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SHORT FORM ORDER

INDEX No. 10-11062
CAL No. 12-02193OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 4-5-13
ADJ. DATE 5-9-13
Mot. Seq. # 002 - MD

KENDALL FRANK, an infant by her father and natural guardian, RUSSELL FRANK and RUSSELL FRANK, individually,

Plaintiffs,

- against -

SOUTHBAY SPORTSPLEX,

Defendant.

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SOUTHBAY SPORTSPLEX,

Third-Party Plaintiff,

- against -

ERIC MAS and LEANDRA MAS,

Third-Party Defendants.

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Upon the following papers numbered 1 to 24 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 14 - 21 ; Replying Affidavits and supporting papers 22 - 23 ; Other memoranda of law 13, 24 ; it is,

ORDERED that this motion by third-party defendant Eric Mas for an Order, pursuant to CPLR 3212, granting summary judgment dismissing the third-party complaint and/or for partial summary judgment, pursuant to CPLR 3212 (g), finding that said party was acting within the scope of his employment at the time of this loss is denied.

KAK

This action was commenced to recover damages, personally and derivatively, for personal injuries allegedly sustained by the infant plaintiff, Kendall Frank ("Kendall"), on October 18, 2009, while at a birthday party held at the sports facility operated by the defendant/third-party plaintiff Southbay Sports Plex, Inc., incorrectly sued herein as Southbay Sportsplex ("Sportsplex"). It is undisputed that Sportsplex owns and operates a facility which includes an indoor field of artificial turf used for multiple sporting activities located at 600 Burman Boulevard, Calverton, New York ("the premises"). It is also undisputed that two portable soccer goals were positioned on the field while Kendall was attending a birthday party at the premises. It appears that Kendall was injured when a soccer goal fell and struck her while she was hanging on its crossbar. The plaintiffs allege, among other things, that Sportsplex is liable for Kendall's injuries based on its failure to properly control, repair and maintain the premises, and its negligence in supervising the participants at the party. After issue was joined, Sportsplex commenced a third-party action against the third-party defendants Eric Mas ("Mas") and Leandra Mas, the parents of the young lady who was celebrating her birthday, and the hosts of the birthday party. Sportsplex alleges that Mas and Leandra Mas were negligent in supervising the participants at the party, and that Mas, who was employed at Sportsplex, failed to obtain signed releases from the parents of the teenagers attending the party.

Mas now moves for summary judgment dismissing the third-party complaint, "and/or granting partial summary judgment, pursuant to CPLR 3212 (g)" on the grounds that he was an employee of Sportsplex at the time of this incident, and the third-party action against him is barred by the antisubrogation doctrine. In support of his motion, Mas submits the pleadings, his deposition, the deposition of Sportsplex, and the deposition of a nonparty witness who was the former general manager at Sportsplex at the time of this incident. The deposition of the nonparty witness is unsigned, and Mas has failed to submit proof that the transcript was forwarded to the witness for his review (*see* CPLR 3116 [a]). However, the Court may consider the unsigned deposition transcript submitted in support of the motion as the parties have not raised any challenges to its accuracy (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; *see also* ***Bennet v Berger***, 283 AD2d 374, 726 NYS2d 22 [1st Dept 2001]; ***Zabari v City of New York***, 242 AD2d 15, 672 NYS2d 332 [1st Dept 1998]), and Sportsplex has submitted a signed copy of said deposition in opposition to the motion.

At his deposition, Mas testified that he was employed at Sportsplex, along with other jobs he held simultaneously, at the time of this incident, and that his supervisors included the general manager, Jack Burns ("Burns"). He stated that his duties at Sportsplex included "help[ing] run the complex itself. I also brought in leagues and teams to participate inside the complex and then supervise that," and that he would create the team schedules and "make sure everything was set up" including lacrosse nets, soccer nets or whatever equipment a league needed. Mas further testified that he was familiar with brackets or pins that were utilized by Sportsplex to keep nets in place, and that the subject bracket was not utilized on the day of this incident. However, he believes that it is safer to not use anything to tie down a goal because it would not give way if it is run into by a player. He indicated that he decided to hold a birthday party for his daughter at Sportsplex on October 18, 2009, and that approximately 15 teenagers aged 14 or 15 years old "planned to attend." He asked Burns for permission to have the party approximately three weeks beforehand and was told that it was okay. Mas further testified that he paid

$200 cash to hold the party, that the reduced rate was based on his agreement to provide supervision for the event, and that Burns did not tell him that releases needed to be signed on behalf of the attendees. He did not recall if it was the custom and practice of Sportsplex to have parents sign releases before a birthday party. On the day of the party, he opened up the facility . . . set up the events, and "basically organized the entire event," and he had his wife, Leandra Mas, and his father there to help supervise the event. He indicated that he told Burns that there would be approximately 15 people at the party, and that Burns told him that using his wife and father to supervise the party was sufficient. At the party, the first event was a "pick-up" soccer game, followed by a kickball game. As the kickball game was winding up, he announced that he was going upstairs to set up for pizza and cake. At that time, his wife was getting equipment out of a little room near the field. While he was upstairs, he could observe the field through a glass partition. He observed two girls hanging on one of the two soccer goals, banged on the partition to get the attention of his 16-year-old son who was at the party, and indicated to his son to tell the girls to get off of the goal. He indicated that he heard his son yell for the girls to get off the goal, and that Kendall's accident happened approximately 15 to 20 minutes thereafter. Mas further testified that this was the second time that the girls had been told to get off of the soccer goal. He stated that, at the time of Kendall's accident, his wife was approximately 50 feet from Kendall, and his father was 100 feet or the "length of the complex" away. He indicated that he had never supervised a birthday party at Sportsplex prior to the date of this incident.

Douglas Dey was deposed on May 8, 2012, and testified that he is the owner of Sportsplex. He indicated that Burns was the general manager of the facility at the time of this incident, that whoever opens up the facility for the day is considered the manager on duty, and that Mas, among others, was a manager of the company. He stated that "it was a perk for employees if they wanted to have their child's birthday party" at Sportsplex without paying a fee, that it was permitted if it did not conflict with a "paying schedule customer," and that he gave Burns the authority to grant permission to Mas to hold the subject party. Dey further testified that, if an employee was the host of a free party, it was not considered a Sportsplex function, and that employee was responsible to decide the level of supervision needed and to hire the necessary people. He indicated that participants at birthday parties were required to sign "a standard release form or waiver," and that the manager on duty was responsible to ensure that the forms were signed.

At his deposition, Burns testified that he was the general manager at Sportsplex from 2006 to 2010, that Mas was a manager at the time of this incident, and that he gave Mas permission to hold the subject birthday party. He stated that he reviewed the procedures for holding a birthday party with Mas, told him that waivers were required, and advised him that he and his wife should not "leave the kids alone." He indicated that Mas was the only Sportsplex employee at the party, that a manager had to be in the building for any event, and that a manager is not supposed to leave the field during a party if a game is being played. Burns further testified that Mas called him after this incident and told him that he was upstairs when it occurred, and that his wife was in the hallway at the time. He stated that Mas did not pay for the use of the facility for this party, that non-employees of Sportsplex are not considered supervising adults of participants, and that he knew the Mas and his wife were the only adults present at the birthday party. He acknowledged that brackets and pins are available to hold the soccer goals in place, and that it is obvious that they were not used because the subject goal fell over and, when he

inspected them after the incident, the brackets were not broken. However, he did not know if the brackets would prevent a goal from falling over as he believes that they are used to prevent the goal from shifting to the left or right during play. Burns further testified that he does not believe that Mas obtained any waivers from the participants at the party because he did not remember filing them.

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 issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

Here, Mas has failed to establish his entitlement to summary judgment dismissing the third-party complaint. There a multiple issues of fact including, but not limited to, whether Mas provided adequate supervision of the participants or obtained the relevant waivers if they were required, which preclude summary judgement herein. Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

The Court now turns to that branch of Mas' motion which seeks summary judgment on the grounds that he was an employee of Sportsplex at the time of this incident, and the third-party action against him is barred by the antisubrogation doctrine. Pursuant to the common-law antisubrogation rule, an insurer "has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered" (***North Star Reins. Corp. v Continental Ins. Co.***, 82 NY2d 281, 294-295, 604 NYS2d 510 [1993]; ***Romano v Whitehall Props., LLC***, 59 AD3d 697, 873 NYS2d 745 [2d Dept 2009]; ***Motors Ins. Corp. v Africk***, 55 AD3d 571, 865 NYS2d 618 [2d Dept 2008]; *see also* ***Pennsylvania Gen. Ins. Co. v Austin Powder Co.***, 68 NY2d 465, 510 NYS2d 67 [1986]). Underlying this rule are two public policy concerns which have been expressly cited by the Court of Appeals in enunciating the rule: (1) an insurer should not be able to pass its loss to its own insured and thus avoid the coverage which its insured had purchased; and (2) an insurer should not be placed in a situation where there exists a potential conflict of interest, such as where the insurer could "fashion the litigation so as to minimize its liability", thereby possibly effecting the insurer's incentive to provide a vigorous defense for one of its insureds (***North Star Reins. Corp. v Continental Ins. Co.***, 82 NY2d at 296; ***Pennsylvania Gen. Ins. Co. v. Austin Powder Co.***, 68 NY2d at 471-472; *see also* ***Jefferson Ins. Co. of N.Y. v. Travelers Indem. Co.***, 92 NY2d 363, 681 NYS2d 208 [1998]).

Thus, the critical issues herein are whether Mas was an employee during the time that he hosted the birthday party for his daughter, and whether Mas was thereby an insured under the liability insurance

policy issued to Sportsplex and in effect at the time of this incident. It is well-settled that employers are vicariously liable for the torts of their employees under the theory of respondeat superior if the acts were committed while the employee was acting within the scope of his or her employment and in furtherance of the employer's business (*see* ***Riviello v Waldron***, 47 NY2d 297, 418 NYS2d 300 [1979]; ***Xin Tang Wu v Ng***, 70 AD3d 818, 894 NYS2d 141 [2d Dept 2010]; ***Carnegie v J.P. Philips, Inc.***, 28 AD3d 599, 815 NYS2d 107 [2d Dept 2006]; ***Elmore v City of New York***, 15 AD3d 334, 790 NYS2d 462 [2d Dept 2005]; ***Oliva v City of New York***, 297 AD2d 789, 748 NYS2d 164 [2d Dept 2002]). However, the employer will bear no vicarious liability where the employee committed the tort for personal motives unrelated to the furtherance of the employer's business (*see* ***White v Alkoutayni***, 18 AD3d 540, 794 NYS2d 667 [2d Dept 2005]; ***Brancato v Dee & Dee Purch.***, 296 AD2d 518, 745 NYS2d 564 [2d Dept 2002]).

Whether an employee was acting in furtherance of his employer's interest, or was simply engaged in a deviation from the scope of employment for purely personal reasons, is heavily dependent on the facts of each case and will depend upon consideration of what the employee was doing and why, when and where and how he was doing it (*see* ***Douglas v Hugerich***, 70 AD2d 755, 416 NYS2d 902 [3d Dept 1979]; ***Makoske v Lombardy***, 47 AD2d 284, 366 NYS2d 475 [3d Dept1975], *affd* 39 NY2d 773, 385 NYS2d 31 [1976]). Such a determination often turns on a decision of whether the employee's activity was incidental to the employer's business or was wholly separate from it (*see* ***Makoske v Lombardy***, *id.*). The question of whether a particular act was within the scope of employment is ordinarily one for the jury since it is heavily dependent upon such factual considerations (*see* ***Riviello v Waldron***, *supra*; ***Petrescu v College Racquet Club***, 40 AD3d 947, 838 NYS2d 574 [2d Dept 2007]; ***White v Alkoutayni***, *supra*; ***Piquette v City of New York***, 4 AD3d 402, 771 NYS2d 365 [2d Dept 2004]; ***Graham v City of New York***, 2 AD3d 678, 770 NYS2d 92 [2d Dept 2003]).

Here, Mas has failed to establish his entitlement to summary judgment on the ground that he was an employee of Sportsplex at the time of this incident. There are multiple issues of fact regarding the issue including whether he paid for the event, whether the party was for his personal convenience, and whether the party was necessary or incidental to the business of Sportsplex. These issues of fact, and others, preclude the issuance of summary judgment herein. Thus, the Court need not address the issue whether Mas was an insured pursuant to the liability insurance policy issued to Sportsplex and in effect at the time of this incident. Accordingly, that branch of Mas' motion which seeks to dismiss the third-party complaint against him on the ground that it is barred by the antisubrogation doctrine is denied, and the motion is denied in its entirety.

Dated: July 12, 2013

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION