STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

WAYNE COOPERATIVE INSURANCE COMPANY, as subrogee of WASHINGTON VENTURES, LLC,

Plaintiff,

-vs-

Index No. 10-70073

2010

DONNA HAWTHORNE, ISMAL RAMOS, and MINNIE HAWTHORNE,

Defendants.

APPEARANCES: LAW OFFICE OF DANIEL W. COFFEY
(Daniel W. Coffey, Esq., of counsel)
Attorneys for Plaintiff

HISCOCK & BARCLAY, LLP
(Mark T. Whitford, Jr., Esq.)
Attorneys for Defendants

MEMORANDUM - DECISION

John B. Nesbitt, J.

Wayne Cooperative Insurance Company *("WCIC" or "plaintiff")* insured a dwelling at 5 Finch Street in the City of Rochester, owned by Washington Ventures, LLC, and leased by defendant Donna Hawthorne. On May 29, 2009, while the policy was in effect, fire significantly damaged the premises and WCIC paid the owner $28,808.17 for its loss under the terms of the policy. Pursuant to its right of subrogation, WCIC commenced this action against defendant Donna Hawthorne and her minor daughter, Minnie Hawthorne, who was also residing at the premises at the time of the fire. WCIC seeks a money judgment against these two defendants compensating it for payment made the property owner due to the fire damage. Defendants are defended and, if necessary, will be indemnified in this action under a State Farm renter's policy bearing a $100,000 personal liability limit.

Plaintiff proceeds against defendants upon allegations of fact ostensibly actionable under both negligence and contract theories. Plaintiff posits that the fire was started in the attic by the juvenile play of 6 year old Minnie Hawthorne feeding sheets of paper into a fully operating electric space heater, which ignited the paper and consequently the rest of the area once the flaming paper hit the floor. This fact implicates two principles of negligence law, the first predicating the potential liability of the minor daughter, and the second the imputed liability of her mother. As to the first, New York decisional law provides:

> An infant under four years of age is incapable as a matter of law of understanding danger, and hence he or she neither can be found negligent nor be held responsible for his or her acts. Above the age of four years, however, if the infant is of sufficient maturity to appreciate danger and take steps to avoid it, he or she may be chargeable with negligence ... The standard of care for an infant is the degree of care expected of a reasonably prudent child of the same age, experience, intelligence and degree of development" (1A NY PJI3d 2:23 at 268 [2012])(citations omitted).

This section of the PJI cites the Fourth Department's decision in *Tenebrusco v Toys 'R' Us - NYNEX* (256 AD2d 1236 [4th Dep't 1998]) for the proposition that a "four-year-olds's capacity to exercise care is a question of fact for the jury," expressly recognized by the Fourth Department fifty five years earlier in *Day v Johnson* (265 App Div 383, 387 [4th Dep't 1943]).

The second tort theory relied upon by plaintiff is known as negligent entrustment. The doctrine derives from the parental duty to control his or her child's conduct. The most expansive statement of this duty can be found in the Restatement [2d] of Torts §316:

> A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent
>
> (a) knows or has reason to know that he has the ability to control his child, and
>
> (b) knows or should know of the necessity and opportunity for exercising such control.

The Restatement cites *Nolechek v Gesaule* (46 NY2d 332) and *Costa v Hicks* (98 AD2d 137 [2d Dept 1983])as instantiating the New York rule, which is narrower that what the Restatement would otherwise suggest. In the *Nolecheck* case, Chief Judge Brietel cabined the scope of parental duty to one of negligent entrustment of dangerous instruments. Said the Chief Judge:

> [I]t is well-established 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. ... [P]arents 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"

Plaintiff alleges that defendant mother breached her duty to its insured by permitting or not controlling her child's access to the space heater that caused the fire.

The third theory of liability advanced by plaintiff is one of contract. In effect at the time of the fire was a lease rental agreement signed by defendant mother providing, among other things:

> 4. RULES & REGULATIONS: ... You agree that you and the other occupants and your guests will comply with the apartment rules which are currently in effect and such other and further rules as we may make for the safety, care, cleanliness, and good order of the property ... You agree to be responsible for all actions of your family, friends, guests and invitees.
>
> ***
>
> 12. MAINTENANCE & REPAIRS: ... You agree to keep the premises in a clean and tenantable condition at all times and to repair the premises or property:
>
> a. When damage is caused by misuse or neglect, rather than as a consequence solely of normal and reasonable wear.
>
> ***
>
> c. When damage results from activities or actions which violate this agreement or the apartment rules by you or your guest.
>
> If you fail to make repairs or replacement, we may do so at your expense and charge to you the costs of the repair or replacement as added rent which shall be due and payable under the terms and conditions of normal rent.
>
> ***
>
> 15. FIRE HAZARDS: You shall not permit any hazardous act or store hazardous substances, which might cause fire or that will increase the rate of insurance.

Plaintiff alleges that the defendant mother was responsible for the acts of her daughter under paragraph 4 of the lease and that paragraphs 12 and 15 were violated when the daughter "misused or neglected" the premises and engaged in a "hazardous" act when she stuck paper into the space heater.

Defendants move for summary judgment dismissing the complaint pursuant to CPLR 3212. They first argue that, as a matter of law, the action against defendant mother cannot stand even if the

facts are as plaintiff claims. Second, defendants argue that plaintiff has not presented sufficient evidence in admissible form to support its claim that the defendant daughter started the fire. Of course, inasmuch as defendant's first argument comes in the context of a motion for summary judgment, we are reminded that summary judgment is a "drastic remedy and should not be granted where there is any doubt as to the existence of triable issues" (*Dal Construction Corp. v City of New York*, 108 AD2d 892, 894 [2d Dep't 1985]). Only where "no reasonable view of the evidence" supports a claim or defense should a court rule upon its merits as a matter of law (*Eddy v Syracuse University*, 78 AD2d 989, 990 [4th Dep't 1980]). "Where varying inferences are possible' the issue remains "a question of fact for the jury" (*Mirand v City of New York*, 84 NY2d 44 [1994]). Evidence adduced upon a motion for summary judgment must be viewed "in the light most favorable" to the party opposing the motion (*Wallace v Waterpointe at Oakdale Shores, Inc.*, 248 AD2d 383 [2d Dep't 1998]).

In this case, the presumptive charge to the jury as suggested by the PJI reads in pertinent part as follows:

> PJI 2:260 Vicarious Responsibility - Family Relationship - Liability of Parent for Tort of Child - Negligence in Permitting Use of Instrumentality
>
> A parent is not responsible for the acts of 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 for the child and her prior experience with such instrument, constitutes an unreasonable risk of harm of others. Reasonable care means that degree of care which a reasonably prudent parent would use under the same circumstances.

Defendants argue that even assuming the plaintiff can prove all that it alleges and viewing that proof most favorably to the plaintiff, the plaintiff nevertheless falls short in raising an issue of fact whether the defendant mother's alleged neglect reaches the degree of culpability the law requires for it to be actionable.

The complaint against Donna Hawthorne, defendants argue, states no more than a nonactionable claim of negligent parental supervision, thus failing to state a cognizable cause of action. Defendants are, of course, correct that, 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 [1997], citing *Holodook v Spencer*, 36 NY2d 35, 51 [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 (*Nolecheck v Gesuale*, 46 NY2d 332, 340 [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 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 575,581 [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 [2001]).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.

"Whether a particular object qualifies as a dangerous instrument depends on the nature of the instrument and the facts pertaining to its use, including the particular attributes of the minor using or operating the item" (*Rios v Smith*, 95 NY2d 647, 653 [2001]). Generally, it is a question of fact properly submitted for jury determination whether a particular object so qualifies (*Rios, supra.; see e.g. Kelly v Di Cerbo*, 27 AD3d 1082 [4th Dept 2006[). An older case that the Court views as instructive and analogous to the instant case is *Craft v Mid Island Dep't Stores* (112 AD2d 969 [2d Dept 1985]).[1] There a boy liberated a container of gasoline from his father's garage and took it to a nearby playhouse. The boy and a friend poured the gasoline onto a wooden board and applied lighted matches to the pooled areas to ignite flames. Unfortunately, the flames flashed back into the bottle, prompting the boy to throw the bottle and in doing so, set his friend on fire. Relying upon *Nolechek v Gesuale* (46 NY2d 332, 338 [1978]), the Appellate Division held that the "determination of whether gasoline is a dangerous instrument involves a flexible standard dealing with several factors including the nature of the instrument, as well as the age and experience of the child, and as such is a question for the trier of fact" (112 AD2d at 969). The instant case is analogous as alleging

---

[1] The Craft case was cited with approval in *Rios v Smith* (95 NY2d 647, 653 [2001]) and *Meyers v 149 Automotive, Inc.* (295 AD2d 104 [1st Dept 2002]).

a case of youthful mischievousness or curiosity attracted by the prospect of fire sparked by touching flammable product with a fire-igniting agent. As in *Craft*, it would appear a question of fact for the trier of fact whether, under the circumstances of this case, the space heater was a dangerous instrument.

In support of their motion for summary judgment, defendants emphasize two factors that arguably render dismissal appropriate. These factors inhere in the nature of the parent's duty. That duty is "to protect third parties from harm that is clearly foreseeable from the child's improvident use or operation of a dangerous instrument, where such use is found to be subject to the parent's control" (1B PJI 2:260 at 723 [2012] citing *Rios v Smith*, supra; *LaTorre v Genesee Management*, Inc., supra [emphasis added]). Regarding the foreseeability issue, defendant argues that, as a matter of law, unless the instrument at issue is inherently dangerous (such that the risk is unreasonable *a priori*) or the parent has notice of some propensity of the child to employ or engage an other than inherently dangerous instrument in a dangerous manner (such that the risk is unreasonable *a posteriori*), the plaintiff's damages were not foreseeable and hence not actionable. While the idea of an "inherently dangerous instrument" finds provenance in some areas of law (*see e.g. Prosser v County of Erie*, 244 AD2d 942 [4th Dept 1997]), it has not been introduced into the law of negligent entrustment so far as this Court's research reveals, except perhaps as a descriptive claim denoting a degree of dangerousness characterizing one aspect of a case- specific, fact-driven determination. Other equally important factors are the age, experience, maturity, and disposition of the child to whom the instrument is entrusted. As the Fourth Department long ago recognized: "Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them must calculate upon this, and take precautions" (*Day v Johnson*, 265 AD 383, 387 [4th Dept 1943], *quoting Union Pacific Railway Co v McDonald*, 152 US 262, 277 [1984]). Under the facts of this case, the nature of the instrument at issue, the relevant characteristics of six year olds in general and the minor defendant in particular, and the precautions taken by the defendant mother to ensure proper instruction and supervision of the minor defendant are factors to be sieved and weighed by the trier of fact to determine whether defendant mother breached her duty of care.

The Court has examined the other contentions of defendants and find them insufficient to warrant granting summary judgment on their behalf. The issue of the degree of defendant mother's control over the minor defendant at the time of the fire sufficient to imply a duty of care to third parties is a question to be determined by the trier of fact. Lastly, the Court does not find as a matter of law that there are no viable evidentiary avenues available to plaintiff to raise an issue of fact whether the minor defendant started the fire as described in the fire investigation report.

Accordingly, the motion for summary judgment is denied.

Dated: February 8, 2012
Lyons, New York

JOHN B. NESBITT
Acting Supreme Court Justice