

Stemke v Mastrogiacomo

2014 NY Slip Op 30504(U)

February 26, 2014

Supreme Court, Suffolk County

Docket Number: 11-10634

Judge: Peter H. Mayer

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SHORT FORM ORDER

INDEX No. 11-10634CAL No. 13-00352OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 7-22-13ADJ. DATE 9-17-13

Mot. Seq. # 004 - MG

005 - MD

006 - MG

-----X
WARREN STEMKE, as Father and Natural
Guardian of BRIAN STEMKE, an infant under
the age of eighteen (18) yeas and WARREN
STEMKE, Individually,

Plaintiffs,

- against -

CAMPBELL MASTROGIACOMO an infant
under the age of eighteen (18) years by his
Parents and Natural Guardians, CHERYL
MASTROGIACOMO and MICHAEL
MASTROGIACOMO, CHERYL
MASTROGIACOMO, MICHAEL
MASTROGIACOMO, MIDDLE COUNTRY
BOYS LACROSSE CLUB, INC., SUFFOLK
COUNTY POLICE ATHLETIC LEAGUE, INC.,
ROGER TOBIAS, WORLD GYM, and PARISI
SPEED SCHOOL,

Defendants.
-----X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants World Gym & Parisi Speed School, dated June 20, 2013, and supporting papers (including Memorandum of Law dated ___); Notice of Motion/Order to Show Cause by the defendants Middle Country Boys Lacrosse Club, Inc., Suffolk Police Athletic League, Inc. & Roger Tobias, dated June 21, 2013, and supporting papers (including Memorandum of Law dated ___); Notice of Motion /Order to Show Cause by the defendants Cheryl & Michael Mastrogiacomo, dated July 12, 2013, and supporting papers (including Memorandum of Law dated ___); (2) Affirmation in Opposition by the defendants World Gym & Parisi Speed School, dated August 12, 2013, and supporting papers; Affirmation in Opposition by the plaintiffs, dated September 6, 2013, and supporting papers;

(3) Reply Affirmation by the defendants World Gym & Parisi Speed School, dated September 12, 2013, and supporting papers; Reply Affirmation by the defendants Middle Country Boys Lacrosse Club, Inc., Suffolk Police Athletic League, Inc. & Roger Tobias, dated September 16, 2013, and supporting papers; (4) Other Memorandum of Law (and after hearing counsels' oral arguments in support of and opposed to the motion); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (#004) by defendants Middle Country Boys Lacrosse Club, Inc., Suffolk County Police Athletic League, Inc., and Roger Tobias, the motion (#005) by defendants Setauket Country Club Ltd and Parisi Speed School, and the motion (#006) by defendants Cheryl Mastrogiacomo and Michael Mastrogiacomo are consolidated for the purposes of this determination; and it is

ORDERED that the motion (#004) by defendants Middle Country Boys Lacrosse Club, Inc., Suffolk County Police Athletic League, Inc., and Roger Tobias for summary judgment dismissing the complaint against them is granted; and it is

ORDERED that the motion (#005) by defendants Setauket Country Club Ltd and Parisi Speed School for summary judgment dismissing the complaint against them is denied; and it is further

ORDERED that the motion (#006) by defendants Cheryl Mastrogiacomo and Michael Mastrogiacomo for summary judgment dismissing the complaint against them is granted.

On November 20, 2010, infant plaintiff Brian Stemke, who at that time was 12 years old and a member of a lacrosse team run by defendant Middle Country Boys Lacrosse Club, Inc., was injured while attending a training program run by defendant Parisi Speed School at a facility owned by defendant Setauket Country Club, Ltd, d/b/a World Gym Setauket, when he collided with infant defendant Campbell Mastrogiacomo and fell to the floor. Infant plaintiff's father, plaintiff Warren Stemke, suing individually and on behalf of his son, commenced this action against defendants, alleging they failed to provide adequate supervision of infant plaintiff and the other participants in the training session.

Defendants Middle Country Boys Lacrosse Club, Inc., Suffolk County Police Athletic League, Inc., and Roger Tobias (hereinafter collectively referred to as the Lacrosse Club defendants) now move for summary judgment dismissing the complaint against them, arguing that they had no duty to supervise infant plaintiff or Campbell Mastrogiacomo at the time and place of the subject incident, and that the alleged inadequate supervision was not the proximate cause of infant plaintiff's injuries. They also argue that the Volunteer Protection Act shields defendant Roger Tobias, coach of the Middle Country Boys Lacrosse team, from personal liability. In support of their motion, the Lacrosse Club defendants submit copies of the pleadings, transcripts of the parties' deposition testimony, and an affidavit of Michael Harvey.

Defendants Setauket Country Club Ltd and Parisi Speed School (hereinafter collectively referred to as the World Gym defendants) move for summary judgment dismissing the complaint and all cross claims against them, arguing that the actions of Campbell Mastrogiacomo were unforeseeable. In support of their motion, they submit copies of the pleadings and transcripts of the parties' deposition testimony.

Defendants Cheryl Mastrogiacomo and Michael Mastrogiacomo (hereinafter collectively referred to as the Mastrogiacomo defendants) move for summary judgment dismissing the complaint against them on the grounds that they had no knowledge of any propensity on the part of their son, infant defendant Campbell Mastrogiacomo, to engage in conduct which could be deemed "vicious" or dangerous to others. In support of their motion, they submit copies of the pleadings and transcripts of the deposition testimony

of Cheryl Mastrogiacomo and Campbell Mastrogiacomo.

Plaintiffs oppose defendants' motions, arguing that triable issues of fact exist as to the adequacy and the quality of the supervision prior to the incident. As to the Mastrogiacomo's motion, plaintiffs also argue that it is untimely. The World Gym defendants partially oppose the motion by the Lacrosse Club defendants, arguing that they cannot be liable for infant plaintiff's injuries as they had no notice of the unforeseeable actions of Campbell Mastrogiacomo.

The affidavit of Michael Harvey, a Suffolk County Police Officer and Police Coordinator of the Police Coordinator of the Suffolk County Police Athletic League's (PAL) lacrosse program, states that the PAL is a not-for-profit corporation which, among other things, supports juvenile crime prevention and promotes recreational sports programs for minors throughout Suffolk County. It states that the PAL does not organize, schedule, supervise, manage or run any clinics or training sessions for players in its lacrosse league at Parisi Speed School or World Gym Setauket. It states that the subject training session at Parisi Speed School and the lacrosse practice held by Tobias for the lacrosse players affiliated with the Middle Country lacrosse program was arranged independently by Middle Country Boys Lacrosse Club. It further states that no member of the PAL was present for the offseason lacrosse workouts or practices that were held by Tobias on the date of the incident.

At his examination before trial, Tobias testified that he was a volunteer lacrosse coach for the Middle Country Boys Lacrosse Club, which is a town league that is a part of the Suffolk County Police Athletic League. He testified that he organized a training session with Parisi Speed School at World Gym Setauket for the players on the lacrosse team, including players who would be joining the team for the upcoming season. He explained that Parisi Speed School is a training center for speed and agility, where the participants do exercises and work on running techniques. Tobias testified that he attended the training session, as his son was on the lacrosse team, and that some of the other parents stayed to observe the training session. He testified that he observed the children "messing around," bouncing three-foot wide, light-weight yoga balls. He testified that he told the children to stop bouncing the balls because the training session had just begun and the training did not involve use of the yoga balls. He testified that he did not observe the incident, but learned that infant plaintiff was injured when his mother came to pick him up. Tobias testified that he is not aware of any behavioral issues involving Campbell Mastrogiacomo, and that Campbell's father was present at the training session.

At his examination before trial, infant plaintiff testified that on the day of the incident, he was dropped off by his mother at World Gym Setauket for training in the Parisi Speed School. He testified that he was waiting on the gym floor for the training session to begin with about 20 other boys when Campbell Mastrogiacomo sprinted towards him and pushed him, causing him to fall. Infant plaintiff explained that he was holding a yoga ball, intending to return it to a bin, when Campbell collided with the ball that he was holding. Infant plaintiff testified that there were no adults in the room at the time of the incident, and that the trainer had not arrived yet.

At his examination before trial, Campbell Mastrogiacomo testified that he was waiting with other members of the lacrosse team for the training session to begin at Parisi Speed School when the incident occurred. He testified that all the children waiting there were running around kicking and throwing the yoga balls; that the yoga balls were just "flying everywhere"; and that no one told them to stop. He testified

that some of the children were playing catch with the yoga balls and some were throwing them at each other. He testified that he observed infant plaintiff playing with the yoga balls. Campbell Mastrogiacomo testified that he was trying to avoid being hit by a yoga ball when he ran into infant plaintiff, causing both of them to fall. He further testified that he did not observe infant plaintiff immediately prior to the accident, and that he accidentally ran into him. He testified that in the 20 minutes that he was waiting for the training session to begin, he did not observe any employees or trainers from Parisi Speed School at the facility, but that there were five or six parents present, including Tobias.

At his examination before trial, Tom Jaklitsch, general manager of World Gym Setauket, testified that Parisi Speed School is a franchise that World Gym Setauket purchased, which is designed to instruct athletes to improve their speed, agility and strength. He testified that at the time of the incident, Michael Strockbine, the program director, would run the Parisi Speed School training sessions. He testified that Strockbine is no longer employed by World Gym Setauket.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]; *Engelhart v County of Orange*, 16 AD3d 369, 790 NYS2d 704 [2d Dept], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). A duty of reasonable care owed by the tortfeasor to the plaintiff is essential to any recovery in negligence (*Eisman v State*, 70 NY2d 175, 187, 518 NYS2d 608 [1987]; *see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120 [2002]; *Pulka v Edelman*, *supra*). Although juries determine whether and to what extent a particular duty was breached, it is for the courts to decide in the first instance whether any duty exists and, if so, the scope of such duty (*Church v Callanan Indus.*, 99 NY2d 104, 110-111, 752 NYS2d 254 [2002]; *Darby v Compagnie Natl. Air France*, 96 NY2d 343, 347, 728 NYS2d 731 [2001]; *Waters v New York City Hous. Auth.*, 69 NY2d 225, 229, 513 NYS2d 356 [1987]). Courts traditionally “fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability” (*Palka v Servicemaster Management Servs. Corp.*, 83 NY2d 579, 586, 611 NYS2d 817 [1994]; *see Tagle v Jakob*, 97 NY2d 165, 737 NYS2d 331 [2001]).

Enacted to provide volunteers serving nonprofit organizations and government entities with “certain protections from liability abuses” (42 USC § 14501 [b]), the federal Volunteer Protection Act immunizes

individuals who perform services for a not-for-profit corporation and do not receive compensation exceeding \$500 per year from liability for harm they caused in the scope of their duties, provided the harm was not caused by “willful or criminal misconduct, gross negligence, reckless misconduct or a flagrant indifference to the rights or safety of the individual harmed by the volunteer” (42 USC § 14503 [a][3]). Here, the evidence submitted in support of the motion shows Tobias was an unpaid volunteer for the Middle Country Boys Lacrosse Club at the time the incident occurred.

The Lacrosse defendants contend that PAL, Middle Country Boys Lacrosse Club, and Tobias owe no duty to supervise infant plaintiff, as the incident occurred inside the World Gym Setauket facility and involved infant plaintiff and defendant Campbell Mastrogiacomo, who were there to participate in a training session given by Parisi Speed School. According to the affidavit of Harvey, the PAL did not organize or schedule the training session at the Parisi school, and no PAL members were present at the time of the incident.

Here, Tobias, the coach of Middle Country Boys Lacrosse Club, organized and scheduled the training session for the lacrosse club, and was present at the facility at the time of the incident. However, while members of the lacrosse club were invited to the training session by Tobias, the lacrosse club had no control over training or supervision of the members at the time of the incident, and thus had no duty to infant plaintiff (*see Mercer by Mercer v City of New York*, 255 AD2d 368, 679 NYS2d 694 [2d Dept 1998]; *Mongello v Davos Ski Resort*, 224 AD2d 502, 638 NYS2d 166 [2d Dept 1996]). In opposition, plaintiffs failed to raise a triable issue of fact as to whether the Lacrosse defendants owed a duty to infant plaintiff. Plaintiffs’ counsel fails to assert any specific arguments in opposition to the Lacrosse defendants, and merely mentions in a footnote that a question of fact exists as to whether Tobias was operating within the scope of a volunteer, and thus whether the Volunteer Protection Act applies. Accordingly, the motion for summary judgment dismissing the complaint by the Lacrosse Club defendants is granted.

The motion for summary judgment by the World Gym defendants, however, is denied. The World Gym defendants, as an owner or tenant in possession of real property who holds their property open to the public, have a general duty to maintain it in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]; *Kimen v False Alarm, Ltd.*, 69 AD3d 579, 893 NYS2d 158 [2d Dept 2010]; *Boderick v R.Y. Mgmt. Co.*, 71 AD3d 144, 897 NYS2d 1 [1st Dept 2009]; *Meyer v Tyner*, 273 AD2d 364, 709 NYS2d 618 [2001]). Significantly, the World Gym defendants failed to submit sufficient evidence from a party with first hand knowledge of the supervision provided to the participants of the training session. Moreover, the contention that the actions of Campbell Mastrogiacomo were sudden and abrupt is without merit, as his testimony reveals that the children were running around and throwing the yoga balls for approximately 20 minutes before the accident. Thus, World Gym failed to establish a prima facie case that the accident occurred so suddenly and in such a short span of time that no level of supervision could have prevented it (*see Oliverio v Lawrence Pub. Schools*, 23 AD3d 633, 805 NYS2d 638 [2d Dept 2005]; *Douglas v John Hus Moravian Church of Brooklyn, Inc.*, 8 AD3d 327, 778 NYS2d 77 [2d Dept 2004]; *c.f. Lopez v Freeport Union Free School Dist.*, 288 AD2d 355, 734 NYS2d 97 [2d Dept 2001]). A triable issue of fact also exists as to whether the World Gym defendants were negligent in leaving the yoga balls out in the area where the children were waiting, which presented a danger of improper use, and in failing to have an adult present to supervise the children. Accordingly, the motion by the World Gym defendants for summary judgment dismissing the complaint against them is denied.

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With regard to the motion for summary judgment by the Mastrogiacomo defendants, parents have an obligation to supervise their children (*Holodook v Spencer*, 36 NY2d 35, 45, 364 NYS2d 859 [1974]), and may be held liable to a third-party for injury caused by an infant child's improvident use of a dangerous instrument if they entrusted the child with such dangerous instrument (see *Holodook v Spencer*, 36 NY2d 35, 364 NYS2d 859; *Nolechek v Gesuale*, 46 NY2d 332, 413 NYS2d 340 [1978]). Parents also may be held liable for the torts of their infant child if they negligently failed to restrain the child from committing a vicious act, if they had knowledge that the child had a propensity to engage in violent or vicious conduct (see *Rivers v Murray*, 29 AD3d 884, 815 NYS2d 708 [2d Dept 2006]; *Armour v England*, 210 AD2d 561, 619 NYS2d 807 [3d Dept 1994]; *Steinberg v Cauchois*, 249 AD 518, 293 NYS2d 147 [2d Dept 1937]). Evidence of a single incident of violence involving the infant child, however, is not sufficient to establish that the child had a propensity to engage in vicious conduct (see *Davies v Incorporated Vil. of E. Rockaway*, 272 AD2d 503, 708 NYS2d 147 [2d Dept 2000]; *Armour v England*, *supra*).

Initially, the Court notes that while the Mastrogiacomo defendants' motion for summary judgment was untimely, having been made more than 120 days after the filing of the note of issue in this action, an untimely motion for summary judgment may nevertheless be considered as long as it involves issues related to a timely pending summary judgment motion (see CPLR 3212 [a]; *James v Jamie Towers Hous. Co.*, 294 AD2d 268, 743 NYS2d 85 [2002], *affd* 99 NY2d 639, 760 NYS2d 718 [1st Dept 2003]; see also, *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 793 NYS2d 176 [2d Dept 2005]). Under the instant circumstances the issues raised by the Mastrogiacomo defendants' untimely motion are already properly before the Court and thus, the nearly identical nature of the grounds may provide the requisite good cause to review the untimely motion on the merits.

Here, there is no evidence in the record that defendants Cheryl Mastrogiacomo and Michael Mastrogiacomo had knowledge prior to the subject incident that their son had a propensity to engage in vicious conduct. The testimony of Cheryl Mastrogiacomo reveals that she was aware of an incident where Campbell pulled the pants of another student down in the cafeteria, and an incident when he was in the fourth grade where a child was injured while they were "horseplaying." However, those incidents are insufficient to establish that Campbell had a tendency to engage in vicious conduct which might endanger a third-party (see *Rivers v Murray*, *supra*; *Armour v England*, *supra*). In opposition, plaintiffs' merely argue that the motion by Mastrogiacomo defendants was untimely. Accordingly, the motion by the Mastrogiacomo defendants for summary judgment dismissing the complaint against them is granted.

The action is severed and shall continue against defendants World Gym, Parisi Speed School, and Campbell Mastrogiacomo.

Dated: 2/26/14


PETER H. MAYER, J.S.C.