

Dibuono v Red Frog Events LLC

2019 NY Slip Op 34732(U)

May 21, 2019

Supreme Court, Westchester County

Docket Number: Index No. 63476/2016

Judge: John P. Colangelo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
DESIREE DIBUONO, SHANON LAKE-CATELLO
and JACQUELINE BALL,

Plaintiffs,

-against-

RED FROG EVENTS LLC d/b/a WARRIOR DASH,

Defendant.

-----X
RED FROG EVENTS LLC d/b/a WARRIOR DASH,

Third-Party Plaintiff,

-against-

LANG CONSTRUCTION INC.,

Third-Party Defendant.

-----X
LANG CONSTRUCTION INC.

Second Third-Party Plaintiff,

-against-

ANTHONY G. NOVACK, B.A.T. CONSTRUCTION
AND REMODELING and TIMOTHY O'BRIEN

Second Third-Party Defendant.

-----X
COLANGELO, J.

The following papers were read on the motion by Defendant Red Frog Events LLC d/b/a

Warrior Dash (“Red Frog Events”) for an Order granting Summary Judgment pursuant to CPLR §3212, dismissing all of Plaintiffs’ claims against it, and granting Summary Judgment to Red Frog Events on its Third Party claims against Lang Construction, Inc. (Motion Sequence #4); and on the motion by Lang Construction for an Order granting Summary Judgment and dismissing the first and second causes of action in the third-party complaint of Defendant/third-party Plaintiff Red Frog Events. (Motion Sequenced #5):

<u>Motion Sequence 4</u>	NYSCEF
Notice of Motion-Affirmation-Memorandum of Law Exhibits A-P	108-127
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Upon the foregoing papers it is ORDERED that the motions are disposed of as follows:

Relevant Procedural History and Factual Background

Plaintiffs Desiree Dibuono, Shanon Lake-Catello and Jacqueline Ball (“Plaintiffs”) commenced an action against Defendant Red Frog Events LLC d/b/a Warrior Dash (“Red Frog”) by the electronic filing of a Summons and Verified Complaint on September 22, 2016, which pleadings were also served upon the Department of State, Division of Corporations. (Def. Exh.

A). Red Frog's Verified Answer was served and filed on October 20, 2016. (Def. Exh. B). Thereafter, on March 28, 2017, Red Frog electronically filed a Third-Party Summons and Complaint naming Lang Construction, Inc. ("Lang") as a Third-Party Defendant. (Def. Exh. C). Lang's Verified Answer to the Third-Party Complaint was electronically filed on July 28, 2017. On September 21, 2017, Lang filed a Second Third-Party Summons and Complaint naming Defendants Anthony G. Novak, B.A.T Construction & Remodeling, and Timothy O'Brien as Second Third-Party Defendants. (Def. Exh. E). According to Red Frog, the Second Third Party Defendants have failed to appear and are currently in default.

Motion Sequence #4

Plaintiffs seek to recover damages for injuries sustained while participating in the Warrior Dash races, which is an outdoor obstacle course with twelve (12) obstacles over the course of a 5k run that was hosted by Red Frog on May 21, 2016 in Warwick, New York. One of the obstacles named the "Goliath" is the obstacle on which Plaintiffs allege to have been injured.

The Motion

The Affirmation of Mark E. Jordan-Poinsette, Esq., counsel for Red Frog, and the deposition testimony of Red Frog's Senior Director of Site Operations, Bryan Sechrist (Def. Exh. J), which testimony is referenced in counsel's affirmation, are submitted, *inter alia*, in support of the instant motion.

With regard to the Warrior Dash races, Red Frog organized and managed the event. (Jordan-Poinsette Aff. ¶15). Bryan Sechrist ("Sechrist") and another employee of Red Frog designed the Goliath. The Goliath was a large structure that participants climbed up before sliding into an excavated pool of water below. (*Id.* ¶18).

According to Sechrist, Red Frog did not build any of the obstacles for the Warrior Dash races, including the Goliath, and retained Lang as their construction contractor to build the obstacles based upon Red Frog's design. Red Frog would show Lang the design for the obstacles and talk through the best ways for Lang to safely build them. Before the plans were finalized, they were shown to Lang to get their input. Once the obstacles were built at a given site, Red Frog did not maintain them. (*Id.* ¶16).

Red Frog typically had twelve employees or volunteers on site for events. The construction team led by Lang would inspect the obstacles; Red Frog did not conduct inspections as to how obstacles were built. Red Frog did have a local team member monitoring the Goliath. Lang was in charge of excavation and Red Frog gave them autonomy to dig as deep as necessary for areas like the water pit below the Goliath. (*Id.* ¶¶17,18). According to the deposition testimony of Lang's manager, Jeffrey Lang (Def. Exh. K) which is also referenced by Red Frog's counsel in his affirmation, Lang regularly hired sub-contractors to participate in the construction work at Warrior Dash events, usually the named second third-party Defendants, and these sub-contractors were in charge of construction of the course, building the obstacles, filling of the pits where required, and general maintenance. (*Id.* ¶20).

Lang was also in charge of the water levels in the pit at the base of the Goliath. Lang put water in the pit whenever they saw it might be needed or when directed to do so by Red Frog. Red Frog typically asked the Lang water crew to maintain the water to be at or above the minimum depth of three feet. According to Mr. Lang, the pit was typically dug to five (5) feet. The pit typically needed more water added and Lang was constantly hauling water throughout the race. There was also a water pump that pumped water to flow from the top of the slide into the

water pit below. Lang controlled the volume of water. Lang also ensured that nothing sharp was in or protruding in the bottom of the pit, and that the pit was free from sharp rocks and boulders prior to a tarp being put down and the pit being filled with water. (*Id.* ¶21). On the date of the accident, Lang measured the depth of the water prior to the race. (*Id.*).

Red Frog denies responsibility for Plaintiffs' injuries, since it did not construct the Goliath, did not excavate the land or dig the water pit. Red Frog merely designed the Goliath while Lang constructed it, maintained it, and was responsible for the pit and the water levels (*Id.* ¶34) pursuant to a Construction Agreement entered into with Lang on April 1, 2016 (the "Agreement") (Def. Exh. O), whereby Lang was responsible to fill all obstacle pits and tanks to required water levels, and to maintain all obstacle pits and water levels throughout event days.

Lang was also required to promptly respond to and repair any obstacles that might malfunction or require further maintenance or attention. (*Id.* ¶36). Red Frog contends that it did not have actual or constructive notice of any dangerous conditions on the Goliath prior to Plaintiffs' accidents since it did not build the Goliath, dig the water pit, or maintain its water levels. (*Id.* ¶41). Further, Red Frog takes the position that while the Goliath was eventually shut down due to a pattern of injuries, this occurred after Plaintiffs had already been injured. (*Id.* ¶52).

Red Frog further asserts that Plaintiffs' claims must be dismissed because each of the Plaintiffs executed a "Waiver and Release of Liability, Assumption of Risk and Consent to Medical Treatment" prior to participating in the race. (*Id.* ¶60; Def. Exh. P).

Based upon the foregoing contentions, Red Frog argues that they have established a *prima facie* entitlement to summary judgment dismissing Plaintiffs' complaint.

Plaintiff's Opposition

Plaintiffs oppose the instant motion, and contend that by the various frivolous and false claims made by Red Frog, Red Frog has attempted to shift the burden to Plaintiffs without having made a *prima facie* case for summary judgment. The Affirmation of Plaintiffs' counsel John O'Gara, Esq. ("O'Gara Aff."), the Expert Report of Edward Pribonic, P.E. (Pl. Exh. 1), and the Affidavit of Emergency Medical Technician Abraham Martinez ("EMT Martinez") (Pl. Exh. 2), *inter alia*, are submitted by Plaintiffs in opposition to the motion.

Plaintiffs contend in the first instance, that even if Red Frog did not build the Goliath, there is no dispute that Red Frog designed and operated it. Red Frog failed to conduct safety inspections, failed to monitor the conditions of the landing pool, and kept the slide open long after it was apparent that it was dangerous, which led to further injuries. (O'Gara Aff. ¶50).

Plaintiff's expert, Edward Pribonic, P.E. is a mechanical engineer who specializes in amusement rides, devices and facilities. He is also a certified amusement ride safety inspector. His report contains many criticisms of Red Frog's design of the Goliath which can be found in Section VII of his report, but two crucial defects cited by him are significant causes of the injuries sustained. The slope of the slide, and the height of the drop from the end of the slide to the water surface are significant causes of the injuries sustained. (Pl. Exh. 1, Section VI a).

Mr Pribonic details in his report that the Goliath was designed by two men who had neither the education nor experience necessary to design a waterslide; and neither of them consulted experts, or an engineer, or relied upon industry standards in their design of the Goliath. Red Frog's Mr. Sechrist does not refute these facts.

Mr Pribonic concludes, *inter alia*, that as a result of the design defects, the Goliath

waterslide was dangerous, not built in accordance with good and accepted waterslide industry custom and practice and not compliant with industry standards. (O’Gara Aff. ¶51; Pl. Exh. 1, pp. 4-11, and generally).

In addition, Plaintiffs dispute Frog’s contention that the problems with the Goliath were limited to the water pit and allege that Red Frog failed to control the flow rate of water streaming down the flume. Plaintiffs correctly point out that the moving papers fail to establish, *prima facie*, that both the flow rate of the water and the water level of the pit at the bottom were proper when Plaintiffs came down the slide. (O’Gara Aff. ¶53).

EMT Martinez was called to the Goliath because those at the site were getting overwhelmed with injuries. There were nine people with lower leg, ankle and foot injuries within about thirty to forty-five minutes. There was no person around to shut down the slide. As stated in his report, “[w]e started to shout up to the people working at the top of the slide to shut it down, but they didn’t. . . [there] didn’t seem to be anyone in charge. Finally after about half an hour or forty-five minutes someone shut it down.” (Martinez Aff. ¶4). “The water at the bottom of the slide was obviously too shallow.” (*Id.* ¶5). Earlier that morning, Martinez had also picked up several 2 by 4 pieces of wood from the structure of the Goliath which had fallen to the ground, and there was not one person from the Warrior Dash to report the fallen wood to. Martinez did not understand why there not one person on the scene in charge to shut down the Goliath, as it should have been shut down much earlier. (*Id.* ¶6).

Plaintiffs dispute the validity of the Waivers and releases of Liability relied upon by Red Frog in support of the motion to dismiss. According to their attorney, the Waivers and releases of Liability signed by them are null and void as against public policy and wholly unenforceable

pursuant to General Obligations Law § 5-326. Since Red Frog's facility is recreational in nature, the releases do not bar Plaintiffs' claim. (O'Gara Aff. ¶¶68-69).

Red Frog has also moved for an Order granting summary judgment against third-party Defendant Lang Construction Inc. ("Lang") on its claims against Lang for contractual indemnification, common law indemnification, contribution, and breach of contract for failure to procure insurance naming Red Frog as an additional insured. (Jordan-Poinsette Aff. ¶68).

Red Frog takes the position that summary judgment is warranted on its third-party contractual indemnification claim based upon the Agreement referred to earlier in this Decision. (*Id.* ¶69; Def. Exh. O, ¶5). With regard to its common law indemnification claim, Red Frog contends that Lang constructed and maintained the Goliath and the water pit that is alleged to have caused Plaintiffs' injuries. (Jordan-Poinsette Aff. ¶71). With regard to Red Frog's third-party claim for breach of contract, Red Frog contends that Lang failed to obtain Commercial General Liability Insurance naming Red Frog as an additional insured, except in the instance of gross negligence, as required by the Agreement. (Def. Exh. O, ¶5). Red Frog contends that since there is no evidence of gross negligence, Lang breached the insurance procurement obligation required by the Agreement. (Jordan-Poinsette Aff. ¶¶72-74).

Counsel for Lang, George P. Epstein II, Esq., has submitted an affirmation in partial opposition to Red Frog's motion to the extent that the motion seeks summary judgment against Lang on the Red Frog's claim of indemnification and failure to procure insurance. (Epstein Aff.). The essence of Lang's opposition to Red Frog's motion is that everything done by Lang was at the direction of or pursuant to instructions provided by Red Frog. (*Id.* ¶7). Lang provides the deposition transcripts of Red Frog's employee, Brian Sechrist, and Jeffrey Lang in support of

this contention. (*Id.* ¶6; Def. Exhs J & K, respectively).

Red Frog has submitted a Reply Affirmation in further support of its motion for summary judgment against Plaintiffs and Lang. The reply to the Plaintiffs' opposition essentially reiterates the claims asserted by Red Frog's moving papers -- that Red Frog had no notice of any dangerous conditions on the Goliath prior to Plaintiffs' injuries', and Plaintiffs' claims are barred by the waivers and the doctrine of assumption of risk. Red Frog's reply to Lang's opposition reiterates the claims made by Red Frog in its moving papers as to Lang's liability.

Summary Judgment

CPLR §3212(b) states in pertinent part that a motion for summary judgment "shall be granted if, upon all of papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

In *Andre v Pomeroy*, 35 N.Y.2d 361, 364 (1974), the Court of Appeals held that:

"[s]ummary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law . . . when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated."

On a motion for summary judgment, the moving party has the burden to establish " a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Voss v. Netherlands Ins Co.*, 22 N.Y.3d 728 (2014), quoting *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); see also

Winegrad v New York University Medical Center, 64 N.Y.2d 851, 853 (1985), *Ayotte v Gervasio*, 81 N.Y.2d 1062, 1063 (1993), *S.J. Capelin Associates, Inc. v. Globe Manufacturing Corp.*, 34 N.Y.2d 338, 341(1974), *Finkelstein v. Cornell University Medical College*, 269 A.D.2d 114, 117 (1st Dept. 2000).

Once the moving party has sustained his burden of making a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Failure of the proponent of a motion for summary judgment to make a prima facie showing of entitlement requires denial of the motion, regardless of the sufficiency of the opposing papers.

Winegrad v New York University Medical Center, 64 NY2d 851, 853 (1985).

Summary judgment is a drastic remedy that "should not be granted where there is any doubt as to the existence of a triable issue" (*Id.* at 853). In its analysis of such a motion, a court must construe the facts in a light most favorable to the nonmoving party so as not to deprive that person his or her day in court. *Russell v A. Barton Hepburn Hosp.*, 154 AD2d 796, 797 (3rd Dept. 1989); *See also, Mascots v Oarlock*, 23 AD2d 943, 944 (3rd Dept., 1965). "To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented .

. [T]his drastic remedy should not be granted where there is any doubt as to the existence of such issues, ...or where the issue is arguable . . . ; 'issue finding, rather than issue-determination, is the key to the procedure' ". . . *Pirrelli v Long Island Railroad*, 226 AD2d 166 (1st Dept. 1996) quoting *Sillman v Twentieth Century-Fox*, 3 N.Y.2d 395, 404 (1957)

With the foregoing principles in mind, this Court turns to the instant motion. In this

Court's view, Red Frog has failed to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. There is no question that Red Frog designed the Goliath and that several individuals including Plaintiffs claim that they sustained injuries on the slide. Red Frog has failed to establish in the first instance that the Goliath was safely designed, by qualified personnel, and that it was monitored and properly supervised during the event. Since Red Frog designed the Goliath, there is a question of fact as to whether Red Frog had or should have had notice that the Goliath was dangerous. (*Id.* ¶54; Pl. Exh. 1, pp. 4-7 and generally).

Red Frog has thus failed to tender sufficient evidence to demonstrate the absence of a material fact which would require a trial of this action. Failure of the proponent of a motion for summary judgment to make a prima facie showing of entitlement requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). The Court finds that even had Red Frog met their burden on a motion of this nature, which they did not, Plaintiffs, through the Expert Report of Edward Pribonic and the sworn affidavit of EMT Martinez, *inter alia*, have proffered sufficient evidence to establish the existence of several material issues of fact that require a trial of this action, including *inter alia*.

whether Red Frog was negligent in the design, monitoring and supervision of the Goliath.

Accordingly and based upon the foregoing, Red Frog's motion for summary judgment dismissing Plaintiffs' claims is denied.

Applying the foregoing principles of law to the branch of Red Frog's motion that seeks an Order granting summary judgment as against Lang, the motion is also denied. Red Frog has

failed to tender sufficient evidence that there are no material issues of fact that require a trial of this action. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented . . . “[t]his drastic remedy should not be granted where there is any doubt as to the existence of such issues, ...or where the issue is arguable . . . ; ‘issue finding, rather than issue-determination, is the key to the procedure’ “. . . *Pirrelli v Long Island Railroad*, 226 AD2d 166 (1st Dept. 1996) quoting *Sillman v Twentieth Century-Fox*, 3 N.Y.2d 395, 404 (1957).

Red Frog has failed to tender sufficient evidence to establish the absence of a material and triable issue of fact that, *inter alia*, that Red frog was not negligent in the design of the Goliath, that the construction of the Goliath by Lang and not the design of the Goliath, was responsible for the Plaintiffs’ injuries, and that the terms of the Agreement require Lang to indemnify Red Frog given the allegations of negligence against Red Frog. Specifically, the Agreement upon which Red Frog relies to eliminate a triable issue of fact as to Lang’s duty to indemnify Red Frog states, “[c]ontractor provides no indemnity under this Agreement against liability arising out of the *negligence* or willful misconduct of RFE”. (Def. Exh. O)(Emphasis added).

In light of Red Frog’s failure to tender sufficient evidence to establish the absence of material issues of fact as to, *inter alia* its negligence in the design of the Goliath which led to Plaintiffs’ injuries, and Lang’s duty to indemnify Red Frog pursuant to the terms of the Agreement, Red Frog’s motion is denied.

Motion Sequence #5

This motion is brought by Lang Construction Inc. (“Lang”) for an Order pursuant to CPLR §3212 granting summary judgment and dismissing the first and second causes of action in

Red Frog's third-party complaint against them. The first cause of action against Lang alleges that Lang has failed to indemnify and hold Red Frog harmless by reason of the occurrence described in Plaintiff's Verified Complaint despite the requirements of the Construction Agreement ("Agreement"). The second cause of action alleges that under the terms of the Agreement, Lang agreed to provide services at the event, and as a result of Lang's negligence in the work performed, Plaintiffs were caused to allegedly suffer damages. (Third-party Complaint).

Lang contends that there is no evidence of their negligence, and Red Frog is not entitled to indemnification under the Agreement. The Affirmation of Lang's counsel, George P. Epstein II is submitted in support of the motion. ("Epstein Aff."). Excerpts from the deposition testimony of Jeffrey Lang (Lang Exh. I) and Bryan Sechrist (Lang Exh. J1 & J2) are set forth in the instant motion. The procedural history and relevant factual background as set forth above in motion sequence #4 is incorporated by reference herein.

The essence of Lang's motion is that the Goliath was wholly designed by Red Frog, without input from Lang, and Lang's only participation with respect to the Goliath was limited to construction of the Goliath to the specifications provided by Red Frog with materials provided by Red Frog, and on event day, to put water into the water pit, if necessary, at Red Frog's direction. (Epstein Aff. ¶18). Further, Red Frog was the only party with the authority to prevent the Goliath from being used if there was an issue, and as such, Lang could not have possibly prevented the injuries from occurring. (*Id.* ¶19).

According to Sechrist, he personally designed the component pieces of the slide, without using outside expertise. (Epstein Aff. ¶31). The person in charge of Goliath on event day would have been either a part-time Red Frog employee or a Local Event Support ("LES") person, who

is an individual hired locally by Red Frog to oversee the Goliath. (*Id.* ¶35). If the person in charge thought the obstacle should be closed down, he/she would call the event director to the Goliath by radio. Whether or not to close the Goliath was a decision to be made by the event director, and there were no guidelines for when an obstacle should be shut down due to injuries. (*Id.* ¶¶37, 40).

According to Sechrist, it was the duty and responsibility of the LES to monitor the water slide and have construction (Lang) add water if necessary, but Sechrist did not know if this occurred at this event. (*Id.* ¶39). After the accidents, Sechrist spoke with the event director regarding the happening of the accident. Sechrist himself was unaware if there were any structural problems or difficulties with the Goliath on the day of this event. Sechrist knew, however, that Red Frog never inspected the Goliath to see that it was built in conformity with Red Frog's design plans. (*Id.* ¶38). Sechrist testified that he received an email from Ms. MacGrath, who was Red Frog's customer service representative at the time, which stated "... as soon as our team deemed Goliath to be unsafe, we made multiple efforts to fix the obstacle, including adding extra medical signage, volunteers, making structural changes, water, et cetera. Once that didn't fix the problem, this is when we made the decision to shut the obstacle down." (*Id.* ¶41).

Sechrist did not know if there was any reason to believe that the design plans were not followed precisely for this event, or what happened at this event - - the exact cause of the injuries. He was not at the event and could not give specifics as to what happened to cause the injuries. (*Id.* ¶42). According to Sechrist, theories were thrown out about what happened - - the event director said it could have been the water, it could have been something in the pit, "we

don't know." (*Id.*)(Emphasis supplied).

Lang argues that with regard to the negligence cause of action, there is no evidence that Plaintiffs' injuries were caused by anything that Lang did or failed to do. (*Id.* ¶65). Further, Lang takes the position that the evidence indicates that the Goliath was designed by Red Frog, and Lang did nothing other than build Goliath to Red frog's specifications. (*Id.* ¶49).

In *Ash v. City of New York*, 109 A.D.3d 854 (2d Dept. 2013), the Appellate Division, Second Department reiterated that "a defendant can make its prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation." "Although [p]roximate cause may be established without direct evidence of causation, by inference from the circumstances of the accident, . . . mere speculation as to the cause of an accident, when there could have been many possible causes, is fatal to a cause of action." *Ash v. City of New York*, 109 A.D.3d at 855.

In *Costantino v Webel*, 57 A.D.3d 472, 472 (2d Dept. 2008), the trial court's decision to grant defendant's motion for summary judgment dismissing the complaint was affirmed in a slip and fall case where defendants made a prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff could not identify the cause of her fall without engaging in speculation, and in opposition, plaintiff failed to raise a triable issue of fact.

Sechrist has admitted that Red Frog cannot identify what happened at the Goliath without engaging in theories, which amount to nothing more than mere speculation. Based upon Red Frog's failure to identify the cause of the accidents, in light of the case law cited above, summary judgment is appropriate and should be granted.

In opposition, Red Frog contends that Lang cannot claim to be free of negligence where

they seek to discredit the credentials of the design, yet relied on the designs to build the Goliath. (Jordan-Poinsette Aff. In Opp. ¶¶3-4). Red Frog's theory is misplaced based upon well-settled law that a builder or contractor is justified in relying upon the plans and specifications which he has contracted to follow, unless so apparently defective that a contractor of average skill and ordinary prudence would not have attempted the construction according to the plan. *Ryan v Feeney & Sheehan Bldg. Co.*, 239 N.Y.43, 46-47(1924); *Rappel v. Wincoma Homeowners Ass'n*, 125 A.D.3d 833, 835 (2d Dept. 2015). The fact that Plaintiff's expert, Edward Pribonic, P.E. has causally connected the two crucial design defects to the injuries sustained - - the slope of the slide, and the height of the drop from the end of the slide to the water surface, does not constitute evidence that Red Frog's plans were so apparently defective so as to put Lang on notice that the work was dangerous and likely to cause injury. Further, there has been no evidence presented to indicate that Lang had any knowledge of Sechrist's lack of design credentials at the time Lang built the Goliath.

As to the claim made in Red Frog's opposition that Red Frog was not negligent and there is no evidence that Red Frog's design plans were defective (Jordan-Poinsette Aff. In Opp. ¶¶3-4), Red Frog ignores the conclusions of Plaintiffs' expert, Edward Pribonic, P.E. This Court cannot ignore those conclusions.

Based upon the foregoing, this Court finds that Lang has tendered sufficient evidence to establish the absence of a material and triable issue of fact as to their non negligence in the construction of the Goliath. Plaintiff has failed in opposition to raise a material issue of fact to warrant a trial on this cause of action. Accordingly, Lang's motion for summary judgment dismissing Red Frog's negligence cause of action is granted.

With regard to the branch of Lang's motion seeking an Order granting summary judgment and dismissing Red Frog's cause of action for indemnification under the Agreement, the motion is also granted.

The Agreement between the parties provides that Lang will indemnify Red Frog in the following circumstances: a) arising out of or pertaining to any material breach, or alleged material breach by Lang of the representations, warranties, or covenants in the Agreement; and b) for or because of injury . . . that arises out of or pertains to any work performed by Lang.

The Agreement further provides that Lang provides no indemnity under the Agreement against liability arising out of the negligence or willful misconduct of Red Frog. (Agreement, §5(a-c)).

Lang argues that Red Frog cannot maintain their indemnification cause of action pursuant to the Agreement because there is no evidence that Plaintiffs' injuries were caused by any work Lang did or failed to do, and no evidence of any material breach of the Agreement that caused the injuries.

Through the testimony of Jeffrey Lang and Brian Sechrist, this Court finds that Lang has tendered sufficient evidence to establish their *prima facie* entitlement to judgment as a matter of law dismissing the indemnification cause of action in Red Frog's complaint. The Goliath was wholly designed by Red Frog without input from Lang, and Lang's participation with regard to the Goliath was limited to constructing the obstacle to Red Frog's specifications using materials provided by Red Frog, and providing drivers to put water into the water pit if necessary at Red Frog's direction. In opposition, Red Frog has failed to tender any evidence to raise a triable issue of fact as to any material breach by Lang in the work performed by them. Based upon Red Frog's failure to tender evidence of a material breach by Lang, this Court need not

discuss the obvious - - that Red Frog has failed to tender any evidence that Plaintiffs' injuries were caused by said breach. Since Red Frog has failed to raise a triable issue of fact requiring a trial of this issue, Lang's motion is granted.

Accordingly, the first and second causes of action in Red Frog's third-party complaint against Lang are dismissed.

Based upon the foregoing, it is hereby

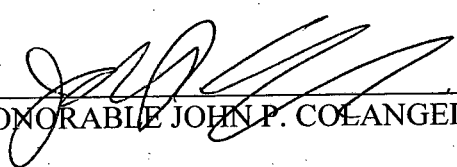
ORDERED that Red Frog's motion for summary judgment dismissing Plaintiffs' complaint is denied; and it is further

ORDERED Lang's motion for summary judgment dismissing the first and second causes of action in Red Frog's third-party complaint is granted, and said causes of action are dismissed; and it is further

ORDERED that the parties and counsel are directed to appear at the Settlement Conference Part, courtroom 1600 on June 18, 2019 at 9:15 am.

The foregoing constitutes the Decision and Order of the Court.

Dated: May 21, 2019
White Plains, New York


HONORABLE JOHN P. COLANGELO, J.S.C.