

Abdolzadeh v Conair Corp.

2016 NY Slip Op 31277(U)

July 6, 2016

Supreme Court, New York County

Docket Number: 152719/2012

Judge: Robert D. Kalish

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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_____ Abdolozadeh an infant under the age of
14 by Galit Abdolozadeh as parent and natural guardian
and individually

Plaintiff,

Index No. 152719/2012

-against-

Conair Corporation a/b/d Cuisinart and
Bed Bath & Beyond, Inc.

Defendants.

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KALISH, J.:

Upon the foregoing papers, the Defendants' motion to amend their answer to include a counterclaim against the parent Plaintiff Galit Abdolozadeh pursuant to CPLR §3025(b) is hereby denied as follows:

Underlying Action and Relevant Background

Without reiterating the entirety of the pleadings, the Plaintiff Galit Abdolozadeh individually and as the parent and natural guardian of the infant Plaintiff brought the underlying product liability action against the Defendants based upon injuries that the infant Plaintiff allegedly sustained due to a product manufactured and designed by the Defendant Conair Corporation ("Conair"). The parent Plaintiff claims that on or about December 13, 2010, she bought a "Cuisinart Smart Stick hand blender model number CSB-76" (the "Hand Blender") from the Defendant Bed Bath & Beyond, Inc. ("Bed Bath & Beyond"), and that the infant Plaintiff was severely injured by said Hand Blender. According to the Defendant's moving papers, the infant Plaintiff's 4-and-half-year-old older sibling (the "Older Child") allegedly operated the Hand Blender and injured the infant Plaintiff's hand. The Plaintiffs allege four

causes of action against the Defendants:

- that the infant Plaintiff's injuries were caused by the Defendants' negligent design, manufacture, assembly, distribution and/or sale of the Hand Blender, which was unreasonably dangerous (Plaintiffs' First Cause of Action);
- Defendants violated both the implied and express warranties as to the Hand Blender (Plaintiffs' Second Cause of Action);
- the Hand Blender was of a defective nature, as such the Defendants are liable for the infant Plaintiff's injuries under a theory of strict product liability (Plaintiffs' Third Cause of Action); and
- the Defendants were fully aware and had actual notice of the dangerous propensities of the Hand Blender and their marketing, labeling and representations as to the Hand Blender was misleading, deceptive, and unfair (Plaintiff's Fourth Cause of Action).

The Defendants now move to amend their answers to include counterclaims against the parent Plaintiff for injuries sustained by the infant Plaintiff.

Parties' assertions

The Defendants argue in support of their motion that leave to amend the pleading should be freely given absent prejudice or surprise resulting in delay. The Defendants further argue that their instant motion is timely.

The Defendants further argue in sum and substance that their proposed counterclaim against the parent Plaintiff as to the injuries allegedly sustained by the infant Plaintiff fall within an exception to the New York "interfamilial immunity" doctrine. Specifically, the Defendants argue that the "interfamilial immunity" doctrine is not absolute and allows for them to assert a counterclaim against the parent Plaintiff for entrusting an infant (the Older Child) with a "dangerous instrumentality". The Defendants acknowledge that whether an instrumentality is "dangerous" is a fact question for the jury and that there are no reported cases in which a jury determined that an immersion blender or similar kitchen appliance was a "dangerous instrumentality". The Defendants refer to multiple cases wherein the courts found that the subject object was a "dangerous instrumentality" in support of their argument that they should be

allowed to amend their answer to include a counterclaim against the parent Plaintiff for negligence as to the infant Plaintiff's alleged injuries.

In opposition, the Plaintiffs argue that the Defendants' proposed counterclaim is prohibited by the long held New York public policy that a Defendant cannot generally bring a counterclaim against a parent Plaintiff for negligent supervision of an infant child (See Holodook v Spencer, 36 NY2d 35 (NY 1974)). The Plaintiffs further argue that the underlying action does not fall within the exceptions to the Holodook rule. Specifically, the Plaintiffs argues that the Older Child's use of the Hand Blender without the parent Plaintiff's permission did not create a "danger to society", nor was the underlying accident an instant where the parent Plaintiff gave the infant Plaintiff permission to use the Hand Blender at all.

In addition, the Plaintiffs attach with their motion papers a decision by the Supreme Court for Nassau County denying a similar motion by the Defendants in a separate case (Siragusa v Conair, 14810/2012 (NY Sup Ct Nassau Cnty June 25, 2015)). The Plaintiffs argue that said action before the Supreme Court for Nassau County involves the same model Hand Blender addressed in the instant action and a nearly identical fact pattern. The Plaintiffs argue in sum and substance that the Court in Nassau County denied the Defendants' motion to amend their answer in that case to include a counterclaim against a parent Plaintiff on the basis that said proposed counterclaim would be counter to the Holodook rule, just as the Defendants' instant motion to add a counterclaim is also counter to the Holodook rule.

In reply to the Plaintiff's opposition, the Defendants refer primarily to Nolechek v Gesuale (46 NY2d 332, 340 (NY 1978)), arguing in sum and substance that a father entrusting a motorcycle to his child, "who is blind in one eye and had impaired vision in the other eye" (Defendants' reply affirmation p 2, para 5) is analogous to the parent Plaintiff in the underlying action entrusting the Hand Blender to the Older Child. The Defendants argue that "[l]ike the parent in Nolechek who was aware of and

capable of controlling the use of the motorcycle, Galit Abdolozadeh was aware of and capable of controlling the use of the blender” (Defendants’ reply affirmation p 4, para 8). The Defendants further argue that the decision of the Supreme Court for Nassau county is not binding upon this Court, is incorrect and that the Defendants have perfected an appeal of said decision.

Oral Argument

On May 16, 2016 the Parties appeared before this Court for oral argument on the motion. The Defendants’ counsel argued before this Court that the Defendants should be allowed to assert a counterclaim against the parent Plaintiff based upon the fact that the underlying action involved the Older Child injuring the infant Plaintiff with the Hand Blender. The Defendants’ counsel argued that they should be allowed to make a counterclaim based upon the theory that the parent Plaintiff “negligently entrusted” the Hand Blender to the Older Child by placing it where the Older Child could easily reach it. Specifically, the Defendants’ counsel argued that the parent Plaintiff placed the Hand Blender on a table where the Older Child could easily reach it as opposed to a spot that the Older Child would not have been able to reach, such as on top of a refrigerator or high cabinet.

In opposition, the Plaintiffs’ counsel argued that the parent Plaintiff did not “entrust” the Hand Blender to the Older Child. Plaintiffs’ counsel argued that the parent Plaintiff left the Hand Blender in the box (though unsealed), and that she did not give the Hand Blender to the children as a toy. Plaintiffs’ counsel further emphasized that the Hand Blender needed to be plugged in and was not battery operated. Plaintiffs’ counsel argued that because the Hand Blender needed to be plugged in in order to operate, it did not pose a danger to the public.

Analysis

Standard for amending pleadings pursuant to CPLR §3025(b)

Pursuant to CPLR §3025(b), “motions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit” (MBIA Ins. Corp. v. Greystone & Co., Inc., 74 AD3d 499, 499-500 (NY App Div 1st Dept 2010) (internal citations omitted)). Moreover, on a motion for leave to amend, the movant is not required to establish the merit of the proposed new allegations “but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit” (MBIA Ins. Corp. v. Greystone & Co., Inc., 74 AD3d 499, 500 (NY App Div 1st Dept 2010) (internal citations omitted)).

However, while leave to amend the pleadings is ordinarily freely given, a Court may deny a Defendants’ motion to amend an answer to add a counterclaim against a parent Plaintiff where said proposed counterclaim runs counter to the Holodook rule (See Morales by Medrano v Felice Props. Corp., 221 AD2d 181 (NY App Div. 1st Dept 1995); Milkis v Condominium Lloyd 54 Condominium, 24 Misc 3d 56 (NY App Term 1st Dept 2009); Cantave v Peterson, 266 AD2d 492 (NY App Div 2d Dept 1999)).

