SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

GABRIEL RAHBAN, an infant by his parent and natural guardian SUSAN LIPSKY and SUSAN LIPSKY, individually,

Plaintiffs,

- against -

JOSEPH HOPKINS, an infant over the age of 14 years by his parent and natural guardian, THERESA HOPKINS,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 14445/09
Motion Seq. No.: 03
Motion Date: 01/24/11

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 3212 (e), for an order granting partial summary judgment dismissing the first, second and fourth affirmative defenses of defendant's Answer and finding the infant-plaintiff was not comparatively negligent as a matter of law; for an order granting partial summary judgment against infant-defendant Joseph Hopkins, finding that said defendant was negligent as a matter of law and that such negligence caused plaintiff's injuries; or alternatively, ordering a unified trial of liability and damages upon the grounds that the nature of infant-plaintiff injuries are probative and have an important bearing as to how the incident

occurred and the negligence of the infant-defendant. Defendant opposes the motion.

This personal injury action arises from an incident on October 22, 2007, that occurred when infant plaintiff and infant defendant, both eighth grade students at the Mattlin Middle School in Plainview, New York, were walking home from football practice after school. During said walk home from school, it is alleged that the infant defendant picked up a broken tree branch, which was approximately five feet in size, and started to swing said branch in a baseball style swing motion when the branch struck infant plaintiff in his right eye area. As a result of being struck with the branch, infant plaintiff sustained a right orbital fracture and retinal dialysis with traumatic macular injury. Said injuries resulted in the loss of usable vision in infant plaintiff's right eye making him legally blind in that eye. On or about July 22, 2009, plaintiff commenced the action by service of a Summons and Verified Complaint. Defendant served a Second Amended Answer on August 27, 2009. In the Second Amended Answer, defendant asserted a first affirmative defense alleging culpable conduct of the plaintiff, a second affirmative defense sounding in assumption of risk and a fourth affirmative defense alleging failure to mitigate damages.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by

tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. S*ee Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Summary judgment is a drastic remedy which should not be granted when there is any doubt about the existence of a triable issue of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, *supra*. It is nevertheless an appropriate tool to weed out meritless claims. *See Lewis v.*

Desmond, 187 A.D.2d 797, 589 N.Y.S.2d 678 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N.A.,* 82 A.D.2d 168, 442 N.Y.S.2d 610 (3d Dept. 1981).

In the instant motion, plaintiff argues that the infant plaintiff was free of any comparative negligence and this matter does not involve any assumption of risk. Plaintiff relies upon the Examination Before Trial ("EBT") testimony of both the infant plaintiff and infant defendant in support of his arguments. Plaintiff contends that the infant plaintiff did not engage in any reckless conduct involving the tree branch and the infant plaintiff was not involved in any sort of back and forth game with the infant defendant. The infant plaintiff was walking ahead of the infant defendant and there was no way the infant plaintiff could have seen the infant defendant begin his baseball type swing. Plaintiff submits that, at the time of the incident, the infant plaintiff was not participating in any game or sport activity to which assumption of risk could be applied. Plaintiff adds that the infant defendant had exclusive control over the tree branch and was the only person swinging said branch in a reckless manner. Plaintiff submits that there is no issue of law or fact concerning the infant plaintiff's alleged comparative negligence and therefore the affirmative defenses set forth in defendant's Answer should be stricken from the Answer.

Plaintiff also argues that the infant defendant is solely responsible for the infliction of injury on the infant plaintiff and it was the infant defendant's negligence that was the sole proximate cause of the infant plaintiff's injuries. Plaintiff submits that the infant defendant knew that the infant plaintiff was in the zone of danger evidenced by the infant defendant telling the infant plaintiff to "keep walking" immediately prior to the infant defendant swinging the tree branch. The infant defendant swung said branch even though the infant plaintiff allegedly had not moved out of the way. Plaintiff contends that there is no question of law or fact concerning

the negligence of defendant and summary judgment in favor of the plaintiff on liability should be granted.

Plaintiff further submits, assuming arguendo that summary judgment on liability is not fully resolved on this motion, that a uniformed trial should be ordered. Plaintiff states that where the nature of a plaintiff's injuries has an important bearing on the question of liability, a unified trial should be held. Plaintiff argues that the defendant claims that the infant plaintiff's injuries were the result of a small six inch piece of branch breaking off a main piece of branch which he had swung against a tree, traveling some distance and striking the infant plaintiff in the eye. Plaintiff contends that the severe eye injury sustained by the infant plaintiff is inconsistent with the version of facts given by defendant. According to plaintiff's doctors, the infant plaintiff's injuries were most likely caused by the follow-through swing of the main portion of the tree branch rather than the result of a six inch piece of ricocheting wood. Plaintiff submits the doctors' opinions have a tremendous ramification upon the liability of the case and that the infant plaintiff's injuries have an important bearing on the question of liability and are probative in determining how the incident occurred.

