

Vanborkulo v Keller's Motorsports, Ltd

2008 NY Slip Op 33557(U)

October 14, 2008

Supreme Court, Suffolk County

Docket Number: 02-22415

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 7-30-08
ADJ. DATE 9-17-08
MNEMONIC: # 005 - MD
 # 006 - XMotD
 # 007 - XMotD

-----X
VICTOR VANBORKULO,
:
:
:
 Plaintiff,
:
:
 - against -
:
:
KELLER'S MOTORSPORTS, LTD, MATT
CORDINER, RICHARD KELLER, EXTREME
KARTING, INC., LONG ISLAND KART
ASSOCIATION INC., KELLER'S KORNER'S,
INC. and JOAN CRESSI,
:
:
 Defendants.
-----X

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Upon the following papers numbered 1 to 50 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (005) 1-9; Notice of Cross-Motion and supporting papers (006) 10-20; (007) 21-34 (no exhibit in 30) ; Answering Affidavits and supporting papers 35-43; 44-46; Replying Affidavits and supporting papers 47-50 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (005) by the defendant Extreme Karting Inc. (hereinafter Extreme), pursuant to CPLR 3212 for an order granting summary judgment dismissing the plaintiff's complaint, is denied; and it is further

ORDERED that the cross-motion (006) by the defendants Long Island Kart Association, Inc. (hereinafter LIKA) and Joan Cressi (hereinafter Cressi), pursuant to CPLR 3212, for summary judgment dismissing the complaint on the basis of assumption of the risk and that LIKA is not a proper party in interest and was not involved with the operation of the

Westhampton Speedway (hereinafter track), is granted only to the extent that the complaint is dismissed as asserted against LIKA as not being a proper party, with the application for dismissal of the complaint on the basis of assumption of the risk being rendered academic as to LIKA; and is denied in all respects as to the defendant Cressi; and it is further

ORDERED that the cross-motion (007) by the defendants Keller's Motor Sports, Ltd., Richard Keller (hereinafter Keller), Matt Cordiner (hereinafter Cordiner) and Keller's Korner's, Inc., pursuant to CPLR 3212, for summary judgment dismissing the complaint on the basis of assumption of the risk is denied as to Keller's Motor Sports, Ltd., Keller and Cordiner; and it is further

ORDERED the cross-motion by the defendant Keller that he was not involved in and did not contribute to the occurrence is denied; and it is further

ORDERED that the cross-motion by Keller's Korner's, Inc. that it was not responsible for the rental of the go-kart is granted; and it is further ordered

ORDERED that the complaint as asserted against Keller's Korner's, Inc. is dismissed, that the cross-claim asserted by Keller's Korner's, Inc. is dismissed, the claim of assumption of the risk is rendered academic as to the defendant Keller's Korner's, Inc; and Keller's Motor Sports, Ltd.'s cross-motion that its go-kart did not contribute to the occurrence is denied.

This is an action by the plaintiff, Victor N. Vanborkulo (hereinafter plaintiff), to recover damages for injuries he allegedly sustained on September 2, 2001 at Keller's Motor Sports, Ltd, located at 122 Old Country Road, Westhampton, New York while using a go-kart. The plaintiff alleges that the defendant Cordiner was operating one of the defendant's go-karts when it crashed into the back of the go-kart being operated by the plaintiff, causing the plaintiff's go-kart to overturn onto the plaintiff.

Initially, an action was commenced against Keller's Motor Sports, Ltd and Cordiner under index number 02-22415, and then a second action was commenced against Keller, Extreme, LIKA, Keller's Korner's, Inc. and Cressi under index number 04-10601. The actions were consolidated by order of this Court, dated May 10, 2005, under index number 02-22415.

The defendants Keller and Keller's Korner's, Inc. have asserted a cross-claim for contribution, apportionment and indemnification from and against the co-defendants.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*,

supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; **Zuckerman v City of New York**, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (**Joseph P. Day Realty Corp. v Aeroxon Prods.**, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (**Castro v Liberty Bus Co.**, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (**Friends of Animals v Associated Fur Mfrs.**, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of motion (005) the defendant Extreme has submitted, inter alia, an affirmation by its counsel, Thomas P. Valet, Esq. (hereinafter Valet); a copy of the answer served by Extreme; a copy of plaintiff's verified bill of particulars to Extreme; the affidavit of Cressi; copies of the transcripts of the examinations before trial of the plaintiff on January 7, 2004 and August 18, 2005; and a copy of the assumption of risk and indemnity agreement. In its reply, the defendant Extreme has submitted the affidavit of Mario Bartolussi (hereinafter Bartolussi).

In support of cross-motion (006) the defendants LIKA and Cressi have submitted, inter alia, the affidavits of Cressi, dated July 22, 2008 and June 23, 2008; an affirmation of Valet, counsel for defendant Extreme; a copy of the verified complaint; a copy of the amended answer of LIKA; a copy of a photograph of a sign; and a document entitled 2001 Club Meeting Schedule.

In support of cross-motion (007) the defendants, Keller's Motor Sports, Ltd., Keller, Cordiner and Keller's Korner, Inc., have submitted, inter alia, the affidavit of Keller; copies of the original and supplemental summons and complaints; a copy of the answer served on behalf of Keller's Motor Sports, Ltd. and Cordiner; copies of the transcripts of the examinations before trial of Keller, dated January 7, 2004, Cordiner, dated January 7, 2004, and the plaintiff; a copy of an assumption of the risk and indemnity agreement; affirmation of Valet, counsel for Extreme; and the affidavit of Cressi, dated June 23, 2008.

In opposing this motion, the plaintiff has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint; copies of the transcripts of the examinations before trial of Cressi, dated August 18, 2005, Bartolussi on behalf of Extreme, dated August 18, 2005, Keller on behalf of Keller's Motor Sports Ltd., and Cordiner; and the affidavit of Charlene Vanborkulo (nee Spates).

The examination before trial (hereinafter EBT) testimony of Cressi establishes that she was present at the track on September 2, 2001 when the plaintiff was injured while driving a racing go-kart on the race track. She was acting as Chief Flagger. She stated that the track was a go-kart racing facility located on the grounds of the Long Island Motorsports Park in Westhampton, New York, which has since been sold to a developer and the facility is closed. The track consisted of both a one-quarter mile paved oval race track and a high speed one-half

mile paved road racing course with eleven turns and two long straights on which racing go-karts could reach speeds in excess of 60 miles per hour; and it was a dedicated racing facility with pits for the racing go-karts and their trailers. She stated that the drivers traveled at high speeds and faced risk of injury by losing control of the go-kart, that they could come into contact with other vehicles on the track, or that the go-kart could experience equipment failure or a flat tire, among other things.

She stated that in September, 2001 the operators of the track took numerous precautions to reduce as far as possible the risk of injury, that go-kart operators were required to wear a full face racing helmet with an impact resistant face shield, a fire retardant race jacket, fire retardant race gloves, and a neck collar or brace. Instructions were given to participants about the use of safety flags and they were instructed where to enter and exit the track, were advised about the operation of the go-karts and were warned against intentional contact with other go-karts (no bumping), and incidental contact while racing or passing was to be avoided if possible. However contact while racing is an inherent part of motor racing. Hundreds of bales of hay were positioned around the track to protect drivers who lost control of their go-karts and crashed, and numerous fire extinguishers were placed around the track in the event of accident or fire.

Cressi stated that on September 2, 2001 LIKA had nothing to do with the activities as LIKA held club races two days a month at the track, always on Sunday, and September 2, 2001 was a Saturday, a practice day when racers could test and tune their go-karts or rent one from Keller's Motor Sports, Ltd. . At the time, the track was under the operation of Extreme and Keller's Motor Sports, Ltd. and that neither she or anyone else was there as a representative of LIKA.

Cressi also stated that on September 2, 2001, the plaintiff was driving a 4-cycle race go-kart he had rented from Keller's Motor Sports, Ltd. after having been given instructions as indicated above. During the session in which he was injured, there were two other race go-karts on the track along with the plaintiff's, for a total of three go-karts in all. They were passing and being passed as they drove around the race track. Cressi stated she observed plaintiff travel down the main straightaway which was followed by a sharp left-right s-shaped turn, and as he approached the second part of the turn, a go-kart in front of him spun out. The plaintiff swerved his vehicle to avoid the other go-kart which had spun out in front of his go-kart, and when he swerved, he lost control of his vehicle and it flipped over, landing on top of the plaintiff. The third racer behind the plaintiff was being driven by Cordiner, whose go-kart was on the main straightaway just entering the first turn when the plaintiff's go-kart flipped. She stated Cordiner stopped his vehicle immediately behind the plaintiff's go-kart and ran to the plaintiff. Cressi stated that at no time did she observe a contact between Cordiner's go-kart and the plaintiff's go-kart and, at the time of the accident, the two vehicles were not close to each other on the track and at no time did she observe Cordiner or any other driver in the plaintiff's race group drive recklessly or dangerously, and, if she had observed such behavior, she would have black flagged that driver and removed him from the track.

