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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 4

MOO, MG, MOO, MOO

Present: HON. UTE WOLFF LALLY
Justice

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CHRISTOPHER CORTESELLI,

Plaintiff,

-against-

TIMOTHY WOLFE, DIANE WOLFE, JOHN SQUIRES, DORA ISRAEL, VIVIAN BARKAI, TALIA BARKAI, LESLIE WATNIK, NEIL WATNIK and SIDNEY STEIN,

Defendant.

Motion Sequence #9, #10, #12, #13
Submitted July 12, 2010

INDEX NO: 21165/08

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ERIC M. PARCHMENT, an infant under the age of 18, by his mother and natural guardian, DANITZA PARCHMENT and DANITZA PARCHMENT, individually,

Plaintiffs,

-against-

TIMOTHY WOLFE, DIANE WOLFE, JOHN SQUIRES, VIVIAN BARKAI, TALIA BARKAI, LESLIE WATNIK, NEIL WATNIK and SIDNEY STEIN,

Defendants.

INDEX NO: 21643/08

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**STEFAN TESSLER, individually, and as parent and natural guardian of plaintiff CLARA TESSLER,**

**Plaintiffs,**

**-against-** **INDEX NO: 1863/08**

**DIANE WOLFE, JOHN SQUIRES and TIMOTHY WOLFE,**

**Defendants.**

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**The following papers were read on these motions:**



This motion by defendants Vivian Barkai and Talia Barkai for an order pursuant to CPLR 3212 granting summary dismissing the complaint and all cross claims asserted against said defendants is granted to the extent that the action is dismissed solely as to defendant Vivian Barkai. The matter is continued as to defendant Talia Barkai.

Cross motion by defendants Leslie Watnik, Neil Watnik, and their daughter Sidney Stein, pursuant to CPRL 3212 for an order granting summary judgment dismissing the complaint and all cross claims asserted against said defendants is granted.

Respective cross motions *in limine* by plaintiff Christopher Corteselli to preclude defendants from offering any evidence alluding to his alcohol and/or drug use and by defendants Vivian Barkai and Talia Barkai to preclude any party from offering any evidence as to alcohol and/or drug use by defendant Timothy Wolfe are respectfully referred to the trial judge.

BACKGROUND

As set forth in the short form order of this court entered September 15, 2009, on September 28, 2008 plaintiff, a back seat passenger in a vehicle operated by defendant Timothy Wolfe, sustained injuries in a one-car accident when Timothy Wolfe allegedly lost control of the vehicle at approximately 2:10 A.M. The vehicle was traveling westbound on South Road in Sands Point, New York, before it crashed head-on into a tree. In addition to plaintiff, there were two other passengers in the vehicle: Eric Parchment and Clara Tessler, both of whom have commenced actions against, *inter alia*, Timothy Wolfe, Diane Wolfe and John Squires.

All of the passengers in the vehicle were under the age of 21 as was Timothy Wolfe and had attended a gathering at the home of Talia Barkai located at 62 Soundview Drive, Port Washington, New York, prior to the accident. It is alleged that defendant Timothy Wolfe was permitted to consume alcohol and/or use drugs at the party and at the home of the Watnik defendants.

Pursuant to the September 15, 2009 order, the cross motion for summary judgment by defendants Vivian Barkai and her daughter, defendant Talia Barkai, who hosted the party where underage drinking/drug use allegedly occurred, was denied without prejudice

to renewal on completion of discovery.[1] In support of their renewed motion, the Berkai defendants argue that summary judgment is warranted in the absence of evidence that defendant Timothy Wolfe was intoxicated and based on the fact that the Berkai defendants did not supply him with any alcohol or drugs.

ANALYSIS

With respect to underage drinking, in addition to common law negligence[2], there can be statutory liability under General Obligations Law § 11-100 which creates a cause of action by a person injured as a result of the acts of an intoxicated minor if the injured party can demonstrate that he/she was injured by reason of the intoxication of a party under 21, and that the host knowingly caused such intoxication by unlawfully furnishing or procuring alcoholic beverages for the underage person with the knowledge or reasonable cause to believe that such person was under 21. The statute provides in pertinent part that:

> "Any person who shall be injured in person, property, means of support or otherwise, by reason of the intoxication or impairment of ability of any person under the age of 21 years, whether resulting in his death or not, shall have a right of action to recover actual damages against any person who knowingly causes such intoxication or impairment of ability by unlawfully furnishing to or unlawfully assisting in procuring alcoholic beverages for such person with knowledge or reasonable cause to believe that such person was under the age of 21 years."

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[1]The three causes of action alleged against the Berkai defendants include negligence (reckless, wilful misconduct; lack of reasonable care); violation of Nassau County's Social Host Law (Local Law No. 13-2007); violation of General Obligations Law § 11-100. The violation of Local Law No. 13-2007 constitutes an unclassified misdemeanor. A first or second offense is punishable by a fine. A third or subsequent offense is punishable by a fine and term of imprisonment not to exceed one year.

[2]The sole cause of action asserted against the Watnik defendants is negligence.

The statute is not intended, however, to impose liability for underage drinking which occurs on an individual's premises without his or her knowledge or permission, or as a result of the use of alcoholic beverages over which he/she has no control. (*Rust v Reyer*, 91 NY2d 355, 359; *Reickert v Misciagna*, 183 AD2d 151, 155).

While the statute does not limit liability to those who physically provide alcohol to a minor, it requires a showing that defendant was more than an unknowing bystander, or an innocent dupe whose premises was used by underage people. (*Guerica v Carter*, 274 AD2d 553, 554). The statute has been strictly interpreted and does not apply to a homeowner or any person who has neither supplied alcohol to, nor procured alcohol for consumption by an underage person who causes injury to another. (*Nelson v Neng*, 297 AD2d 313, 314). Here, defendant Vivian Barkai was at work in New York City on the night of the party and neither knew that a party was being held at the premises at which alcohol was being consumed nor had given permission for her daughter to host an unsupervised party. There is no evidence that she either supplied, procured or assisted in supplying or procuring the alcohol/drugs which were allegedly consumed by defendant Timothy Wolfe at the party. (*Fantuzzo v Attridge*, 291 AD2d 871, 872).

Accordingly, the cause of action under General Obligations Law § 11-100 is dismissed as to defendant Vivian Barkai. With respect to defendant Talia Barkai, who hosted the party at her mother's home, where alcohol was allegedly consumed, the existence of a factual issue as to whether she played a role in making alcohol/drugs available to Timothy Wolfe, an underage party guest, precludes summary dismissal of the claim asserted against her for violation of General Obligations Law § 11-100.

Since the accident did not occur at the Barkai home, or in an area within the Barkai defendants' control, liability cannot be predicated on the common law duty of a landowner to control the conduct of third persons on her premises where she has the opportunity to control such persons and is reasonably aware of the need for such control. (*D'Amico v Christie*, 71 NY2d 76, 85). A landowner may be liable for injuries sustained by persons on his property where there is a proven violation, not here present, of a landowner's duty to act in a reasonable manner to prevent harm to persons on her property – including the duty to control the conduct of third persons when there is an opportunity to do so and the landowner is reasonably aware of the need for such control. (*D'Amico v Christie, supra* at p. 85). That duty generally extends only to persons who are physically present on the owner's property. Since the accident at issue did not occur on the Barkai premises, or in an area within their control, liability cannot be predicated on the theory of common law negligence. (*Walters v Sternlieb*, 255 AD2d 309, 310). It is well settled that "liability may be imposed only for injuries that occurred on defendant's property or in an area under defendant's control where the defendant had a chance to supervise the intoxicated guest." (*Lombart v Chambery*, 19 AD3d 1110, 1111 quoting *D'Amico v Christie*, 71 NY2d 76, 85). As such, the negligence claim asserted against the Barkai defendants must be dismissed.

In the absence of any evidence that the Watnick defendants, or their daughter Sidney Stein, were aware of, or knowingly permitted, defendant Timothy Wolfe's consumption of alcoholic beverages and/or his use of drugs including, but not limited to, marijuana, in the one hour period that the group was present on the backyard patio of the Watnick residence, the claim of negligence asserted against them must fail for the reasons

previously set forth. Although defendants Leslie and Neil Watnik were at home on the night in question, they had retired for the night. Defendant Leslie Watnik attests that she became aware that there was a group of teenagers sitting quietly talking on the patio when she got up to go to the bathroom. Neither she nor her husband, however, observed or were aware of any of the teenagers drinking or using drugs. The record is devoid of any evidence of negligence on the part of the Watnik defendants *vis a vis* defendant Timothy Wolfe.

Defendant Vivian Berkai and the Watnik defendants (Sidney Stein) have met their burden of establishing *prima facie* entitlement to summary judgment dismissing the complaint as to said defendants. (*Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320). No evidence has been introduced in opposition to the respective summary judgment motions to raise a triable issue of fact regarding the failure of those defendants to exercise reasonable care (negligence) or, in the case of Vivian Berkai, a violation of General Obligations Law § 11-100.

With respect to the *in limine* cross motions brought by plaintiff Christopher Corteselli and by the Barkai defendants respectively, the court notes the function of such a motion is to permit a party to obtain a preliminary order before or during trial to exclude the introduction of anticipated inadmissible, immaterial or prejudicial evidence or to limit its use. (*State v Metz*, 241 AD2d 192, 198). Such a motion aids the trial process by enabling the court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of trial. (*Palmieri v Defaria*, 88 F3d 136, 141). Because a ruling on a motion *in limine* is subject to

change as the case unfolds, the ruling constitutes a preliminary determination in preparation for trial. (*Palmieri v Defaria, supra* at p. 139). Generally, a decision on a motion *in limine*, even when made in advance of trial on motion papers, constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission. (*Citlak v Nassau County Medical Center*, 37 AD3d 640; *Winograd v Price*, 21 AD3d 956).

Under the circumstances extant, the court refers the *in limine* motions at bar to the trail judge, so that the issues raised by the motions, including the relevance of the evidence sought to be excluded, might be decided in the appropriate factual context. (*National Union Fire Ins. Co. v L.E. Meyers Co. Group*, 937 F. Supp. 276, 287 [S.D.N.Y. 1996]).

Dated: September 27, 2010

UTE WOLFF LALLY, J.S.C.



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