Rose v Tee-Bird Golf Club, Inc.
2011 NY Slip Op 34170(U)
December 20, 2011
Supreme Court, Saratoga County
Docket Number: 2010-3051
Judge: Richard E. Sise
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STATE OF NEW YORK
SUPREME COURT - COUNTY OF SARATOGA

LARRY ROSE,

Plaintiff,

– against –

TEE-BIRD GOLF CLUB, INc.,

Defendant.

DECISION and ORDER

Index No. 2010-3051
RJI No. 45-1-2011-0836

Appearances:

For Plaintiff:
Burke, Scolamiero, Mortati & Hurd, LLP
By: Adam Hover, Esq.

For Defendant:
Costello, Cooney & Fearon, PLLC
By: Maureen Fatcheric, Esq

Before:
Hon. Richard E. Sise, A.J.S.C.

On October 6, 2008, Plaintiff was driving a golf court on a designated path on the golf course and recreational area owned and operated by Defendant corporation. According to the complaint, the golf cart in which Plaintiff was riding began to slide on a downhill part of the path and, being unable to obtain traction, careened off the path and falling over onto the driver's side, ejecting Plaintiff. The cart then fell on Plaintiff's left leg. The complaint sets forth two causes of action: premises liability, for failing to maintain the premises in a reasonably safe condition, and negligence, for allowing wet leaves to accumulate on the path, creating a dangerous condition.

Defendant's Answer contained a general denial of Plaintiff's allegations and set forth

eight affirmative defenses: lack of personal jurisdiction, insufficient process, damages barred by CPLR 4545, General Obligations Law § 15-108, Plaintiff's own culpable conduct; negligence of a third party; Article 16 of the CPLR; and failure to mitigate. By the instant motion, Defendant seeks to add, as ninth and tenth affirmative defenses, the following:

As and For an [sic] Ninth Affirmative Defense

15 Plaintiff voluntarily engaged in the sport of golf, along with the use of a golf cart to travel around the golf course. That the sport of golf involves known risks of harm, including open and obvious terrain to be navigated by users. That platintiff knew and fully understood, or should have known and fully understood, such risks of harm.

16. By virtue of the foregoing, the plaintiff is precluded from any recovery based upon the doctrine of Primary Assumption of Risk, or in the alternative, plaintiff's recovery should be reduced accordingly under CPLR 1411 pursuant to the doctine of assumption of risk.

As and For an [sic] Tenth Affimative Defense

17. Pursuant to the Golf Cart Rental Contract, plaintiff agreed defendant would not be liable for negligence or damages arising from the use of, operation of, or in any way connected with the golf cart.

Notice of Defendant's intention to amend its Answer and a copy of the Amended Answer was provided to Plaintiff in a letter dated May 13, 2011. Plaintiff rejected Defendant's suggestion that the Answer be amended by consent. As to the status of the action, defense counsel states that all paper discovery has been completed but at the time this motion was instituted, no depositions had yet occurred.

Plaintiff opposes the motion on the ground that the two proposed affirmative defenses – assumption of risk and contractual indemnification – are "wholly devoid of merit." The defense of assumption of risk, Plaintiff contends, is inapplicable because it is not a defense when the conditions causing an injury are unique and create a dangerous condition over and above those inherent in the sport (citing Morgan v State of New York, 90 NY2d 471, 485 [1997]). The

defense of contractual indemnification is meritless, Plaintiff asserts, because the language of the relevant portion of the contract – "Lessor shall not be liable for negligence or damages of any kind whatsoever" – is void as against public policy pursuant to General Obligations Law §5-326.

Leave to amend is to be "freely given upon such terms as may be just" (CPLR § 3205[b]). In particular, amendment should be allowed where the opposing party will be neither prejudiced nor surprised, and where the amendment is not devoid of merit (Lucido v Mancuso, 49 AD3d 220, 222 [2d Dept 2008]; County of Nassau v State of New York, 190 Misc 2d 659, 661 [Ct Cl 2002], affd 1AD3d 732 [3d Dept 2003] ["[i]n the absence of proof of significant prejudice or surprise, motions to amend an answer to assert collateral estoppel are favorably received"]).

Plaintiff is not asserting that assumption of risk and contractual indemnification can never be valid defenses in a case arising from a golf cart accident but, rather, that the facts of this particular case make such defenses inapplicable. Where resolution of an issue requires determination of facts that are specific and unique to an action (here, whether the conditions on this particular cart path are normal and usual risks of the sport of golf and whether the language of this particular contract falls within the scope of the statute) and where there can be reasonable dispute about those facts by the parties, "resolution of the merits of these claims is not appropriate under a CPLR 3025[b] motion to amend a pleading" (Curiale v. Stephen Weicholz & Co., Inc., 192 A.D.2d 339, 339 [1st Dept 1993], citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3025:11).

For this reason, Defendant's motion is granted and the Amended Answer may be served and filed.

This Memorandum shall constitute the Decision and Order of the Court. The original

Decision and Order and the underlying papers are being delivered directly to the Saratoga County Clerk for filing. The signing of this Decision and Order and the delivery of this Decision and Order to the Saratoga County Clerk shall not constitute Notice of Entry under CPLR § 2220, and the parties are not relieved from the applicable provisions of that Rule respecting service of Notice of Entry.

ENTERED
Kathleen A Marchione
Kathleen A Marchione
Saratoga County Clerk

DATED: Dec 20, 2011
Saratoga Springs, New York

HON. RICHARD E. SISE
Acting Justice of the Supreme Court

The following papers were read on Defendant's motion to amend its Answer:

1. Notice of Motion and Supporting Affidavit of Maureen G. Fatcheric, Esq., with annexed Exhibits;

2. Memorandum of Law in support of the motion;

3. Affirmation in Opposition of Adam C. Hover, Esq.

4. Reply Affirmation of Maureen G. Fatcheric, Esq.