

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 102526/2004
COURTS, HARLEY
vs
GUSHEE, CHERYL
Sequence Number : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the accompanying memorandum decision.*

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

FILED
NOV 13 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/8/07

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
RANDALL COURTS, individually and as
parent of HARLEY COURTS,¹

Plaintiff,

Index No. 102526/04
Mtn Seq. 001

-against-

CHERYL GUSHEE and SUSAN O'MALLEY as
Executrix of the Estate of PHILIP
CHARLES GUSHEE a/k/a PHILIP GUSHEE,
VINCENT DiPILATO, and ERIC GUSHEE,

Defendants.

-----x
CHERYL GUSHEE and SUSAN O'MALLEY as
Executrix of the Estate of PHILIP
CHARLES GUSHEE a/k/a PHILIP GUSHEE,

Plaintiff,

-against-

VINCENT DiPILATO,

Defendant.
-----x

WALTER B. TOLUB, J.:

This personal injury action arises out of an accident involving five teenagers, some illegal drugs, and a paintball gun. On the date of the incident, fifteen-year-old plaintiff Harley Courts ("Harley") was injured when he when he was shot in his left eye with a paintball gun wielded by nineteen-year-old

¹ The court notes that the portion of the caption identifying the plaintiffs should probably read as "Harley Courts and Randall Courts, individually, and as parent of Harley Courts".

defendant Vincent DiPilato ("Mr. DiPilato"). The accident occurred in the home of defendants Cheryl and Philip Gushee. Mr. Gushee died on July 22, 2003. The paintball gun was owned by Mr. Gushee, but was primarily used by his fifteen-year-old son, Eric Gushee ("Eric"), who kept the paintball gun in an unsecured box in his bedroom closet.

By this motion, defendants Cheryl Gushee, Susan O'Malley, as Executrix of the Estate of Philip Charles Gushee a/k/a Philip Gushee (hereinafter, "Ms. O'Malley")², and Eric Gushee move for an order dismissing plaintiffs' complaint and the cross-claims advanced by defendant Vincent DiPilato. Plaintiffs cross-move for an order compelling the deposition of Eric Gushee, and seek an extension of time to file the Note of Issue.

Facts

In June, 2001, Philip Gushee purchased a paintball gun for his fifteen-year-old son, Eric. The paintball gun was the second paintball gun purchased by Mr. Gushee, and was used by Mr. Gushee and his son on several occasions at a paintball arena in New Jersey (Notice of Motion, Affidavit of Eric Gushee; Affidavit of Cheryl Gushee). Neither the bedroom closet nor the box where the paintball gun was stored were ever secured in any manner (Deposition Transcript of Cheryl Gushee, p. 68).

²For simplicity, references to Ms. O'Malley refers to her official capacity as Executrix of Mr. Gushee's estate unless otherwise noted.

On December 9, 2001, Eric invited plaintiff Harley Courts, fifteen-year-old Eddie Gordon ("Eddie"), and Mr. DiPilato into his parents' apartment.³ According to Harley's deposition testimony, the group spent part of the afternoon smoking marijuana both inside and outside the apartment (Deposition Tr. of Harley Courts, p. 137, 158-161). At some point, Harley and Eddie located and removed the paintball gun from Eric's bedroom closet and began taking turns shooting the gun into an empty trash can (id at 137-139). After firing the gun several times, Harley pointed the paintball gun at Eric. Eric ran from Harley, and Harley put the paintball gun down (id at 138). Mr. DiPilato then picked up the paintball gun, loaded it, and fired the paintball gun twice: once into the back of Harley's leg, and once into Harley's eye (id at 138-139). Mr. DiPilato admits that the group smoked marijuana on the day of the incident and that he indeed shot Harley in the eye, but denies that he ever loaded the paintball gun (Deposition Tr. of Vincent DiPilato, p. 36-37, 44).

Litigation History

On February 10, 2004, Harley's father, Randall Courts, commenced an action ("the first action") against Cheryl Gushee and Ms. O'Malley alleging that Cheryl and Philip were negligent in failing to properly supervise their premises, their child, and

³ According to Harley Courts, there was a fifth individual, Ernesto Suarez present in the apartment (Deposition Tr. of Harley Courts, p. 137, 158-161).

Mr. DiPilato. On December 15, 2004, Mrs. Gushee and Ms. O'Malley, commenced a third-party action against Mr. DiPilato for contribution and/or indemnification ("the second action"). On June 8, 2005, Harley Courts commenced a third action against Eric Gushee alleging that Eric was negligent in allowing Mr. DiPilato to fire the paintball gun (Notice of Motion, Exhibit E). All three actions were consolidated by stipulation dated December 1, 2005. At this juncture, all discovery, with the exception of the deposition of Eric Gushee, has been completed.

Discussion

At the outset, the court notes that while neither motion under consideration specifically requests the relief of summary judgment, counsel has submitted affidavits indicating that summary judgment, either in full or in part, is sought. Although the court need not entertain requests for relief which were not properly included in the actual moving papers (see, Schultz v. Barrows, 94 NY2d 624, 629 [2000]), in the interest of judicial economy, both motions will be evaluated under the standards for CPLR 3211 and 3212.

As with any motion to dismiss, the only inquiry made by the court is whether plaintiffs' facts, as alleged, "fit within any cognizable legal theory" upon which plaintiffs may succeed (Leon v. Martinez, 84 NY2d 83, 87-88 [1994]; Campaign For Fiscal Equity, Inc. v. State of New York, 86 NY2d 307, 318 [1995]). See

generally, Barr, Altman, Lipshie, and Gerstman; New York Civil Practice Before Trial [James Publishing 2007] §36.01 *et seq.*).

By contrast, a motion for summary judgment limits the role of the court to finding factual issues which would warrant trial (see, Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]; Winegrad v. New York University Medical Center, 64 NY2d 851, 853 [1985]). See also, Barr, Altman, Lipshie and Gerstman; New York Civil Practice Before Trial, §37:91-92). Therefore, unless the opposing party produces evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring trial, summary judgment will be granted.

Under either standard of review, there is no cause of action asserted against Eric Gushee. Review of the three submitted complaints which have since been consolidated, indicates that the only cause of action alleged against Eric Gushee is one for "negligent supervision of an adult" (Notice of Motion, Ex. E).⁴ Contrary to plaintiffs' assertions, this court has found no law in this State which imposes a duty upon a fifteen-year old to supervise a nineteen-year old. As such, the cause of action asserted against Eric Gushee is dismissed.

⁴In relevant part, the complaint filed in Harley Courts v. Eric Gushee reads:

4. That on or about December 9, 2001, defendant **allowed** Vincent DiPilato to use and fire a paintball gun [...]

6. [...] defendant **negligently, carelessly, and recklessly allowed** Vincent DiPilato to fire the paintball gun [...]
(Notice of Motion, Exhibit E, emphasis added)

Turning next to the issue of parental liability, it is well established that a parent is generally not responsible for torts committed by their child (see, Feinerman v. Kaplan, 290 AD2d 480 [2nd Dept 2002]). However, "a parent owes a duty to third parties to shield them from an infant's improvident use of a dangerous instrument, at least, if not especially, when the parent is aware of and capable of controlling its use (Nolechek v. Gesuale, 46 NY2d 332, 338-339 [1978]. See also, Goldhirsch v. Majewski by Majewski 87 F.Supp.2d 272, 279 -280 [S.D.N.Y.,2000], quoting, NY PJI 2:260 "a parent is responsible for the failure to use reasonable care in entrusting or leaving in the possession of the child an instrument which, in view of the instrument, the age, intelligence, and disposition of the child and (his, her) prior experience with such an instrument, constitutes an unreasonable risk of harm to others").

The dangerous instrument, in this case, is a paintball gun, which, as defined under Penal Law § 265.05, is an air gun. Unless used at an appropriate entertainment facility, a paintball gun, by statute, is prohibited to be in the possession of an individual under the age of sixteen (id.). Purchasing and then giving a paintball gun to a fifteen year old therefore violates the statute and constitutes negligence per se (DiSilvestro v. Samler, 32 AD3d 987 [2nd Dept 2006]). The question then, becomes whether the violation of the statute, i.e. purchasing and then

giving a fifteen year old a paintball gun, was a proximate cause of Harley Court's injuries (Basso v. Miller, 40 NY2d 233 [1976]).

The facts of this case and papers presented by the parties do not yet answer this question. If anything, the papers raise several significant questions, including whether Mr. DiPilato's actions, as an adult, constitute a superseding event which would absolve Cheryl and Philip Gushee from liability and whether the admitted use of illegal drugs by all three fifteen-year-olds and nineteen year old Mr. DiPilato played a contributory role to Harley's injuries. As such, summary judgment must be, and is denied as to all parties (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]). The balance of the motion to dismiss advanced by defendants Cheryl Gushee and Susan O'Malley is also denied.

The portion of the cross-motion advanced by plaintiffs which seek the deposition of Eric Gushee and for an extension of time to file the Note of Issue, however, is granted. It is clear to this court that as a witness to the events which resulted in Harley's injuries, the deposition of Eric Gushee is warranted.

Accordingly, it is

ORDERED that the portion of the motion advanced by defendants Cheryl Gushee, Susan O'Malley, as Executrix of the Estate of Philip Charles Gushee a/k/a Philip Gushee, and Eric Gushee for summary judgment and dismissal of the within action is granted only as to the claims advanced against Eric Gushee by

plaintiff Harley Courts, and those claims are dismissed; and it is further

ORDERED that the balance of the motion advanced by defendants Cheryl Gushee, Susan O'Malley, as Executrix of the Estate of Philip Charles Gushee a/k/a Philip Gushee, and Eric Gushee for summary judgment and dismissal of the within action is denied; and it is further

ORDERED that the portion of plaintiffs' cross-motion seeking a deposition of Eric Gushee is granted; and it is further

ORDERED that the deposition of Eric Gushee shall be completed within 45 days of service of a copy of this order with notice of entry; and it is further

ORDERED that the portion of plaintiffs' cross-motion which sought an extension of the time to file of the note of issue is granted. Plaintiffs shall file Note of Issue in this matter on or before January 31, 2008; and it is further

ORDERED that the balance of plaintiffs' motion is denied.

The court notes that inasmuch as these motions for summary judgment were made prior to the filing of the Note of Issue, denial of the above motions is made with leave to renew upon the completion of discovery.

Counsel for the parties are directed to appear for a Status Conference on Friday, December 21, 2008 at 11:00 a.m. in IA Part 15, Room 335, 60 Centre Street, New York, New York. In the event

the parties complete the remaining discovery and file Note of Issue prior to this appearance date, the parties are directed to notify the court and request the scheduling of a Pre-Trial conference in this matter.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 11/8/07



HON. WALTER B. TOLUB, J.S.C.

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