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SHORT FORM ORDER mg

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

GAIL ROBERTSON,

Plaintiff(s),

-against-

MOTION DATE:10/7/09
INDEX No.: 5669/08
MOTION SEQUENCE NO: 3

CAL. NO.:2009H1573

CRAZY FREDDY'S MOTORSPORTS INC.,
d/b/a CRAZY FREDDY'S MOTORSPORTS GROUP,
and DON PHILIPS,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....1-3
Answering Affidavits.....4-8
Replying Affidavits.....9,10
Briefs: .....

Upon the foregoing papers, it is ordered that this motion by defendant Crazy Freddy's Motorsports Inc., d/b/a Crazy Freddy's Motorsports Group for an order pursuant to CPLR 3212 granting summary judgment in its favor on its cross-claim for contractual indemnification against defendant Philips and dismissing defendant Philips' cross-claim against movant is granted in its entirety.

In this action, the plaintiff seeks to recover money damages for personal injuries she sustained on February 16, 2008 when she was struck by a Spyder, a hybrid motorcycle with two front wheels and one rear wheel, which her boyfriend, defendant Don Philips, was test driving at the premises owned and operated by the defendant Crazy Freddy's Motorsports, Inc. d/b/a Crazy Freddy's Motorsports Group ("Motorsports"). Motorsports has cross-claimed against Philips for contractual indemnification and he has cross-claimed

against Motorsports for indemnification and/or contribution.

Defendant Motorsports seeks summary judgment dismissing defendant Philips' counterclaim against it and holding Philips liable to indemnify it in this action pursuant to its cross claim.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" [Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985)]. "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" [Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra]. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (Alvarez v Prospect Hosp., supra, at p. 324). The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference [See, Demishick v Community Housing Management Corp., 34 AD3d 518, 521 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990)].

Before test driving the Spyder, defendant Philips read and signed a "Waiver and Release of Liability Agreement to Indemnify" Motorsports by which he "irrevocably waive[d], release[d], discharge[d] and covenant[ed] not to sue Motorsports" and released it from "any and all actions, causes of action, claims, demands, damages, losses, costs, expenses, compensation, rights, deaths, liabilities, obligations, disputes, controversies and payments of every kind and character, known or unknown, existing or contingent, latent or patent . . . regarding, arising from, on account of, growing out of, or in any way related to the activity, the product, [Motorsports'] conduct, [his] own conduct, whether or not due to [his] own negligence, acts or omissions, or [Motorsports] " He also expressly declared and assumed:

THE ENTIRE RISK OF ANY AND ALL DAMAGES,

> LOSSES, COSTS, OCCURRENCES, ACCIDENTS, AND PERSONAL INJURY, INCLUDING, BUT NOT LIMITED TO DISABILITY OR DEATH, OR LOSS OF PERSONAL PROPERTY, THAT [HE] OR ANY THIRD PARTIES MAY SUFFER AS A RESULT OF [HIS] USE OF THE PRODUCT OR PARTICIPATION IN THE ACTIVITIES, WHETHER IDENTIFIED IN [THAT] WAIVER AND RELEASE OF LIABILITY AGREEMENT TO INDEMNIFY . . . OR NOT (EVEN IF CAUSED, IN WHOLE OR IN PARTY BY THE NEGLIGENCE OF MISCONDUCT OF [MOTORSPORTS]"

At his examination-before-trial, Philips testified that he operated the Spyder for several minutes going backwards and forwards to familiarize himself with its operation before going for a ride. He testified that he felt that the steering mechanism was "heavy." He further testified that when he released the clutch, he lost control "within a millisecond" and that the Spyder moved approximately two feet before striking the plaintiff who was standing nearby waiting to take his picture.

In order to relieve a party of liability for its own negligence, an exculpatory clause must "'plainly and precisely' limit the defendants' liability for [its] own negligent acts" [Delaney v City of Mount Vernon, 28 AD3d 416 (2 nd Dept. 2006), quoting Gross v Sweet, 49 NY2d 102, 107 (1979); Alexander v Kendall Cent. School Dist., 221 AD2d 898, 899 (4th Dept. 1995); Sivaslian v Rawlins, 88 AD2d 703, 704 (3rd Dept. 1982)].

"A contract that provides for indemnification will be enforced as long as the intent to assume such a role is 'sufficiently clear and unambiguous'" [Bradley v Earl B. Feiden, Inc., 8 NY3d 265, 274 (2007), citing Rodrigues v N & S Bldg. Contrs., Inc., 5 NY3d 427 (2005)]. In fact, "[w]hen the intent is clear, an indemnification agreement will be enforced even if it provides indemnity for one's own or a third party's negligence" [Bradley v Earl B. Feiden, Inc., supra, at p. 275, citing Levine v Shell Oil Co., 28 NY2d 205, 210-213 (1971); Gross v Sweet, supra, at p. 108; see also, Balyszak v Siena College, 63 AD3d 1409 (3rd Dept. 2009)]. The right to indemnification for one's own negligence needn't be specifically nor unequivocally set forth: An agreement to indemnify a party for their own negligence will be found where an "unmistakable intent"

to indemnify exists or such an agreement can be "'clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances'" [Great Northern Ins. Co. v Interior Constr. Corp., 7 NY3d 412, 417 (2006), quoting Hooper Associates, Ltd. v AGS Computers, Inc., 74 NY2d 487, 491-492 (1980), and citing Levine v Shell Oil Co., supra; Rodriguez v N & S Bldg. Contrs., Inc., supra]. Agreements to indemnify a party for "any and all claims, suits, loss, cost and liability on account of injury or death of persons or damage to property" and "any and all liability" have been held to secure indemnification for a party for their own negligence [See, Levine v Shell Oil Co., supra, at p. 212; Matter of New York City Asbestos Litigation, 41 AD3d 299, 301 (1st Dept. 2007)].

The Waiver and Release clearly and unequivocally both releases Motorsports from liability for both Philips' negligence as well as its own and requires Philips to indemnify Motorsports for damages incurred by it as a result of his use of the Spyder, again, whether caused by him or it. Motorsports has established its entitlement to summary judgment thereby shifting the burden to Philips to establish the existence of a material issue of fact.

In opposition to this motion, defendant Philips opines that he was poorly instructed and dangerously directed when he conducted his test drive. More specifically, he attests that Motorsports' employee failed to accurately assess his skills, told him that the Spyder handled like a motorcycle but it didn't and started him in an unsafe place. Thus, Motorsports' negligent conduct is alleged to have caused or at least contributed to the accident. Philips also attests that the indemnification provision is "vague and misleading and not precise."

Again, the Release clearly and unequivocally releases Motorsports from any claims by Philips arising out of his use of the Spyder. Philips' cross claim is dismissed [See, Boateng v Motorcycle Safety School, Inc., 51 AD3d 702 (2nd Dept. 2008), citing Lago v Kollage, 78 NY2d 95, 99-100 (1991); Gross v Sweet, supra, at p. 107-108; Castellanos v Nassau/Suffolk Dek Hockey. Inc., 232 AD2d 354, 355 (2nd Dept. 1996); Baschuk v Driver's Way Scuba, 209 AD2d 369 (2nd Dept. 1994)]. Similarly, Philips is also clearly obligated to indemnify Motorsports for both his as well as Motorsports' own

negligence [See, Levine v Shell Oil Co., supra, at p. 212; In re New York City Asbestos Litigation , 41 AD3d 299, 301 (1st Dept. 2007)].

Dated: NOV 24 2009

J.S.C.