

Che Yeung v Burns

2020 NY Slip Op 35493(U)

April 28, 2020

Supreme Court, Queens County

Docket Number: Index No. 714726/2019

Judge: Lourdes M. Ventura

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SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

Present: HONORABLE LOURDES M. VENTURA, J.S.C.

IAS Part 37

CHE YEUNG

Plaintiff,

Index

Number: 714726/2019

-against-

CHRISTINA L. BURNS, DOROTHY A. FIEDOROWICZ,
FRANCIS ROGALLE, LISA ROGALLE,
CHRISTOPHER P. BURNS and SUSAN M. BURNS,

Defendants.

Motion

Date: February 24, 2020

Motion

Seq. No.: 1

The following numbered papers read on this Motion by Defendants Christopher P. Burns and Susan M. Burns, for an Order: pursuant to CPLR 3211(a)(7), dismissing all claims against them, together with such other and further relief as this Court may deem just and proper.

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Notice of Motion - Affirmation - Exhibits.....	16-23
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Upon the foregoing papers, it is Ordered that the Motion by Defendants' Christopher P. Burns and Susan M. Burns, for an Order pursuant to CPLR 3211(a)(7), dismissing all claims against them is determined as follows:

Plaintiff commenced the instant action by Summons and Verified Complaint, which was later Amended, to recover for damages allegedly caused by Defendants. Plaintiff alleges that she was struck by a motor vehicle that was operated by Defendant Christina L. Burns on Ashford Drive, at or near its intersection with Buckingham Lane in the County of Suffolk. The Amended Complaint further alleges that Defendant Dorothy A. Fiedorowicz (Defendant Christina L. Burns grandmother) is the owner of the vehicle Christina L. Burns was operating at the time it struck Plaintiff.

The Amended Complaint further alleges that Defendant Christina L. Burns consumed alcoholic beverage(s) at the home of Defendants Francis and Lisa Rogalle on or about August 10, 2019 continuing through August 11, 2019. The Amended Complaint further states that on or about August 10, 2019 continuing through August 11, 2019, Defendants Francis and Lisa Rogalle provided alcoholic beverages to Defendant Christina L. Burns and as a result she became intoxicated and her abilities were impaired. The third and fourth causes of action contained in the Amended Verified Complaint name Defendants Christopher P. Burns and Susan M. Burns and in pertinent part reads as follows:

“AS AND FOR A THIRD CAUSE OF ACTION

49. Plaintiff repeats, reiterates and realleges each and every allegation contained in those paragraphs of this complaint designated "1" through "48" inclusive, together with the same force and effect, as though they were set forth at length herein.

50. That at some time on August 10, 2019 and/or August 11, 2019, defendant CHRISTINA L. BURNS was at the home of defendants FRANCIS ROGALLE and LISA ROGALLE without the presence of her parents, defendants CHRISTOPHER and SUSAN BURNS.

51. That at this time, defendant CHRISTINA L. BURNS was a minor under the age of 18 years.

52. That during the time that defendant CHRISTINA L. BURNS was at the home of defendants FRANCIS and LISA ROGALLE without her parents, she was in the temporary custody and/or control and/or care of defendants FRANCIS and LISA ROGALLE.

53. That defendants FRANCIS, and LISA ROGALLE had a duty to supervise minor defendant CHRISTINA L. BURNS while she was in their temporary custody and/or care and/or control.

54. That the defendants FRANCIS and LISA ROGALLE breached their duty to supervise minor defendant CHRISTINA L. BURNS while she was in their temporary custody and/or care and/or control on August 10, 2019 and/or August 11, 2019.

55. That the defendants FRANCIS and LISA ROGALLE negligently supervised minor defendant CHRISTINA L. BURNS while she was in their temporary custody and/or care and/or control on August 10, 2019 and/or August 11, 2019.

56. That alcoholic beverages were at the home and/or premises of the defendants FRANCIS and LISA ROGALLE on August 10, 2019 and/or August 11, 2019.

57. That the defendants FRANCIS and LISA ROGALLE were aware that there was alcohol at their home and/or premises on August 10, 2019 and/or August 11, 2019.

