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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU

PRESENT: **HON. ANTHONY L. PARGA, J.S.C.**

CARL HYMAN and CINDY HYMAN,

Plaintiffs,

- against -

DAVID KOPLITZ and IRIS KOPLITZ, SEARS ROEBUCK, POULAN/WEED EATER DIVISION WCI OUTDOOR PRODUCTS, INC. and WCI OUTDOOR PRODUCTS, INC.,

Defendants.

Sequence #03
Motion Date: 9/13/00
Index # 028467/97
Part 26

Upon the foregoing papers, the motion by defendants David and Iris Koplitz for an order granting summary judgment in their favor and dismissing the complaint and the cross-claim as against them is granted.

This is an action to recover damages for serious personal injuries sustained by plaintiff Carl Hyman ("plaintiff") when an object (claimed to be a piece of concrete) shattered the left lense on his glasses and lacerated his left cornea while his neighbor, defendant David Koplitz, was using a lawn edging machine on his property in Plainview, on August 1, 1997, at approximately 7:30 p.m. The edger was sold by defendant Sears, Roebuck and Co. ("Sears"), manufactured by WCI Outdoor Products, Inc. ("WCI"), and owned by defendants David and Iris Koplitz. Prior to the accident, plaintiff was standing on defendant Koplitz'

lawn, holding his baby daughter while speaking with defendant Iris Koplitz (Examination Before Trial ["EBT"] of plaintiff at p. 27). The plaintiff claims that during this time period he heard "sounds of something striking a surface" (EBT of plaintiff at p. 101). Defendant Iris Koplitz testified at her deposition that the edger was making a "sparking sound" (EBT of defendant Iris Koplitz at pp. 10, 12). The plaintiff had seen defendant David Koplitz use the edger once before (EBT of plaintiff at p. 106). Right before the accident occurred, defendant David Koplitz was operating the edger while walking toward the plaintiff, which caused the plaintiff to move "out of the way . . . a little bit further" (EBT of plaintiff at pp. 101, 102). The plaintiff felt there was a risk in staying in his original location (EBT of plaintiff at p. 101).

It is not clear where plaintiff was standing at the time of the accident since he did not testify at his deposition to an exact location. He also did not state at his deposition the distance he was from the defendant Daniel Koplitz when he was struck by the flying object. However, the plaintiff avers in his answer to defendant Sears' written interrogatory number 27 that at the time of the accident he was standing in the street, 50 to 60 feet away from defendant David Koplitz. The operator's manual for the edger depicts on page 3 an illustration of a "Hazard Zone" which had a 30 foot radius. Next to the illustration is a warning that in the "Hazard Zone for thrown objects", the "blade can throw objects violently. Others can be blinded or injured. Keep people and animals 30 feet away." It also cautions the operator on page 4 that he or she should "keep . . . bystanders outside the 60 foot Hazard Zone".

Counsel for the Koplitz' argues that the Koplitz' owed no duty to the plaintiff, and that even if they owed the plaintiff a duty, the plaintiff failed to exercise reasonable care. He

maintains that the case at bar exemplifies the "true definition of an ' accident'" (see, *Bierach v. Nichols,* 248 AD2d 916, 918) and that "'[n]eighbors must be able to have normal relations unaffected by a fear of lawsuits'" (*Milici v. Maresca,* 178 Misc 2d 249, 253 [Sup. Ct. Nassau Co.]).

General principles of negligence law, as set forth by the Court of Appeals, are instructive on the arguments posited by the movants.

"The concept of legal duty merges logic, science and public policy to determine whether the plaintiff's interests are protected against a defendant's conduct [*Turcotte v. Fell,* 68 NY2d 432, 437; *DeAngelis v. Lutheran Med. Ctr.,* 58 NY2d 1053, 1055]" (*Lauer v. City of New York,* 95 NY2d 95, 108). "It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (*Palsgraf v. Long Is. R.R. Co.,* 248 NY 339, 342; [citation omitted]). In the absence of duty, there is no breach and without a breach there is no liability [*Kimbar v. Estis,* 1 NY2d 399, 405]" (*Pulka v. Edelman,* 40 NY2d 781, 782).

"The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the court (see, *Palk a v. Servicemaster Mgt. Servs. Corp.,* 83 NY2d 579, 585]). In analyzing questions regarding the scope of an individual actor's duty, the courts look to whether the relationship of the parties is such as to give rise to a duty of care (see, e.g., *Waters v. New York City Hous. Auth.,* 69 NY2d 225; *Pulka v. Edelman,* [40 NY2d 781, 783]), whether the plaintiff was within the zone of foreseeable harm (see, e.g., *Palsgraf v. Long Is. R.R. Co., supra* [at 344]) and whether the accident was within the reasonably foreseeable risks (see, e.g., *Danielenko v. Kinney Rent A Car,* 57 NY2d 198)" (*DiPonzio v. Riordan,* 89 NY2d 578, 583). Foreseeability of injury does not determine the

existence of a duty (see, *Strauss v. Belle Realty Co.,* 65 NY2d 399, 402). Foreseeability is used to determine the scope of duty, only after it has been determined that there is a duty (*Pulka v. Edelman,* 40 NY2d 781, 785). In sum "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension" (*Palsgraf v. Long Is. R.R. Co., supra*).

Applying these principles to the case at bar, the Court finds that (1) defendant David Koplitz had a legally cognizable duty to bystanders to use reasonable care in the operation of the lawn edger to avert the possible harmful consequence of an object being thrown by the blade of the edger, and (2) defendant David Koplitz did not breach this duty to the plaintiff since the plaintiff was well beyond the zone of reasonably foreseeable harm at the time of the accident. The plaintiff admits that he moved away from defendant David Koplitz, as Koplitz approached him, to an area he perceived to be beyond "the range of apprehension." Furthermore, the plaintiff concedes he was standing at a distance which was 20 to 30 feet beyond the 30 foot radius hazardous zone acknowledged by defendant Sears. Although questions concerning what is foreseeable are generally for the fact finder to resolve (see, *Rivera v. New York City Tr. Auth.,* 77 NY2d 322, 329; *Kriz v. Schum,* 75 NY2d 25, 34; *Derdiarian v. Felix Contr. Corp.,* 51 NY2d 308, 315), neither the plaintiff or the co-defendants have proffered any evidence by an expert from which an inference may be drawn that the plaintaiff was standing within the zone of foreseeable harm when the projectile injured his eye. Accordingly, since no material issue of fact has been raised by the plaintiff on the question of David Koplitz' liability, summary judgment is granted in favor of defendants' Koplitz and the complaint is dismissed as against them (see, *Andre v. Pomeroy,* 35 NY2d 361, 364).

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The branch of defendant Koplitz' motion for an order dismissing the co-defendants' cross-claim against them is granted. Defendant Koplitz' deposition testimony established that he used reasonable care in the operation of the edger. However, the co-defendants did not meet their burden, through an expert, of raising a triable issue of fact pertaining to their contention that defendant Koplitz improperly operated the machine.

Dated: December 6, 2000

Anthony L. Parga, J.S.C.