Fredette v Town of Southampton
2010 NY Slip Op 31451(U)
May 25, 2010
Supreme Court, Suffolk County
Docket Number: 05-9250
Judge: Denise F. Molia
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SHORT FORM ORDER

INDEX No. 05-9250
CAL. No. 09-00749-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 8-14-09 (#012)
MOTION DATE 8-13-09 (#013)
MOTION DATE 9-4-09 (#014)
MOTION DATE 12-18-09 (#015)
ADJ. DATE 12-18-09
Mot. Seq. # 012 - MotD
013 - MG
014 - MotD
015 - XMD

LEE ADAM FREDETTE,

Plaintiff,

- against -

TOWN OF SOUTHAMPTON, HONDA MOTOR COMPANY, a Japanese Corporation; AMERICAN HONDA MOTOR CO., INC , a California Corporation; LONG ISLAND CYCLE & MARINE, INC., a New York Corporation; BIEFFE HELMETS SRL, an Italian limited liability company; BIEFFE USA, INC., a California Corporation; LEWIS LOBEN; CYNTHIA LOBEN; ERNEST SBASCHNIK; CHRISTINE SBASCHNIK; MICHAEL KANE; and LISA KANE,

Defendants.

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Upon the following papers numbered 1 to 141 read on this motion for summary judgment and to preclude; Notice of Motion/ Order to Show Cause and supporting papers 1 - 42; 43 - 48; 49 - 79 ; Notice of Cross Motion and supporting papers 80 - 100 ; Answering Affidavits and supporting papers 101 - 106; 107 - 125; 126 - 128 ; Replying Affidavits and supporting papers 129 - 133; 134 - 135; 136 - 139 ; Other 140 - 141 memorandum of law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#012) by defendants American Honda Motor Co., Inc. and Honda Motor Company for, inter alia, summary judgment in their favor is granted in part and denied in part; and it is further

ORDERED that the motion (#013) by defendant Town of Southampton for summary judgment dismissing plaintiff's complaint is granted; and it is further

ORDERED that the motion (#014) by defendant Long Island Cycle & Marine, Inc. for summary judgment dismissing plaintiff's complaint is granted in part and denied in part; and it is further

ORDERED that plaintiff's cross motion (#015) is denied.

This is an action to recover damages sustained by plaintiff Lee Adam Fredette as a result of an accident that occurred on April 20, 2002. The accident allegedly occurred while plaintiff was riding a dirt bike manufactured by defendants American Honda Motor Co., Inc. and Honda Motor Company (hereinafter "the Honda defendants") and purchased by plaintiff's father at defendant Long Island Cycle & Marine, Inc. (hereinafter "Long Island Cycle"). As plaintiff was riding the dirt bike on a trail in a park owned and maintained by defendant Town of Southampton, he was thrown over the handle bars. Plaintiff was allegedly standing on the foot pegs of the bike when the bike hit an obstacle which was covered by a pile of leaves. Plaintiff's complaint seeks to recover damages under theories of negligence, strict products liability, and breach of warranty. More particularly, plaintiff alleges in his complaint, among other things, that the Honda defendants and Long Island Cycle were negligent in failing to design adequate damping or shock absorption into the suspension of the dirt bike; in failing to design a vehicle with sufficient wheel size or ground clearance; in failing to instruct on the safe and proper operation of the dirt bike; and in failing to warn of the propensity of the bike to throw its rider upon contact with an obstacle.

The Honda defendants now move for summary judgment dismissing the claims against them, arguing that the subject dirt bike was a "state of the art off road motorcycle intended for competition use in motocross," and that "standing on foot pegs is a standard and essential part of off road riding." The Honda defendants also move to preclude plaintiff's experts Leonard Goldblatt and James Pugh from giving expert testimony, arguing that they are unqualified. In support of their motion, the Honda defendants submit, among other things, a copy of the pleadings, and expert affidavits of Yasuyuki Tsurumi, Ken Glaser, John Frackleton, and Kris Kubly. They also submit plaintiff's responses to interrogatories, a copy of an instruction manual of the subject motorcycle, and transcripts of the deposition testimony of plaintiff, Wesley Bennett, Thomas Fredette, Jason Fredette, and Robert Fredette.

Defendant Long Island Cycle also moves for summary judgment dismissing the claims against it. Defendant adopts the arguments and evidence concerning strict products liability, breach of warranty, negligence and failure to warn causes of action in the Honda defendants' summary judgment motion. Defendant also argues that there is no evidence that it or its employees acted in any way which was

inconsistent with the standard of care required of a reasonably prudent seller of motorcycles under the same circumstances. In support of its motion, defendant submits the deposition testimony of Thomas Castellano, owner of Long Island Cycle.

Plaintiff opposes defendants' motions for summary judgment, arguing that the dangers of failing to warn riders to "walk the trail prior to riding it" and of riding while standing on the motorcycle's foot pegs were not evident. Plaintiff, however, states that he does not intend to continue to pursue the claims based on defective physical design or manufacture of the subject motorcycle. Plaintiff opposes the Honda defendants' application for an order precluding the testimony of his expert witnesses. Plaintiff cross-moves for leave to serve an amended complaint which asserts causes of actions against defendants for violation of §349 of the General Business Law and for willful failure to warn. Plaintiff also cross-moves to preclude portions of the testimony of the Honda defendants' experts. Plaintiff submits, among other things, expert affidavits of Leonard Goldblatt and James Pugh, a copy of the subject dirt bike's vehicle registration, an excerpt of the deposition testimony of Yasuyuki Tsurumi, an affirmed medical report of Dr. Beatrice Engstrand, a copy of the proposed amended complaint, an affidavit of his father, and his own affidavit.

With respect to the cause of action for breach of warranty, the statute of limitations for such a claim is four years (*see* Uniform Commercial Code § 2-725; ***Frumento v On Rite Co., Inc.***, 66 AD3d 828, 887 NYS2d 620 [2009]; ***Weiss v Polymer Plastics Corp.***, 21 AD3d 1095, 802 NYS2d 174 [2005]; ***Ito v Dryvit Systems***, 16 AD3d 554, 792 NYS2d 516 [2005]), and claims against the manufacturer or distributor accrues on the date the party charged tenders delivery of the product (*see* ***Heller v U.S. Suzuki Motor Corp.***, 64 NY2d 407, 488 NYS2d 132 [1985]; ***Ito v Marvin Lbr. & Cedar Co.***, 54 AD3d 1001, 865 NYS2d 118 [2008]; ***Schrader v Sunnyside Corp.***, 297 AD2d 369, 747 NYS2d 26 [2002]). Here, the record demonstrates that the dirt bike was sold to plaintiff's father at defendant Long Island Cycle in May 1999 and this action was not commenced until April 2005. Therefore, as the breach of warranty claim is untimely, plaintiff's second cause of action against the Honda defendants and defendant Long Island Cycle is dismissed (*see* ***Ito v Dryvit Systems***, *supra*).

A manufacturer who places a defective product into the stream of commerce may be liable for injuries or damages caused by such product (*see* ***Gebo v Black Clawson***, 92 NY2d 387, 392, 681 NYS2d 221 [1998]; ***Liriano v Hobart Corp.***, 92 NY2d 232, 235, 677 NYS2d 764 [1998]; ***Amatulli v Delhi Constr. Corp.***, 77 NY2d 525, 532, 569 NYS2d 337 [1991]). A product may be defective due to a mistake in the manufacturing process, an improper design or a failure to provide adequate warnings regarding the use of the product (***Gebo v Black Clawson***, supra; ***Voss v Black & Decker Mfg. Co.***, 59 NY2d 102, 463 NYS2d 398 [1983]). Depending upon the factual circumstances, a person injured by a defective product may maintain causes of action under the theories of strict products liability, negligence or breach of warranty (*see* ***Voss v Black & Decker Mfg. Co.***, 59 NY2d 102, 463 NYS2d 398 [1983]). Whether an action is pleaded in strict products liability, negligence or breach of warranty, the plaintiff has the burden of establishing that a defect in the product was a substantial factor in causing the injury, and that the defect existed at the time the product left the manufacturer or other entity in the chain of distribution being sued (*see* ***Clarke v Helene Curtis, Inc.***, 293 AD2d 701, 742 NYS2d 325 [2002]; ***Tardella v RJR Nabisco***, 178 AD2d 737, 576 NYS2d 965 [1991]).

A defectively designed product is one in which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its

intended use (*see* ***Voss v Black & Decker Mfg. Co.***, *supra*; ***Bombara v Rogers Bros. Corp.***, 289 AD2d 356, 734 NYS2d 617 [2001]). Stated differently, a defective product is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce (***Robinson v Reed-Prentice Div.***, 49 NY2d 471, 403 NE2d 440 [1980]; ***Denny v Ford Motor Co.***, 87 NY2d 248, 639 NYS2d 250 [1995]; ***Voss v Black & Decker Mfg. Co.***, *supra*). To establish a strict liability claim based on a defective design, a plaintiff must show the product as designed posed a substantial likelihood of harm, that it was feasible for the manufacturer to design the product in a safe manner, and that the defective design was a substantial factor in causing plaintiff's injury (*see* ***Voss v Black & Decker Mfg. Co.***, *supra*; ***Gonzalez v Delta Intl. Mach. Corp.***, 307 AD2d 1020, 763 NYS2d 844 [2003]; ***Ramirez v Sears, Roebuck & Co.***, 286 AD2d 428, 729 NYS2d 503 [2001]). A product may be defective due to a mistake in the manufacturing process, an improper design, or a failure to provide adequate warnings regarding the use of the product (***Sprung v MTR Ravensburg***, 99 NY2d 468, 758 NYS2d 271 [2003]; ***Gebo v Black Clawson Co.***, *supra*; ***Liriano v Hobart Corp.***, *supra*; ***Voss v Black & Decker Mfg. Co.***, *supra*). It is well settled that distributors of defective products, as well as retailers and manufacturers, are subject to strict products liability (*see* ***Harrigan v Super Prods. Corp.***, 237 AD2d 882, 654 NYS2d 503 [1997]; ***Giuffrida v Panasonic Indus. Co.***, 200 AD2d 713, 607 NYS2d 72 [1994]). Strict products liability extends to retailers and distributors in the chain of distribution even if they "never inspected, controlled, installed or serviced the product" (***Perillo v Pleasant View Assocs.***, 292 AD2d 773, 739 NYS2d 504 [2002]). It is established law that a products liability case can be proven absent evidence of any particular defect by presenting circumstantial evidence excluding all causes of the accident not attributable to defendant, thereby giving rise to an inference that the accident could only have occurred due to some defect in the product (***Graham v Walter S. Pratt & Sons Inc.***, 271 AD2d 854, 706 NYS2d 242 [2000]).

As to the claim of strict liability based on defendants' alleged failure to provide adequate warnings regarding "walking the trail" to determine whether there are obstacles, or warnings as to the alleged dangers of standing on the motorcycle's foot pegs, a manufacturer may be held liable for the failure to warn of the latent dangers resulting from the foreseeable uses of its product which it knew or should have known (*see* ***Liriano v Hobart Corp.***, *supra*; ***Rastelli v Goodyear Tire & Rubber Co.***, 79 NY2d 289, 582 NYS2d 373 [1992]). Liability may be imposed based on either the complete failure to warn of a particular hazard or the inclusion of warnings that are inadequate (*see* ***DiMura v City of Albany***, 239 AD2d 828, 657 NYS2d 844 [1997]; ***Johnson v Johnson Chem. Co.***, 183 AD2d 64, 588 NYS2d 607 [1992]). However, a manufacturer has no duty to warn product users of dangers that are obvious, readily discernable or apparent (*see* ***Martino v Sullivan's of Liberty***, 282 AD2d 505, 722 NYS2d 884 [2001]; ***Lonigro v TDC Elecs.***, 215 AD2d 534, 627 NYS2d 695 [1995]). The duty to warn of a specific hazard also does not arise if the injured person, through common knowledge or experience, already is aware of such hazard (*see* ***Warlikowski v Burger King***, 9 AD3d 360, 780 NYS2d 608 [2004]; ***Banks v Makita, U.S.A.***, 226 AD2d 659, 641 NYS2d 875 [1996]).

Here, the motions by the Honda defendants and defendant Long Island Cycle for summary judgment dismissing the claims for negligence and strict products liability based on design and manufacturing defect are denied. The affidavits of Mr. Glaser and Mr. Kubly are in inadmissible form inasmuch as they were signed and notarized in the State of California and Wisconsin, respectively, and were not accompanied by the required certificate of conformity (*see* CPLR 2309 [c]; ***PRA III, LLC v Gonzalez***, 54 AD3d 917, 864 NYS2d 140 [2008]). Mr. Tsurumi's affirmation also is in inadmissible form, as it was signed in Japan and was neither notarized nor was it accompanied by the required certificate of conformity with the laws of

Japan (*see* CPLR 2309 [c]; Real Property Law § 301-a). Furthermore, Mr. Frackleton's affidavit lacks probative value, as there is no indication that Mr. Frackleton is qualified to provide expert opinion regarding motorcycle design and safety (*see* ***Romano v Stanley***, 90 NY2d 444; 661 NYS2d 589 [1997]; ***Franklin v Jaros, Baum & Bolles***, 257 AD2d 500; 684 NYS2d 282 [1999]). An expert is qualified to proffer an opinion if he or she possesses the requisite skill, training, education, knowledge or experience to render a reliable opinion (*see* ***Matott v Ward***, 48 NY2d 455; 423 NYS2d 645 [1979]; ***de Hernandez v Lutheran Med. Ctr.***, 46 AD3d 517, 850 NYS2d 1460 [2007]). The qualifications set forth in Mr. Frackleton's curriculum vitae shows that he currently is employed at Lake Country Consulting and his prior experience includes working as a technical advisor for U.S. Suzuki Motor Corp., senior district service manager and sales manager at American Honda Motor Co., and senior product litigation investigator at Honda North America. The information offered fails to establish that Mr. Frackleton has any specialized knowledge, experience, training, or education with regard to motorcycle design and safety so as to qualify him as an expert (*see* ***Jahier v Jahier***, 50 AD3d 966, 857 NYS2d 196 [2008]; ***Hofmann v Toys R Us, NY Ltd. Partnership***, 272 AD2d 296, 707 NYS2d 641 [2000]). The Court notes that it did not review the DVDs submitted with Mr. Frackleton's affidavit. Thus, inasmuch as defendants failed to meet their initial burden of demonstrating that there was no defect in the design or manufacture of the subject off-road motorcycle, the burden never shifted to plaintiff to establish the existence of a triable issue of fact, and the sufficiency of plaintiff's papers need not be considered (*see* ***DeLaRosa v City of New York***, 61 AD3d 813, 877 NYS2d 439 [2009]).

As to plaintiff's cross motion for leave to amend his complaint, generally leave to amend or supplement a pleading "shall be freely given" (CPLR 3025 [b]), unless the proposed amendment is palpably insufficient as a matter of law, devoid of merit, or would prejudice or surprise the opposing party (*see* ***Kiaer v Gilligan***, 63 AD3d 1009, 883 NYS2d 224 [2009]; ***Kinzer v Bederman***, 59 AD3d 496, 873 NYS2d 692 [2009]; ***Zorn v Gilbert***, 60 AD3d 850, 875 NYS2d 245 [2009]; ***Gitlin v Chirinkin***, 60 AD3d 901, 875 NYS2d 585 [2009]). Prejudice is not shown by the belatedness of the amendment or the mere fact that the defendant will be exposed to greater liability (*see* ***Loomis v Civetta Corinno Constr. Corp.***, 54 NY2d 18, 23, 444 NYS2d 571 [1981]; ***State of New York v Exxon Corp.***, 7 AD3d 926, 777 NYS2d 539 [2004]; ***Dolan v Garden City Union Free School Dist.*** 113 AD2d 781, 493 NYS2d 217 [1985]). Instead, to establish prejudice a defendant must show that it has been hindered in the preparation of its case or has been prevented from taking some measure in support of its position (***Loomis v Civetta Corinno Constr. Corp.***, *supra*, ***Whalen v Kawasaki Motors Corp.***,92 NY2d 288, 680 NYS2d 435 [1998]; ***Valdes v Marbrose Realty***, 289 AD2d 28, 734 NYS2d 24 [2001]). However, when an amendment to a complaint or a bill of particulars is sought on the eve of trial, judicial discretion must be exercised in a "discreet, circumspect, prudent and cautious manner" (***Smith v Plaza Transp. Ambulance Serv.***, 243 AD2d 555, 665 NYS2d 513 [1997]; ***Kyong Hi Wohn v County of Suffolk***, 237 AD2d 412, 654 NYS2d 826 [2003]; ***Volpe v Good Samaritan Hosp.***, 213 AD2d 398, 623 NYS2d 330 [1995]), and the court should consider how long the party seeking the amendment was aware of the facts upon which the motion is predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted from such delay (*see* ***Morris v Queens Long Is. Med. Group., P.C.***, 49 AD3d 827, 828, 854 NYS2d 222 [2008]; ***Cohen v Ho***, 38 AD3d 705, 833 NYS2d 542 [2007]; *see also* ***Kyong Hi Wohn v County of Suffolk***, 237 AD2d 412, 654 NYS2d 826 [2003]). Similarly, once discovery is complete and the case is certified as ready for trial, a party will not be permitted to amend his or her bill of particulars except upon a showing of "special and extraordinary circumstances" (***Schreiber-Cross v State of New York***, 57 AD3d 881, 870 NYS2d 438 [2008]).

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A review of the proposed amended complaint attached to plaintiff's cross motion reveals that two additional causes of action are included therein The eighth cause of action asserts that the Honda defendants and defendant Long Island Cycle violated §349 of the General Business Law in that the owner's manual encouraged riding the motorcycle while standing on the foot pegs even though it is contrary to Vehicle and Traffic Law §2404(4) and §1251(a). The ninth cause of action asserts that the Honda defendants knew of the above statutes and encouraged plaintiff to ride in the standing position. Here, plaintiff's counsel failed to offer a reasonable explanation for his substantial delay in seeking leave to amend the complaint, only stating that he did not become "aware of the Honda defendants' knowledge of the New York State law against riding while standing until October 6, 2009." Furthermore, plaintiff has failed to demonstrate how Vehicle and Traffic Law §2404(4) and §1251 are relevant to the claims made in the instant action (***Schreiber-Cross v State of New York***, *supra*). Vehicle and Traffic Law §1251(a) states that "a person operating a motorcycle shall ride only upon the permanent and regular seat attached thereto, and such operator shall not carry any other person nor shall any other person ride on a motorcycle unless such motorcycle is designed to carry more than one person" Vehicle and Traffic Las §2404(4) states the same as the above but pertains to all-terrain vehicles. Contrary to the assertions of plaintiff's counsel, the statutes do not stand for the proposition that one is prohibited from standing on the foot pegs while riding on a motorcycle. Rather, the statutes prohibit passengers from riding on a motorcycle unless it was designed to carry more than one person (***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]). Accordingly, plaintiff's cross motion for leave to serve an amended complaint is denied.

The application by the Honda defendants for an order precluding the testimony of plaintiff's expert witnesses and the application by plaintiff for an order precluding portions of defendants' expert evidence are both denied as premature at this juncture. The decision regarding the admissibility of evidence should wait until trial when a determination as to the relevance of such evidence may be made in context (*see* ***Grant v Richard***, 222 AD2d 1014, 636 NYS2d 676 [1995]; ***Speed v Avis Rent-A-Car***, 172 AD2d 267, 568 NYS2d 90 [1991]).

Defendant Town of Southampton also moves for summary judgment dismissing plaintiff's complaint against it, arguing that it is immune from liability by application of General Obligations Law § 9-103. In support of its motion, it submits a copy of the pleadings, a transcript of plaintiff's deposition testimony, and an affidavit of Allyn Jackson, superintendent of parks and recreation for the Town of Southampton. In the affidavit, Mr. Jackson states that the subject premises is owned by the Town of Southampton and is intended for "park uses" and is not intended or used as a supervised park or for recreational purposes. He states that he is aware that dirt bike riders used the area to ride motorcycles for many years prior to plaintiff's accident, but that such riding is unauthorized and the Town has discouraged such use.

General Obligations Law § 9-103(1)(a) provides that an owner of premises, whether or not signs are posted, owes no duty to keep the premises safe for entry or use by others for recreational motorized vehicle operation, or to give warning of any hazardous condition on such premises to persons entering for that purpose (*see* ***Rivera v Glen Oaks Vil. Owners, Inc.***, 41 AD3d 817 [2007]; ***Obenauer v Broome County Beaver Lake Cottagers Assn.***, 170 AD2d 739 [1991]). In effect, the statute grants landowners, lessees, and occupants immunity from liability based on ordinary negligence if a person engaged in a listed recreational activity is injured while using their land (***Bragg v Genesee County Agric. Socy.***, 84 NY2d 544, 620 NYS2d 322 [1994]; ***Ferres v City of New Rochelle***, 68 NY2d 446, 510 NYS2d 57 [1986]; ***Morales v Coram***

Materials Corp., 51 AD3d 86, 853 NYS2d 611 [2008]). Statutory immunity will only be granted if it is proven that the land is suitable for the permitted activity, which must be judged by viewing the property as it exists generally and the plaintiff must have been engaged in one of the enumerated activities (*see* ***Sena v Town of Greenfield***, 91 NY2d 611, 673 NYS2d 984 [1998]; ***Albright v Metz***, 88 NY2d 656, 649 NYS2d 359 [1996]; ***Bragg v Genesee County Agric. Socy.***, *supra*; ***Iannotti v Consolidated Rail Corp.***, 74 NY2d 39, 544 NYS2d 308 [1989]). "The premise underlying section 9-103 is simple enough: outdoor recreation is good; New Yorkers need suitable places to engage in outdoor recreation; more places will be made available if property owners do not have to worry about liability when recreationists come onto their land" (***Bragg v Genovese County Agric. Socy.***, *supra* at 550, 620 NYS2d 322).

Based upon the adduced evidence, defendant Town has met its prima facie burden entitling it to judgment as a matter of law by establishing that it is immune from liability by application of GOL § 9-103 (*see* ***Albright v Metz***, *supra*; ***Bragg v Genesee County Agric. Socy.***, *supra*; ***Hoffman v Joseph R. Wunderlich, Inc***, 147 AD2d 807, 539 NYS2d 07 [1989]). Defendant has demonstrated that plaintiff was engaged in dirt bike riding, an activity included within the statute, when he was injured. Defendant also established that the land was suitable for such purposes as dirt bike riding by submitting the affidavit of Mr. Jackson and the deposition testimony of plaintiff.

Plaintiff opposes the motion by defendant Town of Southampton arguing that defendant is not entitled to immunity under the recreational use statute GOL § 9-103 because the property was not suitable for the permitted activity. Plaintiff argues that in a response to plaintiff's interrogatory defendant Town stated that appropriate uses of the subject area included "pedestrian uses such as walking," and when asked whether operation of an off-road motorcycle would constitute an appropriate use of the premises, answered "no."

Plaintiff, in opposition, has failed to raise a triable issue of fact that the land was not suitable for off-road motorcycling. A substantial indicator that property is physically conducive to the particular activity is whether recreationists have used the property for that activity in the past; such past use by participants in the sport manifests the fact that the property is physically conducive to it (*see* ***Albright v Metz***, *supra*, ***Iannotti v Consolidated Rail Corp.***, *supra*). Here, plaintiff testified himself that he, his brothers and friends rode dirt bikes on the subject property prior to the accident. Accordingly, defendant Town's motion for summary judgment is granted.

Dated: 5 · 25 · 2010

Hon. Denise F. Molia
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION