

Triola v Ingargiola

2014 NY Slip Op 32669(U)

September 30, 2014

Supreme Court, Suffolk County

Docket Number: 15854/2012

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Kelly Triola, individually and as Mother and
Natural Guardian of Matthew Triola, an infant,

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Plaintiff,

Attorneys [See Rider Annexed]

-against-

Christopher Ingargiola, Evan Malone,
Patrick Appel and Valentino Ruocco,

Motion Sequence No.: 001; MOTD
Motion Date: 4/23/14
Submitted: 6/18/14

Defendants.

Motion Sequence No.: 002; XMOTD
Motion Date: 4/23/14
Submitted: 6/18/14

Motion Sequence No.: 003; XMOTD
Motion Date: 6/4/14
Submitted: 6/18/14

Upon the following papers numbered 1 to 52 read upon this motion and two cross-motions for summary judgment: Notice of Motion and supporting papers, 1 - 11; Notice of Cross Motion and supporting papers, 12 - 18; 19 - 30; Answering Affidavits and supporting papers, 31 - 32; 33 - 34; 35 - 36; 37 - 38; 39 - 40; 41 - 42; Replying Affidavits and supporting papers, 43 - 45; 46 - 49; 50 - 52; it is

ORDERED that the motion by defendant, Patrick Appel, and the cross-motions by defendants Valentino Ruocco and Evan Malone for an order awarding summary judgment dismissing the complaint of plaintiff, Kelly Triola, individually and as mother and natural guardian of Matthew Triola, against him is granted only to the extent that the first cause of action in negligence is dismissed against movant and cross-movants, and in all other respects the motion and cross-motions are denied.

Plaintiff Kelly Triola commenced this action on behalf of herself and her infant son, Matthew Triola, to recover damages for injuries sustained by Matthew Triola (Triola) when he was struck by a bat on March 7, 2012 in front of their home in Bay Shore, New York. According to the complaint, the incident allegedly occurred when defendants Christopher Ingargiola, Evan Malone, Patrick Appel and Valentino Ruocco entered onto plaintiffs' property and "negligently, recklessly and/or carelessly flailed their persons and/or weapons in close proximity to [i]nfant [p]laintiff," striking him in the face. A second cause of action for intentional assault and battery has also been asserted against each defendant upon a claim that the defendants "intentionally struck [i]nfant [p]laintiff, Matthew Triola, to and about his head, face, body and person without any provocation whatsoever" and that the infant plaintiff's injuries "were the un-intentional result of the intentional acts of the Defendants." The complaint also sets forth a third cause of action for loss of services. Defendant Patrick Appel now moves and defendants Valentino Ruocco and Evan Malone cross-move for summary judgment dismissing the complaint against them. Plaintiffs and defendant Ingargiola oppose the motion and cross motions.

At his examination before trial, Patrick Appel testified that on the evening of the incident he was with Christopher Ingargiola at another friend's house, non-party Jacky Lipsky. He testified that Ingargiola received a telephone call, believed to have been from Evan Malone, in which Ingargiola was informed that there would be a fight at the Triola residence. He testified that he wanted to stop the fight, and that he and Ingargiola went to meet up with Malone. Ingargiola drove to meet Malone, who was in his car with Valentino Ruocco, Zack Huff and Mike Howell. Appel testified that the two cars drove to the Triola residence and observed a group of people there, including Triola, Mike Laine and John Hughes. The group was on the front lawn of Triola's house, and some were holding bats and two-by-four pieces of wood. It was Appel's testimony that no one that he was with had a weapon. At the time of the incident, Appel was 19 years of age and Triola was approximately 16 years of age. He testified that the two groups converged and yelled at each other. Appel testified that at one point, infant plaintiff brought a shotgun out from his house and pointed it at him and the group with whom he was standing on Triola's front lawn. Appel tried to "rip [the gun] out of [Matt's] hands" and he and Matthew Triola "were both fighting for it." According to Appel's testimony, Triola "cracked" him with the end of the gun. He testified that he fell to the ground, and then got up and ran to Ingargiola's car.

Christopher Ingargiola testified at a deposition that he drove Appel to Jacky Lipsky's house in West Islip and that they were at the house for thirty to forty-five minutes when Malone called him, asking if he wanted to watch a fight. He answered "yes" and then drove with Appel to Ruocco's house, where Malone was seen with Ruocco, Huff and Howell. He testified that he followed Malone's vehicle to the Triola residence and that, upon arriving, Appel grabbed an aluminum bat out of Ingargiola's car. It was Ingargiola's testimony that one person from the Malone vehicle also had a bat. As the group walked toward the Triola house, Ruocco was wearing a ski mask that covered the bottom of his face. Ingargiola testified that there were 6 to 7 people at the Triola residence with pipes, chains, and bats, and that he got out of his vehicle to get the bat from Appel to prevent the situation from escalating. As he approached the Triola property, everyone was on the front lawn screaming at each other. Triola's sister handed Triola a gun, described as a shotgun about

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three-and-a-half feet long. Triola cocked the gun and started pushing Appel with it “like sideways with both arms.” Ingargiola testified that he grabbed his bat from Appel “to put it back into [his] car” when Triola took the back of the gun and butted Appel along his jaw. Appel fell to the ground and Triola “repeatedly struck [Appel] in the face and kicked him while he was on the ground.” Ingargiola explained that when he observed his friend being struck with the gun, he swung the bat at Triola but did not know what it struck. He testified that he swung the bat at Triola and “was trying to knock the gun out of his hands” from a distance of about five feet away. Ingargiola did not know what he struck, but he then helped Appel up from the ground and the two returned to Ingargiola’s car and drove away. Thirty seconds later, the police pulled his vehicle over. On October 23, 2012, Ingargiola entered a conditional plea of guilty to assault in the third degree, a misdemeanor, under an agreement by which the charge would be amended to harassment, a violation, upon Ingargiola’s successful completion of one year of probation supervision.

At his examination before trial, Valentino Ruocco testified that on the evening of the incident he was picked up from his home by Malone and that they drove to Triola’s house. When they arrived at Triola’s residence, he observed Mike Laine with a metal baseball bat in his hand. Ruocco explained that he wore a ski mask as he walked toward Triola’s house with Malone, Huff and Howell because he did not want to be identified in case there was any retaliation. Triola’s sister grabbed a gun from the house, and Matthew Triola took the gun from his sister’s hand. Ruocco testified that he then ran back to Malone’s car. He saw Appel fight with Triola over the gun and Ingargiola ran to his car, grabbed a bat and struck Triola in the face with the bat.

At his examination before trial, Evan Malone testified that on the evening of the incident, he called Patrick Appel because his friend, Michael Sgamati, had been beaten up by Mike Laine and Cody Triola. Ingargiola and Appel drove to Malone’s house, and Malone spoke to them by their car and told them that he was going to talk with Mike Laine. Malone had confronted Laine via telephone, and they initially agreed to meet at Target. Malone drove to Target but received a text from Laine to meet at the a house that Malone later learned was the Triola house. Malone drove with Zack Huff, Valentino Ruocco and Mike Howell while Ingargiola and Appel followed in Ingargiola’s car. Malone testified that he parked on the street about 150 yards away from the residence and that no one in his vehicle had any weapons. Malone, Huff, Ruocco and Howell got out of the car and walked to the house, along with Ingargiola and Appel. Ruocco was wearing a ski mask. He testified that there were 5 to 9 people at the Triola residence and that the two groups were yelling at each other. He observed “2x4s, club-like objects” and testified that Matthew Triola had an object in each hand: a 2-foot piece of rebar and something that looked like a large blade. He saw a girl come out of the house with a shotgun that Triola took from her hands. He pointed the gun at Malone, and Malone turned around and went behind a car. He saw Appel step toward Triola and grab the shotgun. He testified that as he was running back to his own vehicle, he observed infant plaintiff and Appel struggle over the gun.

Chelsea Triola testified at a deposition that earlier in the evening of the incident, she was at the police station with her mother, as her brother, Cody Triola, had been arrested for his involvement in a fight with a person named Mike “Sgambati.” She testified that shortly after she returned home,

she observed Ruocco, who was wearing a black bandana over his face and holding something metal, walking up the Triolo driveway. She told him twice to get off her property, but Ruocco “kept coming.” She testified that she went inside her house and grabbed a “toy BB gun” which was not loaded. When she returned, she saw Appel, Ruocco and another person coming toward the house. She testified that when she returned outside and was on the front lawn, Appel approached her and grabbed the gun from her. Her brother Matthew came to help her, and he and Appel struggled for the gun. She testified that she picked up a metal pipe from the floor and hit Appel on the head with the pipe, and the gun fell. She testified that soon afterwards, she heard her brother scream and saw that he had been injured.

The deposition transcripts of Patrick Appel, Christopher Ingargiola, and Chelsea Triola, while unsigned, were certified by the stenographer and are thus admissible (*see Montalvo v United Parcel Serv., Inc.*, 117 AD3d 1004, 986 NYS2d 551 [2d Dept 2014]). The deposition of Valentino Ruocco was signed.

The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [1974]; *Benincasa v Garrubo*, 141 AD2d 636, 529 NYS2d 797 [2d Dept 1988]). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (*Pantote Big Alpha Foods, Inc. v Schefman*, 121 AD2d 295, 503 NYS2d 58 [1st Dept 1986]). On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (*see S.J. Capelin Associates v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). The courts have repeatedly held that in order to obtain summary judgment, movant must establish its claims or defenses sufficiently to warrant a court’s directing judgment in its favor as a matter of law (*see Gilbert Frank Corp. v Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988], citing *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [1980]; *Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790, 390 NE2d 298 [1979]). The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests (*see Gilbert Frank Corp. v Federal Insurance Co., supra*). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (*Robinson v Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

It is well-established law that a pleading should not be dismissed as long as it sets forth a cause of action, and a decision on an application for summary judgment must be made on the version of the facts most favorable to the plaintiff (*see Sarmiento v Northern Woods Realty Corp.*, 245 AD2d 361, 666 NYS2d 439 [2d Dept 1997]; *see also McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 555 NYS2d 125 [1st Dept 1990]). While the complaint does not specifically allege that the defendants Malone, Appel and Ruocco “aided and abetted” Ingargiola or that they “acted in concert” with Ingargiola in the alleged assault and battery upon plaintiff Triola, the evidence before this Court creates an issue that the aforementioned defendants encouraged the assault and that such

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encouragement was a substantial factor in causing the assault (*see Scollo v Nunez*, 60 AD3d 840, 874 NYS2d 380 [2d Dept 2009]; *see also Wilson v DiCaprio*, 278 AD2d 25, 717 NYS2d 174 [1st Dept 2000]). Issues of fact have been raised whether the moving defendants acted in concert with defendant Ingargiola in attacking the infant plaintiff (*see Skewes v Infranca*, 5 AD3d 662, 774 NYS2d 739 [2d Dept 2004]). For example, there is evidence before this Court that defendant Malone encouraged others to engage in a fight with plaintiff Triola, that defendants Appel, Malone and/or Ruocco carried baseball bats onto Triola's property, and that the defendants went to the Triola residence to confront and/or engage in a fight with others. Thus, there are issues of fact to be determined at trial whether the moving defendants caused or contributed to the altercation.

To establish a *prima facie* case of negligence, a plaintiff must demonstrate the existence of a duty owed by the defendant to plaintiff, a breach of that duty, and that the breach was the proximate cause of the plaintiff's injury (*Demshick v Community Hous. Mgt. Corp.*, 34 AD3d 518, 519, 824 NYS2d 166 [2d Dept 2006]). A defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control (*D'Amico v Christie*, 71 NY2d 76, 88, 524 NYS2d 1 [1987]). Here, defendants Malone, Appel and Ruocco owed no duty to prevent Ingargiola, whom they did not supervise or control, from striking infant plaintiff (*see Donnelly v Elling*, 85 AD3d 847, 925 NYS2d 184 [2d Dept 2011] *see also Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]). In opposition, plaintiffs fail to raise any triable issues of fact. Accordingly, the first cause of action sounding in negligence is dismissed as against defendants Malone, Appel and Ruocco.

Dated:

September 30, 2014 

HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___ X ___ NON-FINAL DISPOSITION

RIDER

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