

Weber v Harley-Davidson Motor Co., Inc.

2007 NY Slip Op 32660(U)

August 9, 2007

Supreme Court, Queens County

Docket Number: 0019555/2004

Judge: David Elliot

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 14

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ROBERT B. WEBER, et al.		INDEX NO. 19555/04
-against-		MOTION SEQ. NO. 6
HARLEY-DAVIDSON MOTOR COMPANY, INC., et al.		BY: ELLIOT, J.
	x	DATED: AUGUST 9, 2007

Defendant Lighthouse Harley-Davidson, Inc. (Lighthouse) has moved for summary judgment on its cross claim for common-law indemnification asserted against defendant Harley-Davidson Motor Company, Inc. (Harley-Davidson). Defendant Harley-Davidson has cross-moved for, inter alia, an order declaring that it is not required to indemnify defendant Lighthouse.

In 2002, plaintiff Robert B. Weber purchased a Harley-Davidson motorcycle from defendant Lighthouse, a dealer. Defendant Harley-Davidson subsequently issued a safety recall of 40 amp circuit breakers which could open unexpectedly, thereby interrupting electrical power and possibly causing the motorcycle to stall out. On or about March 22, 2004, defendant Lighthouse received notice of the safety recall, which stated in relevant part: "This condition could cause a 'quit while riding' situation, which could lead to a crash, thereby causing death or injury to the rider." On or about April 15, 2004, defendant Harley-Davidson sent

the defendant dealer a recall service bulletin which provided in relevant part: "Advise them [the owners of motorcycles] of the safety recall and make arrangements for them to come in for recall service." The service bulletin did not instruct dealers to tow or otherwise bring the motorcycles to the dealerships for the repair. The defendant manufacturer sent the plaintiff a recall notice dated June 10, 2004, which provided in relevant part: "This condition could cause a 'quit while riding' situation which could occur without warning and ultimately lead to a crash, thereby presenting a risk of death or injury to the rider.***We strongly urge you to take your motorcycle to your dealer to have the appropriate service performed as soon as possible. Should you choose to ride your motorcycle prior to this service, we urge you to be aware of this condition."

Plaintiff Weber received the recall notice, but he chose not to read it in its entirety. Instead, he spoke to Lenny, an employee of the defendant dealer, to whom he stated, "I got a recall notice, I don't know what it's about." Lenny responded, "Don't worry about it, bring the bike in and bring the notice with you." Although the plaintiff told Lenny that he had not read the recall notice, Lenny did not inform him about the nature of the recall, nor did Lenny inform him that an owner had the option of having the dealer pick the motorcycle up from his home at the dealer's expense. The plaintiff testified at his deposition: "I

figure I know Lenny, I'd call him, he would tell me what the story was and I would take it from there. If he had told me there was something with the circuit breaker, I would have had them tow it in or I would have had it towed myself." In contrast, Steven Ruckel, another Lighthouse employee, told owners who called about the recall "[i]f they chose to bring their bikes in, they can bring it in, or we can pick it up for them if they didn't feel comfortable riding them."

On May 14, 2004, as the plaintiff rode the motorcycle to the defendant dealer in response to the recall notice, the motorcycle stalled out, causing him to fall and to sustain personal injury. The plaintiff restarted his motorcycle and rode it to the defendant dealer, where he told employees that the motorcycle had stalled out, causing an accident. The plaintiff first learned at that time that the recall pertained to the main circuit breaker on the motorcycle.

On or about August 26, 2004, the plaintiffs began this action for personal injury against defendant Lighthouse and defendant Harley-Davidson. The plaintiff alleges that the defendant dealer was negligent in merely informing him to "bring it in," which induced him to believe that the motorcycle was safe to ride. The plaintiff alleges that the defendant dealer was negligent in failing to warn him not to ride his motorcycle until the circuit breaker was replaced. The defendant dealer asserted a

cross claim against the defendant manufacturer for common-law indemnification. The plaintiff filed a note of issue on or about June 29, 2006.

"[A] seller or distributor of a defective product has an implied right of indemnification as against the manufacturer of the product***." (Godoy v Abamaster of Miami, 302 AD2d 57; see, German v Morales, 24 AD3d 246.) However, a party is not entitled to common-law indemnification if its liability is other than vicarious. (See, Prenderville v International Service Systems, Inc., 10 AD3d 334; Colyer v K Mart Corp., 273 AD2d 809; Eastman v Volpi Mfg. USA, Co., 229 AD2d 913.) "Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious***." (Balladares v Southgate Owners Corp., 40 AD3d 667; see, Kelly v City of New York, 32 AD3d 901; Johnson v Packaging Corp. of America, 274 AD2d 627; Deyo v County of Broome, 225 AD2d 865.)

In the instant case, factual issues exist as to whether the defendant dealer was actively negligent or whether its role in the occurrence was solely passive. (See, Hollenbaugh v Frontier Asphalt, Inc., 231 AD2d 865.) Defendant Harley-Davidson produced sufficient evidence to create a triable issue of fact concerning whether active negligence of defendant Lighthouse caused or contributed to the plaintiff's injuries. (See, Kramer v City of

New York, 35 AD3d 175; Prenderville v International Service Systems, Inc., *supra*; Leo v Artco Contracting, Inc., 266 AD2d 808; Szymanski v Nabisco, Inc., 256 AD2d 1154; Eastman v Volpi Mfg. USA, Co., *supra*.) The plaintiff spoke to an employee of the defendant dealer who failed to inform him that (1) the recall notice concerned the defective circuit breaker, (2) the defective circuit breaker could cause the motorcycle to stall out, thereby causing a serious accident, and (3) he had the option of having the defendant dealer pick up the motorcycle for repair. Contrary to the argument made by defendant Lighthouse, there is evidence in the record which shows that it did more than simply rely on the instructions of the defendant manufacturer concerning the recall.

Accordingly, the motion made by defendant Lighthouse is denied.

In regard to the cross motion made by defendant Harley-Davidson, the defendant manufacturer did not assert a cross claim for a declaratory judgment against defendant Lighthouse concerning common-law indemnification. If the cross motion is deemed to be for summary judgment dismissing the cross claim for common-law indemnification, then there are issues of fact concerning whether the defendant dealer was actively negligent concerning the recall. (See, Kramer v City of New York, *supra*; Prenderville v International Service Systems, Inc., *supra*; Leo v Artco Contracting, Inc., *supra*.)

Accordingly, the cross motion by defendant Harley-Davidson is denied.

Short form order signed herewith.

J.S.C.