The Defendants’ proposed counterclaim is barred by the Holodook rule and does not fall within an exception to said rule

Under the Holodook rule, “[a] parent's negligent failure to supervise a child is generally held not to constitute a tort actionable by the child” (LaTorre v Genesee Management, Inc., 90 NY2d 576, 579, (NY 1997) citing Holodook v Spencer, 36 NY2d 35, 51 (NY 1974)). The Holodook rule also bars actions by third parties against parents for the tortious acts of their children when predicated simply upon general claims of negligent supervision (Nolechek v Gesuale, 46 NY2d 332, 340 (NY 1978) [“Negligent supervision of children, in general, creates no direct unreasonable hazard to third parties.”]). This “sound rule” however, is accompanied by “sound exceptions,” which include “the duty owed by parents

to third parties to control their [children's] use of dangerous instruments to avoid harm to third parties" (Id at 339, 341). This exception is a "very specific and narrow complement to the Holodook principle" (LaTorre v Genesee Management, 90 NY2d 576, 581 (NY 1997)), and "is limited to circumstances where a parent's conduct creates a particularized danger to third persons that is plainly foreseeable (Rios v Smith, 95 NY2d 647, 652 (NY 2001)). "[I]t is 'unreasonable to burden parents and guardians ... by exposing them to rebound liability, flowing from a child's or adult's natural deficits or personal qualities' based merely on 'general allegations'. In order to establish the basis for liability, a plaintiff must prove the 'extraordinariness or patent foreseeability of the particular situation'" (Rios v. Smith, 95 N.Y.2d 647, 652 (NY 2001) citing LaTorre v Genesee Management, 90 NY2d 576, 581 (NY 1997)). "[P]arental liability for negligent entrustment is limited to circumstances where a parent's conduct creates a particularized danger to third persons that is plainly foreseeable" (Rios v Smith, 95 N.Y.2d 647, 652 (NY 2001)).

"[I]t is well-established law that a parent owes a duty to third parties to shield them from an infant child's improvident use of a dangerous instrument, at least, if not especially, when the parent is aware of and capable of controlling its use... Parents are permitted to delegate to their children the decision to participate in dangerous activities, but they are not absolved from liability for harm incurred by third parties when the parents as adults unreasonably, with respect to such third parties, permit their children to use dangerous instruments." (Nolechek v. Gesuale, 46 NY2d 332, 338-339 (NY 1978) see also LaTorre v Genesee Mgmt., 90 N.Y.2d 576, 581 (NY 1997)). "The limited parental duty principle that emerges from Nolechek is thus designed 'to protect third parties from the foreseeable harm that results from the children's improvident use of dangerous instruments, to the extent that such use is subject to parental control'" (LaTorre v Genesee Mgmt., 90 NY2d 576 (NY 1997) quoting Nolechek v. Gesuale, 46 NY2d 332, 340 (NY 1978)). Further negligent supervision of children entrusted with

dangerous instruments can portend foreseeable injury to third parties, while negligent supervision of children without such instruments generally do not (Wayne Coop. Ins. Co. v Hawthorne, 2012 NY Slip Op 30328(U) (NY Sup Ct Wayne Cnty 2012)).

This principle of parental responsibility/negligence for the tort of a child is best stated in section 2:260 of the New York Pattern Jury Instructions which read as follows:

PJI 2:260 Liability for the Conduct of Another—Family Relationship—Liability of Parent for Tort of Child—Negligence in Permitting Use of Instrumentality

A parent is not responsible for the acts of (his, her) child, but is responsible for the failure to use reasonable care in entrusting to or leaving in the possession of the child an instrument which, in view of the nature of the instrument, the age, intelligence, and disposition of the child and (his, her) prior experience with such an instrument, constitutes an unreasonable risk of harm to others. Reasonable care means that degree of care which a reasonably prudent parent would use under the same circumstances.

The language of PJI 2:260 is based upon a review of Nolechek v Gesuale, 46 NY2d 332 (NY 1978); Marks v Thompson, 18 AD2d 731 (NY App Div 3d Dept 1962), affd, 13 NY2d 1029 (NY 1963); Ansbro v Noviello, 202 AD2d 211 (NY App Div 1st Dept 1994); Len v Cohoes, 144 AD2d 187 (NY App Div 3d Dept 1988); Costa v Hicks, 98 AD2d 137 (NY App Div 2nd Dept 1983); Gordon v Harris, 86 AD2d 948 (NY App Div 3rd Dept 1982); Bucholtz v Grimmer, 50 AD2d 1062 (NY App Div 4th Dept 1975); Lichtenthal v Gawoski, 44 AD2d 771 (NY App Div 4th Dept 1974); Restatement, Second, Torts, §§ 308, 316; Prosser and Keeton, Torts (5th Ed) § 123; 46 NYJur2d, Domestic Relations § 534; 79 NYJur2d, Negligence § 75; and Warren's Negligence, Vol 2C-Part 2, Parent and Child § 80.01 (3) (4th Ed. 1990).

Upon examination of the Parties' submitted papers, the alleged facts of the underlying action and having heard oral argument, the Court finds that the Defendants' proposed counterclaims are prohibited by the Holodook rule. The Court further finds that the Defendants have failed to establish any basis for the Court to conclude that their proposed counterclaim falls within an exception to the Holodook rule.

Although the Defendants cite to numerous decisions wherein the courts referred to a parent plaintiff permitting an infant plaintiff to use a "dangerous instrumentality", the Defendants do not go so far as to ever explicitly argue that the Hand Blender should be considered a dangerous instrumentality. Instead, the Defendants argue in sum and substance that the fashion in which the parent Plaintiff allowed the Older Child to have access to the Hand Blender in the underlying action created a particularized danger to third persons that was plainly foreseeable and on par with the situations addressed in cases cited by the Defendants including but not limited to:

- a father entrusting a motorcycle to his child, who is blind in one eye and had impaired vision in the other eye (Nolechek v. Gesuale, 46 NY2d 332, 338-339 (NY 1978));
- parents allowing a 13-year-old child to operate an ATV at a construction site (Sabia v K. Hovnanian Cos., 280 AD2d 461 (NY App Div 2nd Dept 2001));
- a parent allowing a 14-year-old child to light a gas grill even though the parent knew that the child was unfamiliar with the grill, followed by the parent walking away because she was "afraid something might happen" (Bottillo v Poette, 152 AD2d 840 (NY App Div 3d Dept 1989));
- a parent permitting a 17-year-old to use a chainsaw (Bucholtz v Grimmer, 50 AD2d 1062 (NY App Div 4th Dept 1975)); and
- a parent allowing a 12-year-old child to operate a "motorized bicycle" (Lalomia v Bankers & Shippers Ins. Co., 35 A.D.2d 114, 116 (NY App Div 2d Dept 1970))

The Court finds that the facts alleged in the underlying action do not rise to the level of any of the cases cited by the Defendants. Specifically, the Older Child's alleged use of the Hand Blender, when considered within the context of the allegations, did not create a particularized danger to third persons that was plainly foreseeable. Neither did the Older Child's alleged use of the Hand Blender render the Hand Blender a "dangerous instrumentality" on par with a "motorized bike", chainsaw, gas grill or any of the examples from the cases cited by the Defendants.

Further, the Defendants have presented no basis of proof for the Court to conclude that the parent Plaintiff "entrusted" the Hand Blender to either her Older Child or the infant Plaintiff, or otherwise allowed either of her children to use the Hand Blender. In the instant case, the parent Plaintiff simply purchased a blender for use in the family home. She did not purchase the Hand Blender for her Older Child or the infant Plaintiff, nor did she give the Hand Blender to either of her children to play with. The underlying action alleges a scenario in which a child plays with an item in a manner that injured an infant plaintiff. This is a very different scenario from one in which an adult Plaintiff specifically entrusts an instrument to a child, who injures another child using said instrument. At worst, in the instant action the parent Plaintiff may have negligently supervised her child.

Based upon the alleged circumstances of the underlying action, the Hand Blender did not constitute a dangerous instrumentality, nor did it create a particularized danger to third persons that was plainly foreseeable by the parent Plaintiff. As such, the Defendants' proposed counterclaim against the parent Plaintiff is barred by the Holodook rule.

Conclusion

Accordingly and for the reasons so stated, it is hereby

ORDERED that the Defendants' motion to amend their answer to include a counterclaim against the parent Plaintiff Galit Abdolozadeh pursuant to CPLR §3025(b) is hereby denied. It is further

ORDERED that the Parties will appear before this Court for a further compliance conference on August 9, 2016.

The foregoing constitutes the ORDER and DECISION of the Court.

Dated:

July 6, 2016

ENTER:

Robert D. Kalish, JSC
HON. ROBERT D. KALISH
J.S.C.