[* 1]

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

SCAN

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4

NASSAU COUNTY

CAMERON MELVILLE, an infant by his mother and natural guardian, DEBRA MELVILLE,

Plaintiffs,

-against-

IRENE LENTZ AND JOHN F. LENTZ, by IRENE LENTZ, temporary administrator,

Defendants,

IRENE LENTZ,

Third-Party Plaintiff,

-against-

JAKE MELVILLE, an infant by his mother and natural guardian, DEBRA MELVILLE,

Third-Party Defendants.

INDEX NO.: 2047/06

MOTION DATE: 4/28/11

MOTION SEQ. NO.: 003

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....1
Notice of Cross Motion 2
Affirmation in Opposition.....3

Motion by defendants IRENE LENTZ and JOHN F. LENTZ, by IRENE LENTZ, temporary administrator, for summary judgment is determined as follows. Due to administrative error, this motion was erroneously marked disposed in the court's case management system.

This action for personal injuries arises out of an incident which occurred on April 5, 2002 when infant plaintiff Cameron Melville ("CAMERON") was playing tag with his

brother, third-party defendant infant JAKE MELVILLE ("JAKE"), and non-party infant Patrick Reid ("Patrick") in the front yard of property owned by Patrick's grandparents, defendants IRENE and JOHN F. LENTZ. Since the date of the incident, defendant JOHN F. LENTZ ("JOHN") passed away.

CAMERON claims that Patrick ran into and pushed him, causing him serious injuries, including a fractured femur. At the time of the incident, Patrick and JAKE were six years old and CAMERON was approximately three and one-half years old. The Court has issued several Orders in this matter, which for the most part related to discovery motions and issues pertaining to non-party Patrick, which have been resolved. Patrick was deposed in chambers, on July 20, 2010.

In support of their motion for summary judgment, defendants proffer the deposition testimony of CAMERON, JAKE, defendant IRENE LENTZ ("IRENE") and non-parties Patrick, David Reid ("David") and Lorraine Reid ("Lorraine") (Patrick's father and mother). At his deposition conducted on August 31, 2007, when he was nine years old, CAMERON testified that on the date of the incident, he was playing tag with Patrick and CAMERON's brother JAKE, in what CAMERON described was Patrick's front yard. In the game, Patrick was "it" and pushed CAMERON when he was trying to make CAMERON "it". CAMERON testified that before the incident occurred, Patrick's grandfather JOHN, who was in the front yard with the boys, told Patrick to slow down but that Patrick failed to change his speed.

CAMERON's brother, third-party defendant JAKE, testified at his deposition on August 31, 2007 (when he was twelve years old) that he, CAMERON and Patrick were playing tag in the front yard of Patrick's grandparents' house, defendants herein, for about five minutes before the incident. JAKE testified that both defendants were outside and that approximately one minute before the incident occurred, JOHN was located on the stoop of the house, defendant IRENE was near a car in the driveway and that JOHN told Patrick to slow down. JAKE testified however that Patrick failed to do so. JAKE also testified that he saw Patrick "really push [his] brother down and I saw his leg twist and after that I saw him crying loudly."

At his deposition conducted on July 20, 2010, when he was fifteen years old, Patrick testified that JAKE and JAKE's younger brother CAMERON were in defendants' front yard, and were wrestling. At that time, Patrick's grandfather JOHN was in the backyard but went to the front yard upon hearing the commotion "as I [Patrick] was getting him, to break it up." Patrick testified that it was JAKE who attacked CAMERON. Defendant IRENE testified that she was inside the house when CAMERON and JAKE visited but that her husband JOHN was outside. She testified further that she was not

aware of any prior disciplinary problem involving Patrick or any prior incident in which Patrick pushed another child

The deposition testimony of non-party witness Patrick's father, David, reveals that since 2002, Patrick had experienced some problems at school relating to paying attention and completing homework assignments. David also testified Patrick only engaged in pushing behavior with his brother and when "horsing around" with other boys playing games such as cops and robbers. David testified that in 2007, Patrick received a disciplinary referral at school for a fight with another student but that Patrick was in that instance provoked. Patrick's mother, non-party Lorraine, testified that she did not know of any incidents in which Patrick had pushed another child.

Defendants argue that plaintiffs' claim of negligent supervision against them, presumably alleged by plaintiffs to be acting in loco parentis, must be dismissed on grounds that the injury to infant plaintiff occurred during a normal childhood activity of tag which is not inherently dangerous. Defendants contend that infant plaintiff's injury was the result of a sudden spontaneous act which could not have been anticipated. Defendants argue further that there was no evidence on the record that infant non-party Patrick had previously engaged in vicious or violent conduct of which either his parents or his grandparents, the defendants, should have been aware.

"While as a general rule, parents are not liable for the torts of their child, a parent may be held liable, *inter alia*, 'where the parent[s]' negligence consists entirely of his [or her] failure reasonably to restrain the child from vicious conduct imperiling others, when the parent has knowledge of the child's propensity toward such conduct (*internal citations omitted*)." **Rivers v. Murray**, 29 AD3d 884. *See* **Feinerman v. Kaplan**, 290 AD2d 480; **DiCarlo v. City of New York**, 286 AD2d 363. A single prior accident in which a child engaged in similar behavior, is not sufficient to establish a propensity to engage in vicious acts. **Rivers v. Murray**, *supra* at 885. *See* **Mirand v. City of New York**, 84 NY2d 44.

Under the circumstances of this case, the Court finds that defendants have established their *prima facie* entitlement to judgment as a matter of law. Even assuming defendants were acting in loco parentis, there is no proof to support plaintiffs' claim of negligent supervision. The record contains no evidence that non-party infant Patrick had previously engaged in vicious or violent conduct or that defendants were aware of any such conduct. Further, the activity the boys were engaged in was tag, which is a normal childhood activity that is not inherently dangerous. The Court notes that the spontaneous and unanticipated act of Patrick, while he was playing tag with CAMERON and JAKE, could not have been reasonably anticipated. The incident occurred in a short span of

time, and accordingly, there is no evidence that it could not have been prevented even with the most intense supervision. *See generally* **Schleef v. Riverhead Central School District**, 80 AD3d 743; **Paragas v. Comsewogue Union Free School District**, 65 AD3d 1111; **Convey v. City of Rye School District**, 271 AD2d 154, 160.

In opposition, plaintiffs argue that (1) defendants violated their duty to use reasonable care to keep their premises safe; and (2) defendant JOHN violated his duty to properly and adequately supervise the infants present on his property and that plaintiffs do not need to demonstrate Patrick's "vicious propensity." The Court finds that plaintiffs have failed to raise an issue of fact. The record is devoid of any evidence that a defect in defendants' property caused the incident which would support plaintiffs' allegation that defendants failed to use reasonable care to keep their premises safe. Furthermore, the Court finds that under the circumstances of this case, the injury to infant CAMERON does not give rise to a claim for negligent supervision as the act by non-party infant Patrick was the result of a spontaneous act which could not have been anticipated and there was no evidence that Patrick had previously demonstrated a propensity toward violent or vicious conduct. *Cf* **Singh v. Persaud**, 269 AD2d 381.

On the basis of the foregoing, it is

ORDERED, that the motion by defendants IRENE LENTZ and JOHN F. LENTZ, by IRENE LENTZ, temporary administrator, for summary judgment pursuant to **CPLR §3212** dismissing the action against them is **granted** and the action and third-party action are hereby **dismissed**.

This constitutes the Order of the Court.

Dated: June 23, 2011

J.S.C.

ENTERED
JUL 11 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE