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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

DOUGLAS D. MENAGH, as Executor of the Estate of CLAIRE MENAGH, deceased,

Plaintiff,

- against -

DANA BREITMAN, JULIETTE BREITMAN, RACHEL KOHN, and JACOB KOHN,

Defendants.

INDEX NO. 107856/09

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers were read on this Motion by defendant Juliette Breitman to dismiss pursuant to Section 3211 of the Civil Practice Law and Rules.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3

Cross-Motion: ☐ Yes ■ No

In this action for personal injury, plaintiff alleges that the infant defendants, who were racing bicycles on a sidewalk while under the supervision of their parent defendants, struck the plaintiff with their bicycles, causing severe injuries to the elderly plaintiff Claire Menagh. The infant defendant Juliet Breitman, sued herein as Juliette Breitman, seeks in this pre-answer motion to dismiss plaintiff's complaint, as against her only, based upon documentary evidence and upon failure to state a cause of action, pursuant to CPLR § 3211(a)(1) & (7). Defendant-movant has attached her birth certificate as an exhibit to her motion papers. The sole issue before the Court is whether an infant aged four years, nine months, is *non sui juris*, incapable of negligence as a matter of law, under the facts presented.

CPLR 3211(a) Motion to Dismiss Standards

CPLR 3211(a) provides:

> (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> 1. A defense is founded on documentary evidence; . . .
> 7. the pleading fails to state a cause of action[.]

Pursuant to CPLR 3211(a)(1), in order to "prevail on a motion to dismiss based on documentary evidence, the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Pshp.*, 221 AD2d 248 (1st Dept. 1995); *Juliano v McEntee*, 150 AD2d 524 [2d Dept 1989]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept 1986]). A CPLR 3211(a)(1) "motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326-27 [2002]).

Upon a 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept. 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). In order to defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *(Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.,* 262 A.D.2d 188 [1st Dept.1999].)

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *Leon v Martinez*, 84 NY2d 83, 87, [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, [2001]; *Wieder v Skala*, 80 NY2d 628, [1992]). "We also accord plaintiffs the benefit of every possible favorable inference" (*511 W. 232nd Owners Corp.*, 98 NY2d at 152; *Sokoloff*

v Harriman Estates Dev. Corp, 96 NY2d at 414).

Non Sui Juris

Defendant-movant correctly notes that infants under the age of four are conclusively presumed incapable of negligence (*Verni v Johnson*, 295 NY 436, 438 [1946]). Defendant-movant Juliet Breitman, however, was over the age of four at the time of the subject incident.

For infants above the age of four, there is no bright line rule, and "in considering the conduct of an infant in relation to other persons or their property, the infant should be held to a standard of care . . . by what is expected of a reasonably prudent child of that age, experience, intelligence and degree of development and capacity" (*Gonzalez v Medina*, 69 AD2d 14, 18 [1st Dept. 1979], citing *Camardo v. New York State Rys.* 247 N.Y. 111 [1928]; *see also Steeves v City of Rochester*, 293 NY 727, 731 [1944] ["The general rule is that 'a child is not guilty of contributory negligence if it has exercised the care which may reasonably be expected of a child of similar age and capacity.'"]; *Weidenfeld v Surface Transp. Corp. of N.Y.*, 269 AD 341, 345 [1st Dept 1945]; *McLoughin v Bonpark Realty Corp.*, 260 AD 471 [1st Dept. 1940]; *Redmond v City of New York*, 81 AD2d 908, 909 [2d Dept. 1981], *affd* 55 NY2d 796 [1981]; *Eagle v Janoff*, 12 AD2d 638, 639 [2d Dept. 1960]; *Yun Jeong Koo v St. Bernard*, 89 Misc 2d 775, 779 [Sup Ct, Queens County 1977]).

If "conflicting inferences may be drawn, the question is one of fact; if only one inference can be drawn the question is one of law" (*Camardo*, 247 NY at 116 [1928]; *accord Steeves*, 239 NY at 731-32; *see also Weidenfeld*, 269 AD at 345; *Republic Ins. Co. v Michel*, 885 F Supp 426, 432-34 [EDNY 1995] [applying New York State Law, an infant aged four years, four months was not automatically *non sui juris*, but could be found *non sui juris* upon the presentation of "substantial evidence regarding the child's lack of intelligence and maturity"]; *cf. Boyd v Trent*, 297 AD2d 301 [2d Dept. 2002] [held, without preliminary discussion, that four year old infant was *non sui juris* for contributing to accident by distracting parent from driving,

presumably because Second Department did not believe the four year old could appreciate the danger of distracting its parent]).

This method of analysis has resulted in ostensibly conflicting case law, in which children less than a month apart in age are treated differently as to *sui juris* status. For example, a child aged four years, ten months who is hit by a car while crossing the street at his mother's direction is *non sui juris* as a matter of law (*Ehrlich v Marra*, 32 A.D.2d 638 [2d Dept. 1969]). On the other hand, an unsupervised child of the same age who is struck by a car will not be held *non sui juris* as a matter of law, absent evidence that the child is otherwise unable to comprehend the danger posed by an approaching vehicle (*e.g. Camardo*, 247 NY at 111, *Yun Jeong Koo*, 89 Misc 2d at 775).

According to defendant-movant, supervision is the distinguishing factor between these cases. The Court disagrees. A parent's presence alone does not give a reasonable child carte blanche to engage in risky behavior such as running across a street. A reasonably prudent child, whom we may presume has been told repeatedly by the age of four to look both ways before crossing a street[1], knows that running across a street is dangerous even if there is a parent nearby. Despite this, if a parent or other trusted adult actively directs a four year old child to cross a street at a certain time, the only logical inference is that the child will reasonably believe it is safe to cross the street at that time. Because a child above the age of four will only be *non sui juris* if it is impossible under the circumstances to draw any other inference, parental supervision is unlikely to affect the *sui juris* status of a child above the age of four unless the parent has taken an active role in encouraging the child's conduct (*see Camardo*, 247 NY at

[1]See *Yun Jeong Koo*, 89 Misc 2d at 779 (noting that the *Camardo* decision would be more rational now that, "in this modern day of enlightenment, children are prone to view television programs which, by voice and sight exemplification, point out to youngsters of very early age the necessity of their looking and listening to avoid danger or dangerous conditions.").

111).

Defendant-movant's reliance on *Romanchuk v County of Westchester* (40 A.D.2d 877 [2d Dept. 1972]), to establish that a child days shy of the age of five can be held *non sui juris* as a matter of law, is therefore misplaced. In that case, the child was actively placed onto a sled and pushed down a slope by his father, whereupon the sled was allegedly struck by a vehicle. The *Romanchuk* child was declared not to be contributorily negligent as a matter of law, not because of his age or because of a mere parental presence, but because the only logical inference was that the child reasonably believed that allowing his father to push him on a sled was a safe course of action.

Applying the *Camardo* conflicting inferences rule and reasonable child standard to the facts presented here, defendant-movant cannot be held *non sui juris* as a matter of law. The motion papers and pleadings do not indicate that defendant-movant's mother had any active role in the alleged incident, only that the mother was "supervising," a term that is too vague to hold meaning here. There are no exhibits containing evidence as to the defendant-movant's lack of intelligence or maturity, nor are there any other mitigating factors apparent in the record that would indicate that another child of similar age and capacity under the circumstances could not have reasonably appreciated the danger of riding a bicycle into an elderly woman.

Furthermore, even if defendant-movant had alleged facts which, if true, might constrain the Court to a single inference, all facts must be viewed in a light most favorable to plaintiff (*see supra*; *511 W. 232nd Owners Corp.*, 98 NY2d at 152; *Sokoloff v Harriman Estates Dev. Corp*, 96 NY2d at 414). Merely introducing such allegations would therefore still be insufficient. Rather, defendant-movant had the burden of conclusively establishing such allegations.

Because defendant-movant has utterly failed to allege, let alone establish, facts constraining the Court to a single inference, defendant-movant's *sui juris* status is a matter of fact for a jury, and this motion to dismiss must be denied.

ORDERED, that the motion to dismiss by defendant Juliet Breitman is denied; and it is further,

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on December 8, 2010, at 11:00 A.M.; and it is further

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: October 1, 2010

Enter:

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**