

Zerniak v Davis

2012 NY Slip Op 30057(U)

January 12, 2012

Supreme Court, Wayne County

Docket Number: 71034

Judge: Dennis M. Kehoe

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WAYNE COUNTY
SUPREME AND COUNTY COURT

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

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SAMANTHA ZERNIAK,
Plaintiff,

-vs-

JEFFREY DAVIS,
Defendant

DECISION
AND
ORDER

Index No. 71034

2010

Woods Oviatt Gilman, LLP
William G. Bauer, Esq., of Counsel
Attorneys for Plaintiff

Rupp, Baase, Pfalzgraf, Cunningham & Coppola, LLC
Alison M.K. Lee, Esq., of Counsel
Attorneys for Defendant

The Defendant Jeffrey Davis has moved by his attorneys for an order granting summary judgment against the Plaintiff Samantha Zerniak in this personal injury action and dismissing her Complaint in its entirety. The Plaintiff has opposed the motion by her attorneys, maintaining that there exist material issues of fact which must await resolution at trial. The Plaintiff has also filed a Cross-Motion, seeking permission to amend the Complaint by adding Morgan Davis and Brock Phelps as Co-Defendants. (As background, the Court notes that this action was originally commenced by Cheryl Zerniak, as parent of Samantha Zerniak; upon reaching the age

of majority, Samantha was substituted as the sole Plaintiff).

The action arises from an incident which occurred on the afternoon of December 26, 2007 at 4935 County Road, Dundee, New York, the residence owned by the Defendant. On that date, the Plaintiff participated in a game involving the use of two paintball guns, with her cousin, Morgan Davis, her boyfriend, Brock Peters, and Morgan's friend, Stacy Draper. Mr. Davis was not at home. During the course of the game, the Plaintiff's right eye was injured.

The Plaintiff's original Complaint sets forth two causes of action against the Defendant: 1) premises liability; and 2) negligent entrustment of a dangerous instrument. The Plaintiff now seeks to amend her Complaint by adding a third cause of action, alleging negligence as to Mr. Davis, as well as the proposed additional defendants, Ms. Davis and Mr. Phelps. The Defendant has moved for summary judgment, dismissing both original causes of action and further dismissing all claims of the Plaintiff, as barred by the doctrine of assumption of the risk. Both parties have submitted memoranda of law in support of their respective positions. However, in her memorandum, the Plaintiff does not address her original argument regarding premises liability, and at the time of oral argument, it

was clear that the Plaintiff has chosen not to pursue this claim. Therefore, the Plaintiff's first cause of action is hereby dismissed.

In her attorney affirmation, counsel for the Plaintiff sets forth portions of the deposition testimony of the Plaintiff, the Defendant and other witnesses to support her account of the events surrounding the incident at issue. On December 26, 2007, at approximately 1:00 P.M., Brock Phelps brought two paintball guns out of Morgan Davis' bedroom. (The Plaintiff had never played paintball before, although she appears to have been familiar with bb guns.) The teens went into the backyard, and Morgan and Stacy proceeded to put on four-wheeler helmets. It appears that no protective eyewear was used (although the Defendant apparently had safety glasses in his shop related to his construction work). After playing for a period of minutes, Stacy was hit twice by Morgan and decided to stop playing. She dropped the gun, and ran into the house, still wearing the helmet. The Plaintiff picked up the gun and shot four rounds at Brock. Morgan then fired six rounds at the Plaintiff. On her sixth shot, a paintball hit the Plaintiff's right eye. The Defendant later arrived home from work and found the Plaintiff lying on the couch. After learning of the incident, the Defendant told Brock to remove the guns from the house. (The

Defendant testified that Morgan subsequently told him that Brock had given her a gun for Christmas; the second gun apparently belonged to Brock.)

The Plaintiff maintains that there is a clear question of fact as to whether the Defendant was aware of his daughter's possession of a paintball gun. In support of her position, the Plaintiff refers to the deposition testimony of Mr. Davis which, she maintains, contains certain inconsistencies regarding his knowledge of the existence of the guns and the use of paintball guns on his property. Based on those alleged inconsistencies, the Plaintiff argues that there are factual issues sufficient for the Plaintiff's claim of negligent entrustment to survive the Defendant's motion for summary judgment. (See, e.g. *Nyhus v Vantino*, 83 AD3d 802 (2nd Dept, 2011); *Kelly v DiCerbo*, 27 AD3d 1082 (4th Dept, 2006)).

On the other hand, counsel for the Defendant maintains that there is no proof whatsoever that the Defendant knew that Brock or Morgan possessed paintball guns on his property before the incident. It is uncontroverted that the Defendant was not at home at the time of the accident. He had never purchased a paintball gun nor is there any evidence that paintball guns had been previously used on his premises.

The only evidence cited by the Plaintiff is an isolated statement in his deposition testimony, which the Defendant maintains is a “mischaracterization” of his testimony.

In regard to a claim for negligent entrustment, it is settled that a parent may owe a duty to third parties “from harm that is clearly foreseeable from an infant child’s improvident use of a dangerous instrument, at least, if not especially, when the parent is aware of and capable of controlling its use.” (*Merle v Baderman*, 305 AD2d 1059; 758 NYS 2d 737 (4th Dept, 2003), citing *Nolechek v Gesuale*, 46 NY2d 332, 1978)). In this instance, the Court agrees with the Defendant that there is no credible evidence of any awareness or control on the part of the Defendant. The Court has reviewed the Defendant’s deposition testimony and finds that the statement relied on by the Plaintiff is quoted out of context. Other than that statement, there is no proof of prior knowledge or foreseeability. Therefore, the Defendant’s second cause of action is also dismissed.

However, the Court will grant the Plaintiff’s Cross-Motion, to the extent of adding Brock Phelps and Morgan Davis as defendants, and asserting a cause of action against them for negligence. The Court finds

that there is no factual basis for a negligence claim against Jeffrey Davis.

The Defendant argues that the Plaintiff's entire claim is barred by the doctrine of assumption of the risk. A defense of assumption of the risk requires proof of the following: (1) the plaintiff's actual or imputed knowledge of the risk; (2) the plaintiff's appreciation of the resultant dangers from the risk; (3) the plaintiff's voluntary acceptance of the known risk; and (4) the injury-causing danger or risk must have been one that the plaintiff assumed. The Defendant argues that these criteria have been met, in that the Plaintiff voluntarily assumed the risk of injury by engaging in a dangerous game, having had the opportunity to observe the potential dangers of participation. As the Court of Appeals stated in Anand v Kapoor, 15 NY3d 946 (2010), "(a) person who chooses to participate in a sport or recreational activity consents to certain risks that are inherent in and arise out of the nature of the sport generally and flow from such participation. A court evaluating the duty of care owed to a plaintiff by a co-participant in sport must therefore consider the risks that the plaintiff assumed and how those assumed risks qualified defendant's duty to him." (Anand at 947). Whether a given participant is aware of and appreciates a particular risk must be assessed against his or her skill, background and


experience.

However, in order to constitute an absolute bar to an action, the Court must find the existence of a **primary** assumption of the risk by the Plaintiff as a matter of law. While the doctrine has been extended from its original application to professional sports to include amateur recreational activities, the Court of Appeals has recently held in Trupia v Lake George Central School District, 14 NY3d 392 (2010) that “the inference of (assumption of the risk) as a ground for exculpation may not be made in (a child’s) case, or for that matter where adults are concerned except in the context of pursuits both unusually risky and beneficial that the defendant has in some nonculpable way enabled.” (emphasis added). (In Pattern Jury Instructions, the Committee suggests that this Decision “casts doubt on the ongoing vitality” of earlier cases. See PJ §2:55). Therefore, while assumption of the risk is certainly a type of “culpable conduct”, that may operate to mitigate a Defendant’s liability in the instant case and reduce the Plaintiff’s recovery, the Plaintiff’s participation in the game, considered in light of all the surrounding circumstances, does not constitute a primary assumption of the risk, so as to bar her action.

Therefore, the Plaintiff’s first and second causes of action are

dismissed. The Plaintiff is directed to file and serve a Supplemental Summons and Amended Complaint, naming Morgan Davis and Brock Phelps as defendants, and stating a cause of action against each of them for negligence. The amended pleadings are to be filed and served within 30 days of the date of this Decision, which constitutes the Order of the Court.

Dated: January 12, 2012.
Lyons, New York

A handwritten signature in cursive script, appearing to read "Dennis M. Kehoe". The signature is written in dark ink and is positioned above a horizontal line.

Honorable Dennis M. Kehoe
Acting Supreme Court Justice