SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 13

X

DENISE STANTON and KEVIN STANTON,

Plaintiffs,

- against -

OCEANSIDE UNION FREE SCHOOL DISTRICT a/k/a OCEANSIDE PUBLIC SCHOOLS, EASTERN NEW YORK YOUTH SOCCER ASSOCIATION, INC., OCEANSIDE UNITED SOCCER CLUB and AFFORDABLE INFLATABLES and ENTERTAINMENT, INC., and AFFORDABLE INFLATABLES & PARTY RENTALS, INC.,

Defendants.

X

Action No. 1
Index No.: 001925/12
Motion Sequence...01
Motion Date...03/19/14

Papers Submitted:
Notice of Motion.....x
Memorandum of Law.....x
Affirmation in Opposition.....x
Affirmation in Opposition.....x
Reply Affirmation.....x
Reply Affirmation.....x

X

CATHLEEN HUGHES, and SEAN HUGHES, an infant, by his mother and natural guardian, CATHLEEN HUGHES and CATHLEEN HUGHES, individually,

Plaintiffs,

- against -

Action No. 2
Index No.: 001991/12
Motion Sequence...01
Motion Date...03/19/14

AFFORDABLE INFLATABLES and PARTY RENTALS, INC., AFFORDABLE INFLATABLES & ENTERTAINMENT, INC., OCEANSIDE UNITED SOCCER CLUB, INC. and OCEANSIDE UNION FREE SCHOOL DISTRICT,

Defendants.

X

Papers Submitted:
Notice of Motion.....x
Memorandum of Law.....x
Affirmation in Opposition.....x
Memorandum of Law.....x

X

JEFFREY GREEN and PAMELA GREEN,

Plaintiffs,

- against -

AFFORDABLE INFLATABLES & ENTERTAINMENT, INC., AFFORDABLE INFLATABLES and PARTY RENTALS, INC., AFFORDABLE INFLATABLES, and OCEANSIDE UNITED SOCCER CLUB, INC.,

Defendants.

X

Papers Submitted:
Notice of Motion.....x
Memorandum of Law.....x
Affirmation in Opposition.....x
Affirmation in Opposition.....x
Reply Affirmation.....x
Reply Affirmation.....x

Action No. 3
Index No.: 004509/12
Motion Sequence...02
Motion Date...03/19/14

X

CHRISTINA MARRA and ROBERT MARRA,

Plaintiffs,

- against -

AFFORDABLE INFLATABLES and PARTY RENTALS, INC. d/b/a AFFORDABLE INFLATABLES, OCEANSIDE UNION FREE SCHOOL DISTRICT, and OCEAN UNITED SOCCER CLUB, INC.,

Defendants.

X

Action No. 4
Index No.: 006099/12
Motion Sequence...01, 02
Motion Date...03/19/14

Papers Submitted:
Notice of Motion (Mot. Seq. 01).....x
Memorandum of Law.....x
Affirmation in Opposition.....x
Affirmation in Opposition.....x
Reply Affirmation.....x
Notice of Motion (Mot. Seq. 02).....x
Affirmation in Support.....x
Affirmation in Support.....x
Affirmation in Support.....x
Affirmation in Opposition.....x
Affirmation in Opposition.....x
Affirmation in Reply.....x
Affirmation in Reply.....x

X

RHONA COHEN,

Plaintiff,

- against -

AFFORDABLE INFLATABLES and PARTY RENTALS, INC., AFFORDABLE INFLATABLES & ENTERTAINMENT, INC., and OCEANSIDE UNITED SOCCER CLUB, INC.,

Defendants.

X

Action No. 5
Index No.: 008475/12
Motion Sequence...01, 02
Motion Date...03/19/14

Papers Submitted:
Notice of Motion (Mot. Seq. 01).....x
Memorandum of Law.....x
Affirmation in Opposition.....x
Affirmation in Opposition.....x
Reply Affirmation.....x
Notice of Cross-Motion (Mot. Seq. 02).....x
Affirmation in Opposition.....x
Reply Affirmation.....x

The following motions have been submitted in the above captioned actions:

Action No. 1 – motion brought by the Defendants, Oceanside United Soccer Club, Inc. and Oceanside Union Free School District for summary judgment pursuant to CPLR § 3212 (Mot. Seq. 01).

Action No. 2 – motion brought by the Defendants, Oceanside United Soccer Club, Inc. and Oceanside Union Free School District, for summary judgment pursuant to CPLR § 3212 (Mot. Seq. 01).

Action No. 3 – motion brought by the Defendant, Oceanside United Soccer Club, Inc. for summary judgment pursuant to CPLR § 3212 (Mot. Seq. 02).

Action No. 4 – motion brought by the Defendants, Oceanside United Soccer Club, Inc. and Oceanside Union Free School District, for summary judgment pursuant to CPLR § 3212 (Mot. Seq. 01).

Motion brought by the Plaintiffs, Christina Marra and Robert Marra, for an order of this Court, pursuant to CPLR § 602 (a), joining the above captioned actions for trial (Mot. Seq. 02).

Action No. 5 – motion brought by the Defendant, Oceanside United Soccer Club, Inc., for summary judgment pursuant to CPLR § 3212 (Mot. Seq. 01).

Cross-motion brought by the Plaintiff, Rhona Cohen, for an order of this Court, pursuant to CPLR § 4102 (e) relieving the Plaintiff from her failure to file a Jury Demand and CPLR § 602 (a) joining the above captioned actions for trial (Mot. Seq. 02).

Based upon all the papers submitted for this Court's consideration, the Court makes the following findings of fact solely for the disposition of the hereinabove described motions:

The incident which is the subject matter of the above captioned actions occurred at approximately 12:00 to 12:15 p.m. on Saturday, June 4, 2011.

The subject incident occurred on open athletic fields located at the Oceanside Union Free School District's School Number 9, known as the Boardman Middle School, Alice Avenue, Oceanside, New York. This property is owned, operated and maintained by the Oceanside Union Free School District.

At the date, time and place of the subject incident, the Defendant, Oceanside

United Soccer Club, Inc., was conducting its end of year soccer festival and tournament.

The Defendant, Oceanside Union Free School District, had approved and consented to the use of its fields by the Defendant, Oceanside United Soccer Club, Inc., for the said Defendant's annual soccer festival pursuant to a May 25, 2011 written request and approval for use of the District's fields.

Pursuant to an invoice, signed on behalf of Oceanside United Soccer Club and dated May 13, 2011, the Defendant, Oceanside United Soccer Club, Inc., contracted with the Defendant, Affordable Inflatables and Party Rentals, Inc., to provide three (3) inflatable rides and slides on the District's hereinabove described fields on June 4, 2011.

At the time, date and place of the subject incident, the Defendant, Oceanside Union Free School District, had a custodian present at the premises.

On June 4, 2011, the Defendant, Affordable Inflatables and Party Rentals, Inc., set up, maintained and manned three (3) inflatable rides and slides on the District's fields at locations it was directed to by the Defendant, Oceanside United Soccer Club, Inc.

At the time, date and place of the subject incident, the three (3) inflatables were anchored by the use of sandbags.

At the time, date and place of the subject incident, the aforesaid three (3) inflatables became airborne as a result of a gust of wind and struck the Plaintiffs, Denise Stanton, Cathleen Hughes, Jeffrey Green, Pamela Green, Christina Marra and Rhona Cohen.

The rule in motions for summary judgment has been stated by the Appellate

Division, Second Department, in *Stewart Title Insurance Company v. Equitable Land Services, Inc.*, 207 A.D.2d 880, 881 (2d 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 (*Weingrad v New York Univ. Med.Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]). 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 v McAuliffe,* 97 AD2d 607 [3d Dept 1983]), 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 NY2d 320, 324 [1986]; *Zuckerman v City of New York, supra* at 562)."

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court, as a matter of law, in directing judgment in its favor (CPLR § 3212 [b]). The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement as a matter of law to judgment by offering sufficient evidence to remove any material question of fact. Absent such a showing, the motion will be denied, irrespective of the sufficiency of the opposing proof (*see Northside Sav. Bank v. Sokol,* 183 A.D.2d 816 [2d Dept. 1992]; *Liberty Taxi Mgt. Inc. v. Gincherman,* 32 A.D.3d 276 [1st Dept. 2006]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary

judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v. Kenworth Truck Co.*, 68 N.Y.2d 714 [1986]; *Forrest v. Jewish Guild for the Blind,* 309 A.D.2d 546 [1st Dept. 2003]).

The Defendants, Oceanside United Soccer Club, Inc. ("OUSC") and Oceanside Union Free School District ("OUFSD"), in support of their hereinabove described motions for summary judgment dismissing the complaints of the Plaintiffs herein, submit that:

> ". . . plaintiffs cannot establish each of the requisite elements of a negligence action. OUSC and OUFSD did not directly employ any individuals designated to provide inflatable rides and attraction services on the day of the alleged incident. OUSC and OUFSD did not own, control, operate, manage, direct, supervise, repair or have custody of the inflatable rides and attractions at the event. Such services were provided exclusively by Defendant Affordable Inflatables, in accordance with a written agreement entered into on May 13, 2011, which was in effect on June 4, 2011. . . .
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> * * *
>
> . . . OUSC and OUFSD did not create nor have notice, actual or constructive, of any alleged dangerous condition at the field that day."

In support of the motions of the Defendants, OUSC and OUFSD and their hereinabove set forth submissions, the Defendants proffer the GML 50-h hearing transcripts and transcripts of the Examinations Before Trial of the Plaintiffs, the transcripts of the Examination Before Trial of Regina Michielini and Dominick Musto, the principals of the Defendant, Affordable Inflatables and Matthew Strandberg, an employee of the Defendant, Affordable Inflatables and Party Rentals, Inc., and the transcript of the Examination Before

Trial of Michael Meagher, the current president of the Defendant, OUSC and Maria Bavaro, the current recreation supervisor for the Defendant, OUFSD.

It is well settled that the owner of property has a duty to maintain its property in a reasonable safe condition (*see Basso v. Miller*, 40 N.Y.2d 233 [1976]). This duty applies to owners of athletic fields (*see Akins v. Glens Falls City School District*, 53 N.Y.2d 325 [1981]). Furthermore, a landowner has a duty to reasonably control the actions of third parties permissibly on its property, including the regulation and/or prevention of certain activities of which the landowner knows, or reasonably should know, pose a risk to its property or to visitors of its property (*see Rill v. Chiarella*, 50 Misc 2d 105 [Sup. Ct Westchester County 1966] *mod* 30 A.D.2d 852 [2d Dept. 1968] *affd* 25 N.Y.2d 702 [1969]).

Where the premises is open to the public, the owner has a non-delegable duty to provide the public with a reasonably safe premises. This duty may not be delegated by the owner to an independent contractor. This duty extends to anyone who comes onto the premises for any reasonably foreseeable purposes (*see Beckiel v. Citibank*, 299 A.D.2d 504 [2d Dept. 2002]).

With respect to the Defendant, OUSC,:

> "A party who possesses real property, either as an owner or as a tenant, is under a duty to exercise reasonable care to maintain that property in a safe condition, and this duty includes the understanding of minimal precautions to protect members of the public from the reasonably foreseeable acts of third persons (citations omitted)." (*Martinez v. Santoro*, 273 A.D.2d 448 [2d Dept. 2000]).

Based upon this Court's hereinabove set forth findings of fact and applicable

law thereto and all of the papers submitted in support of the Defendants' motions for summary judgment dismissal of the Plaintiff's complaints, the Court finds and determines that the Defendants have not met their burden of showing an entitlement as a matter of law to judgment.

While recognizing that the facts and circumstances of this case are unusual, the moving Defendants' proof in and of itself raises the following factual issues:

Did the Defendant, OUFSD, breach its non-delegable common-law duty to maintain the premises in a reasonably safe condition for the general public and persons reasonably expected to be on the premises;

Did the Defendant, OUFSD, direct the manner or method of securing the inflatables;

Did the Defendant, OUSC, breach its non-delegable common-law duty to maintain the premises in a reasonably safe condition for the people that it invited on the premises; and

Did the Defendant, OUSC, direct the manner or method of securing and/or maintaining the inflatables.

In the seminal case defining the Court's function in determining a motion for summary judgment, the Court in *Esteve v. Abad*, 271 A.D. 725, 727 (1st Dept. 1947) said that "issue-finding, rather than issue-determination is the key to the procedure."

The Defendants, OUSC and OUFSD, further move for summary judgment

dismissal of the cross-complaint and cross-claims interposed by the Defendants, Affordable Inflatables & Entertainment, Inc. and Affordable Inflatables and Party Rentals, Inc.

In support of this prayed for relief, these moving Defendants cite the indemnification clause in the hereinabove described May 13, 2011, invoice/contract which provides:

> "Client and all users assume all risk of use of 'equipment and services' and agree to indemnify and otherwise hold Affordable Inflatables and Party Rentals, Inc. harmless from any and all liability arising out of the use of any and all equipment."

Interposed in the Verified Amended Answer of the Defendants, Affordable Inflatables & Entertainment, Inc. and Affordable Inflatables and Party Rentals, Inc., are the following cross-complaints:

> "AS AND FOR A FIRST CROSS-COMPLAINT FOR CONTRIBUTION AGAINST THE CO-DEFENDANTS PURSUANT TO CPLR § 3019(b) AND THE RULE IN *DOLE V DOW CHEMICAL CO.*, 30 NY2d 143. . . .
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> * * *
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> AS AND FOR A SECOND CROSS-CLAIM AGAINST THE CO-DEFENDANTS FOR COMMON-LAW INDEMNIFICATION. . . .
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> * * *
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> AS AND FOR A THIRD CROSS-CLAIM AGAINST THE CO-DEFENDANTS FOR CONTRACTUAL INDEMNIFICATION. . . .
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> * * *
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> AS AND FOR A FOURTH CROSS-CLAIM AGAINST CO-

DEFENDANTS FOR BREACH OF CONTRACT/LEASE FOR FAILURE TO PURCHASE INSURANCE. . . ."

In light of this Court having found issues of fact sufficient to defeat the moving Defendants' motions for summary judgment dismissal of the Plaintiffs' complaints, the Court will now address the moving Defendants' motion seeking a summary judgment dismissal of the hereinabove set forth cross-complaints of the co-Defendants.

The branch of the moving Defendants' motion to dismiss the first cross-complaint interposed by the co-Defendants is **DENIED**. The right to apportionment of liability among/between the Defendants herein rests upon their relative responsibility, if any, to be determined by the trier of the facts (*see Dole v. Dow Chemical Co.*, 30 N.Y.2d 143).

The branch of the moving Defendants' motion to dismiss the second cross-claim interposed by the co-Defendants is **DENIED**. Where, as here, there has not been a determination of any party's negligence, it is premature to determine the issue of common-law indemnification. Since the moving Defendants failed to satisfy their burden on their motions for summary judgment, the branch of their motions for summary judgment dismissal of the co-Defendants' cross-claim for common-law indemnification must also be denied regardless of the sufficiency of the co-Defendants' opposing papers (*see Konsky v. Escada Hair Salon, Inc.*, 113 A.D.3d 656 [2d Dept. 2014]).

The branch of the moving Defendants' motions to dismiss the third cross-claim interposed by the co-Defendants is **GRANTED** with respect to the Defendant, Oceanside Union Free School District and **DENIED** and with respect to the Defendant, Oceanside

United Soccer Club, Inc.

Oceanside Union Free School District was not a party to the May 13, 2011 invoice/contract between the Defendants, Oceanside United Soccer Club, Inc. and Affordable Inflatables & Entertainment, Inc. Therefore, there was a lack of any contractual relationship between the co-Defendants, Oceanside Union Free School District and Affordable Inflatables and Party Rentals, Inc.

This Court finds and determines that the hereinabove described contractual indemnification clause which encompasses "... any and all liability arising out of the use of any and all equipment" was drafted by the co-Defendants to indemnify the co-Defendants for their own negligence. While New York law has long disfavored exculpatory clauses that relieve a party to a contract from liability for the consequences of its own negligence, the law's disfavor has been expressed not in a prohibition of such clauses, but in strict requirements that the disclaimer of liability for negligence be made explicit and be communicated in such a way as to ensure that the party who is to be bound by the disclaimer has knowingly accepted such disclaimer as part of the contract between the parties (*see Gross v. Sweet*, 49 N.Y.2d 102 [1979]). This Court finds and determines that the subject clause satisfies the requirement of explicitness as articulated in *Gross v Sweet, supra.*

The branch of the moving Defendants' motions to dismiss the fourth cross-claim interposed by the co-Defendants is **GRANTED**. The affirmation of counsel in support posits:

> "in its Verified Answer, Affordable Inflatables cross-claimed against OUSC and OUFSC for breach of contract, 'pursuant to the co-Defendant's failure to purchase insurance coverage in favor of Affordable Inflatables as per the aforementioned agreement, contract or lease.' "

Although the quoted language is not verbatim correct, it is factually correct.

The Defendants, Affordable Inflatables & Entertainment, Inc. and Affordable Inflatables and Party Rentals, Inc. do not oppose the branch of the movants' motions to dismiss their fourth cross-claim. Furthermore, this Court's review of all the papers submitted for its consideration finds no basis for the hereinabove described fourth cross-claim.

The motion of the Plaintiffs, Christina Marrra and Robert Marra, in Action No. 4 of the above captioned actions, seeking an order of this Court, pursuant to CPLR § 602 (a) joining Actions Nos. 1, 2, 3, 4 and 5 for trial on liability and damages is **GRANTED**.

Based upon all the papers submitted for this Court's consideration, the Court finds and determines that all five (5) of the above captioned actions involve the same incident, have common and shared issues of fact and law and may well have the same witnesses, both eyewitnesses and experts, testifying on liability and damages.

The Cross-motion of the Plaintiff, Rhona Cohen, in Action No. 5 of the above captioned actions, seeking an order of this Court, pursuant to CPLR § 4012 (e), relieving the said Plaintiff from the effect of failing to file a Jury Demand, is **GRANTED**[1] in the exercise of this Court's discretion upon the finding that no party in Action No. 5 would be unduly

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[1]Although this Court is granting the Cross-motion, the original Note of Issue was vacated by the Order of Hon. R. Bruce Cozzens, dated March 12, 2014.

prejudiced by the granting of this relief.

Accordingly, it is hereby

ORDERED, that the Plaintiff in Action No. 5 shall serve and file a Note of Issue, together with a Jury Demand in the form annexed to the cross-moving papers and with the payment of any filing fees required therefore upon Action No. 5 being re-certified; and it is further

ORDERED, that the branch of the cross-motion of the Plaintiff, Rhona Cohen, seeking an order of this Court joining the above captioned actions for trial on liability and damages is **GRANTED**; and it is further

ORDERED, that counsel for the Defendants, Oceanside Union Free School District and Oceanside United Soccer Club, Inc., are herewith directed to serve a copy of this order upon the Clerk of the Calendar Control Part and the attorneys for all parties within ten (10) days of the date hereof; and it is further

ORDERED, that the service and filing of any Note of Issue in the above captioned actions shall be accompanied with a copy of this order.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
April 10, 2014

Hon. Randy Sue Marber, J.S.C.