

Gomes v Boy Scouts of America

2013 NY Slip Op 32453(U)

October 9, 2013

Sup Ct, New York County

Docket Number: 115435/10

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JAFFE
Justice

PART 12

Index Number : 115435/2010
GOMES, DAVIDE E.
vs.
BOY SCOUTS OF AMERICA
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 115435/10
MOTION DATE _____
MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

S/D
No(s). 13-27, 39
No(s). 30, 59-82
No(s). 79

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/8/13

[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X
DAVIDE E. GOMES,

Plaintiff,

-against-

Index No. 115435/10

Motion seq. nos. 001, 002

DECISION & ORDER

BOY SCOUTS OF AMERICA, *et al.*,

Defendants.
-----X

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By notice of motion, defendant Boy Scouts of America (BSA) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against it. Plaintiff and defendant Loureiro oppose.

By notice of motion, defendant Michael Medeiros moves for an order precluding plaintiff from introducing at trial certain evidence based on his failure to respond to discovery demands. Plaintiff opposes.

The motions are consolidated for disposition.

I. PERTINENT BACKGROUND

On July 24, 2005, plaintiff, then a 13-year-old Boy Scout, was participating in a Boy

Scout excursion at Floodwood Mountain Scout Reservation in the Adirondacks. Plaintiff was a member of Boy Scout Troop 141. He and other scouts were accompanied by volunteer adult leaders. Near or in the shower house at the Reservation, plaintiff sustained head injuries.

(NYSCEF 19).

In accident and witness reports created after the accident, the other scouts who were at the showers at the time of plaintiff's accident stated that they saw plaintiff run from the shower area and discovered him lying prone on the ground and bleeding. None of them saw him fall.

(NYSCEF).

In his amended complaint, plaintiff alleges that as he was walking along the common area and/or grassy area at or near the showers, he fell due to defendants' failure to keep the area safe, in good repair, well-lit and free from obstruction or defect and supervise him and the other scouts. As to BSA, plaintiff alleges that it owned, operated, controlled, maintained, managed, and inspected the Reservation and camp grounds and supervised the activities held there.

(NYSCEF 17).

In plaintiff's supplemental verified bill of particulars, he describes the dangerous condition which caused his fall as follows: "that the area in front of the showers where the [] accident occurred was not lit, and/or was poorly lit, and/or was inadequately lit; was raised and un-leveled, and had rocks and/or tree limbs/branches strewn about it," all of which defendants had constructive notice. (NYSCEF 22).

At an examination before trial held on December 16, 2011, plaintiff testified that he did not recall his accident or what had caused his fall, and that his last memory before falling was of walking to the showers. At the time of his accident, it was dark outside and there was no lighting

outside the showers, although it was lit inside, and he noticed that there were many rocks on the ground around the shower house. He was wearing a working head lamp as he approached the showers. (NYSCEF 25).

By affidavit dated July 25, 2012, Todd McGregor, area director for BSA's Northeast Region, states that BSA grants charters to local scout councils and organizations to operate scouting groups or units, that the Reservation and camp grounds were owned and operated by Northern New Jersey Council, Inc., Boy Scouts of America, and that no BSA employees were in staff positions at the camp when plaintiff was injured, nor did BSA supervise the scouts or maintain the grounds. (NYSCEF 39).

II. MOTION FOR SUMMARY JUDGMENT

Based on McGregor's affidavit, BSA has established, *prima facie*, that it may not be held liable to plaintiff for the alleged dangerous condition at the Reservation or the alleged assault upon plaintiff by another scout. (*See Entler v Koch*, 85 AD3d 1098 [2d Dept 2011], *lv denied* 18 NY3d 869 [2012] [BSA not liable for alleged negligence of charter BSA Council as there was no agency relationship between it and Council, and it lacked requisite supervision, direction, or control over adult leader who had custody of Scouts during trip at issue]; *O'Lear v Boy Scouts of Am.*, 33 AD3d 685 [2d Dept 2006] [where plaintiff died while on Scout trip, BSA granted summary judgment as it exercised no supervisory control over troop or adult leaders who accompanied scouts on trip]; *Pitkewicz v Boy Scouts of Am., Inc. - Suffolk County Council*, 261 AD2d 462 [2d Dept 1999] [absent evidence that Council had supervision or control over day-to-day activities of Scout troop or scoutmaster, it could not be held liable for scoutmaster's alleged negligent supervision]; *Alessi v Boy Scouts of Am. Greater Niagara Frontier Council, Inc.*, 247

AD2d 824 [4th Dept 1998] [neither BSA nor Council held liable for acts of scoutmaster]).