58. That the defendants FRANCIS and LISA ROGALLE were serving and/or providing and/or allowing alcohol in their home and/or premises on August 10, 2019 and/or August 11, 2019.

59. That the defendants FRANCIS and LISA ROGALLE were allowing the guests in their home and/or premises to consume alcohol.

60. The defendants FRANCIS and LISA ROGALLE failed to supervise the minors, including but not limited to defendant CHRISTINA L. BURNS, at their home and/or premises while alcohol was present and/or available and/or being served to guests.

61. The defendants FRANCIS and LISA ROGALLE failed to safeguard the alcohol present in their home and/or premises on August 10, 2019 and/or August 11, 2019.

62. That the defendants FRANCIS and LISA ROGALLE failed to safeguard the alcohol in their home and/or premises from the minors, including but not limited to defendant CHRISTINA L. BURNS, who were present in their home on August 10, 2019 and/or August 11, 2019.

63. That the defendants failed to observe that minors, including defendant CHRISTINA BURNS had alcohol while at the ROGALLE home and/or premises.

64. That the defendants FRANCIS and LISA ROGALLE knowingly and/or unknowingly allowed minors, including but not limited to defendant CHRISTINA L. BURNS, to consume alcohol in their home and/or premises on August 10, 2019 and/or August 11, 2019.

65. That the defendants FRANCIS and LISA ROGALLE knowingly and/or unknowingly allowed minors, including but not limited to defendant CHRISTINA L. BURNS, to become intoxicated in their home and/or premises on August 10, 2019 and/or August 11, 2019.

66. That the defendants FRANCIS and LISA ROGALLE failed to supervise the intoxicated minors at their home and/or premises on August 10, 2019 and/or August 11, 2019, including but not limited to defendant CHRISTINA L. BURNS.

67. That the defendants FRANCIS and LISA ROGALLE failed to observe that CHRISTINA BURNS was intoxicated on August 10, 2019 and/or August 11, 2019.

68. That the defendants FRANCIS and LISA ROGALLE failed to properly supervise the departure of defendant CHRISTINA L. BURNS on August 11, 2019.

69. That on August 11, 2019, defendant CHRISTINA L. BURNS departed from the ROGALLE home in a motor vehicle.

70. That at the time defendant CHRISTINA L. BURNS departed from the ROGALLE home she was intoxicated.

71. That as a result of the foregoing, on August 11, 2019, defendant CHRISTINA L. BURNS struck the plaintiff CHE YEUNG with the motor vehicle she was operating on Ashford Drive, Bohemia, New York

72. That as a result of being struck by the aforementioned vehicle operated by defendant CHRISTINA L. BURNS, plaintiff CHE YEUNG was caused to sustain severe and permanent injuries as set forth above.

73. That defendants FRANCIS and LISA ROGALLE were negligent as follows: in negligently supervising CHRISTINA L. BURNS; in negligently supervising CHRISTINA L. BURNS while alcohol was present in their home and/or premises; in negligently supervising CHRISTINA L. BURNS while alcohol was present and/or available and or being served in their

home and/or premises; in negligently supervising CHRISTINA L. BURNS such that she was able to consume alcohol in their home and/or premises; in failing to properly observe, care for, and control CHRISTINA L. BURNS while she was in their custody, control and care; in failing to properly observe, care for, and control CHRISTINA L. BURNS while she was in their custody, control and care and by so failing CHRISTINA L. BURNS was able to consume alcohol and/or become intoxicated; in failing to properly observe CHRISTINA L. BURNS to determine that she was intoxicated; in knowingly or unknowing allowing CHRISTINA L. BURNS to consume alcoholic beverage(s); of being aware that CHRISTINA L. BURNS consumed alcoholic beverage(s); in failing to become aware that CHRISTINA L. BURNS consumed alcohol; in failing to supervise defendant CHRISTINA L. BURNS' departure from their residence; in failing to supervise defendant CHRISTINA L. BURNS' departure from their residence while she was in their custody and/or care and/or control allowing defendant CHRISTINA L. BURNS to operate a vehicle on August 11, 2019; in allowing defendant CHRISTINA L. BURNS access to a motor vehicle on August 11, 2019; in allowing defendant CHRISTINA L. BURNS to operate a motor vehicle after defendant CHRISTINA L. BURNS had consumed alcohol; in failing to supervise the minor child CHRISTINA L. BURNS in the operation of the aforementioned motor vehicle; in allowing the minor child CHRISTINA L. BURNS to operate a motor vehicle while impaired, or intoxicated; in negligently and recklessly entrusting the minor child with a motor vehicle while intoxicated or impaired; defendants lack of supervision of defendant CHRISTINA L. BURNS was grossly negligent, and/or wanton and/or so reckless as to amount to a conscious disregard of the rights of others.

