powder. He testified that the children began spraying each other with shaving cream and hitting each other with the talcum powder filled tube socks. The infant plaintiff testified that after he had been struck twice by a talcum powder filled tube sock and sprayed twice with shaving cream, he stated that he did not want to be hit or sprayed anymore. The infant plaintiff testified that he, Everett, and Didi were standing by the tree in the front yard and that the other children were closer to the house immediately before the incident occurred. He testified that he was punched, without warning, in his left eye by Didi, and that he immediately fell to his knees. He testified that he did not say anything to Didi, nor did he punch or push Didi prior to Didi striking him in his eye. The infant plaintiff testified that he did not know why Didi struck him in his eye. He testified that immediately after Didi struck him, Everett yelled that he was having an asthma attack and all of the adults came running outside to check on him. He testified that after Didi struck him, he felt dizzy and it was hard for him to see. The infant plaintiff testified that his mother was called and he was rushed to the Huntington Hospital, where he stayed overnight. The infant plaintiff testified that he had a black eye, was out of school for two weeks and had to have corrective eye surgery. He further testified that he has not spoken to Everett since the incident, and that the last time he saw an eye doctor about his left eye was the week after the surgery.

The defendant Richard Kushner testified at an examination before trial that on the day of the incident his ex-wife was having a Halloween-theme birthday party for his younger son Everett, who was turning 10. Mr. Kushner testified that he came to the party as a guest and that at the time of the incident he was living in Massachusetts, because he and his wife were either separated or divorced. Mr. Kushner testified that when he arrived at the party, it was already in "full swing." He testified that there were about 20 kids at the party and that his older son Ryan had one friend named Gene McNeil at the party. He testified that Gene is the older brother of Didi and that Didi is approximately one or two years younger than his son Everett. Mr. Kushner testified that the children, after having played some activities that were organized by his ex-wife's friend's teenage daughter in the house, went outside into the front yard. Mr. Kushner testified that he remained inside of the house in the living room. He testified that it is difficult to see out into the front yard from the living room window, because there is insufficient lighting. He testified that he became aware of the subject altercation after the children ran inside the house and informed the adults. Mr. Kushner testified that upon learning of the incident, he ran outside to see what had occurred, but that other adults were already attending to the infant plaintiff. Mr. Kushner testified that he was very upset about the incident and that he spoke to Didi, as well as his ex-wife, about the occurrence. He testified that he immediately took Didi home and that when he returned to the house the police were there. He testified that he was unaware of just how seriously the infant plaintiff had been injured. Mr. Kushner testified that the children informed him that "a bunch of children had repeatedly sprayed the infant plaintiff with shaving cream, and then Didi sprayed the infant plaintiff, and that is when the infant plaintiff called Didi a 'nigger,' and Didi immediately punched him." Mr. Kushner further testified that Didi is black.

Based upon the adduced evidence, the defendants failed to establish their *prima facie* burden that they did not breach their duty to adequately supervise the infant plaintiff and the other children at their son's birthday party (see *Moreno v Weiner*, 39 AD3d 830, 834 NYS2d 323 [2007], *lv denied* 9 NY3d

807, 843 NYS2d 536 [2007]; *Goldstein v Welter*, 303 AD2d 551, 756 NYS2d 465 [2003]; *Fernandez v Stepping Stone Day School*, 291 AD2d 530, 737 NYS2d 864 [2002]). Both the infant plaintiff and Mr. Kushner testified that while the children were outside in the front yard playing all of the adults remained in the house and only went outside to check on the children after the adults were informed that the infant plaintiff had been punched in the eye by Didi. The defendants have not shown that they did not have the ability and opportunity to control the conduct of Didi, or that there was no awareness on their behalf of the need to control the conduct of Didi (*see Quitana v Rupa*, 31 AD3d 524, 818 NYS2d 282 [2006]; *Comeau v Lucas*, 90 AD2d 674, 455 NYS2d 871 [1982]; *Bartkowiak v St. Adalbert's R.C. Church Socy.*, 40 AD2d 306, 340 NYS2d 137 [1973]; *cf. Lazar v TJC Cos.*, 1 AD3d 319, 767 NYS2d 52 [2003]; *Lee v Durow's Rest.*, 238 AD2d 384, 656 NYS2d 321 [1997]). Consequently, there are questions of fact as to whether a more appropriate level of supervision would have been able to prevent the infant plaintiff from being struck in the left eye by Didi (*see Oliverio v Lawrence Pub. Schools*, 23 AD3d 633, 805 NYS2d 638 [2005]; *Douglas v John Hus Moravian Church of Brooklyn, Inc.*, 8 AD3d 327, 778 NYS2d 77 [2004]; *Johnson v City of New York*, 309 AD2d 671, 766 NYS2d 834 [2003]; *cf. Navarra v Lynbrook Pub. Schools, Lynbrook Union Free School Dist.*, 289 AD2d 211, 733 NYS2d 730 [2001]).

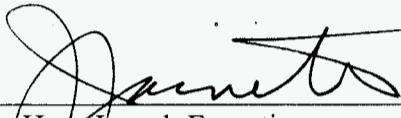
Moreover, while it is understood that a certain amount of "horseplay" will be found where there is a gathering of young children, such conduct is to be discouraged when it becomes dangerous (*see Gibbud v Camp Shane, Inc.*, 30 AD3d 865, 817 NYS2d 435 [2006]; *Kosok v Young Men's Christian Assn. of Greater N. Y.*, 24 AD2d 113, 264 NYS2d 123 [1965], *aff'd* 19 NY2d 935, 281 NYS2d 341 [1967]). An intervening act will be deemed a superseding cause and will serve to relieve a defendant's liability when the act is of such an extraordinary nature or so attenuates defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant (*see Kush v City of Buffalo*, 59 NY2d 26, 462 NYS2d 831 [1983]; *Martinez v Lazaroff*, 48 NY2d 819, 424 NYS2d 126 [1979]). Therefore, in order to constitute a superseding event severing the causal connection between the defendant's alleged negligence and the plaintiff's injury, the intervening act "must be a new and independent force," which was not set "in motion by the defendant's own wrongful acts" (*Bell v New York City Health & Hosps. Corp.*, 90 AD2d 270, 285, 456 NYS2d 787 [1982]; *see also Campbell v Cluster Hous. Dev. Fund Co.*, 247 AD2d 353, 668 NYS2d 634 [1998]). However, where the intervening act is a natural and foreseeable consequence of a circumstance created by the defendant, liability will subsist (*see Derdiarian v Felix Contr. Co.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Parvi v City of Kingston*, 41 NY2d 553, 394 NYS2d 161 [1977]).

Contrary to the defendants' assertion that Didi's punch of the infant plaintiff in his left eye was an unforeseen intervening act, it cannot be said a matter of law that the incident that occurred between the infant plaintiff and eight-year-old Didi was unforeseeable (*see Bell v Bd of Educ. of City of N.Y.*, 90 NY2d 944, 665 NYS2d 42 [1997]; *Mendieta v 333 Fifth Ave. Assn.*, __ AD3d __, 2009 NY Slip Op. 6515 [2d Dept 2009]; *Pabon v Nouveau El. Indus., Inc.*, 49 AD3d 702, 854 NYS2d 175 [2008]; *Mooney v Petro, Inc.*, 51 AD3d 746, 858 NYS2d 689 [2008]; *cf. Cruz v City of New York*, 7 AD3d 394, 776 NYS2d 469 [2004]; *Jaume v Ry Mgmt. Co.*, *supra*; *Ascher v Scarsdale School Dist.*, 267 AD2d 339, 700 NYS2d 210 [1999]). The children, ranging in age from 9 to 15 years old, were left unattended in the front yard hitting each other with talcum powder filled tube socks and spraying each other with shaving cream provided to them by the adults at the party. "While an extraordinary and unforeseeable

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act will sever the causal connection between a defendant's actions and a plaintiff's injuries, the issue of whether an injury-producing act was foreseeable is typically a question for the trier of fact" (see *Lapidus v State of New York*, 57 AD3d 83, 866 NYS2d 711 [2008]; *Singh v Persaud*, *supra*; see also *Broad v Patico Corp.*, 243 AD2d 434, 662 NYS2d 809 [1997]; *Ceglia v Portledge School*, 187 AD2d 550, 590 NYS2d 228 [1992]). As a consequence, whether Didi's act of punching the infant plaintiff in the left eye flows from the fact that the children were left unattended at the party is a matter for the trier of fact (see *Kush v City of Buffalo*, *supra*; *Pironti v Leary*, 42 AD3d 487, 840 NYS2d 98 [2007]; *Rotz v City of New York*, 143 AD2d 301, 532 NYS2d 245 [1988]). As there are questions of fact as to whether the defendants adequately supervised the infant plaintiff and the other children at their son's birthday party, and whether that inadequate supervision was a proximate cause of the infant plaintiff's injuries, the defendants' motion for summary judgment is denied (see *Goldstein v Welter*, 303 AD2d 551, 756 NYS2d 465 [2003]; *Fernandez v Stepping Stone Day School*, *supra*; *Singh v Persaud*, *supra*). Having determined that the defendants failed to meet their *prima facie* burden demonstrating their entitlement to judgment as a matter of law, it is not necessary for this Court to address the sufficiency of the opposing party's papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Pabon v Nouveau El. Indus., Inc.*, *supra*; *Fabish v Garden Bay Manor Condominium*, 44 AD3d 820, 843 NYS2d 460 [2007]).

Dated: October 7, 2009



 Hon. Joseph Farneti
 Acting Justice Supreme Court

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION