

Gaydos v NYC Bike Share, LLC
2019 NY Slip Op 33481(U)
November 25, 2019
Supreme Court, New York County
Docket Number: 156496/2018
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

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STEPHEN GAYDOS, INDEX NO. 156496/2018
MOTION DATE 03/28/2019
MOTION SEQ. NO. 001
Plaintiff,

- v -

NYC BIKE SHARE, LLC, ALTA BICYCLE SHARE, INC. **DECISION + ORDER ON MOTION**
Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion of defendant NYC Bike Share, LLC to dismiss the complaint is denied, in accord with the following memorandum decision.

Plaintiff Stephen Gaydos (“Plaintiff”) commenced this action to recover damages for personal injuries he sustained while riding a Citi Bike bicycle in New York City on June 27, 2017. Defendant NYC Bike Share, LLC (“NYCBS”) operates the Citi Bike bicycle-sharing program (Flynn Aff. ¶ 1). As alleged in the complaint, Plaintiff, a Citi Bike member, was riding a Citi Bike bicycle when it malfunctioned, allowing the front fender to become dislodged, propelling the plaintiff over the handlebars of the bicycle and causing serious and severe injuries. Plaintiff alleges that the bicycle malfunction was caused by a latent defect to the fender that could not be recognized by a layperson, even upon a reasonable inspection, and that NYCBS and co-defendant Alta Bicycle Share, Inc. (together, “Defendants”) were negligent by failing to properly maintain and inspect Citi Bike bicycles, including the bicycle used by Plaintiff on the day of the injury, for such defects, as required by contract and Defendants’ internal operating procedures (Compl. ¶¶ 9-22). Plaintiff also alleges that Defendants failed to track and respond to

maintenance requests, thereby allowing bicycles with latent defects or damage, undetectable to a layperson, to remain in use by Citi Bike members, despite notice of the dangerous condition and knowledge of at least two prior incidents of injury caused by the same fender defect that resulted in Plaintiff's injuries (Compl. ¶¶ 11-12, 15-16; Ilchert Aff. ¶ 24). Plaintiff also alleges that these actions constitute gross negligence.

NYCBS filed this pre-trial motion on the grounds that Plaintiff waived and released all negligence claims against NYCBS by virtue of certain waiver and release provisions contained in the NYCBS User Agreement, which Defendant agreed to when he purchased a Citi Bike membership. In opposition, Plaintiff argues that the waiver and release provisions cited by NYCBS are unenforceable as a matter of public policy pursuant to GOL § 5-326, which states the following:

Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable.

In reply, NYCBS argues that GOL § 5-326 does not apply because Citi Bike is not a place or a recreational facility and that it is not in "substantial control" over the use of its bicycles by Citi Bike users. Finally, NYCBS argues that Plaintiff's pleading is insufficient to support a claim for gross negligence (Beadle Reply Aff. ¶ 32).

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). When reviewing such a motion, the court must "accept the facts as alleged as true, accord plaintiffs the benefit of every possible

favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*id.*). On a motion pursuant to CPLR 3211(a)(1), dismissal “motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]). Defendant bears the burden of demonstrating that the proffered documentary evidence conclusively refutes the allegations set forth in the complaint (*Kolchins v Evolution Markets, Inc.*, 31 NY3d 100, 105 [2018]).

On the present motion, the limited evidence before the court is insufficient to conclusively establish a defense as a matter of law. As an initial matter, the parties dispute, but have not fully briefed, whether the 2013 User Agreement or the 2017 User Agreement is applicable in the present instance. Although the agreements are similar and each contains various waiver and release provisions, each agreement imposes distinct duties and responsibilities on the parties. Additionally, the 2012 User Agreement contains a provision which states that the waiver and release provisions “may otherwise be limited by New York General Obligation Law Section 5-326.” Although not determinative of whether GOL § 5-326 applies, this language nonetheless raises a question of fact regarding the intent of the parties and the application of GOL § 5-326. Furthermore, although Citi Bike may not be considered a “place” of recreation, Citi Bike bicycles are used for both recreational and transportation purposes. The level of “control” NYCBS retains over the Citi Bike bicycles is an issue of fact that may be deduced in the course of discovery or at trial. It is also unclear upon the limited record before the court whether and to what extent NYCBS had a duty to inspect, repair or maintain the Citi Bike bicycles and track and respond to bicycle maintenance requests in order to safeguard against the type of latent defect alleged in the complaint.

NYCBS also argues that the complaint should be dismissed because Plaintiff fails to state a claim for gross negligence. “[G]ross negligence differs in kind, not only in degree, from claims of ordinary negligence. It is conduct that evidences a reckless disregard for the rights of others or ‘smacks’ of intentional wrongdoing” (*Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823-824 [1993]). “Gross negligence has been termed the failure to exercise even slight care” (*Food Pageant, Inc. v Consolidated Edison Co., Inc.*, 54 NY2d 167, 172 [1982]). In relevant part, the complaint alleges not only that Defendants recklessly or willfully failed to inspect, repair, and maintain Citi Bike bicycles, as required by contract and their own internal operating procedures, but also that Defendants failed to track and respond to maintenance requests, thereby allowing bicycles with latent damage, undetectable to a layperson, to remain in use by Citi Bike members, despite notice of the dangerous condition and notice of at least two prior incidents of injury caused by the same fender defect that resulted in Plaintiff’s injuries (Compl. ¶¶ 11-12, 15-16; Ilchert Aff. ¶ 24). Accepting these allegations as true and according the Plaintiff the benefit of every possible favorable inference, as the court must do on a pre-answer motion to dismiss (*Leon v Martinez*, 84 NY2d 83, 87 [1994]), a reasonable factfinder could conclude that these actions were sufficiently reckless to rise to the level of gross negligence (*see Food Pagent*, 54 N.Y.2d at 173 [“Where the inquiry is to the existence or nonexistence of gross negligence, the ultimate standard of care is different [from ordinary negligence], but the question nevertheless remains a matter for jury determination”]); *See also S.A. De Obras y Servicios, COPASA v Bank of Nova Scotia*, 170 AD3d 468, 472 [1st Dept 2016]; *Summer v Federal Signal Corp.*, 79 NY2d 540, 556 [1992][“Whether this indeed is a case of a simple mistake or reckless indifference is for a jury to determine”]).

Accordingly, it is

ORDERED that defendant NYCBS's motion to dismiss is denied; and it is further

ORDERED that a preliminary conference for this matter will be held on January 16, 2020 at 2:15 p.m. in the courthouse located at 111 Centre Street, Part 38-Room 1166, New York, New York.

11/25/2019
DATE

Louis L. Nock
LOUIS L. NOCK, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE