SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

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ANDREY TROEGUBOV, an Infant Under the age of Fourteen Years, by his Mother and Natural Guardian, IRINA SOTHERN,

Plaintiffs, Decision and order
Index No. 23218/07

- against -

RICHARD MUNORE, CAROLE D. MCNEIL and FIRST CHERNOMORETS USA, INC.

Defendants, July 6, 2009

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PRESENT: HON. LEON RUCHELSMAN

The defendant First Chernomorets USA, Inc. (hereafter "First") move pursuant to CPLR §3212 for summary judgment dismissing the complaint filed by Plaintiff. The plaintiff opposes the motion and papers were submitted by all parties. After reviewing the arguments of all parties this court now makes the following determination.

Background

On April 25, 2007, plaintiff Andrey Troegubov sustained personal injuries when he was struck by a vehicle owned by Defendant Richard Munroe and operated by defendant Carole McNeil while attempting to cross Caton Avenue in Brooklyn, New York. The plaintiff, a ten year old, was attending defendant First's

soccer camp at the time of the accident and was under their supervision and care. The coach, an employee of defendant First was escorting other campers to the van and there is a dispute concerning where the coach was at the time of the collision. The plaintiff was hit by the vehicle while he was crossing the street to enter the camp's van to be driven home.

The defendant First now argues that the complaint must be dismissed since defendant First breached no duty to plaintiff, plaintiff has failed to demonstrate defendant First's acts and/or omission were a proximate cause of the plaintiff's injury, and defendant First was not negligible in hiring its coaches.

Conclusions of Law

Summary judgment may be granted where the movant establishes sufficient evidence which would compel the court to grant judgment in his or her favor as a matter of law (Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]). Under CPLR 3212(h), summary judgment "shall be granted unless the party responding to the motion demonstrates that the action, claim, cross claim or counterclaim has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law." Thus,

summary judgment would be appropriate where no issue of fact exists foreclosing the continuation of the lawsuit.

Generally, it is for the jury, the trier of fact to determine the legal cause of any injury (Aronson v. Horace Mann-Barnard School, 224 AD2d 249, 637 NYS2d 410 [1st Dept., 1996]). However, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Derdiarian v. Felix Contracting Inc., 51 NY2d 308, 434 NYS2d 166 [1980]).

Thus, to succeed on a motion for summary judgment it is necessary for the movant to make a prima facie showing of an entitlement as a matter of law by offering evidence demonstrating the absence of any material issue of fact (Winegrad v. New York University Medical Center, 64 NY2d 851, 487 NYS2d 316 [1985]). Moreover, a movant cannot succeed upon a motion for summary judgment by pointing to gaps in the opponents case because the moving party must affirmatively present evidence demonstrating the lack of any questions of fact (Velasquez v. Gomez, 44 AD3d 649, 843 NYS2d 368 [2d Dept., 2007]).

I. Defendant First's Duty to the Plaintiff

Camp employees have a duty to supervise their campers as reasonably prudent parents would supervise their children under

the same circumstances (Mirand v. City of New York, 84 NY2d 44, 614 NYS2d 372 [1994]; De Los Santos v New York City Deptartment of Education, 42 AD3d 422, 840 NYS2d 91 [2d Dept., 2007]).

In this case, there are substantial issues of fact whether defendant First breached their duty to the plaintiff. Plaintiff's testimony states that the coach was already across the street at the time of the accident. Yet, the coach testified that at the time of the accident he was on the same side of the street as the plaintiff and had not yet crossed with the other campers to the camp van before the plaintiff ran into the street on his own.

The difference of whether the coach left the plaintiff behind to cross on his own or the coach was still on the same side of the street of the plaintiff before the plaintiff ran into the street is an important one. It is an issue of fact that would determine whether or not defendant First's breached their duty to the plaintiff. A reasonably prudent parent would stay on the same side of the street as his or her child before crossing and would never cross the street leaving behind the child to cross on his or her own.

Moreover, it is important to note that to determine whether the duty to provide adequate supervision has been

breached, it must be established that the camp had sufficient specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated (Mirand v. City of New York, (supra); see Nocilla v. Middle Country Cent. School Dist., 302 AD2d 573, 757 NYS2d 300 [2d Dept., 2003]; Morman v. Ossining Union Free School Dist., 297 AD2d 788, 747 NYS2d 586 [2d Dept., 2002]; Janukajtis v. Fallon, 284 AD2d 428, 726 NYS2d 451 [2d Dept., 2001]; Convey v. City of Rye School Dist., 271 AD2d 154, 710 NYS2d 641 [2d Dept., 2000]).

In this case, a jury must determine whether the camp was on notice of the dangerous conduct that caused this injury since it be reasonably anticipated that a child could be hit by a car after crossing the street outside the cross path. Thus, these factual discrepancies must be resolved by a trier of fact.

Therefore, the Plaintiff has sufficiently opposed the motion for summary judgment and that portion of the motion is denied.

II. Defendant First's Lack of Supervision being Proximate Cause

Even if negligence has been determined and a breach of a duty owed, an unforeseeable superseding force can relieve the defendant of any liability notwithstanding that negligence

(Boltox v. Joy Day Camp, 67 NY2d 617, 499 NYS2d 660 [1986], Smith v. Stark, 67 NY2d 693, 499 NYS2d 922, (McKinnon v. Bell Security, 268 AD2d 220, 700 NYS2d 469 [1st Dept., 2000]), Mesick v. State, 118 AD2d 214, 504 NYS2d 279 [3rd Dept., 1986]). The test to be used is whether the chain of events that followed the defendant's negligence act or omission would be a normal or foreseeable consequence of the situation created by the Defendant (Mirand v City of New York, (supra); Parvi v. City of Kingston, 41 NY2d 553; Restatement, Torts 2d, §§ 443, 449; Prosser, Law of Torts, § 44).

Applying the test to this case, it cannot be established as a matter of law that a superseding cause severed all of defendant First's negligence. The coach testified on behalf of defendant First that the plaintiff crossed the street on his own accord, ahead of the other campers and the coach. However, plaintiff testified that the coach had already crossed leaving plaintiff to cross on his own. Therefore, it is foreseeable that a child who cannot safely cross a street on his own will face risks injuring himself by contact with oncoming traffic.

Furthermore, for a tortfeasor to escape liability on the grounds it merely furnished the condition for the happening of the event, the actual cause of the accident must be an

unforeseeable occurrence, something which the original tortfeasor (defendant First) could not have reasonable anticipated (Sheehan v. City of New York, 40 NY2d 496, 387 NYS2d 92 [1976]). Here, defendant First could have reasonably anticipated and foreseen that a child crossing from the middle of the block to the other side could be injured by a car. Therefore, the original tortfeasor (defendant First) cannot escape liability on the grounds that it merely furnished the condition since the cause of accident (child injured because of contact with car) is a foreseeable occurrence.

Therefore, the plaintiff has sufficiently opposed the motion for summary judgment and that portion of the motion is denied.

III. Defendant First's Negligence in Hiring its Coaches

In order to establish a claim for negligent hiring, the plaintiff must demonstrate that the defendant hired or retained their employees with knowledge of their propensity for the sort of behavior which caused plaintiff's harm (Detone v. Bullit Courier Service, Inc., 140 AD2d 278, 528 NYS2d 575 [1st Dept., 1988]; Robles v. GNF Properties Co., 5 Misc3d 1006(A), 798 NYS2d 713 [Supreme Court Bronx County, 2004]. Here, plaintiff presents no evidence showing that defendant First hired its coaches knowing they would be inadequate supervisor of children.

Plaintiff has failed its burden of proof demonstrating defendant First had knowledge of the coaches' propensity for this behavior. Therefore, that cause of action is consequently dismissed.

So ordered.

ENTER:

DATED: July 6, 2009
Brooklyn N.Y.

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Hon. Leon Ruchelsman
JSC