SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH COVELLO

Justice

TRIAL/IAS, PART 29
NASSAU COUNTY

PETER MIRRO an infant over the age of 14 years, by his mother and natural guardian, SUSAN MIRRO and SUSAN MIRRO, Individually,

Plaintiffs,

INDEX NO.: 28744/99

-against-

MOTION DATE: 04/19/02

PAUL DONG, CATHIE DONG, and JOHN DONG, an infant over the age of 14 years, by PAUL DONG and CATHIE DONG, his parents and natural guardian,

MOTION SEQ. #: 003

Defendants.

The following papers read on this motion:

Notice of Motion	**1**
Affirmation in Opposition	**2**
Reply Affirmation	**3**

Upon the foregoing papers the motion brought by the plaintiffs, in the above-captioned action, for an order of this Court, pursuant to CPLR § 3212, granting summary judgment to the plaintiffs on the issue of liability is denied.

This action arises out of an accident that occurred on May 8, 1998, at the premises known as 6 Dikeman Court, Hicksville, New York, owned by the defendants, Paul Dong and Cathie Dong. On the aforesaid date and place the infant plaintiff, Peter Mirro, and the infant defendant, John Dong, who was then 15 years of age, were present while the defendants, Paul Dong and Cathie Dong, the natural parents of the infant defendant, were not present. The defendant, Paul

Dong, owned a 22 caliber CO2 pellet gun. Mr. Dong stored the subject gun and pellets in a vinyl briefcase which he kept on the top shelf of his closet at the subject premises, while the CO2 cartridges for the gun were kept in a drawer in a different location within the premises. There was no lock on either the briefcase, the closet or the drawer;

On May 8, 1998, the accident, which is the subject matter of the instant action, occurred in the back yard of the defendant's premises, when the infant defendant retrieved his father's pellet gun from its storage space and, believing the subject gun to be unloaded, pointed it at the infant plaintiff and pulled the trigger. The infant plaintiff was struck in the eye by a pellet fired from the pellet gun when the infant defendant pulled the trigger as above described.

> "(T)he proponent of a summary judgment motion 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 (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853; *Zuckerman v City of New York*, 49 NY2d 557, 562; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center, supra*, at p 853). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which

> require a trial of the action (*Zuckerman v City of New York, supra*, at p 562)." **Alvarez v Prospect Hosp.**, 68 NY2d 320, 324.

The decisive consideration upon a motion for summary judgment is the existence of issues of fact. (**Werfel v Zivnostenska Banka**, 287 N.Y. 91; **Ugarizza v Schmieder**, 46 NY2d 471.) "Issue finding, rather than issue-determination, is the key to the procedure." **Esteve v Abad**, 271 App. Div. 725. The court is not authorized to try the issues; its function is merely to determine whether any issue exists. (**Sillman v Twentieth Century-Fox Film Corp., supra**; **Cross v Cross**, 112 AD2d 62.) The motion cannot be granted unless it is clear that the movant has made out a case by the undisputed material facts presented on the record by affidavit or other proof. (**Barrett v Jacobs**, 255 N.Y. 520; **Piccolo v DeCarlo**, 90 AD2d 609.) If material facts are in dispute or different inferences may reasonably be drawn from facts themselves undisputed, the motion for summary judgment must be denied. (**Supan v Michelfeld**, 97 AD2d 755.) On a motion for summary judgment the facts are to be construed in a light most favorable to the non-moving party and summary judgment should be denied where there is any significant doubt whether material issues of fact exist or if there is even arguably such an issue. (**Bulger v Tri-Town Agency, Inc.**, 148 AD2d 44, app dsm 75 NY2d 805.) Upon a motion of such character, the credibility of the

affiants is for the trier of the facts. (**Bernstein v Kritzer**, 224 App. Div. 387; **Air Flow Taxi Corp. v C.I.T. Corp.**, 258 App. Div. 857.)

While this Court finds, as a matter of law, that the CO2 pellet gun, which is the subject matter of the instant action, is a dangerous instrumentality (see, **Lichtenthal v Gawoski**, 44 AD2d 771), it is also plain to the Court that a number of genuine issues of material fact exist with respect to the reasonableness of the infant defendant's belief that the subject pellet gun was unloaded and whether the conduct of the infant defendant was negligent measured by the standard of care which a reasonably prudent child of his years, experience, intelligence and degree of development would exercise under the same circumstances. See, **Sorto v Flores**, 241 AD2d 446 and **Gonzalez v Medina**, 69 AD2d 14.

Furthermore, while there is a duty of a parent to protect third parties from harm resulting from an infant child's improvident use of a dangerous instrumentality (see, **Lalomia v Bankers & Shippers Ins.**, 35 AD2d 114, aff'd on opn at App Dis 31 NY2d 830), this Court, again, finds genuine issues of material fact exist with respect to the reasonableness of the defendant parents' measures of securing the subject pellet gun from the infant defendant's access and control.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient

evidence to eliminate any material issues of fact from the case (*citations omitted*)." **Winegrad v New York University Medical Center**, 64 NY2d 851, 853. Where, as in the instant motion, the movants have failed to meet their burden of proof, such failure mandates denial of the subject motion regardless of the sufficiency of the opposing papers. See, **1014 Fifth Avenue Realty Corp. v Manhattan Realty Company**, 67 NY2d 718.

This constitutes the decision and Order of this Court.

Dated: May 15, 2002

JOSEPH COVELLO, J. S. C.