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SHORT FORM ORDER

INDEX No. 10-11831
CAL. No. 15-00738OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 9-15-15 (001) (002)
ADJ. DATE 3-1-16
Mot. Seq. #001 - MG
#002 - MG

MICHAEL MARINO, an infant under the age of 18, by his Mother and Natural Guardian, ELENA MARINO, and ELENA MARINO, Individually,

Plaintiffs,

- against -

RICHARD MORRISON, JR, CARMELA MORRISON and RICHARD BEDROSIAN,

Defendants.

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Attorney for Defendant C. Morrison
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by defendant Carmela Morrison, dated August 19, 2015, and supporting papers; (2) Notice of Cross Motion by defendant Richard Bedrosian, dated August 19, 2015, and supporting papers; (3) Affirmation in Opposition by plaintiffs, dated December 1, 2015, and supporting papers; (4) Reply Affirmations by defendants, dated February 28, 2016 and January 4, 2016, and supporting papers; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (seq. 001) by defendant Carmela Morrison and the motion (seq. 002) by defendant Richard Bedrosian are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Carmela Morrison for summary judgment dismissing the complaint against her is granted; and it is further

ORDERED that the motion by defendant Richard Bedrosian for summary judgment dismissing the complaint against him is granted.

This action was commenced by plaintiff to recover damages for injuries infant plaintiff Michael Marino allegedly sustained as a result of an accident involving an all-terrain vehicle (ATV) on July 28, 2009. The complaint alleges that Mr. Marino was a passenger on the rear seat of the ATV, that he was caused to be ejected from the ATV, and that the accident took place on property located behind the address known as 29 Buckingham Drive, Dix Hills, New York. Elena Marino individually asserts a derivative claim for loss of love, services, companionship, and household support. Defendant Richard Bedrosian asserts cross claims against defendant Richard Morrison, Jr., who has failed to appear in this action.

Defendant Carmela Morrison now moves for summary judgment in her favor on the grounds that she is exempt from liability pursuant to General Obligations Law § 9-103, that Mr. Marino assumed the risk inherent in the activity, and that plaintiffs lack knowledge as to the location of the alleged accident or the manner in which it occurred. In support of her motion, Ms. Morrison submits copies of the pleadings and transcripts of the deposition testimony of Michael Marino, Richard Bedrosian, and herself.

Defendant Richard Bedrosian also moves for summary judgment in his favor on the grounds that he is exempt from liability pursuant to General Obligations Law § 9-103, plaintiffs lack knowledge as to the location of the alleged accident or the manner in which it occurred, and he had no knowledge that Mr. Marino was present on his property, and Mr. Marino assumed the risk inherent in the activity. In support of his motion, he submits copies of the pleadings and transcripts of the deposition testimony of himself and Michael Marino.

At his deposition, infant plaintiff Michael Marino testified that, on the date in question, he was 15 years old and was spending time at the house of his school friend, Richie Morrison. Mr. Marino indicated that Mr. Morrison's father purchased an ATV for Mr. Morrison "a few years" prior, which was parked on the premises next to a shed. Mr. Marino explained that he, Mr. Morrison, and Mr. Morrison's cousin were waiting for a few friends to arrive at Morrison's house. Mr. Marino testified that at some point, after it had gotten dark outside and when Mr. Morrison's parents were not home, Mr. Morrison and his cousin began drinking liquor they had stolen from Mr. Morrison's parents' liquor cabinet. Mr. Marino explained that the young men had been playing video games in Mr. Morrison's basement for a number of hours, but eventually went into the backyard, at which time Mr. Morrison and Mr. Morrison's cousin began driving the ATV in question around the backyard of the premises. Mr. Marino, upon being offered a ride on the ATV, stated that he climbed aboard and sat behind Mr. Morrison and that neither one of them wore a helmet. Mr. Marino testified that after he sat down on the ATV, Mr. Morrison began driving it on the premises and the next thing he remembers is waking up in a basement with people "picking branches out of [his] head." He stated that although they started out riding the ATV in Mr. Morrison's backyard, due to his losing consciousness he is unable to identify exactly where the accident took place. Mr. Marino testified that he later came to learn from "mutual friends" that the accident occurred due to the ATV's brakes failing, the ATV hitting something, and he and Mr. Morrison being thrown off the ATV. Mr. Marino further testified that he was later informed by his friend, Peter Frisina, that he, too, was injured in a similar way on that same ATV.

Regarding his experience with ATVs, Mr. Marino testified that his father owned one and he had both driven it and been a passenger on it "since [he] was young." Mr. Marino stated that neither Carmela Morrison nor Richard Bedrosian ever gave him permission to ride on Mr. Morrison's ATV, and that neither parent was aware of any alcohol consumption by the young men.

At her deposition, Carmela Morrison testified that her partner, Richard Bedrosian, owns the subject premises. She further testified that she was not home at the time of the alleged ATV accident, but was told by various parties that, contrary to plaintiffs' allegations, Mr. Marino had been the driver of the ATV and that her son was the rear passenger. Ms. Morrison indicated that she had taken her son and Mr. Marino to the beach earlier in the day with Mr. Marino's mother's permission. She stated that at approximately 6:00 p.m., after they all had returned to the subject premises, she left the house in order to attend a networking event. She explained that she asked Mr. Marino if his mother was coming to pick him up and he said "yes." She informed him that he was welcome to stay to eat some pizza that she had recently ordered. She testified that she then left the young men at the premises with Mr. Morrison's 20-year-old sister, Kristina, who was preparing to go out and was not present at the time of the accident. Carmela Morrison indicated that at approximately 8:00 p.m. she received a call saying that there had been an accident at the premises and she went home immediately. When asked whether her son obtained permission from her to use the ATV on the date in question, she replied "[a]bsolutely not." Regarding prior accidents involving the ATV, Ms. Morrison testified that a few months prior to the date in question, Mr. Morrison's friend, Peter, was driving it, fell off of it, and sustained scratch to his face. She further testified that after Peter's fall, she "took the key and gave it to Bedrosian and said 'I don't want this ATV used at all.'"

At his deposition, Richard Bedrosian testified that he is the owner of the subject premises, but does not know exactly where the accident in question occurred, although he was told by his girlfriend, Carmela Morrison, that it happened "off property," on state land behind his backyard. He stated that his property is approximately 1.9 acres in size, completely fenced, with the backyard consuming ⅔ of that land. Of that backyard, he explained, ½ of it is ungroomed woods. Regarding the ATV in question, Mr. Bedrosian testified that it was a Christmas gift from Mr. Morrison's biological father, defendant Richard Morrison, Jr., to Mr. Morrison, which he received approximately seven months before the accident. Mr. Bedrosian testified that he strongly disapproved of the ATV being on his property, but was told by Mr. Morrison's father that he had no place to store it. Mr. Bedrosian indicated that Mr. Morrison would occasionally drive it around the backyard in circles or into the wooded area, but that Mr. Morrison's father promised Mr. Bedrosian that he would take Mr. Morrison to off-premises locations to ride it and, based on that proviso, Mr. Bedrosian allowed the ATV to be stored on his property. Mr. Bedrosian testified that Mr. Morrison was forbidden from operating it if he or Carmela Morrison were not home.

Regarding the date in question, Mr. Bedrosian testified that he was told by Carmela Morrison, Mr. Morrison, and Tony Yacende that Mr. Marino was the driver of the ATV at the time and that Mr. Morrison was the passenger. Also, Mr. Bedrosian explained that no one was permitted to operate the ATV on the date in question because he had taken its only key and put it in a desk in his home office– a location that was "off limits to everybody."

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, 26 NY3d 40, 19 NYS3d 488 [2015]; ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Nomura***, *supra*; *see also* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (***Daliendo v Johnson***, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Nomura***, *supra*; *see also* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

It is axiomatic that for a plaintiff to recover against a defendant in a negligence action, plaintiff must prove defendant owed plaintiff a duty and that the breach of that duty resulted in the injuries sustained by plaintiff (*see* ***Lugo v Brentwood Union Free School Dist.***, 212 AD2d 582, 622 NYS2d 553 [2d Dept 1995]; ***Kimbar v Estis***, 1 NY2d 399, 153 NYS2d 197 [1956]).

"The doctrine of primary assumption of risk provides that a voluntary participant in a sporting or recreational activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (***Shivers v Elwood Union Free Sch. Dist.***, 109 AD3d 977, 978 [2d Dept 2013] [internal quotation omitted]; *see* ***Trupia v Lake George Cent. School Dist.***, 14 NY3d 392, 901 NYS2d 127 [2010]; ***Morgan v State of New York***, 90 NY2d 471, 662 NYS2d 421 [1997]). "A plaintiff is barred from recovery for injuries which occur during voluntary sporting or recreational activities if it is determined that he or she assumed the risk as a matter of law" (*id.* at 978; *see* ***Leslie v Splish Splash at Adventureland***, 1 AD3d 320, 766 NYS2d 599 [2d Dept 2003]; ***Morgan v State of New York***, *supra*). "It is not necessary to the application of the doctrine that the injured plaintiff should have foreseen the exact manner in which the injury occurred so long as he or she is aware of the potential for injury of the mechanism from which the injury results" (***Cruz v Longwood Cent. Sch. Dist.***, 110 AD3d 757, 758, 973 NYS2d 260 [2d Dept 2013] [internal quotation omitted]).

"There is . . . a duty by a parent to protect third parties from harm resulting from [his or her] 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 NY2d 332, 336, 413 NYS2d 340 [1978]). "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" (*id.* at 339). "In order for a third-party claim of this kind against a parent or guardian . . . negligence must be alleged and pleaded with some reasonable specificity, beyond mere generalities" (***LaTorre v Genesee Mgmt.***, 90 NY2d 576, 584, 665 NYS2d 1 [1997]).

Defendants Carmela Morrison and Richard Bedrosian, both relying on nearly identical arguments in support of their motions, have established a prima facie case of entitlement to summary judgment by offering sufficient proof that Mr. Marino voluntarily assumed the risks inherent in riding an ATV (*see* ***Shivers v Elwood Union Free Sch. Dist.***, *supra*; *see generally* ***Alvarez v Prospect Hosp.***, *supra*).

Moving defendants proved that Mr. Marino voluntarily boarded the ATV, either as a driver or a passenger, having possessed significant prior experience with such machines. Further, there is nothing in the record indicating that Mr. Marino did not have full awareness of Mr. Morrison's consumption of alcohol, if true, the weather and lighting conditions, and the landscaping of the backyard prior to riding on the ATV. Even if the Court were to assume, for the purposes of this decision, that Mr. Morrison's consumption of alcohol, or some other factor, exceeded the level of risk Mr. Marino can be said to have assumed, plaintiffs have not proven the manner in which Mr. Marino allegedly sustained his injuries or even that Mr. Marino's injuries were sustained on Mr. Bedrosian's property. Accordingly, moving defendants, having established their entitlement to summary judgment on the ground of Mr. Marino's primary assumption of the risk, the Court need not reach defendants' other arguments.

Defendant having established a prima facie case entitlement to summary judgment, the burden shifted to plaintiff to raise an issue of fact necessitating a trial (*see* ***Alvarez v Prospect Hosp.***, *supra*). Plaintiffs argue that: (1) General Obligations Law § 9-103 does not apply to the facts of this case; (2) that enhanced risks were present at the time of Mr. Marino's alleged injury, which he cannot be expected to assume; and (3) defendants owed a duty of care to Mr. Marino and failed to supervise him properly. In opposition, plaintiffs submit a copy of the Bill of Particulars and Michael Marino's own affidavit.

Generally, "a plaintiff who suffers from amnesia as the result of the defendant's conduct is not held to as high a degree of proof in establishing [his or her] right to recover for [his or her] injuries as a plaintiff who can describe the events in question" (***Menekou v Crean***, 222 AD2d 418, 419, 634 NYS2d 532 [2d Dept 1995]; ***Sawyer v Dreis & Krump Mfg. Co.***, 67 NY2d 328, 502 NYS2d 696 [1986]; ***Santiago v Quattrociocchi***, 91 AD3d 747, 937 NYS2d 119 [2d Dept 2012]). However, in order to invoke that lower burden of proof, plaintiff must not only make a prima facie case, but must also submit an expert's affidavit demonstrating the amnesia through clear and convincing evidence (***Menekou v Crean***, *supra*). Plaintiffs have failed to meet that burden here. Therefore, plaintiffs' attempts to raise triable issues will be evaluated in the usual manner (*see* ***Alvarez v Prospect Hosp.***, *supra*).

As Richie Morrison, Tony Yacende, and Peter Frisina have not been deposed, the Court must decide this matter solely on the three deposition transcripts and single affidavit submitted by the parties herein. The undisputed facts can be summarized as follows: (1) Mr. Bedrosian owned the subject premises, but was unaware of Mr. Marino's presence there at the time of the incident; (2) Mr. Marino, Mr. Morrison, and Mr. Yacende were unsupervised for a period of time on the evening in question; (3) Mr. Marino voluntarily rode on an ATV while not wearing protective equipment; (4) Mr. Marino was knocked unconscious at some point in the evening and awoke in a basement surrounded by friends and his father; (5) Mr. Marino was transported to the hospital via ambulance; (6) Peter Frisina sustained an injury while riding the subject ATV on an occasion prior to plaintiff's alleged injuries; and (7) Ms. Morrison and Mr. Bedrosian took the keys for the ATV away from Mr. Morrison and forbade Mr. Morrison using the ATV after Peter Frisina's injury.

Here, plaintiffs rely almost entirely on hearsay not subject to any exception, in an attempt to raise triable issues. Any reference by plaintiffs' counsel to "defective" brakes is unfounded and speculative (*see* ***Daliendo v Johnson***, *supra*). Further, plaintiffs have failed to provide any proof as to the mechanism of Mr. Marino's alleged injury (*see* ***Passaro v Bouquio***, 79 AD3d 1114, 914 NYS2d 905 [2d

Dept 2010]). Based upon the admissible, non-hearsay evidence submitted, it is just as likely that Mr. Marino jumped from the moving ATV; took an uneventful ride on the ATV, then attempted to climb a tree and fell to the ground; or was hit in the head by some unknown object, causing him to become unconscious, as it is that the ATV crashed and he was thrown from it. Furthermore, the "dangerous instrument" exception is inapplicable here, as plaintiffs have not submitted evidence that movants gave Mr. Morrison permission to use the ATV or supplied him with access to it (*see* ***Nolechek v Gesuale***, *supra*). Instead, uncontroverted evidence has been submitted that movants took affirmative steps to deny use of the ATV to Richie Morrison.

Accordingly, the motions by defendants Carmela Morrison and Richard Bedrosian for summary judgment in their favor dismissing the complaint against them is granted.

Dated: September 8, 2016

Peter H. Mayer

PETER H. MAYER, J.S.C.