74. That as a result of the foregoing, the plaintiff CHE YEUNG, has been, damaged in an amount exceeding the jurisdictional limits of all lower courts which would otherwise have jurisdiction herein and is entitled to compensatory damages.

AS AND FOR A FOURTH CAUSE OF ACTION

75. Plaintiff repeats, reiterates, and realleges each and every allegation contained in those paragraphs of this complaint designated "1" through "74" inclusive, together with the same force and effect, as though fully set forth 'at length herein.

76. Upon information and belief, defendant CHRISTOPHER P. BURNS is the father and natural guardian of defendant CHRISTINA L. BURNS.

77. That defendant CHRISTOPHER P. BURNS had a duty to supervise his minor child defendant CHRISTINA L. BURNS.

78. Upon information and belief, on or about August 10, 2019 continuing through August 11, 2019, defendant CHRISTOPHER P. BURNS attended a party at the home of defendants FRANCIS ROGALLE and LISA ROGALLE located at 22 Ashford Drive, Bohemia, New York.

79. Upon information and belief, defendant CHRISTOPHER P. BURNS was aware that his daughter defendant CHRISTINA L. BURNS was present at the aforementioned party at the

home of defendants FRANCIS ROGALLE and LISA ROGALLE located at 22 Ashford Drive, Bohemia, New York.

80. Upon information and belief, on or about August 10, 2019 continuing through August 11, 2019, defendant CHRISTOPHER P. BURNS was aware that alcoholic beverage(s) were being provided at the aforementioned party.

81. Upon information and belief, on or about August 10, 2019 continuing through August 11, 2019, defendant CHRISTOPHER P. BURNS was aware that defendant CHRISTINA L. BURNS had ingested alcoholic beverage(s).

82. Upon information and belief, on or about August 10, 2019 continuing through August 11, 2019, defendant CHRISTOPHER P. BURNS was aware that defendant CHRISTINA L. BURNS was impaired or intoxicated as a result of consuming alcoholic beverage(s).

83. Upon information and belief, defendant CHRISTOPHER P. BURNS had knowledge that defendant CHRISTINA L. BURNS would be operating a motor vehicle in the early morning hours of August 11, 2019.

84. Upon information and belief, defendant CHRISTOPHER P. BURNS had knowledge that defendant CHRISTINA L. BURNS would be operating a motor vehicle in the early morning hours of August 11, 2019 after she had ingested alcoholic beverage(s).

85. Upon information and belief, defendant CHRISTOPHER P. BURNS had knowledge that defendant CHRISTINA L. BURNS would be operating a motor vehicle in the early morning hours of August 11, 2019 after she had ingested alcoholic beverage(s) resulting in her impairment or intoxication.

86. Upon information and belief, defendant SUSAN M. BURNS is the mother and natural guardian of defendant CHRISTINA L. BURNS.

87. That defendant SUSAN M. BURNS had a duty to supervise her minor child defendant CHRISTINA L. BURNS.

88. Upon information and belief, on or about August 10, 2019 continuing through August 11, 2019, defendant SUSAN M. BURNS attended a party at the home of defendants FRANCIS ROGALLE and LISA ROGALLE located at 22 Ashford Drive, Bohemia, New York.

89. Upon information and, belief, defendant SUSAN M. BURNS was aware that her daughter defendant CHRISTINA L. BURNS was present at the aforementioned party at the home of defendants FRANCIS ROGALLE and LISA ROGALLE located at 22 Ashford Drive, Bohemia, New York.

90. Upon information and belief, on or about August 10, 2019 continuing through August 11, 2019, defendant SUSAN M. BURNS was aware that alcoholic beverage(s) were being provided at the aforementioned party.

91. Upon information and belief, on or about August 10, 2019 continuing through August 11, 2019, defendant SUSAN M. BURNS was aware that defendant CHRISTINA L. BURNS had ingested alcoholic beverage(s).

92. Upon information and belief, on or about August 10, 2019 continuing through August 11, 2019, defendant SUSAN M. BURNS was aware that defendant CHRISTINA L. BURNS was impaired or intoxicated as a result of consuming alcoholic beverage(s).

93. Upon information and belief, defendant SUSAN M. BURNS had knowledge that defendant CHRISTINA L. BURNS would be operating a motor vehicle in the early morning hours of August 11, 2019.

94. Upon information and belief, defendant SUSAN M. BURNS had knowledge that defendant CHRISTINA L. BURNS would be operating a motor vehicle in the early morning hours of August 11, 2019 after she had ingested alcoholic beverage(s) resulting in her impairment or intoxication.

95. That on August 11, 2019 defendant CHRISTINA L. BURNS was operating the aforementioned vehicle while intoxicated or impaired.

96. That a motor vehicle is a dangerous instrumentality when operated by an individual who is intoxicated or impaired.

97. That on August 11, 2019, the aforementioned vehicle that defendant CHRISTINA L. BURNS was operating violently struck plaintiff CHE YEUNG as a result of defendant CHRISTINA L. BURNS' impairment or intoxication.

98. That defendants CHRISTOPHER P. BURNS and SUSAN M. BURNS were negligent as follows: in negligently supervising CHRISTINA L. BURNS; in allowing CHRISTINA L. BURNS to consume alcoholic beverage(s); of being aware that CHRISTINA L. BURNS consumed alcoholic beverage(s); in failing to supervise their minor child CHRISTINA L. BURNS while she was at the aforementioned premises of defendants FRANCIS and LISA ROGALLE located at 22 Ashford Drive, Bohemia, New York; in failing to supervise defendant CHRISTINA L. BURNS' departure from the residence of defendants FRANCIS and LISA ROGALLE; in allowing defendant CHRISTINA L. BURNS to operate a vehicle on August 11, 2019; in allowing defendant CHRISTINA L. BURNS access to a motor vehicle on August 11, 2019; in allowing defendant CHRISTINA L. BURNS to operate a motor vehicle after defendant CHRISTINA L. BURNS had consumed alcohol; in failing to supervise their minor child CHRISTINA L. BURNS in the operation of the aforementioned motor vehicle; in allowing their minor child to operate a motor vehicle while impaired or intoxicated; in negligently and recklessly entrusting their minor child with a motor vehicle while intoxicated or impaired; defendants lack of supervision of defendant CHRISTINA L. BURNS was grossly negligent, and/or wanton and/or so reckless as to amount to a conscious disregard of the rights of others.

99. That as a result of being struck by the aforementioned vehicle operated by defendant CHRISTINA L. BURNS, plaintiff CHE YEUNG was caused to sustain severe and permanent injuries as set forth above.

100. That as a result of the foregoing, the plaintiff CHE YEUNG, has been damaged in an amount exceeding the jurisdictional limits of all lower courts which would otherwise have jurisdiction herein and is entitled to compensatory and punitive damages.”

Defendants Christopher P. Burns and Susan M. Burns seek dismissal of the instant Complaint pursuant CPLR 3211(a)(7). CPLR 3211(a)(7) in pertinent part reads as follows:

“(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

7. the pleading fails to state a cause of action; ...”.

A CPLR 3211(a)(7) motion may be employed to dispose of an action in which the plaintiff has failed to state a claim cognizable at law, or an action in which plaintiff has identified a cognizable cause of action, but failed to assert a material allegation necessary to support the cause of action.

Initially, the sole criterion to dismiss a complaint is whether the pleading, and the factual allegations contained within its four corners, manifests any cause of action cognizable at law (*see Gaidon v. Guardian Life Ins. Co. of America*, 94 NY2d 330 [1999]; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). “To withstand dismissal, the requisite elements of the cause of action must be discernable from the pleadings, and the complaint must give notice of the transactions and occurrences to be proved” (CPLR 3013; *see Dolphin Holdings, Inc. v Gander & White Shipping, Inc.*, 122 AD3d 901[2014]).

On a motion to dismiss the complaint, pursuant to CPLR 3211(a)(7), for failure to state a cause of action, the court must afford the pleading a liberal construction, accept as true all the facts alleged therein, give the nonmoving plaintiff the benefit of all favorable inferences, and determine only whether the alleged facts fit within any cognizable legal theory, and not whether plaintiff can ultimately prove such facts (*see J.P.Morgan Securities, Inc. v Vigilant Ins. Co.*, 21 NY3d 324 [2013]; *People ex rel. Cuomo v Coventry First LLC*, 13 NY3d 108 [2009]; *Odierna v RSK, LLC*, 171 AD3d 769 [2d Dept 2019]; *Ramirez v Donado Law Firm, P.C.*, 169 AD3d 940 [2d Dept 2019]; *Webster v Sherman*, 165 AD3d 738 [2d Dept. 2018]; *Murphy v Department of Educ. of the City of N. Y.*, 155 AD3d 637 [2017]; *Bank of New York Mellon Trust Co., N.A. v Universal Dev., LLC*, 136 AD3d 850 [2016]). A motion to dismiss merely addresses the adequacy of a pleading and does not reach the substantive merits of plaintiff’s cause of action (*see Kaplan v New York City Dep’t. of Health and Mental Hygiene*, 142 AD3d 1050 [2016]; *Lieberman v Green*, 139 AD3d 815 [2016]). Whether the pleading will later survive a summary judgment motion, or plaintiff will ultimately prevail on the claims, is not relevant on a pre-discovery motion to dismiss (*see Lieberman v Green*, 139 AD3d 815; *Tooma v Grossbarth*, 121 AD3d 1093 [2014]).

The Court Appeals of New York in *Nolechek v. Gesuale*, held that “[a] minor child has no cause of action against his parent for negligent supervision in general, or for negligently entrusting him with a dangerous instrument in particular. There is, however, a duty by a parent to protect third parties from harm resulting from an infant child's improvident use of a dangerous instrument, at least, and perhaps especially, when the parent is aware of and capable of controlling its use” *Nolechek v. Gesuale*, 46 N.Y.2d 332, 336, 385 N.E.2d 1268 (1978) citing (e.g., *Lalomia v Bankers & Shippers Ins. Co.*, 35 AD2d 114, 117, affd at App Div 31 NY2d 830; *Carmona v Padilla*, 4 AD2d 181, 183, affd 4 NY2d 767; see Restatement, Torts 2d, § 316; Prosser, Torts [4th ed], pp 872-873).

Defendants Christopher P. Burns and Susan M. Burns file the instant Motion and seek to dismiss all claims against them and assert *inter alia* that the Amended Complaint fails to set forth a claim for which relief may be granted, particularly since neither of the movants, were the owner of the vehicle involved in the accident, had no knowledge of any prior unauthorized use of a motor vehicle by their daughter and had no prior knowledge of intoxication of their daughter.

Plaintiff opposes Defendants' Motion and asserts *inter alia* that the cause of action against Defendants Christopher P. Burns and Susan M. Burns is for the negligent supervision of their minor child Defendant Christina L. Burns. Plaintiff further alleges that Defendant Christina L. Burns plead guilty to Aggravated Vehicular Assault in violation of Section 120.04-a(1) and Aggravated Driving While Intoxicated, as a Misdemeanor, in violation of Section 1192.2-a(a). Plaintiff further asserts that the Amended Complaint is sufficient and set forth a cause of action for negligent supervision against Defendants Christopher P. Burns and Susan M. Burns and as such, Defendants' Motion to Dismiss must be denied in its entirety.

Upon a review of the Amended Complaint, affording a liberal construction, accepting as true all the facts alleged therein, and giving Plaintiff the benefit of all favorable inferences; the Court finds that the alleged facts are sufficiently pled and fit within cognizable legal theory of negligent supervision. *Nolechek v. Gesuale*, 46 N.Y.2d 332, 336, 385 N.E.2d 1268 (1978)

Accordingly, Defendants Christopher P. Burns and Susan M. Burns' Motion to Dismiss pursuant to CPLR 3211(a)(7) is denied. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Date: April 28, 2020



LOURDES M. VENTURA, J.S.C.

