

**Pennington v Island Motocross of N.Y., Inc.**

2008 NY Slip Op 32105(U)

June 10, 2008

Supreme Court, Suffolk County

Docket Number: 0023341/2005

Judge: Joseph C. Pastorella

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INDEX No. 05-23341  
CAL. No. 07-02449-MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 34 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOSEPH C. PASTORESSA  
Justice of the Supreme Court

MOTION DATE 3-12-08  
ADJ. DATE 5-14-08  
Mot. Seq. # 001 - MD

-----X  
 JASON PENNINGTON and KELLY :  
 PENNINGTON. :  
 :  
 Plaintiffs, :  
 :  
 - against - :  
 :  
 ISLAND MOTOCROSS OF NEW YORK, INC., :  
 ISLAND MOTOCROSS OF N.Y., INC., ISLAND :  
 MOTOCROSS, LONG ISLAND CYCLE PARK, :  
 JOSEPH MERRILL, TAMMY MERRILL, :  
 AMERICAN MOTORCYCLIST ASSOCIATION :  
 and AMERICAN MOTORCYCLE :  
 ASSOCIATION, :  
 Defendants. :  
 -----X

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 :  
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 :  
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Upon the following papers numbered 1 to 34 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20 ; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 21 - 29 ; Replying Affidavits and supporting papers 30 - 34 ; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by the defendants Island Motocross of New York, Inc., Joseph Merrill and Tammy Merrill for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint as against them is denied.

The plaintiffs commenced the instant action to recover damages, personally and derivatively, for serious injuries allegedly sustained on April 10, 2005 by the then 28 year old plaintiff Jason Pennington while riding his motocross bike at a motocross track named Island Motocross-Long Island Cycle Park owned by the defendant Island Motocross of New York, Inc. and located at Horseblock Road, Yaphank,

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New York. Although the plaintiff had ridden his motocross bike regularly for many years on trails, this was the first time that he was riding on a professional track and the first time at this particular track. The accident occurred when the plaintiff lost control of his motocross bike as he was riding on the novice or beginner race track and going around a right-hand turn on the inner portion of the track. The defendants Joseph Merrill and Tammy Merrill are shareholders of the defendant Island Motocross of New York, Inc.

The plaintiffs allege that the plaintiff's loss of control of his motocross bike was proximately caused by the negligence of the defendants, their agents and/or employees in failing to inspect that particular curve for cracks in the soil surface, allowing the sprinkler system at the racetrack to oversaturate that area, designing and constructing that curve without retaining walls, side slope structural supports, reinforcement, guard rails, hay bales, rubber tires or other forms of barrier protection, and failing to post any type of caution or warning signs.

The defendants Island Motocross of New York, Inc., Joseph Merrill and Tammy Merrill now move for summary judgment in their favor dismissing the complaint as against them on the grounds that the plaintiff voluntarily participated in the sport of motocross bike riding and thereby assumed the risk of injury inherent in and arising out of the nature of said sport as well as the risk of the open and obvious condition of the track. The defendants assert that the sole proximate cause of the plaintiff's accident and injuries was his erratic use of his motocross bike rather than any defective or dangerous condition of the motocross track.

A party seeking summary judgment must establish their position by evidentiary proof in admissible form sufficient to warrant judgment for them as a matter of law (see, **Zuckerman v City of New York**, 49 NY2d 557, 562). If the proponent of such motion does not tender evidence which would eliminate material issues of fact, the motion must be denied, regardless of the sufficiency of the opposition (see, **Winegrad v New York Univ. Med. Ctr.**, 64 NY2d 851, 853).

"[B]y engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (**Morgan v State of New York**, 90 NY2d 471, 484). However, a participant will not be deemed to have assumed concealed or unreasonably increased risks (*Id.* at 485). Implied assumption of risk is generally a question of fact for the jury (see, **Maddox v City of New York**, 66 NY2d 270, 279).

The plaintiff Jason Pennington described himself as a beginner motocross bike rider and he testified that he understood that he was riding at his own risk. In addition, the plaintiff testified that the accident occurred as he was riding five to ten miles per hour in first gear while making a right-hand turn around an approximately seven foot high berm about two feet away from its edge when his front tire gave out from the mud, his bike went to the left, and his front tire dropped down from the other side of the bank and then his rear tire hit the top of the berm and the plaintiff was thrown up into the air. According to the plaintiff, the area where the accident occurred was softer than the entrance area and consisted of wet dirt that was not covered with wood chips. The plaintiff also stated that when his front wheel began to give out or sink in, he hit his rear brake and lost control of his bike.

The plaintiff's brother, Christopher Koza, testified at his deposition that the plaintiff went on ahead of him to the track when he went back to the truck to get his gloves. In addition, he testified that he went around the track three times riding on the outside of the track while the plaintiff was riding on the inside. He further testified that he did not witness the plaintiff's accident. Non-party witness Michael Garone testified at his deposition that after the plaintiff's accident, he spoke to the plaintiff's brother who told him something to the effect of "My brother was driving crazy," which he understood to mean faster than he was supposed to ride on the track.

Non-party witness Kenneth J. Giosi testified at his deposition that he was standing by the fence as a spectator just prior to the accident when he observed the plaintiff entering the "sweeper turn" which is the right-hand turn and the plaintiff was riding slowly, that is, approximately ten miles per hour. In addition, Mr. Giosi testified that the plaintiff's speed did not change at any time prior to the accident and that he observed the plaintiff ride his bike straight off the furthest corner of that turn. Mr. Giosi recalled that prior to entering the curve, he heard the plaintiff accelerating and then getting off the throttle and accelerating and then getting off the throttle, not in a smooth pattern, which was atypical for riders who went through that area.

At his deposition, non-party witness John P. Thompson testified that he observed the plaintiff moving at an average rate of speed for a novice, ten to fifteen miles per hour, and seemed to maintain the same speed through the turn. In addition, Mr. Thompson testified that the plaintiff appeared to be losing control because his bike was moving side to side two to three feet as he was entering a big turn. According to Mr. Thompson, the plaintiff continued to go straight and did not make the turn and he left the track very close to the end of the big right-hand turn and went right over the turn with both wheels remaining level.

Non-party witness Robert W. Fontana testified that he observed the plaintiff prior to the accident and noticed that the bike did not sound right, that the plaintiff was revving up and down as if he was going on and off the throttle. In addition, Mr. Fontana testified that when he first observed the plaintiff, he was moving 20 to 25 miles per hour.

During his deposition, non-party witness Paul J. Laube testified that Joe Merrill always watered the race track early in the morning before everyone got there so that the track was good to ride on, with no dust and good traction.

At her deposition, the defendant Tammy Merrill testified that she gave the plaintiff permission to ride his 125 cc bike with the mini's, 100 cc bikes, which the plaintiff's brother owned, with the caution that the plaintiff go slow on the track. She did not witness the plaintiff go out to the track nor did she witness the accident. However, the defendant Tammy Merrill testified that she went to the plaintiff's side immediately after the accident and that he was lying against a fence. In addition, the defendant Tammy Merrill testified that when she was walking down the incline she found it to be "pretty dry" and that she did not remember the sprinklers having run inasmuch as it would have been noticeable and fewer people ride when the sprinklers are on. She further testified that as she walked the track she noticed that it was moist, not dry, but that there were no puddles.

The report of the defendants' expert, Dr. Russell E. Darnell, submitted in support of the motion to demonstrate that neither the design nor the construction of the subject racetrack was the proximate cause of the plaintiff's fall or his injuries, is unsworn and thus inadmissible (see, **Sherin v Roda**, 14 AD3d 604).<sup>1</sup> In addition, the defendants failed to submit copies of any of the photographs referred to in the submitted deposition transcripts which purportedly depicted the area of the subject race track where the plaintiff's accident occurred. Also, counsel for the defendants refers to, in her affirmation, portions of the deposition transcript of the defendant Joseph Merrill without providing any page numbers and without attaching a copy of the deposition transcript as an exhibit to the motion papers. Without the submission of the actual pages of the deposition transcript of the defendant Joseph Merrill, the defendants' attorney, who lacks personal knowledge, cannot offer her version of his testimony as evidence (see, **Feratovic v Lun Wah, Inc.**, 284 AD2d 368; **Carpluk v Friedman**, 269 AD2d 349).

Moreover, the proffered deposition transcripts present conflicting testimony concerning the way that the plaintiff was riding his motocross bike just prior to the accident as well as the condition of the track at the subject curve. Said deposition testimony raises issues of fact as to, among other things, what caused the plaintiff to lose control of his motocross bike, whether it was his manner of riding his motocross bike or the condition of the track; and if it was the condition of the track, whether the condition was an open and obvious condition of which he was fully aware prior to the accident; and whether the condition of the track was a commonly appreciated risk inherent in this sport which the plaintiff had sufficient experience to appreciate (see generally, **Lombardo v Cedar Brook Golf & Tennis Club, Inc.**, 39 AD3d 818). Furthermore, the proffered deposition testimony raises questions of fact regarding the credibility of the parties such that the defendants are not entitled to summary judgment on their motion (see, **S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.**, 34 NY2d 338). Therefore, the defendants' motion must be denied, regardless of the sufficiency of the opposition papers (see, **Winegrad v New York Univ. Med. Ctr.**, supra).

In any event, the plaintiffs raised triable issues of fact by proffering the sworn affidavit of their expert, Nicholas Bellizzi, P.E., and the deposition transcript of the defendant Joseph Merrill. Mr. Bellizzi indicated in his affidavit that at the time of his site inspection on August 31, 2005 the subject 45 degree embankment exhibited stress cracks which were visible signs of rupture surfaces and a lack of adequate support under dry, static, conditions. He opined within a reasonable degree of engineering certainty that the proximate cause of the loss of support of the plaintiff's motocross bike and resulting falling accident was the foreseeable and expected event of the elevated road track segment's side slope failure and collapse on the outside of the subject turn due to weakness zones that developed in the soil. In addition, Mr. Bellizzi opined that the collapse of the outer edge segment of the curve was due to the lack of adequate, proper and safe structural support and soil stability.

The defendant Joseph Merrill testified at his deposition that he designed and constructed the original track and that in 2005 one change was made to the track and that all changes were made by him by bulldozer. He stated that the area where the plaintiff fell consisted of "black loamy dirt," mixed with

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<sup>1</sup>The defendants submit another copy of their expert's report, one that is notarized, with their reply papers. However, said report cannot be considered inasmuch as the defendants failed to submit it with the original motion papers (see, CPLR 3212 [b]).

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sand and wood chips. According to the defendant Joseph Merrill, the purpose of the sprinkler system was to keep the dust down and when the track is dry, it gets slick and when the track is wet with "loamy" dirt, there is the best traction. The defendant Joseph Merrill also testified that the sprinklers are not in operation when the riders are actually riding on the track.

Accordingly, the instant motion is denied.

Dated June 10, 2008

  

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HON. JOSEPH C. PASTORESSA, J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION