

Kennedy v Riordan

2013 NY Slip Op 33672(U)

February 6, 2013

Supreme Court, Ulster County

Docket Number: 10-3843

Judge: Henry F. Zwack

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ULSTER

ORIGINAL

TABETHA KENNEDY,

Plaintiff,

-against-

THOMAS RIORDAN AND PAUL DONAHUE,

Defendants.

THOMAS RIORDAN,

Third-Party Plaintiff,

-against-

PAUL DONOHUE,

Third-Party Defendant.

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Nina Postupack
Ulster County Clerk

All Purpose Term
Hon. Henry F. Zwack, Acting Supreme Court Justice Presiding
RJ: 55-10-02203 Index No. 10-3843

Appearances: ✓ Rutberg Basso Personal Injury Law
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DECISION/ORDER

Zwack, J.:

Plaintiff Tabetha Kennedy has moved for summary judgment on the issue of liability against defendant Thomas Riordan in this in this personal injury case. Defendant Paul Donohue has cross-moved for an order dismissing the first party complaint against him on the basis that neither plaintiff nor defendant Thomas Riordan has established any liability on his part for plaintiff's injuries, and for that same reason, for a summary judgment in the third party action.

Plaintiff alleges that on October 31, 2008, defendant Thomas Riordan negligently shot her in the eye with a BB gun, causing injuries and damages. Plaintiff amended her original complaint to add a cause of action against Paul Donohue, alleging that he negligently purchased and supplied his infant son with the BB gun, in violation of Penal Law 265.05, and it was this gun that caused her injuries. In addition to a violation of the penal law, plaintiff also alleges that defendant Donohue negligently failed to supervise his son.

In his notice of cross-motion, defendant Donohue asserts that plaintiff can offer no proof on her causes of action against him, as his son Paul Donohue was in fact the purchaser and owner of the BB gun that injured her. Both defendant Donohue and his wife testified that their son Paul, who was of legal age at the time of the accident, owned the gun, and that

their younger son Ian had no interest in guns. Their son Paul testified at his own deposition that it was his BB gun which he had left at the defendant Riordan's home, the last time they were shooting together. Plaintiff testified that the gun that shot her in the eye belonged to her boyfriend Paul (deposition transcript of Tabettha Kennedy, page 35, lines 6-14).

Landowners have a duty to control the conduct of third persons on their premises when they have the opportunity and are reasonably aware of the need for control (*D'Amico v. Christie*, 71 NY2d 76). The inquiry distills to whether a defendant should have been aware of the risk of harm to the plaintiff or the threat of harm posed by the other guests, because without awareness there is no duty (*Ahlers v. Wildermuth*, 70 AD3d 1154 [3d Dept 2010]).

Defendant Donohue has established his entitlement to a judgment dismissing the complaint (*Winegard v. New York University Med. Ctr.*, 64 NY2d 851). In opposition, Plaintiff and third party plaintiff have submitted no opposition. It is well settled that once a defendant has established its entitlement to summary judgment, the burden shifts to plaintiff to demonstrate by admissible evidence the existence of a factual issue (*Zuckerman v. City of New York*, 49 NY 2d 557). The opposing party must come forward with proof in evidentiary form to demonstrate a triable issue of fact (*Bradt v. John Hancock Mutual Life Ins. Co.*, 98 AD2d 866 [3d Dept 1983]).

Plaintiff has presented no proof in evidentiary form that would raise a question of material fact. The Court does not find that defendant Paul Donohue had any liability for plaintiff's accident, and the complaint is dismissed against him.

Plaintiff's motion for an order granting her summary judgment on the issue of defendant Thomas Riordan's liability for her eye injury is granted as well. Defendant Riordan offered no opposition to the motion, but notwithstanding the same, the testimony of both plaintiff and defendant Riordan are consistent and that he shot plaintiff in the face with a BB gun. Riordan testified that he did not look, he just shot at the opening door. Although the parties testimony is radically different as to what transpired immediately before the shooting, it is unequivocal that defendant Riordan shot a loaded BB gun in plaintiff's direction and injured her.

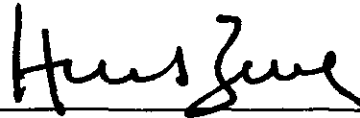
Accordingly, it is

ORDERED that defendant Paul Dohohue's motion for summary judgment dismissing the complaint against him is granted, and it is further

ORDERED that plaintiff Tabetha Kennedy's motion for partial summary judgment as to the liability of defendant Thomas Riordan is granted.

This constitutes the Decision and Order of the Court. This original Decision and Order is returned to the attorneys for the plaintiff. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

Dated: February 6, 2013
Troy, New York



Henry F. Zwack
Acting Supreme Court Justice

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Ulster County Clerk

Papers Considered:

1. Notice of Motion dated December 20, 2012; Affirmation in Support of Motion of Luke S. Malamood, Esq., dated December 20, 2012; together with Exhibits "A" through "H";
2. Notice of Cross Motion dated January 9, 2013; Affirmation in Support of Daniel E. O'Neill, Esq., dated January 9, 2013, together with Exhibits "A" through "G";
3. Affirmation of Betsy N. Garrison, Esq. dated April 12, 2012;
4. Notice of Cross Motion dated April 11, 2012; Affirmation in Support and in Opposition of Daniel E. O'Neill, Esq. dated April 11, 2012; together with Exhibit "A".