Swanson v Kuhn

2010 NY Slip Op 32003(U)

July 29, 2010

Supreme Court, Greene County

Docket Number: 09/663

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

DIANA SWANSON, MICHAEL SWANSON, Individually and as Parents and Guardians of ALEX SWANSON, an Infant,

Plaintiffs,

-against-

JAMES KUHN, BARBARA KUHN and CONNOR KUHN,

Defendants.

DECISION and ORDER
INDEX NO. 09-663
RJI NO. 19-10-4857

Supreme Court Greene County All Purpose Term, July 16, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

On February 12, 2008, Alex Swanson and Connor Kuhn, both fourteen years old, were playing with black powder[1] at Connor's home. Alex was injured and Plaintiffs commenced this personal injury action seeking damages. Issue was joined by Defendants, discovery is complete and a trial date certain is set. Defendants now move for summary judgment under the Barker/ Manning doctrine. (Barker v. Kallash, 63 NY2d 19 [1984], Manning v. Brown, 91 NY2d 116 [1997], *see also* Alami v. Volkswagen of America, Inc., 97 NY2d 281 [2002]). Plaintiffs oppose the motion. Because Defendants failed to demonstrate the applicability of the Barker/Manning

[1] The substance used for firing a muzzle loader.

doctrine as a matter of law, their motion is denied.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). It is well established that the proponent of a summary judgment motion bears the "threshold burden of tendering evidentiary proof in admissible form establishing entitlement to judgment as a matter of law." (Chiarini ex rel. Chiarini v. County of Ulster, 9 AD3d 769 [3d Dept. 2004], Smalls v. AJI Industries, Inc., 10 NY3d 733 [2008], Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; CPLR §3212). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). Moreover, on a motion for summary judgment, all evidence must be viewed in the light most favorable to the opponent of the motion. (Kropp v. Corning, Inc., 69 AD3d 1211 [3d Dept. 2010]; Haider v. Zadrozny, 61 AD3d 1077 [3d Dept. 2009]).

The Barker/ Manning doctrine provides that "where a plaintiff has engaged in unlawful conduct, the courts will not entertain [a] suit if the plaintiff's conduct constitutes a serious violation of the law and the injuries for which the plaintiff seeks recovery are the direct result of that violation." (Alami, supra at 285, quoting Manning, supra at 120, citing Barker, supra). Thus, Defendants must first demonstrate that Alex's injuries were, as a matter of law, the "result of his commission of a crime". (Johnson v. State, 253 AD2d 274 [3d Dept. 1999]). On this record, Defendants failed to make such threshold showing.

The facts surrounding Alex and Connor's use of the black powder are largely undisputed. On their bus ride home from high school, Alex and Connor discussed using / playing with black powder later that day. Both knew of, and had played with once before, the can of black powder

Connor's father kept in an unlocked living room cabinet.[2] Alex went to Connor's home with a lighter, specifically intending to play with the black powder. When Alex arrived at Connor's home they both went, with a small bag of black powder, to a barn. Both agree that they had no preconceived plan, just to use / experiment with the black powder. They both searched the barn for items to use the black powder with, settling on a glass jar with a wax paper / petroleum jelly wick. The two boys brought the combined items into a nearby field. After Alex unsuccessfully attempted to light the wax paper / petroleum jelly wick twice, his third attempt caused the combined items to immediately ignite causing Alex to sustain serious burns to his face.

Defendants allege Alex's conduct violated Penal Law §265.02(2), Criminal Possession of a Weapon in the Third Degree. Penal Law §265.02(2) states that "[a] person is guilty of criminal possession of a weapon in the third degree when... [s]uch person [knowingly] possesses any explosive or incendiary bomb..." (CJI2d[NY] Penal Law §265.02[2]; Penal Law §15.05[2]). "The statutory terms-'incendiary', 'bomb' and 'explosive substance'-are susceptible of reasonable application in accordance with the common understanding of men" and women. (People v. Cruz, 34 NY2d 362, 370 [1974]).

While the black powder Alex and Connor were using is not commonly known as an "incendiary device" (*see generally* Penal Law §150.20[2]) it is commonly understood as an explosive material (*see generally* Labor Law §451). However, on this record, Defendants failed to demonstrate that Alex knowingly possessed a bomb, as that item is commonly understood.

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[2] The black powder was kept for use in firing a muzzle loader Connor had assembled with his father. This manner of storage appears to violate 22 NYCRR 39.12(c)(1)(i-iii).

The deposition testimony of both Alex and Connor demonstrate that neither intended to make a bomb. Connor readily acknowledged that he "didn't think [they] really had an intent." Alex similarly stated that they were "[u]sing the gunpowder[3]. It wasn't necessarily to make an explosive device." Alex explained that the two boys discussed "using" the black powder, not making "an explosive device." Alex further stated that he had not researched "making an explosive device" nor did he "have a formal plan." Moreover, the description of the combined items does not, as a matter of law, constitute a bomb as that term is commonly understood. Nor have Defendants demonstrated, as a matter of law, that Alex was "aware" that he possessed a bomb. (Penal Law § 15.05[2], *see generally* People v. Perez, 126 Misc2d 1087 [Sup Ct, Queens County 1985]). Considering the proof in a light most favorable to the Plaintiffs, Defendants failed to demonstrate, as a matter of law, that Alex violated Penal Law §265.02(2).

This lack of proof contrasts sharply with the Barker criminal conduct, "constructing a 'pipe bomb.'" (Id. at 22). The Barker plaintiff was injured while "screwing the second cap on to" a pipe filled with gunpowder and capped at one end, a readily apparent Penal Law §265.02(2) "explosive bomb". (Barker, supra at 23). Here however, contrary to Defendants' contention, Alex's use of a jar, wax paper and petroleum jelly to "use" the black powder did not necessarily create a 'bomb" or constitute criminal conduct as a matter of law.

Nor have Defendants demonstrated that Alex violated any other statute that criminalizes conduct. While Labor Law Article 16 specifically criminalizes (Labor Law §464[3]) the use of "Explosives," Labor Law §451specifically excludes from its application "quantities of black powder not exceeding five pounds for use in firing of antique firearms or artifacts or replicas thereof." No proof was offered demonstrating that Alex's use of black powder exceeded the

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[3] "[G]unpowder" should have been "black powder."

statutory exclusion. Nor did Defendants offer any proof that Alex violated any of the specific regulations promulgated under the Labor Law. (22 NYCRR 39.12 [titled "Special Provisions Relating to Black Powder"]). Defendants similarly failed to demonstrate Alex's violation of General Business Law § 322-b, as an element of such statute requires "injury of the person or property of another." It is undisputed, on this record, that only Alex was injured by his use of black powder. As such, Defendants failed to demonstrate their entitlement to judgment as a matter of law.

Accordingly, Defendants' motion is denied.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: July 29, 2010
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated June 15, 2010, Affidavit of Alexandra George, dated June 15, 2010, copy of Affidavit of Alexandra George, dated June 15, 2010, with attached Exhibits A-J.
2. Affirmation of Dennis Schlenker, dated June 30, 2010.
3. Affirmation of Affidavit of Alexandra George, dated July 7, 2010.