The plaintiff testified at his EBTs on January 7, 2004 and on August 18, 2005 that on the date of the accident, September 2, 2001, he arrived at the race track with his children and his girlfriend, Charlene Spates. His past driving experience with go-karts occurred in his childhood

when he went to a small go-kart place in Hampton Bays, New York in 1977, but he had never been at this track before. He stated he had been a licensed motor cycle driver since 1986 and had a driver's license for a car as well. He testified he was familiar with racing vehicles as he had a '65 GTO which he raced on Sundays, and in the past he had fast cars. He had a two year degree in auto mechanics but had no familiarity with go-kart engines. He was a licensed real estate agent licensed by Suffolk County Department of Consumer Affairs in air conditioning and refrigeration and by the Towns of Southampton and East Hampton, New York, as a contractor.

He stated that, upon arriving at the race track, he was required to sign a document as he entered the gates but did not read it, paid a fee, and was given a receipt from Keller's Korner's, Inc.. He did not remember seeing a sign by the booth indicating a warning with respect to the dangers of operating a go-kart. He asked for two slower ones for his children and a faster one for himself, but since he could not fit into the faster ones, Cordiner gave him a slower go-kart like his children had. He estimated that the speed of the slower go-karts could be between 30 and 35 miles per hour and estimated the top speed he achieved prior to the accident was about 35 miles per hour on the straightaways. He wore a protective helmet, neck brace, gloves and fire retardant jacket. He testified he was given instructions by Cordiner, but could not remember what they were. He did not recall whether he had been instructed not to pass anyone or that no one would pass him, but it was his understanding that there was the possibility that he would pass someone or someone would pass him. He was instructed that there should be no intentional contact between go-karts. The vehicles did not come with rear view mirrors.

He stated that he was instructed that only go-karts of the same speed and caliber were allowed on the track at the same time so that no injuries would take place and the vehicles were limited to minimal speeds so the children couldn't get hurt, and that the very fast cars or race cars in the pits were only allowed on the track individually by themselves and were driven by professional drivers and were not intermingled with the slower race vehicles. He was then instructed to go up to the circle and listen to the instructor. There was a woman (Cressi) standing at the end of the ramp going up, and he was instructed to obey her directions. After being instructed by her, he was admitted to the track. He observed, among other things, that the person in charge would group together cars of the same speed and allow them out on the track at the same time. If there were younger children with very slow vehicles they would go out by themselves and if there were fast cars with adults or younger adults they would mix them. Everyone got off the track before Cressi allowed another group on it. When it came time to enter onto the track, they entered in a line with about three or four cars ahead of him and maybe three or four cars behind him, and when he entered he knew there would be about eight cars on the track. He stated that Cordiner's vehicle was not part of the group being admitted on the track at the beginning and that Cordiner's go-kart entered the track after all the other go-karts had already started, and that he saw it when Cordiner's vehicle passed his on the track.

He described the track as oval, about one-half mile long, with one turn at one end and several smaller turns at the other end and two straightaways. The plaintiff testified that he made about five rounds on the track, reaching the highest rate of speed of about 30 to 35 miles per hour. He observed the woman who gave the instructions at the end of the track by the

entrance each time he went around. At no point did he pass another go-kart, but a vehicle rode in tandem with his vehicle when passing him several times. He had been on the track that day one or two other times at fifteen minute intervals. He stated he was not in competition and did not race any vehicle while on the track.

He testified that at the time of the accident, he had been on the track for about five minutes and that Cordiner's vehicle passed his about three times. He testified he was flooring the go-kart as fast as it would go on the straightaways, but he did not have a speedometer. He stated he slowed down before entering the curves, removed his foot from the gas, braked, and slowed down enough to take the curve. At no time did he attempt to take the curve at the same speed he was traveling on the straightaways. He entered turn one and then as he entered turn two, a right turn, he heard a vehicle behind him and felt a jolt on his left rear tire and then his vehicle suddenly stopped and the right side of his vehicle lifted up, went back and forth a little bit, came back down on its right side and its left side lifted up, and then it flipped over. He testified that as his go-kart started to turn he believed he turned into the slide to correct it. He landed on his left side with the go-kart on top of him and Cordiner came over to him. after his vehicle stopped directly behind the plaintiff's go-kart.

He stated that afterwards he was told by Cressi that she saw Cordiner driving recklessly on the track in speeds exceeding almost twice the speed of the other go-karts on the track, getting his vehicle very close to other vehicles, especially the plaintiff's, passing him and ultimately, in turn two, bringing his go-kart into contact with the rear tires of the plaintiff's go-kart

Keller submitted an affidavit wherein he stated he was the president of two corporate defendants, Keller's Motor Sports, Ltd. and Keller's Korner's, Inc. and he presented it on their behalf and on behalf of Cordiner. At the time of the accident, he stated, he was doing business as Keller's Motor Sports, Inc., selling, renting and servicing go-karts. On the date of the accident the go-kart operated by the plaintiff was rented by Keller's Motor Sports, Ltd.. He stated he was not present at the track on the date of the accident, did not observe the incident, and did not speak to the plaintiff or have an dealings with him prior to commencement of the action

Keller stated that on the date of the accident that Keller's Korner's, Inc. was not the entity renting the go-karts and whoever was present on the date of the accident to rent the go-karts used an old receipt that had the name of Keller's Korner's Inc. on it. He stated there were three signs prominently placed near the entrance of the track to draw the public's attention to the dangers of go-kart racing and to the fact that entry was made at one's own risk.

At his EBT, Keller testified that he had operated a go-kart track at 122 Old Country Road, Westhampton, New York, for about thirty years, and until about four or five years ago, the track had been run by a club (LIKA) with which he was involved as a board member. When the track got to the point about five years ago where LIKA could no longer afford to operate the track for its members, he took it over because he had a go-kart shop in Bay Shore, New York. In September 2001, the property where the track was located was owned by 1320 Entertainment, Inc. from whom he leased the track pursuant to a written lease. 1320 Entertainment operated the drag strip on the same piece of property. He stated that on

Sundays the track was used for twenty to twenty two races a year, and that there was no recreational use of the track until the races had completed. In September 2001 the track was open about three to four days a week, and if it was busy, it was open until dark. He stated he was not always present.

Keller stated that generally volunteers from LIKA would be there to help out. There usually were two or three of them present and they were not employees of one of his entities. He stated that the year before his EBT (2003) he had some employees besides himself or his wife or daughter. On the date of the accident, Cordiner, who was on his race team, was at the track representing him, and Cressi, president of LIKA, whom he stated was an expert and did not need instructions from him, was also there. He testified that Cressi physically ran the track itself, was in control of who was on the track, and when they came off, put the go-karters on the track for their fifteen minutes, operated the safety flags and supervised people who rented the go-karts.

Keller stated that in September 2001, he was renting go-karts to be driven on the track at the location of the accident, and that the rental fee charged covered use of the go-kart, use of the track, and safety gear. Some people brought their own go-karts to the track and paid a fee to use the track and could use the track at the same time the recreational users who rented from him were using the track. Everyone was required to rent a slower go-kart when a person first started, and each person was brought up by the grid of the track which was the closest access to where one could get onto the track. The go-karts were run in fifteen minute rounds, so, if rented for one hour, the go-kart would go out four times and its operator went onto the track with a group of go-karts that were similar in performance.

He further stated that on the date of the accident Cordiner was at the track helping out and driving his own go-kart as well and pursuant to Keller's conversation with Cressi, he stated Cordiner was the next person on the track behind the plaintiff. Bartolussi filled out an accident report, as their insurance company required that one be filled out within twenty four to forty eight hours after the incident and that the report be given to a broker, National Kart Alliance. He stated he did not see the report before it was submitted to the insurance company.

Keller testified that, about three years before, he started Extreme, taking in a couple of partners, including Valet¹ and Bartolussi, to give him a hand with mowing the lawn as the place consisted of about sixteen acres. He further stated, that Extreme, LIKA and Keller's Motor Sports Ltd. all operated out of the same facility simultaneously. Keller's Motor Sports, Ltd. did the rentals and sold go-karts, parts or tires, safety gear, and fuel. In September, 2001, LIKA and Extreme's function was to operate the track. He stated that from January 1, 2001 through December 31, 2001, he, individually or on behalf of Keller's Motor Sports Ltd., paid employees to work at the track, including his girlfriend Marie Leone and several others. He testified that generally he or Valet or Cressi would give these employees training. He testified that it didn't take a lot of training for somebody to collect the money, fill out the papers and have the person sign it, and to train someone to be put in Cressi's position standing up on the grid, taking the

¹ Thomas P. Valet, Esq. is appearing as counsel for Extreme Go-karting in this action.

go-karts on and off the track as somebody like Cressi didn't need much training because that person was not going to do that until being involved in racing for years.

He stated that when five and seven year old kids were on the track, no one else could be on the track except them. The next age group involved eight to twelve year olds. The next group was from thirteen to seventy years old. They ran their go-karts in a 40 to 60 mile an hour range. The final group was for the very fast go-karts which went over 60 miles per hour and the racers used either rented go-karts or privately owned go-karts. None of these go-karts went slower than 40 miles per hour. Additionally, there were full perimeter bumper go-karts such as would be found in an amusement park and which were used by adults and kids together and the maximum speed they could go was about 40 miles per hour.

Keller stated he provided Cordiner with years of training as Cordiner was on his race team for many years. He taught him how to race, and that Cordiner and his father started racing at the track six years ago. Cordiner came to the races all the time and traveled with him everywhere around the country. He stated the first thing Cordiner was taught is that when they were going to drive high performance go-karts, they couldn't drive over other go-karts or they would flip over, they were never to hit anyone as they would get hurt, and one can't touch somebody else's tires when the go-karts were in operation or a go-kart could flip over.

Aside from the risks set forth on the waiver, Keller stated he could not think of any additional risks. He further testified that the go-kart operators would be told to keep in line and if one vehicle was faster than another vehicle, it would come around and pass that vehicle, but the track was not separated into separate lanes physically. He described the track as being a maximum width of twenty five feet, and the narrowest parts of the track were in the corners rather than the straightaways and were about fifteen feet wide. Volunteers could use the track without paying and generally signed the waiver but there could be exceptions.

At his EBT, Cordiner testified that on September 2, 2001 he was present at the track. He sometimes worked on go-karts at 1500 Fifth Avenue in Bay Shore, New York but he usually went to the track about three or four times a week, and stayed the entire day if he arrived in the morning. Normally, he would get go-karts ready in case someone asked to rent one. then he could work on his go-kart and use the track. He first went to the track about five or six years prior to the incident, and in 2001 just volunteered at the track, but sometimes received tips from people he helped out or from Keller who would give him some cash for helping out, getting the rentals ready or putting people on the track by doing safety checks on the tires and wheels, gas and other things, telling them which way to going on the track or, most of the time, go on the track with them and show them the direction of the track and where to exit. He stated that most of the time it was one of the concession go-karts that had the bumpers all around and he would just go around the track slowly and pull off after a lap and let them go. He instructed them not to get too close to someone else, and advised that if they touched wheels, the go-karts would flip over, and if they had to stop, they should put their hand up and get out of the way off the pavement. He testified that on race days he paid to use the track, but on non-race days he used the track as part of his volunteering and he volunteered because he was on the race team. Each time he went on the track he signed a waiver and release form. If he was going out on the track, he would let Cressi know as she watched everything that went on at the track, especially up on the grid, as to who was using the track

and when they came on and off it. He thought Cressi was a volunteer as she was president of LIKA.

When the incident involving the plaintiff occurred, Cordiner testified he was operating a go-kart himself, a CRG Forza with a maximum obtainable speed between 50 to 60 miles per hour and the plaintiff was operating a go-kart that could do a top speed of about 50 miles per hour. He thought he got the plaintiff's go-kart, a four cycle, ready for him. He stated he was out on the track practicing in his go-kart, and went onto the track at a different time and made one or two laps. When Cordiner was about forty to forty five feet in back of the plaintiff, he observed the plaintiff make a first left hand turn on the track, then enter into a second right hand turn and as he started coming out of it, Cordiner saw the go-kart go sideways and start going up a little bit, the plaintiff turned it to the other way to compensate for this and the go-kart came back down and then went over completely the other way. He could not tell the approximate speed the plaintiff's go-kart was traveling during that time. He could not remember the closest his go-kart got to the plaintiff's go-kart, or the furthest distance that they were apart. He was not sure if he passed the plaintiff's go-kart at any time, but stated that it was possible as he was driving his go-kart pretty fast and passed a lot of people. After the incident he explained to Keller what happened, but did not fill out an incident report.

Bartolussi testified at his EBT on behalf of Extreme that it was a for-profit company which operated out of the race track, collected the fees, provided the racing venue and maintained the go-kart track, including for LIKA, rented and maintained go-karts, purchased and installed the fleet of concession type go-karts which he described as detuned race go-karts which are rented to the general public. He stated that he, Frances Lee, Valet, and Keller were officers of Extreme. He stated that Keller was considered to be the most active partner of the four partners as he was a go-kart dealer and had a tremendous amount of experience in go-karting and ran the day-to-day operations of the track.

Bartolussi stated he was not present at the track on September 2, 2001 when the incident occurred. He is a physician and acting paramedic at the events, and has had a background in electrical engineering. He ran the electronic timing and scoring system exclusively on race days. He knew Cressi as an officer of LIKA and stated that although Cressi testified at her EBT that he paid her, that Keller may have called him from time to time to say Cressi needed to be paid or given a certain amount of money, and if he were physically there, he would have paid her, but it was Keller who hired Cressi. He did not know if Cressi or Cordiner were employees on the date of the accident but in his affidavit submitted in the reply, a factual issue was raised when he then stated that Cordiner was never employed by Extreme.

Charlene Vanborkulo (nee Spates) submitted an affidavit stating that she was present at the go-kart track at the time of the incident and observed Cordiner recklessly driving a go-kart on the track, reaching speeds almost twice that of the other go-karts. She further stated that his go-kart got very close to the plaintiff's go-kart until his go-kart finally hit the rear tires of the plaintiff's vehicle causing the plaintiff's vehicle to flip over.

There are factual issues which preclude summary judgment. There are three conflicting stories as to how the incident occurred. The plaintiff contends that his go-kart was struck from the rear by the go-kart operated by Cordiner, causing his go-kart to skid and flip over. Cressi

contends that a go-kart in front of the plaintiff's go-kart spun out of control causing the plaintiff to lose control of his go-kart and for it to flip over. Cordiner contends his go-kart did not make contact with the plaintiff's go-kart, and that the plaintiff merely lost control of his go-kart causing it to skid and then flip over. Charlene Vanborkulo, in her affidavit, stated that Cordiner's go-kart was traveling almost twice the speed of the other go-karts on the track and his go-kart made contact with the plaintiff's go-kart causing it to flip over. There are also factual issues concerning whether Cressi and Cordiner were employees of Extreme and Keller and Keller Motor Sports, Inc.. As testimony has established that Cressi was overseeing the go-karts on the track and was to flag anyone down who was negligently operating a go-kart, there are factual issues which precludes summary judgment as to Cressi as well on the issue of liability.

LIKA has established prima facie that is not a proper party to the action in that it was not involved with the operation of the Track at the time of the occurrence because the plaintiff has failed to raise a factual issue in this regard. It has been established by Cressi that at the time of the accident, the track was under the operation of Extreme and Keller's Motor Sports, Ltd. and that neither she or anyone else was there as a representative of LIKA. The plaintiff, in opposing the motion, has failed to raise a factual issue to preclude summary judgment by demonstrating that LIKA is a proper party or that Cressi was working on its behalf at the time of the occurrence. However, there are factual issues as stated above with regard to Cressi sometimes being employed by Keller or Extreme.

Accordingly, that part of motion (006) by LIKA for dismissal of the complaint asserted against it because LIKA is not a proper party in interest and was not involved with the operation of the Track on the date of the plaintiff's accident is granted.

In Keller's testimony, he established prima facie that he leased the track from 1320 Entertainment, and operated a "go-kart track" at 122 Old Country Road, Westhampton, New York. Keller's Motor Sports, Ltd. did the rentals and sold go-karts, parts or tires, safety gear, and fuel. Keller testified receipts were issued to people if they did not use all their rental time. The receipt issued to the plaintiff contained the name Keller's Korner's, Inc. on it. Keller stated that was the name of his seafood business which had previously rented out the go-karts, but when he opened the motor sports business, he formed a new corporation called Keller's Motor Sports, Ltd. and used the name Keller's Korner's, Inc. for the seafood business. Keller stated that from January 1, 2001 through December 31, 2001, he, individually or on behalf of Keller's Motor Sports Ltd., paid employees to work at the track. Cordiner testified that in 2001 he just volunteered at the track, but sometimes received tips from people he helped out or from Keller who would give him some cash for helping, getting the rentals ready or putting people on the track by doing safety checks on the tires and wheels, gas and other things. The plaintiff has failed to raise any factual issues in this regard.

Accordingly, that part of cross-motion (007) for summary judgment dismissing the complaint because Keller's Korner's, Inc. was not involved in and did not contribute to the occurrence, and that Keller's Korner's, Inc. was not responsible for the rental of the go-kart is granted and the complaint is dismissed as asserted against Keller's Korner's, Inc.. That part of the application dismissing the complaint as against Keller, Keller's Motor Sports, Ltd., and Cordiner is denied.

Accordingly, that part of motion (005) which seeks summary judgment dismissing the complaint against Extreme is denied on the basis that it was operating the track at the time of the occurrence.

RELEASE AND WAIVER

The Assumption of the Risk and Indemnity Agreement provides in pertinent part that the signer "2. HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE the promoters, participants, racing associations, sanctioning organizations or any subdivision thereof, track owners, officials, car owners, drivers, pit crews, rescue personnel, and persons in any RESTRICTED AREA, promoters, sponsors, advertisers, owners and lessees of premises used to conduct the EVENTS(s), premises and event inspectors, surveyors, underwriters, consultants and others who give recommendations, directions or instructions or engage in risk evaluation or loss control activities regarding the premises or EVENT(s) and each of them, their directors, officers, agents and employees, all for the purposes herein referred to as 'Releasees,' FROM ALL LIABILITY TO THE UNDERSIGNED, HIS PERSONAL REPRESENTATIVES, ASSIGNS, HEIRS AND NEXT OF KIN FOR ANY AND ALL LOSS OR DAMAGES, AND ANY CLAIM OR DEMANDS THEREFOR ON ACCOUNT OF INJURY TO THE PERSON OR PROPERTY OR RESULTING IN DEATH OF THE UNDERSIGNED ARISING OUT OF OR RELATED TO THE EVENTS(S)M WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE.... 4. HEREBY ASSUMES FULL RESPONSIBILITY FOR ANY RISK OF BODILY INJURY, DEATH OR PROPERTY DAMAGE arising out of or related to the EVENT(S) whether caused by the NEGLIGENCE OF RELEASEES or otherwise.... 5. HEREBY acknowledges that THE ACTIVITIES OF THE EVENT(S) ARE VERY DANGEROUS and involve the risk of serious injury and/or death and/or property damage. Each of the UNDERSIGNED, also expressly acknowledges that INJURIES RECEIVED MAY BE COMPOUNDED OR INCREASED BY NEGLIGENT RESCUE OPERATIONS OR PROCEDURES OF THE RELEASEES.... 6. HEREBY agrees that this Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement extends to all acts of negligence by the Releasees, INCLUDING NEGLIGENT RESCUE OPERATIONS and is intended to be as broad and inclusive as is permitted by the laws of the Province or State in which the Event(s) is/are conducted, and that if any portion thereof is held invalid, it is agreed that the balance shall, notwithstanding, continue in full legal force and effect. I HAVE READ THIS RELEASE AND WAIVER OF LIABILITY, ASSUMPTION OF RISK AND INDEMNITY AGREEMENT, FULLY UNDERSTAND ITS TERMS, UNDERSTAND THAT I HAVE GIVEN UP SUBSTANTIAL RIGHTS BY SIGNING IT, AND HAVE SIGNED IT FREELY AND VOLUNTARILY WITHOUT ANY INDUCEMENT, ASSURANCE OR GUARANTEE BEING MADE TO ME AND INTEND MY SIGNATURE TO BE A COMPLETE AND UNCONDITIONAL RELEASE OF ALL LIABILITY TO THE GREATEST EXTENT ALLOWED BY LAW."The foregoing is determined to be an exculpatory agreement.

N.Y. Gen. Oblig. Law §5-326 has declared exculpatory agreements void as against public policy (*Meier v Ma-Do Bars, Inc. Doing Business as Hunter Village Inn, et al*, 106AD2d 143, 484 NYS2d 719 [3rd Dept 1985]). To void a release of liability executed by a user of a recreational facility pursuant to Gen. Oblig. Law §5-326 the individual must have paid a fee for the use of the facility (*Rice v Harley Davidson, Inc., Buell Motorcycle Company, LLC and Buell Distribution Company, LLC*, U.S. Dist. Ct. Northern Dist. Of N.Y., 2005 U.S.

Dist. LWXIS 44740, citing **Miranda v Hampton Auto Raceway**, 130 AD2d 558, 515 NYS2d 291 [2nd Dept 1987] release signed by the plaintiff was void under statute "since (plaintiff)... paid a fee to use the defendant's racing facility and was injured while engaged in the activity for which he paid the fee and signed the release"; ...The courts in New York State... "do not deem the statute...as limited in application to the person or entity who actually pays the fee. Rather, the statute, by its express terms, is applicable to an owner or operator of a recreational facility who receives a fee" **Williams v City of Albany**, 271 AD2d 855, 706 NYS2d 240 [3rd Dept 2000]. Facilities used for recreational purposes are subject to the statute, **Bacchiocchi v Ranch Parachute Club, Ltd.**, 273 AD2d 173, 710 NYS2d 54 [1st Dept 2000]. In the instant action it is undisputed that the plaintiff paid a fee to the operator of the facility when he signed the forms and entered into the facility for recreational use of the go-karts (see also, **Beardslee v Bloomberg**, 70 AD2d 732; cf., **Meier v Ma-De Bars**, 106 AD2d 143, **Wurzer v Seneca Sport Parachute Club**, 66 AD2d 1002). Therefore, the waiver and release as provided by the defendant and signed by the plaintiff is void pursuant to N.Y. Gen. Oblig. Law §5-326 as such exculpatory agreements are void as against public policy as the fee was paid by the plaintiff for the activity of go-karting at the recreational facility where the plaintiff was injured while operating a go-kart.

Accordingly, the plaintiff is not precluded from commencing this action as he is not barred by the waiver and release agreement.

ASSUMPTION OF THE RISK

The doctrine of assumption of risk provides that a voluntary participant in a sporting or recreational activity 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...(**Joseph v New York Racing Association, Inc.**, 28 AD3d 105, 809 NYS2d 526 [2nd Dept 2006]). In determining applicability of the doctrine of primary assumption of the risk, awareness of the risk is to be assessed against the background of the skill and experience of the particular plaintiff (**Joseph v New York Racing Association, Inc.**, *supra*). It is not necessary to the application of the doctrine of primary assumption of risk that the injured plaintiff may have foreseen the exact manner in which the injury occurred so long as he or she is aware of the potential for injury or the mechanism from which the injury results (**Joseph v New York Racing Association, Inc.**, *supra*). "Relieving an owner or operator of a sporting venue from liability for inherent risks of engaging in a sport is justified when a consenting participant is aware of the risks, has an appreciation of the nature of the risks, and voluntarily assumes the risks. Thus, to be sure, a premises owner continues to owe a duty to exercise care to make the conditions as safe as they appear to be. If the risks for the activity are fully comprehended or perfectly obvious, a plaintiff consents to them and a defendant performs its duty. The balance struck at the threshold duty stage of responsibility and adjudication is that the tort rules support a social policy to facilitate free and vigorous participation in athletic activities. It is also important to appreciate that, by 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. Correspondingly, for purposes of determining the extent of the threshold duty of care, knowledge plays a role but inherency is the sine qua non....The analysis of care owed to plaintiff in the sporting event must be evaluated by considering the risks plaintiff assumed when he elected to participate in the event and how

those assumed risks qualified defendants' duty to him. Another important counterweight to an undue interposition of the assumption of risk doctrine is that participants will not be deemed to have assumed the risks of reckless or intentional conduct or concealed or unreasonably increased risks" (*Morgan v State of New York*, 90 NY2d 471,662 NYS2d 421 [1997]).

Considering the skill of the players, the rules and nature of the particular game, and risks which normally attend it, a participant's conduct may amount to such careless disregard for the safety of others as to create risks not fairly assumed. But it is nevertheless true that what the scorekeeper may record as an 'error' is not the equivalent, in law, of negligence (*Turcotte et al v Jeffrey Fell et al*, 123 Misc2d 877, 474 NYS2d 893 [Sup Ct NY Nassau County 1984]; see also, *Gobin Joseph et al v New York Racing Association, Inc.*, 28 AD3d 105, 809 NYS2d 526 [2nd Dept 2006]).

This Court finds that there are factual issues concerning what caused the accident to occur, whether the plaintiff was negligently operating his go-kart, whether Cordiner was negligently operating his go-kart or made contact with the plaintiff's go-kart, or whether a third individual was negligently operating the go-kart in front of the plaintiff, or if the race track was being negligently supervised. Therefore, it cannot be determined whether or not the plaintiff assumed the risks which caused his injury and whether the risks presented under the circumstances constitute commonly appreciated risks inherent in and arising from the nature of the sport of go-karting and which flow from such participation. Such factual issues preclude summary judgment.

Accordingly, those parts of cross-motions (006) and (007) which seek dismissal of the complaint on the basis of assumption of the risk are denied.

Dated: October 14, 2008



J.S.C.

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION