SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

JOSEPH ELLUL,

Plaintiff,

-against-

MOTION SEQ. NO.: 002
MOTION DATE: 4/12/2010

CHILD OF THUNDER, INC. d/b/a JIREH CYCLES, DNA SPECIALTY, INC., MIDWEST MOTORCYCLE SUPPLY DISTRIBUTORS CORP., LOWBALL ACQUISITIONS, LLC., d/b/a JIREH CYCLES and LOWBALL ACQUISITIONS, LLC,

INDEX NO.: 10843/08

Defendants.

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

Motion by the attorneys for the defendants Lowball Acquisition, LLC s/h/a Lowball Acquisitions, LLC d/b/a Jireh Cycles and Lowball Acquisitions, LLC ("Lowball") for an order to dismiss the complaint and cross-claims against Lowball pursuant to CPLR 3211(a)(1) (a defense based on documentary evidence) and CPLR 3212 is **granted**.

This is an action for personal injuries sustained by the plaintiff Joseph Ellul in an accident that occurred on August 21, 2005 while the plaintiff was operating his motorcycle. It is alleged the accident occurred when the DNA Speciality, Inc. Sprinter front end failed causing plaintiff to crash.

The following facts are set forth in the affidavit sworn to of James R. Jones, Jr., the sole principal of Lowball. Defendant Lowball is a Missouri Limited

Liability company organized pursuant to Articles of Organization and Certificate of Organization filed with the State of Missouri on April 26, 2007. (Exhibit G). (All exhibits are annexed to the Notice of Motion and supporting affirmation and affidavit.) Pursuant to a Warranty Bill of Sale and Settlement, Release, Waiver and Assignment of Rights, dated May 25, 2007, (Exhibit H) (The Purchase Agreement), Lowball purchased only the assets of Child of Thunder, Inc., a Missouri corporation doing business as Jireh Cycles.

This Purchase Agreement does not include the purchase or assumption of the liabilities of Child of Thunder. There was no exchange of stock involved in the Purchase Agreement. At no time, either before or after the date of the Purchase Agreement was any employee, stockholder, principal, director, or officer of Lowell in any way affiliated with Child of Thunder or Jireh Cycles. Neither Deborah Lang, the President of Child of Thunder, Inc. as set forth in the Purchase Agreement nor the shareholders, principals or managers of Child of Thunder, Inc. or Jireh Cycles acquired any interest in Lowball Acquisitions, LLC, nor were any of the principals, shareholders or manager of Child of Thunder, Inc. involved in the operation of Lowball Acquisitions, LLC doing business as Jireh Cycles after May 25, 2007. Jireh Motorcycles is not a separate legal entity, but rather the fictitious name or d/b/a of Lowball Acquisitions LLC previously operated by Child of Thunder, Inc. Child of Thunder, d/b/a Jireh Cycles, and its principal Deborah Lang, as president, assigned the fictitious name "Jireh and Jireh Cycles" to Lowball Acquisitions, LLC and agreed to cease all usage of such names, logos and trademarks. Included in the Purchase Agreement is a non-compete clause. Jones asserts that Child of Thunder, Inc. d/b/a Jireh Cycles, has not conducted any business and has been inactive following the sale of the assets. All leases, phone numbers, client lists, work product data bases, mail order agreements, internet agreements, parts orders, phone orders, event contracts and participations, business licensees and all other things involved in the daily operation of Jireh Cycles were assigned to Lowball Acquisitions, LLC pursuant to the Purchase

Agreement. Further, pursuant to the Purchase Agreement all rights and interest in all of the equipment and inventory of Jireh Cycles operations, and physical possession of same, were transferred to Lowball. Following the asset purchase on May 25, 2007, Lowball began to operate Jireh Cycles. Lowball did not manufacture, sell or distribute the subject part(s) alleged to have been defective and/or unmerchantable or unfit for the intended purpose. The Amended Summons and Amended Verified Complaint alleges the sale of the subject part(s) alleged to have been defective and/or unmerchantable or unfit for the plaintiff's intended purpose occurred on or about May 3, 2005, and the alleged accident occurred on August 21, 2005. However, Lowball Acquisitions, LLC did not exist until April 26, 2007 and did not commence doing business as Jireh Cycles until after May 25, 2007, more than two (2) years after the alleged date of sale. Since Lowball Acquisitions, LLC did not exist at the time of the alleged sale of the subject part(s) claimed to have been defective and/or unmerchantable or unfit for the intended purpose at the time of the plaintiff's accident, Lowball Acquisitions, LLC is not covered by any policy of insurance for the date of the plaintiff's alleged loss. Lowball asserts that, since it did not exist at the time of the alleged sale of the subject part(s), Lowball has no liability for the plaintiff's loss.

The Purchase Agreement (Exhibit H, ¶ 10) provides that the agreement would be subject to the Laws of the State of Missouri.

Under both New York and Missouri Law, when all of the assets of a corporation are sold or transferred, the transferee is not liable for the transferor's debts and liabilities. *See*, *Schumacher v Richards Shear Co., Inc.*, 59 NY2d 239; *Young v Fulton Iron Works Co.*, 709 S.W. 927 (Mo. App. S.D. 1986); *Chemical Design, Inc. v American Standard, Inc.*, 847 S.W. 2d 488 (Mo. App. E.D. 1993). This rule is subject to four exceptions: (1) when the purchaser expressly or impliedly agrees to assume the debts and liabilities; (2) when the transaction amounts to a consolidation or merger of the corporation; (3) when the purchasing corporation is merely a continuation of the selling corporation; (4) when the

transaction is entered into fraudulently in order to escape liability for the debts and liabilities. *Colon v Multi-Pak Corp., 477 f. supp.* 2d 620, 626 (S.D.N.Y.) 2007); *Cargo Partner AG v Albatrans, Inc.*, 352 F 3d 41, 45 (2d Cir 3003); *Young v Fulton Iron Works, Co.*, 709 S.W. 927, 938 (Mo. App. S.D. 1986); *Brockman v O'Neill,* 565 S.W. 2d 796, 798 (Mo. App. 1978).

The documentary evidence demonstrates that (1) defendant Lowball did not exist as a corporate entity, either on the date the plaintiff purchased the allegedly defective part, May 3, 2005, or on the date of his accident, August 21, 2005 (Exhibit G); (2) defendant Lowball did not have a policy of insurance in effect for the subject date of loss; (3) defendant Lowball did not manufacture, distribute or sell the allegedly defective part to the plaintiff; (4) the assets of the Child of Thunder d/b/a Jireh Cycles were sold to Lowball on April 26, 2007 (Exhibit H); and (5) Lowball did not expressly or impliedly assume any liabilities of Child of Thunder, Inc. d/b/a Jireh Cycles.

There was no consolidation or merger of the Child of Thunder d/b/a Jireh Cycles and Lowball because, (1) there was no continuity of ownership, as Lowball purchased only the assets and the right to operate as Jireh Cycles from Child of Thunder, Inc. (Exhibits F and H); 92) no managerial employees, officers, agents, or material parties related to Child of Thunder, Inc. have been involved in the management or day-to-day operations of Lowball since the date of the assets purchase (Exhibit G); (3) there was no exchange of stock involved in the asset purchase, and neither the shareholders nor the principals of Child of Thunder, Inc. acquired any interest in Lowball (Exhibits F and H); (4) there is no common identity of principals, directors or stockholders between the two corporate entitles (Exhibit F); (5) the Purchase Agreement solely provided for the sale of the Assets and use of the fictitious name, "Jireh or Jireh Cycles," which had no corporate identity, and was merely the d/b/a under which Child of Thunder, Inc. operated the motorcycle parts business (Exhibits F and H); (6) pursuant to the Purchase Agreement, Lowball purchased only the assets of Child of Thunder, Inc. d/b/a

Jireh Cycles, and assumed none of its predecessors' liabilities (Exhibits F and H); and (7) there is no evidentiary proof that the Purchase Agreement between Lowball and Child of Thunder, Inc. d/b/a Jireh Cycles, was entered into fraudulently to escape the liabilities of Child of Thunder, Inc. d/b/a Jireh Cycles (Exhibits F and H).

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1) the documentary evidence that forms the basis of the defense must resolve all factual issues as a matter of law, and conclusively dispose of the plaintiff's claim. *Arnav Industries, Inc. Retirement Trust v Brown, Raysman, Millstein, Felder and Steiner, L.L.P.*, 96 NY 2d 300, 303; *Leon v Martinez*, 84 NY 2d 83; *Davidson Metals Corp. v Marlo Development Co.*, 238 AD2d 465; *Teitler v Max J. Pollack & Sons*, 288 AD2d 302.

The documents submitted by defendant Lowball, to wit, the Articles of Incorporation of Lowball; the Warranty Bill of Sale; and the Settlement, Release, Waiver and Assignment of Rights conclusively establish the defenses to the complaint and cross-claim as a matter of law; *see Owens Road Associates, LLC v Town Bd. of Town of Goshen*, 50 AD3d 908.

Defendant Lowball has also moved to dismiss pursuant to CPLR 3212 (summary judgment). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *Alvarez v Prospect Hospital*, 66 NY2d 320. Therefore, the defendant, Lowball has also made an adequate *prima facie* show of entitlement to summary judgment.

Defendant Child of Thunder has not appeared in the within action.

Other than citing boiler plate summary judgment cases, the only opposition to the motion by the plaintiff is the assertion that plaintiff's attorney telephoned Lowball's attorney and agreed to sign a stipulation to discontinue the action against Lowball if the co-defendants also executed the stipulations so that plaintiff was not in the position of having an "empty chair" defendant. However, according to Lowball's attorney, she was unable to obtain the signature of the attorneys for

co-defendant DNA Specialty, Inc. In opposing the motion , the attorneys for the defendant DNA Specialty, Inc. argue that since discovery has not yet taken place, plaintiff's claim against Lowball should be dismissed without prejudice in the event discovery raises an issue of fact, defendant DNA would maintain the ability to implead Lowball.

The opposition papers submitted do not contradict or rebut defendant Lowball's *prima facie* showing based on the affidavit of defendant Lowball's principal and the supporting documentation that Lowball was not in existence at the time of the accident, did not assume the liabilities of Child of Thunder and was neither negligent nor the proximate cause of the accident.

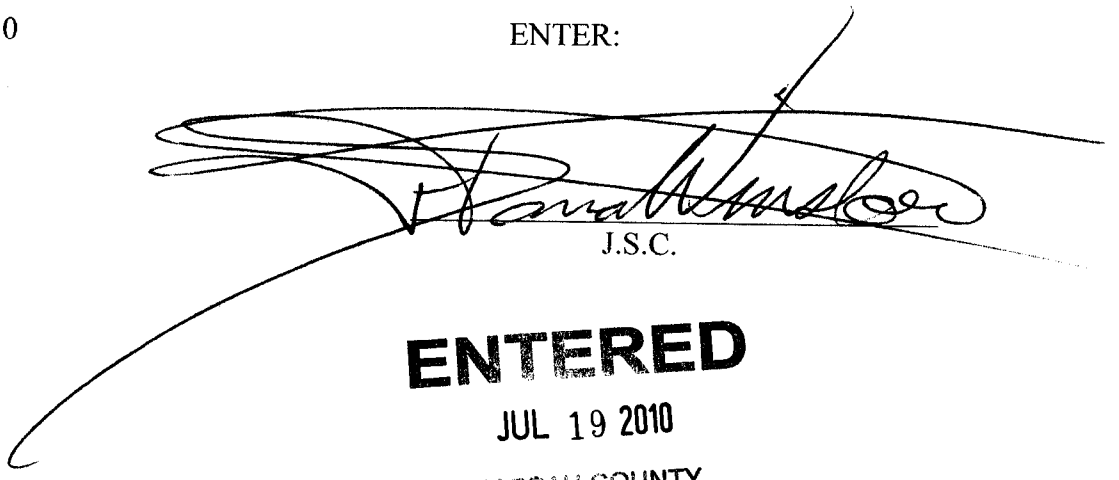
The defendant Lowball's motion to dismiss the complaint and all cross-claims against Lowball pursuant to CPLR 3211(a)(1) (a defense based on documentary evidence) and CPLR 3212 (summary judgment) is **granted.**

Defendant Lowball Acquisitions, LLC d/b/a Jireh Cycles and Lowball Acquisitions, LLC shall be deleted from the caption as a party defendant.

This Constitutes the Order of the Court.

Dated: June 24, 2010

ENTER:



J.S.C.