

Zerniak v Davis

2014 NY Slip Op 31766(U)

July 9, 2014

Supreme Court, Wayne County

Docket Number: 71034/2010

Judge: Dennis M. Kehoe

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF WAYNE

SAMANTHA ZERNIAK,

Plaintiff,

-vs-

MORGAN DAVIS and BROCK PHELPS,

Defendants.

DECISION
AND
ORDER

Index No. 71034

2010

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Attorneys for Defendants

The Defendant Morgan Davis has moved by her attorneys for an order granting summary judgment against the Plaintiff Samantha Zerniak in this personal injury action and dismissing the Complaint against her in its entirety. The Plaintiff has opposed the motion by her attorneys, maintaining that there are material issues of fact which must await resolution at trial. The Co-Defendant Brock Phelps has never appeared in this action and has not responded in any manner to the Plaintiff's motion.

As background, the Court notes that this action was originally commenced against Jeffrey Davis, the father of Morgan Davis. That action

was subsequently dismissed by Order of this Court. The Plaintiff chose not to pursue the first cause of action in the Complaint based on premises liability, and the second cause of action alleging negligent entrustment of a dangerous instrument was dismissed by the Court. Further, the Court denied the Plaintiff's motion to add a new cause of action for negligence against Mr. Davis, finding no factual basis for the claim. However, the Court did grant the Plaintiff's application to amend the Complaint by adding Ms. Davis and Mr. Phelps as co-Defendants, based on allegations of negligence.

The Plaintiff's claim arises from facts which were previously set forth in the Decision of this Court, dated January 1, 2012, but are reiterated herein, based on portions of the deposition testimony of the Plaintiff, the Defendants and other witnesses, as set forth in the affirmations of respective counsel. On December 26, 2007, at approximately 1:00 P.M., while the parties were at the Davis residence, Brock Phelps proceeded to bring two paintball guns from Morgan Davis' bedroom. Mr. Davis testified at his deposition that Morgan subsequently told him that Brock had given her a paintball gun for Christmas, and that the second gun belonged to Brock. The Plaintiff had never played paintball before, although her testimony indicates that she had

some prior familiarity with “bb guns” and other recreational firearms, and that she was aware of the basics of paintball competition. The teens went into the Davis backyard, and Morgan and her friend Stacy proceeded to put on four-wheeler helmets. It appears that no protective eyewear was used. After playing for a period of minutes, while the Plaintiff observed, Stacy was hit twice by Morgan and decided to stop playing, stating that it hurt too much. 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.

Initially, the Court finds that the Defendant Phelps was properly served and has failed to appear in this action, thereby entitling the Plaintiff to a default judgment against him. Moreover, the Plaintiff has also moved for judgment against Mr. Phelps, based upon allegations that his actions constitute negligence *per se* in that he violated Penal Law §§265.05 and 265.10(5). The deposition testimony of the parties makes it clear that Mr. Phelps provided the paintball guns used by the Plaintiff and the co-Defendant on the date of the incident, at which time the girls were 15 and 17 years of age respectively. While Mr. Phelps’ guilt under the statute is

unresolved, since there has been no opposition by the Defendant, the Court hereby grants the Plaintiff's motion for judgment against Mr. Phelps on the issue of liability.

In moving for an order granting summary judgment to the Defendant Davis dismissing the Plaintiff's Complaint, the Defendant relies on the doctrine of primary assumption of the risk which, if established, constitutes an absolute bar to the Plaintiff's action. For many years, this doctrine was held to apply only to claims arising in the area of professional sports. In recent years, its application has been extended to certain amateur recreational activities, under limited circumstances. In its prior decision in this action, this Court held that primary assumption of the risk did not bar the amendment of the Plaintiff's complaint by adding Morgan Davis and Brock Phelps as Co-Defendants, based upon theories of negligence. This Court relied on Trupia v Lake George Central School District, 14 NY3d 392 (2010), and its progeny, which have held that the application of the doctrine, while expanded, should nevertheless be "closely circumscribed".

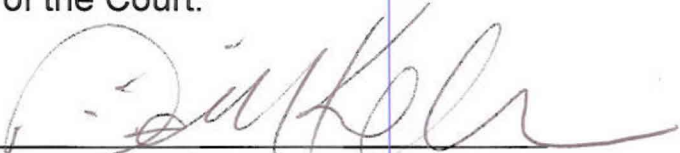
Some ten months after this Court issued its prior decision, the Court of Appeals again addressed the application of primary assumption of the risk in Custodi v. Town of Amherst, 20 NY3d 83 (2012). The Defendant argues

that, since the Court stated in Custodi that the doctrine shields “coparticipants” from liability, the Defendant in the instant case owes no duty to the Plaintiff as a result of their joint participation in the game. However, Custodi goes on to state that, as a general rule, the doctrine should be “limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreational pursuits that take place a designated venues”. (Custodi at p. 89) (emphasis added). While its decision was limited to the facts presented, the Court of Appeals noted that the Plaintiff’s injuries, which were incurred in a rollerblading incident, did not take place at a “designated venue”, and the Court of Appeals declined to expand the doctrine in those circumstances. Similarly, this Court is reluctant to extend the doctrine to a private backyard in an unsupervised informal game.

(Parenthically, in reaching its determination, this Court has not relied on its prior decision as “law of the case”, as suggested in a foot note in the Plaintiff’s memorandum. Rather, the Court has reconsidered the doctrine of primary assumption of the risk in the light of Custodi and its progeny, and has determined that the facts of this case do not support the application of the doctrine as a bar to this Plaintiff’s claims.)

Therefore, the motion of the Defendant Morgan Davis for summary judgment dismissing the Plaintiff's Complaint is denied. The Plaintiff's motion for judgment against Brock Phelps on the issue of liability is granted. This Decision constitutes the Order of the Court.

Dated: July 9, 2014
Lyons, New York


Honorable Dennis M. Kehoe
Acting Supreme Court Justice

WAYNE COUNTY
SUPREME COURT
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