In opposition to plaintiff's motion, defendant argues that questions of fact exist which preclude the granting of summary judgment in this matter on the liability issue. Defendant claims that the infant plaintiff assumed the risk of the injury herein. Defendant contends that the infant plaintiff told the infant defendant to do it again - meaning to hit another tree with the tree branch. Additionally, defendant states that the infant defendant testified at his EBT that he did not want anything to happen to the infant plaintiff which is why he told him to keep walking. Defendant argues that there is a question of fact as to whether there was an implied assumption of risk by the infant plaintiff in this matter as the infant defendant advised the infant plaintiff to

keep walking but the infant plaintiff did not. Defendant claims that the infant plaintiff was aware of the warning to keep walking prior to the infant defendant swinging the tree branch. Defendant submits that the infant plaintiff's failure to appreciate a known danger would constitute an implied assumption of risk and that "[c]learly the plaintiff in this case had the capacity to understand and fully appreciate the risk of another youngster swinging a branch at a tree which always has the possibility of breaking, or even if it did not break, could have hit him directly in the face."

With respect to plaintiff's request for a joint trial, defendant argues that it is clear that there is no need for a joint trial and that said request is a "blatant tactic to place plaintiff's serious injury before the jury who will be deciding liability in this case." Defendant argues the fact that the plaintiff wishes to have testimony regarding the infant plaintiff's loss of sight during a liability trial is prejudicial to the rights of the defendant and the type of injury sustained by the infant plaintiff is irrelevant to the liability determination in this case. Defendant submits that the plaintiff has failed to explain how the infant plaintiff's injury itself would be probative of how the incident occurred. The issue of liability exists independently from that of the issue of injury in this case and there should not be a unified trial.

Based on the record before it, the Court finds that plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law. First, the Court holds that the doctrine of assumption of risk is not applicable under the circumstances alleged in the instant matter. The infant plaintiff and infant defendant were not involved in an activity that involved an inherent, known and obvious risk that was voluntarily assumed by the infant plaintiff. The infant plaintiff and infant defendant were merely walking home after school - an activity in which there is no inherent, known or obvious risk involved. Walking home from school is not an "injury-

producing activity." Even if the defendant was to argue that playing with a tree branch constituted an "injury-producing activity," the infant plaintiff was not playing with said branch. The infant plaintiff was an innocent bystander when the infant defendant chose to engage in swinging said tree branch. The infant plaintiff did not make a voluntary and informed decision to accept any alleged risks associated with the infant defendant swinging the tree branch. Additionally, the infant defendant allegedly advising the infant plaintiff "to keep walking" does not equate to the infant defendant making the risk of being hit in the face with the tree branch apparent. The infant defendant did not tell the infant defendant to "watch out because I am going to swing this tree branch again." The Court finds defendant's argument "that there was an implied assumption of risk by the infant plaintiff in this matter as the infant defendant advised the infant plaintiff to keep walking but the infant plaintiff did not" is without merit.

The Court finds that there is no triable issue of fact regarding the infant plaintiff's alleged comparative negligence and assumption of risk as no such comparative negligence nor assumption of risk exist. The Court therefore hereby dismisses the first, second and fourth affirmative defenses of defendant's Answer.

Additionally, the Court holds that plaintiff established, *prima facie*, that the defendant is solely responsible for the infliction of injury on plaintiff and that it was the infant defendant's negligence that was the sole proximate cause of the infant plaintiff's injuries.

As previously stated, if a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra.* The Court concludes that defendant's proof is insufficient to raise a triable issue of fact.

The cases cited by defendant in support of his arguments are distinguishable from the case at bar.

Therefore plaintiff' motion, pursuant to CPLR § 3212, for an order granting partial summary judgment against infant-defendant Joseph Hopkins, finding that said defendant was negligent as a matter of law and that such negligence caused plaintiff's injuries is hereby granted.

Plaintiff's request for a joint trial on liability and damages is moot given the Court's instant decision.

The matter shall proceed to trial on the issue of damages. All parties shall appear for a Pre-Trial Conference in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on March 1, 2011 at 9:30 a.m.

This constitutes the Decision and Order of this Court.

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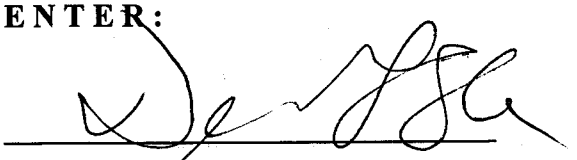

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
February 22, 2011