Plaintiff's claim that BSA may be held liable for negligent supervision based on his claim that he was assaulted by other scouts does not raise a triable issue absent evidence that BSA had or violated a duty to supervise the scouts at the Reservation or that it knew of any prior conduct that would have put it on notice of a potential assault by another scout. (*See eg Buchholz v Patchogue-Medford School Dist.*, 88 AD3d 843 [2d Dept 2011] [injuries caused by impulsive, unanticipated act of fellow student will not give rise to negligent supervision claim absent proof of prior conduct that would have put reasonable person on notice]; *Ullrich v Bronx House Community Ctr.*, 99 AD3d 472 [1st Dept 2012] [community center not liable for assault on player during basketball game as it was unprovoked and unanticipated, there was no warning of impending assault, and thus it occurred in such short span of time that "even most intense supervision could not have prevented it"]).

In *Phelps v Boy Scouts of Am.*, on which plaintiff relies, "very young campers" were placed in bunks at a camp with "much older campers," who allegedly assaulted the young campers. The court denied summary judgment to BSA, finding that there were triable issues as to whether the camp negligently supervised the campers and whether BSA had "sufficient control over the operation of the camp" to be held liable for the camp's negligent supervision. (305 AD2d 335 [1st Dept 2003]). The court observed that a summer camp has a duty to supervise its campers as would a parent of ordinary prudence in similar circumstances, and that constant supervision in a camp setting is neither desirable nor feasible. However, the court also allowed that very young campers often require closer supervision than older campers, and that placing the younger campers in the bunks with the older campers was an apparent violation of camp policy.

Here, there is no issue of very young campers being unsupervised or placed in risky circumstances as plaintiff and his fellow scouts were all teenagers and there is no evidence that any camp policy was violated or that BSA had any control over the camp's operation. (*See Kosok v Young Men's Christian Assn. of Greater New York*, 24 AD2d 113 [1st Dept 1965], *affd* 19 NY2d 935 [1967] [finding that camp operator did not negligently supervise activities of campers of high school age for short period as "certain amount of horseplay is almost always to be found in gatherings of young people, and is generally associated with children's camps" and is only discouraged when it becomes dangerous and camp operator had no notice that it was likely to do so; however, situation is different when very young children involved]).

Moreover, to the extent that plaintiff relies on a "Leaders' Guide" which allegedly sets forth requirements for the supervision of scouts, BSA denies that it was involved with its preparation or that it reviewed, approved, or was aware of it. (NYSCEF 79). Plaintiff has thus failed to raise a triable issue as to BSA's liability.

III. MOTION TO PRECLUDE

Defendant Michael Medeiros's motion to preclude is granted solely to the extent of directing plaintiff to respond to his June 8, 2012 discovery demands and setting the matter down for a compliance conference.

IV. CONCLUSION

Accordingly, it is hereby

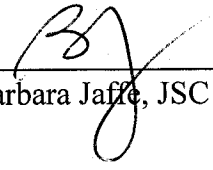
ORDERED, that defendant Boy Scouts of America's motion for summary judgment is granted, and the complaint and any cross claims against it are severed and dismissed, with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate

bill of costs, and the Clerk is directed to enter judgment accordingly; it is further

ORDERED, that defendant Michael Medeiros's motion to preclude is granted solely to the extent of directing plaintiff to respond to his June 8, 2012 discovery demands within 20 days of service on plaintiff of a copy of this order with notice of entry; and it is further

ORDERED, that the remaining parties in the consolidated action are directed to appear for a compliance conference on November 13, 2013 at 2:15 pm, in Room 279 at 80 Centre Street, New York, New York.

ENTER:



Barbara Jaffe, JSC

DATED: October 9, 2013
 New York, New York