DeSousa v March of Dimes Found.

2012 NY Slip Op 30395(U)

February 3, 2012

Supreme Court, Nassau County

Docket Number: 6999/11

Judge: Roy S. Mahon

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[* 1]

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

CARLOS DeSOUSA,

Plaintiff(s),

- against -

MARCH OF DIMES FOUNDATION and DONALD R. HANSEN,

Defendant(s).

TRIAL/IAS PART 6

INDEX NO. 6999/11

MOTION SEQUENCE NO. 1 & 2

MOTION SUBMISSION DATE: November 30, 2011

The following papers read on this motion:

Notice of Motion	**XX**
Affirmation in Opposition	**XX**
Reply	**X**
Reply Affirmation	**X**

Upon the foregoing papers, the motion by the Defendant March of Dimes Foundation for an Order dismissing plaintiff's verified complaint pursuant to CPLR §3221(a)(1) on the ground that a defense is founded upon documentary evidence and the motion by the Defendant Donald R. Hanson for an Order granting summary judgment pursuant to CPLR §3212 which seeks to dismiss the plaintiff's complaint on the basis that there are no issues of fact which would require trial on liability on this matter, are both determined as hereinafter provided:

This personal injury action arises out of a motorcycle accident during an event the 8th Annual "Dee Snider's Bikers for Babies" motorcycle tour allegedly organized by the Defendant March of Dimes which was held on May 23, 2010 commencing and returning to the Hempstead Town Park at Point Lookout, New York.

The Defendant March of Dimes seeks the requested relief upon the ground of an allegedly signed "Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement." In its entirety said release sets forth:

[* 2]

"RELEASE AND WAIVER OF LIABILITY,
ASSUMPTION OF RISK AND INDEMNITY AGREEMENT

Bikers For Babies Point Lookout, NY May 23, 2010
DESCRIPTION AND LOCATION OF SCHEDULED EVENTS) DATE RELEASE SIGNED

Consideration of being permitted to compete, officiate, observe, work, or participate in any way in the EVENT(S) or being permitted to enter for any purpose any RESTRICTED AREA (defined as any area requiring special authorization, credentials, or admission to enter or any area to which admission by the general public is restricted or prohibited), EACH OF THE UNDERSIGNED, for himself, his personal representatives, heirs, and next of kin:

Acknowledges, agrees and represents that he has or will immediately upon entering any of such RESTRICTED AREAS, and will continuously thereafter, inspect the RESTRICTED AREAS which he enters, and he further agrees and warrants that, if at any time, he is in or about RESTRICTED AREAS and he feels anything to be unsafe, he will immediately advise the officials of such and if necessary will leave the RESTRICTED AREAS and/or refuse to participate further in the EVENT(S).

HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE the promoters, participants, racing associations, sanctioning organizations or any subdivision thereof, track operators, track owners, officials, car owners, drivers, pit crews, rescue personnel, any persons in an RESTRICTED AREA, sponsors, advertisers, owners and _____ of premises used to conduct the EVENT(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, employees, representatives, owners, members, affiliates, successors and assigns 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 DAMAGE, 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 EVENT(S), WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE.

HEREBY AGREES TO INDEMNIFY AND SAVE AND HOLD HARMLESS the Releasees and each of them FROM ANY LOSS, LIABILITY, DAMAGE, OR COST they may incur arising out of or

related to the UNDERSIGNED'S INJURY OR DEATH, WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE.

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.

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.

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 Sate or Province 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, 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."

In examining the issue of Releases from liability, the Court in **Abramowitz v New York University Dental Center College of Dentistry**, 110 AD2d 343, 494 NYS2d 721 (Second Dept., 1985) set forth:

> "It is clear, as a general matter, that the law looks with disfavor upon agreements intended to absolve an individual from the consequences of his negligence (*see,* ***Gross v. Sweet,* 49 N.Y.2d 102, 424 N.Y.S.2d 365, 400 N.E.2d 306**), and although they are, with certain exceptions, enforceable like any other contract against their signatories, such agreements are always subjected to the closest of judicial scrutiny and will be strictly construed against their drawer (*see,* ***Gross v Sweet supra,* at p. 106, 424 N.Y.S.2d 365, 400 N.E. 2d 306**; *Van Dyke Prods. v. Eastman Kodak Co.,* 12 N.Y.2d 301, 304, 239 N.Y.S.2d 337, 189 N.E.2d 693; *Boll v. Sharp &*

Dohme, 281 App.Div. 568, 570, 121 N.Y.S.2d 20, *affd.* 307 N.Y. 646, 120 N.E.2d 836). Thus, parties will not be presumed to have intended to exempt themselves from consequences of their own negligence in the absence of express and unmistakable language to that effect (*see, Van Dyke Prods. v. Eastman Kodak Co., supra* at p. 304, 239 N.Y.S.2d 337, 189 N.E.2d 693 [language which is "absolutely clear"]; *Ciofalo v. Vic Tanney Gyms,* 10 N.Y.2d 294, 297, 220 N.Y.S.2d 962, 177 N.E.2d 925 [language which is "sufficiently clear and unequivocal"]; *Boll v. Sharp & Dohme, supra,* at p. 580, 121 N.Y.S.2d 20 [language which is "clear and explicit"]), or to put it another way, it must clearly appear **346** that the "limitation of liability extends to [the] negligence or other fault of the party attempting to shed his ordinary responsibility" before an exculpatory clause will be given legal effect (*Howard v. Handler Bros. & Winell, Inc.,* 279 App.Div. 72, 76, 107 N.Y.S.2d 749, *affd.* 303 N.Y. 990, 106 N.E.2d 67). Moreover, it is not sufficient that the terms of the asserted agreement be "unambiguous" in their import, they must be "understandable" as well (*see,* ***Ross v Sweet, supra,* at p. 107, 424 N.Y.S.2d 365, 400 N.E.2d 306**; *Rappaport v. Phil Gottlieb-Sattler, Inc.,* 280 App.Div. 424, 114 N.Y.S.2d 221, *affd.* 305 N.Y. 594, 111 N.E.2d 647; *cf.* General Obligations Law § 5-701[a]). *Abramowitz v. New York University Dental Center College of Dentistry, supra* at 723."

Abramowitz v New York University Dental Center College of Dentistry, supra at 723

The Court initially observed that the release by its own terms is devoid of any reference to and/or description of the involvement of the Defendant March of Dimes Foundation in the event which seeks the benefit of the terms of the release (supra). The Court additionally observes that the written provisions of the release are set forth in boiler plate language and are not tailored to the activities in issue in the event for which the release is allegedly given. The Court notes that by its own provisions the release provides for the signature of a witness which is absent from the release submitted.

Based upon all of the foregoing the Defendant March of Dimes Foundation's application for an Order dismissing plaintiff's verified complaint, is **denied**.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):**

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe,* 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient

to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York, supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

Upon review of the affidavit of the Defendant Donald R. Hansen and the affidavit of the Plaintiff Carlos DeSousa, there is an issue of fact as to the facts and circumstances of the accident in issue that occurred northbound on the Meadowbrook Parkway and in particular whether the Defendant's motorcycle skidded into the Plaintiff's motorcycle or the Plaintiff's motorcycle came into contact with the rear of the Defendant's motorcycle. As such the Defendant Donald R. Hansen's application for an Order granting summary judgment, is **denied**.

SO ORDERED.

DATED: 2/3/2012

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J.S.C.

ENTERED
FEB 08 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE