

Potucek v Boy Scouts of Am.

2011 NY Slip Op 33130(U)

November 28, 2011

Supreme Court, Nassau County

Docket Number: 020765-09

Judge: Steven M. Jaeger

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

MARTIN POTUCEK, an infant under the age
of fourteen years, by his mother and natural
guardian, ELIZABETH J. GARI, and
ELIZABETH J. GARI, individually,

TRIAL/IAS, PART 43
NASSAU COUNTY
INDEX NO.: 020765-09
XXX

Plaintiffs,

MOTION SUBMISSION
DATE: 10-4-11

-against-

MOTION SEQUENCE
NOS. 1, 2, 3

BOY SCOUTS OF AMERICA, THEODORE
ROOSEVELT COUNCIL INC., MITCHELL
KOPROWSKI, JOLANTA KOPROWSKI,
ANTHONY MINERVA, an infant and ROBERT
C. MINERVA, individually and as parent and
natural guardian of ANTHONY MINERVA,

Defendants.

The following papers read on this motion:

- Notice of Motion, Affirmation, and Exhibits (Mot. Seq. 1) X
- Notice of Motion, Affirmation, and Exhibits (Mot. Seq. 2) X
- Notice of Motion, Affirmation, and Exhibits (Mot. Seq. 3) X
- Affirmation in Reply (Defts. Minerva) X
- Affirmation in Opposition of Defendants' Motion X
- Affirmation in Opposition of Defendants' Motion X
- Affirmation in Opposition of Defendants' Motion X
- Reply Affirmation X
- Reply Affirmation X
- Memorandum of Law (Defts. Koprowski) X
- Memorandum of Law in Support of Motion on Behalf
of Theodore Roosevelt Council, Inc., Boys Scouts of
America X

Motion (seq. no. 1) by the attorneys for defendants Mitchell Koprowski and Jolanta Koprowski for an order pursuant to CPLR 3212 granting summary judgment to the Koprowski defendants dismissing the plaintiff's complaint and all cross-claims against them is granted.

Motion (seq. no. 2) by the attorneys for the infant-defendant Anthony Minerva and defendant Robert C. Minerva, individually and as a parent and natural guardian of Anthony Minerva for an order pursuant to CPLR 3212 granting summary judgment to the Minerva defendants dismissing the plaintiff's claim against them is granted.

Motion (seq. no. 3) by the attorneys for the defendants Theodore Roosevelt Council Inc., Boy Scouts of America (Boy Scouts) for an order pursuant to CPLR 3212 dismissing the complaint as to the Boy Scouts is granted.

This action arose as a result of an accident that is alleged to have occurred on February 9, 2009, when the infant-plaintiff (date of birth February 19, 1998), aged 10 years old attended a Boy Scout meeting at the home of co-defendants Mitchell and Jolanta Koprowski. The Koprowski's 14 year-old son is and has been a member of the Boy Scouts since he was 6 years old. On February 9, 2009, the son who was then 12 years of age, was a scout patrol leader. With the permission of the Koprowskis, their son hosted several Boy Scout patrol meetings

at their home. The meeting that date took about 45 minutes and was held in the son's bedroom. When the meeting was over, the scouts, about 7 in number and all 10 to 12 years of age, would go outside to the backyard and play while they waited for their parents to pick them up. The infant-defendant Martin Potucek (Martin) was allegedly injured when the co-defendant, another Boy Scout named Anthony Minerva, (Anthony) (born September 10, 1997, age 11 at the time of the accident) suddenly yanked him down to the ground.

The boys were engaged in horseplay. Martin went to stand on the patio. At some point, Anthony attempted to pull Martin off of the patio by pulling on his right jacket cuff. Martin stiffened his legs, and then fell to the ground. When asked of his opinion of Anthony, Martin indicated that he did not know him well, but had never observed Anthony acting aggressively towards any other Scouts. His impression of Anthony was "an okay one". There was no bullying (Exhibit E, pgs. 42-45). Anthony testified the boys were all "wrestling", and Martin had moved onto the concrete patio, using it as "base". Anthony asked Martin if he was still playing, but received no answer. Anthony then "pulled" on the plaintiff's jacket sleeve. While he was attempting to pull him back into the game, Martin fell. (Exhibit F, pgs. 16-18). There was no testimony that there had ever been any prior enmity between Martin and Anthony, or that Anthony had any problems with any of the other boys.

The cause of action against the Koprowski defendants is based on the allegation that they were “negligent and careless in that [they] did not properly supervise the defendant Anthony Minerva, at the scout patrol meeting that was held at the premises owned by the defendants, Mitchell and Jolanta Koprowski . . .” (§ 3). The Koprowski defendants assert they were always home when the Boy Scouts met. On the night of the incident they were both in a room immediately adjacent to the backyard. Martin testified that the Koprowskis were in the living room. There was a sliding door “and you could always see in.” (Martin, pg. 39).

Defendant Robert Minerva, the father of Anthony, was not present at any time leading up to or during the accident, but only arrived to pick up Anthony after the incident.

Defendant Theodore Roosevelt Council, Inc., Boy Scouts of America is a non-profit corporation. Martin was a registered youth member of Boy Scout Troop 382. The scouting program is carried out in units run by local community organizations chartered by the Boy Scouts of America. Local organizations apply for a charter from the Boy Scouts of America through their local council.

The Boy Scouts of America is congressionally chartered (36 U.S.C. § 30901 et seq.). The purposes of the organization are “to promote through organization,

and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance and kindred virtues, using the methods that were in common use by boy scouts on June 15, 1916.” (36 U.S.C. § 30902). The Boy Scouts of America is divided into geographic areas known as local councils. Three hundred ninety-eight local councils are chartered in the United States. Local sponsors, such as schools, churches or civic organizations apply for charters from the Boy Scouts of America through their local councils. Local volunteers form a patrol leaders’ council to plan troop activities. *Wilson v United States*, 989 F.2d 953, 959.

The Theodore Roosevelt Council is a local council that does not have supervision or control over the day-to-day activities of a Boy Scout troop or the adult leaders of a troop. During the deposition of co-defendant Robert Minerva, he testified that troop meetings were held in the cafeteria of a local church which is the chartered organization. Infant-plaintiff Martin was a youth member of Cub Pack 469 in 2005 and 2005 (charter organization Bowling Green Elementary School); and a youth member of Boy Scout Troop 382 in 2008 and 2009 (charter organization St. Ignatius Loyola Parish). Defendant Boy Scouts of America alleges it did not operate or supervise the troop activities on the date of the incident.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. *Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404. A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *Alvarez v Prospect Hospital*, 68 NY2d 320; *Winegrad v New York University Medical Center*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133. The defendants have made an adequate *prima facie* show of entitlement to summary judgment.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Friends of Animals, Inc. v Associated Fur Mfgs., Inc.*, 46 NY2d 1065. Conclusory statements are insufficient. *Sofsky v Rosenberg*, 163 AD2d 240, *aff'd* 76 NY2d 927; *Zuckerman v City of New York*, 49 NY2d 557; *see Indig v Finkelstein*, 23 NY2d 728; *Werner v Nelkin*, 206 AD2d 422; *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781, *app. dismissed*. 53 NY2d 1028; *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 AD2d 868, *lv app. denied*. 82 NY2d 660.

The Kopowski Defendants

The plaintiffs argue that the exercise of more adequate supervision by the Koprowskis could have prevented the injury. The manner in which Martin's injury occurred could have happened even if he had been supervised as argued by the plaintiff. When a spontaneous and unintentional accident happens in just a few minutes, no amount of supervision, however intense, can prevent a resulting injury. *See, Tomlinson v Board of Education*, 183 AD2d 1023; *Bellinger v Ballston Spa Central School District*, 57 AD3d 1296. *See also, Lopez v Freeport Union Free School District*, 288 AD2d 355; *Kantor v City of New York*, 251 App. Div. 454. The motion by the attorneys for the Kopowski defendants for an order granting summary judgment dismissing the complaint as to the Kopowski defendants is granted.

Anthony Minerva as an Infant and Robert C. Minerva, individually
and as Parent and Natural Guardian of Anthony Minerva

In support of the motion, the plaintiff's mother argues that she mentioned to the Boy Scouts that games were taking place at the patrol meetings that were rough and that defendant Robert C. Minerva knew or should have known that there was no adult supervision at these troop meetings. Consequently, he should not have permitted his son Anthony to attend these meetings. The plaintiff's

conclusions, expressions of hope or unsubstantiated allegations or assertions are not sufficient to raise a triable issue of fact. *Billordo v E.P. Realty Associates*, 300 AD2d 523. A parent's liability for the actions of his child does not merely arise by virtue of the parental relationship. The parent must have prior knowledge of a known vicious conduct in the child. There is no evidence in the record before this court that Anthony exhibited any "vicious tendencies" before this incident, or that the incident itself was vicious. *See Armour v England et al.*, 210 AD2d 561.

Plaintiffs argue that Martin was "on base" and out of the game in a "safe area". In his deposition, Martin stated that "he [Anthony] grabbed my jacket and it wasn't intentional. It was more of an accident but he grabbed my cuff like trying to get me into the action and I didn't want to do." (Notice of Motion by Minerva, Exhibit E, pg. 27).

In Carillo v Kreckel, 43 AD2d 499, 502-503, the court discussed the negligence of children:

It is recognized in New York that children of different ages play different games which may injure a participant or a spectator.

Applying these principles to the horseshoe throwing involved herein, it is clear that 14 year-old boys will invent and continue to participate in frolics of this nature and will not perceive the dangers which may result. Certainly, infants must abstain from negligent acts and thereby exercise the degree of care to which children of their age, experience, intelligence and ability are

capable. However, unless the frolic chosen is so inherently dangerous that mere participation therein is negligence, the child should only be held liable for an act which was a deviation from the frolic to such an extent that it would put the child on notice that an unreasonable risk of injury was involved to either other participants or spectators (internal citations omitted).

Martin and Anthony were wrestling and horseplaying in the backyard when Anthony tugged on the sleeve of Martin who then slipped, fell and sustained injury. None of the testimony demonstrates negligence on the part of Anthony. The motion by defendants Robert C. Minerva and Anthony Minerva for an order dismissing the complaint as to them is granted.

Boy Scouts of America,
Theodore Roosevelt Council, Inc.

In opposition to the motion by the Boy Scouts, the plaintiff asserts that on one prior occasion she made a complaint to the Scoutmaster of Boy Scout Troop 328 and other parents, about a previous occasion when her son had been tied up. However, Martin was deposed first and he testified that he never mentioned any prior incidents of "rough play" to his parents. (Minerva Notice of Motion, Exhibit E, pgs. 7 & 18). Assuming *argundo*, the court accepts Martin's mother's allegations that she advised the local troop, the claimed prior notice is insufficient to raise a triable issue of fact as to the Theodore Roosevelt Council, since a complaint made to a Scoutmaster of a Boy Scout troop is not notice to the Council.

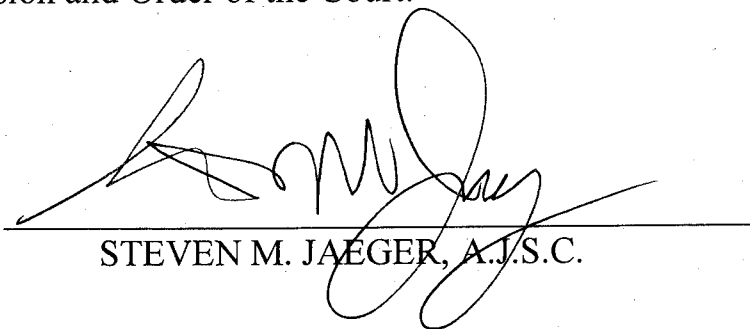
O'Lear v Boy Scouts of America, 33 AD3d 685; *Davis v Shelton*, 33 AD2d 707;
Alessi v Boy Scouts, 247 AD2d 824.

Moreover, and most crucial to the court's consideration is the lack of any documentary evidence that the defendant Boy Scouts in the within action exercised any supervision or control over the day-to-day activities that resulted in the subject accident. The cases cited by the plaintiff can be distinguished. In those cases, the Boy Scouts Council undertook a duty to supervise and control the daily activities that resulted in the injury. *Compare, Riker v Boy Scouts of America, Saratoga County, Inc.*, 8 AD2d 565.

All proceedings under index no. 020765/09 are terminated.

This constitutes the Decision and Order of the Court.

Dated: November 28, 2011



STEVEN M. JAEGER, A.J.S.C.

ENTERED
NOV 30 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE