

Flanagan v Wolff

2012 NY Slip Op 30780(U)

February 27, 2012

Supreme Court, Suffolk County

Docket Number: 07-24866

Judge: Joseph C. Pastorella

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 11-28-11
ADJ. DATE 1-4-12
Mot. Seq. # 006 - MG

-----X
JAMES FLANAGAN,

Plaintiff,

- against -

BARON & PAGLIUGH, ESQS.
Attorney for Plaintiff
85 Main Street
Cold Spring Harbor, New York 11724

THOMAS WOLFF, SR. and DIANE WOLFF, as
parents and natural guardians of THOMAS
WOLFF, JR., upon information and belief, an
infant over the age of 14 years and THOMAS
WOLFF, JR., individually, and ROBERT E.
JUVET and TRACEY A. JUVET, as parents and
natural guardians of JAMES JUVET, upon
information and belief, an infant over the age of
14 years and JAMES JUVET, individually,

Defendants.

BELLO & LARKIN
Attorney for Defendants/Third-Party Plaintiffs
Wolff
150 Motor Parkway, Suite 405
Hauppauge, New York 11788

MILBUR MAKRIS PLOUSADIS & SEIDEN
Attorneys for Defendants/Second Third-Party
Plaintiffs Juvet
1000 Woodbury Road, Suite 402
Woodbury, New York 11797 7

-----X
THOMAS WOLFF, SR. and DIANE WOLFF, as
parents and natural guardians of THOMAS
WOLFF, JR., upon information and belief, an
infant over the age of 14 years and THOMAS
WOLFF, JR., individually,

Third-Party Plaintiffs,

- against -

SCHONDEBARE & KORCZ
Attorney for Third-Party Defendant Santorello
3555 Veterans Memorial Highway
Ronkonkoma, New York 11779

CURTIS VASILE, P.C.
Attorney for Third-Party/Second Third-Party
Defendant Chapman
2174 Hewlett Avenue, P.O. Box 801
Merrick, New York 11566

DREW SANTORELLO, MICHAEL CHAPMAN,
CHARLES WOLFE, MARK M. WERNER, JR.,
JAMES SPOONLEY and ALYSSA MORRIS,

Third-Party Defendants.

BAXTER, SMITH, SHAPIRO, P.C.
Attorney for Third-Party/Second Third-Party
Defendant Spoonley
99 North Broadway
Hicksville, New York 11801

OA

ROBERT E. JUVET, TRACEY A. JUVET, and
JAMES JUVET,

Second Third-Party Plaintiffs,

- against -

DREW SANTORELLO, MICHAEL CHAPMAN,
CHARLES WOLFE, MARK M. WERNER, JR.,
JAMES SPOONLEY and ALYSSA MORRIS,

Second Third-Party Defendants.

MCCABE, COLLINS, MCGEOUGH, &
FOWLER, LLP

Attorney for Third-Party/Second Third-
Party Defendant Morris

346 Westbury Avenue, P.O. Box 9000
Carle Place, New York 11514

Upon the following papers numbered 1 to 33 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (006) 1 - 18; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 19-23; 24-28; 29-30; Replying Affidavits and supporting papers 31-32; Other 33; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (006) by defendants, Robert E. Juvet and Tracey A. Juvet, as parents and natural guardians of James Juvet, pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims and counterclaims asserted against them is granted.

In this negligence action, the plaintiff, James Flanagan, asserts that he sustained personal injury when he was struck in his left eye by a frozen paintball pellet fired from a paintball gun operated by either defendant James Juvet or Thomas Wolff, Jr. on September 24, 2005, at the premises located at Forest Road and Stanley Drive in Centereach, New York, causing him to sustain sudden loss of vision, microhyphema, retinal detachment, retinal hemorrhage, vitreous hemorrhage, posterior vitreous separation, reduced central and peripheral vision, and scarring in the central vision of the left eye, requiring surgery. It is asserted that these defendants were careless and should have known under the circumstances that their conduct was dangerous and would cause injury to the plaintiff. Causes of action for negligence, battery, emotional distress, gross negligence, and for punitive damages have been asserted. Although not articulated in the complaint, the plaintiff asserts in the verified bill of particulars that Robert E. Juvet and Tracey A. Juvet were careless, reckless and negligent in failing to exercise the proper degree of control over their son, James Juvet; that they failed to control James Juvet's vicious, vile and disorderly propensities; and were otherwise negligent in causing and permitting, and not preventing, James Juvet's dangerous, negligent, and/or intentional conduct.

This action was commenced against Robert E. Juvet and Tracey A. Juvet as the parents and natural guardians of the then infant plaintiff, James Juvet. In searching the four corners of the complaint, it is determined that a cause of action has not been asserted against Robert E. Juvet and Tracey A. Juvet in their individual capacity. The bill of particulars makes certain allegations against the parents, rendering the complaint inartfully and inadequately drawn. The plaintiff has not moved to amend the complaint. In the event a cause of action can be gleaned against them in their individual capacity, Robert E. Juvet and Tracey A. Juvet seek summary judgment dismissing the complaint, all cross claims, and all counterclaims asserted against them. They contend that pursuant to CPLR 309, they were only conduits to obtaining personal jurisdiction over the then infant defendant, James Juvet and that James Juvet is now over the age of eighteen years. In addition, movants assert that the record does not support that James Juvet had a history of engaging in violent or vicious conduct or that his parents were ever aware of his use of a paintball gun prior to the incident herein.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014 [1981]).

In support of this motion, by way of an amended notice of motion, the moving defendants have submitted, inter alia, an attorney’s affirmation; copies of the summons and complaint, supplemental summons and amended complaint, the moving defendants’ verified answer (with cross claims against Thomas Wolff, Sr. and Diane Wolff as parents and guardians of Thomas Wolff, Jr. and Thomas Wolff, Jr., individually for contribution and/or indemnification and apportionment of damages), the verified answer and amended answer served by Thomas S. Wolff, Sr. and Diane Wolff (with cross claim against Robert E. Juvet and Tracey A. Juvet as parents and natural guardians of James Juvet, and James Juvet, individually for apportionment of damages, contribution and/or indemnification), third-party complaint, third-party answer to third-party complaint on behalf of Alyssa Morris (with cross claim against the Wolff defendants, the Juvet defendants, and defendants Santorello, Chapman, Charles Wolfe, Werner Jr., and Spoonley) third-party answer to third-party complaint on behalf of James Spoonley (with cross claim against the Juvet defendants, and defendants Santorello, Chapman, Charles Wolff, Werner, Jr. and Morris; and counterclaim against Thomas Wolff, Sr. Diane Wolff, and Thomas Wolff, Jr., third-party answer of Michael Chapman (with cross claim against defendants Santorello, Charles Wolff, Werner, Jr, Spoonley and Morris; and counterclaim against the Wolff defendants), third-party answer on behalf of Drew Santorello (with a cross claim against the Wolff and Juvet defendants, and defendants Chapman, Charles Wolfe, Werner, Jr., Spoonley and Morris), second third-party summons and second third-party complaint commenced by the Juvet defendants against defendants Santorello, Chapman, Charles Wolfe, Werner, Jr., Spoonley, and Morris, second third-party answer served by Alyssa Morris (with cross claim against second third-party Juvet defendants and defendants Santorello, Chapman, Charles Wolfe, Werner, Jr., Spoonley), second third-party answer on behalf of defendant Spoonley (with cross claim against the Wolff defendants, and defendants Santorello, Chapman, Charles Wolfe, Werner, Jr., and Morris); second third-party answer on behalf of Michael Chapman (with cross claim asserted against defendants Santorello, Charles Wolfe, Werner, Jr., Spoonley, and Morris and counterclaim against the Juvet defendants), second third-party answer served on behalf of Drew Santorello (with cross claim against the Wolff and Juvet defendants, and defendants Chapman, Charles Wolfe, Werner, Jr., Spoonley, and Morris), second third-party answer to second third-party complaint served on behalf of Alyssa Morris (with cross claim against the Juvet defendants, and defendants Santorello, Chapman, Charles Wolfe, Werner, Jr., and Spoonley), reply to counterclaim, and verified bill of particulars as to the Juvet defendants; signed and certified partial transcript of the examination before trial of James Juvet dated November 7, 2008; and the affidavits of Tracey A. Juvet and Robert E. Juvet.

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In opposing this motion, the plaintiff, James Flanagan, has submitted, an attorney's affirmation; a signed and certified partial copy of the transcript of the examination before trial of Thomas Wolff, Jr. dated March 9, 2011. In support of her partial opposition to the Juvet defendant's motion, Alyssa Morris has submitted, inter alia, an attorney's affirmation; and an unsigned and uncertified transcript of the examination before trial of James Juvet dated April 8, 2011, and Thomas Wolff, Jr. dated March 9, 2011. In partial opposition to this motion, James Spoonley has submitted an attorney's affirmation.

James Juvet testified to the extent that he was born on November 22, 1988, and in September 2005, he was attending Centereach High School. On the date of the incident, James Juvet was under the age of eighteen. Thus, personal jurisdiction was obtained over him by service on his parents and natural guardians, Robert E. Juvet and Tracey A. Juvet.

Robert E. Juvet avers in his supporting affidavit that he is the father and natural guardian of James Juvet, who was sixteen years of age on September 24, 2005. He further avers that at no time prior to this incident was he aware that his son ever used or possessed a paintball gun, and he never provided him with any frozen paintballs. He further avers that his son James never displayed vicious, vile or disorderly propensities and that prior to September 24, 2005, was never involved in any violent incidents or fights; was suspended from school for any disciplinary reasons; and never fired any type of gun or paintball gun at any person.

Tracey A. Juvet avers in her supporting affidavit that she is the mother and natural guardian of James Juvet who was residing with her and her husband on the date of the within incident. She too avers that prior to this incident, she was not aware that her son ever used or possessed a paintball gun, and she never provided him with frozen paintballs. She further avers that her son James never displayed vicious, vile or disorderly propensities and that prior to September 24, 2005, was never involved in any violent incidents or fights; never suspended from school for any disciplinary reasons at any time; and never fired any type of gun or paintball gun at any person.

The moving defendants argue that New York does not recognize a claim for negligent supervision by a parent. "It has long been established that there is no legally cognizable cause of action to recover damages for injuries suffered by a minor child for negligent parental supervision (*see Holodook v Spencer*, 36 NY2d 35, 50 [1974]; *Thurel v Varghese*, 207 AD2d 220 [2d Dept 1995]). The court-created intrafamilial immunity doctrine arose from the desire to preserve family resources and to prevent family discord. As the Court of Appeals so aptly reasoned in *Holodook v Spencer*, supra at 47, '[i]ndeed, if within the wide scope of daily experiences common to the upbringing of a child a parent may be subjected to a suit for damages for each failure to exercise care commensurate with the risk--for each injury caused by inattention, unwise choice or even selfishness--a new and heavy burden will be added to parenthood' " (*Rider v Speaker*, 180 Misc2d 999 [Sup Ct Sullivan County 1999]).

In *Grivas v Grivas* (113 AD2d 264 [2d Dept 1985]), the court stated the defense of intrafamilial immunity was not extended to situations in which the parent breached a duty owed apart from the familial relationship. The parental immunity exception is confined to injuries resulting solely from negligent supervision and is not extended to situations in which the parent breached a duty owed apart from the familial relationships. In *Nolechek v Gesuale* (46 NY2d 332 [1978]), the court stated that "[e]ven third-party tort-feasors are not entitled to contribution from parents for liability resulting in part from negligent supervision of children. When dangerous instruments are involved, however, the

considerations are different". Thus, when a parent negligently permits an infant child to use a dangerous instrument, there is a breach of an established duty to third persons who may be harmed.

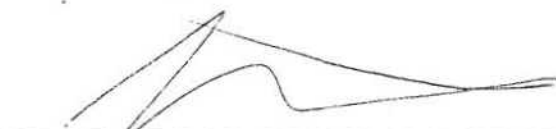
In *Rios v Smith* (95 NY2d 647 [2001]), the Court of Appeals set forth that a parent owes a duty to protect third parties from harm that is clearly foreseeable from a child's improvident use or operation of a dangerous instrument, where such use is found to be subject to the parent's control. In *Panililio v Vergakis* (22 Misc3d 1108A [Sup. Ct. Nassau County 2008] [citations omitted]), the court stated that "[t]he law in New York is settled that a parent cannot be held liable for the negligent supervision of his or her children . . . There are two exceptions to this general rule: (1) a parent may be liable if his or her child has a tendency to engage in vicious conduct and the parent is aware of such tendency . . . and (2) where a parent negligently entrusts a dangerous instrument to his or her child".

Here, the evidentiary proof establishes that neither Robert Juvet nor Tracey Juvet were aware that their son James may have had a tendency to engage in vicious conduct, or that he had ever been involved in any trouble prior to this incident. Moreover, Robert and Tracey Juvet have established prima facie that there can be no liability established against them, or a basis for contribution or indemnification against them, as they were not aware that James fired either a gun or a paintball gun prior to the date of the within incident; that they did not negligently entrust a dangerous instrument to him; and that they had no knowledge that their son had access to, used, or possessed a paintball gun.

The parties opposing the motion have not raised a triable issue of fact as to whether James Juvet engaged in vicious conduct prior to the incident of September 24, 2005, or that his parents were aware of any behavior on his part which would rise to such a level. Although it is argued that James Juvet owned a paintball gun, Thomas Wolff testified that he could not say that everyone else involved in the incident owned a paintball gun. Although he stated that he believed James Juvet owned one or more paintball guns, he had never seen such guns. He added that James Juvet told him paintballing was a hobby, and that James Juvet had gone to Cousins Paintballing, an indoor-outdoor paintball center. This testimony, however, does not raise a factual issue concerning whether or not Robert and/or Tracey Juvet negligently entrusted a dangerous instrument to their son, or that they were even aware that he engaged in paintballing. The assertions of the plaintiff and the co-defendants interposed in opposition to the motion are speculative, and unsupported by evidentiary proof that movants entrusted a paintball gun to their son, gave him permission to own or use a paintball gun, or that they had knowledge of his prior use of a paintball gun.

Accordingly, motion (006) is granted, and the complaint, cross claims, and counterclaims asserted against Robert E. Juvet and Tracey A. Juvet in their individual capacity are dismissed with prejudice; the cross claims asserted against their co-defendants in the answer served by Robert E. Juvet and Tracey A. Juvet are dismissed with prejudice; and that part of the second third-party action, asserted by Robert E. Juvet and Tracey A. Juvet, is dismissed with prejudice.

Dated: February 27, 2012



HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION