SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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BERRYL SCHIFFER,

Plaintiff,

– against –

FREETIME, INC., TIMOTHY LUNDY-HERNANDEZ, LAKESIDE BROOKLYN, LLC, and UPSILON VENTURES, LLC,

Defendants.

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Index No.: 517450/2016
Motion Seq.: 05, 06

DECISION AND ORDER

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of these motions.

The following e-filed documents, listed by NYSCEF document number (Motion 05) 95-113, 136-137, and 140-141, and (Motion 06) 114-126, 130-135, and 142, were read on these motions for summary judgment.

In this action to recover damages for personal injuries, the plaintiff moves for an Order (Motion 05) granting partial summary judgment on the issue of liability pursuant to CPLR § 3212(a) against defendants Freetime, Inc. (Freetime), Lakeside Brooklyn, LLC (Lakeside), and Upsilon Ventures, LLC (Upsilon) (collectively referred to as the Corporate Defendants). The Corporate Defendants also move for an Order (Motion 06) seeking summary judgment pursuant to CPLR § 3212(a) dismissing the plaintiff's complaint and all cross claims asserted against the Corporate Defendants. Defendant Timothy Lundy-Hernandez has not answered in this action and is in default. *See* NYSCEF Doc. No. 27. After oral argument and upon consideration of the papers, Motion 05 is denied and Motion 06 is granted.

The plaintiff alleges that she was struck by a quad bicycle inside Prospect Park on East Drive at or near its intersection with Lincoln Avenue in Brooklyn, New York. In support of her motion (Motion 05), the plaintiff submits, inter alia, the pleadings, copies of licensing agreements, and copies of incident and accident reports. The plaintiff alleges that she was walking in the designated pedestrian lane when she was violently struck from behind by a quad bicycle driven by defendant Timothy Lundy-Hernandez, owned by defendant Freetime, and rented for use within Prospect Park per a contractual agreement with Lakeside and Upsilon. Mr. Lundy-Hernandez stated in an incident report that he became distracted when something flew into his eyes, resulting in him striking the plaintiff.

The plaintiff asserts that Lakeside and Upsilon signed licenses that allowed them to use property within Prospect Park for profit through the operation of recreational boat and cycle rentals, including the quad bicycle that injured plaintiff, which they did through a contractual agreement with Freetime. The plaintiff contends that the Corporate Defendants are specifically required to protect the public in the event of injury. The sublicense agreement between Lakeside and Prospect Park Alliance (PPA) states as follows:

> XIX. RESPONSIBILITY FOR SAFETY, INJURIES OR DAMAGE, AND INDEMNIFICATION
>
> (a) As between [Lakeside] and PPA, [Lakeside] shall be solely responsible for taking all reasonable precautions to protect the persons and property of PPA, the City or others from damage, loss or injury resulting from any operations undertaken by [Lakeside] on the Licensed Premises under this Sublicense.
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> (b) As between [Lakeside] and PPA, [Lakeside] shall be solely responsible for injuries to any and all persons, including death, and damage to any and all property arising out of or related to the operations undertaken by [Lakeside] on the Licensed Premises under this Sublicense, whether or not due to the negligence of [Lakeside], including but not limited to injuries or damages resulting from the acts or omissions of any of its employees, agents, servants, contractors, subcontractors, or any other person.

See NYSCEF Doc. No. 98. The plaintiff further notes that Mr. Lundy-Hernandez was under 18 at the time he was operating the quad bicycle, which is a violation of Freetime's own rules. Plaintiff asserts that the Corporate Defendants rented the quad bicycle to Mr. Lundy-Hernandez despite knowing that he was under the age of 18. As such, plaintiff contends that the Corporate Defendants are liable for the plaintiff's injuries pursuant to the terms of the licensing agreements, and that plaintiff should be granted summary judgment on liability so that this matter can proceed to a trial on damages.

In opposition and in support of their motion (Motion 06), the Corporate Defendants submit the pleadings, copies of deposition transcripts, and copies of incident reports, waivers, and Mr. Lundy-Hernandez's driver's license. The Corporate Defendants argue that they are not liable for this accident because they had no duty to the plaintiff relative to this incident. The Corporate Defendants further contend that they cannot be held vicariously liable for Mr. Lundy-Hernandez's negligence simply because he rented the quad bicycle from them, as he did not make any complaints of mechanical difficulties with the quad bicycle, and there has been no evidence to the contrary. Further, the Corporate Defendants assert that since the quad bicycle is not a vehicle, there is no statutory vicarious liability, and therefore that no special relationship existed between Mr. Lundy-Hernandez and the Corporate Defendants. The Corporate Defendants also assert that there was no special skill required to operate the quad bicycle and that the plaintiff therefore cannot establish a claim of negligent entrustment.

The Corporate Defendants rely on the deposition testimony of, inter alia, Reyes Cuapio, who testified that he was working for Wheel Fun (Freetime) as a supervisor on the date of the accident. *See* NYSCEF Doc. No. 122. Mr. Cuapio stated that he would perform maintenance on the bicycles on a routine basis, and that upon his promotion to manager, he conducted safety training for new hires. Mr. Cuapio further stated that he underwent safety training from multiple supervisors on how to handle customers, the sales system, and the equipment. Mr. Cuapio testified that each renter was given a booklet detailing designated areas for bicycle riding in the park, recommendations for wearing a helmet, and instructions for staying within marked lanes and respecting traffic lights within the park, along with a training on how to operate the bicycle that the renter selected. Mr. Cuapio further testified that he was the only supervisor working at the time of the accident, and that he went to the scene of the accident and filled out the incident report. Mr. Cuapio testified that he inspected the bicycle just after the accident and did not find any mechanical issues with it. The Corporate Defendants also refer to the testimony of Peter

Stonehouse, the owner of Freetime, who testified that after paying the rental fee and receiving instructions on how to operate the bicycles safely, customers would sign a waiver agreement assuming the risk of the activity and acknowledging that they received safety instructions. *See* NYSCEF Doc. No. 125.

The Corporate Defendants argue that they owed no duty to the plaintiff aside from Freetime's duty to ensure that their bicycles were in good working order and fit for their purposes. The Corporate Defendants contend that the testimony herein establishes that there were no issues with the bicycles. Corporate Defendants also assert that they had no control over Mr. Lundy-Hernandez and did not have a special relationship with him. The Corporate Defendants further assert that Mr. Lundy-Hernandez was operating a quad bicycle, which is not a vehicle within the meaning of the Vehicle and Traffic Law, and that liability cannot be imputed to Freetime as the owner of the bicycle. Corporate Defendants also argue that the plaintiff cannot establish her claim of negligent entrustment, as the fact that Mr. Lundy-Hernandez was 17 at the time of the accident is insufficient to support a claim in this regard, since he possessed a driver's license and did not demonstrate any physical or mental impairment prior to renting the quad bicycle. The Corporate Defendants further assert that the plaintiff cannot rely on the defendants' own rules to create a higher standard of care than those imposed by law.

In opposition to the Corporate Defendants' motion, the plaintiff asserts that counsel has a conflict of interest in that Lakeside and Upsilon argue that they were not involved in Freetime's operation, maintenance, management, and control of their recreational bicycles. Plaintiff further contends that the Corporate Defendants are contractually responsible for the injuries to the plaintiff and that they obligated themselves to cover all losses and injuries caused by their bicycles. The plaintiff asserts that the language of the contract, which states that the sublicensee takes "sole responsibility" for particular occurrences or acts, implies that the contract was intended to confer benefits on innocent third parties such as the plaintiff.

In reply, the Corporate Defendants contend that the plaintiff has admitted both that Mr. Lundy-Hernandez is at fault for the accident and that the Corporate Defendants were not negligent. The Corporate Defendants also argue that the plaintiff's assertions related to the contract are incorrect in that the plaintiff was not a party to the contract and that contractual obligations do not give rise to tort liability. The Corporate Defendants cite to *Espinal v Melville Snow Contrs.*, 98 NY2d 136 (2002) in support of their argument that a contractual obligation between two parties such as PPA and Lakeside/Upsilon, or Lakeside/Upsilon and Freetime, standing alone, generally does not give rise to liability in favor of a third party such as plaintiff in this action. The Corporate Defendants further argue that the plaintiff cannot satisfy any of the three exceptions set forth in *Espinal*.

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *see also Phillips v Joseph Kantor & Co.*, 31 NY2d 307 (1972). The moving party is required to make a prima facie showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact. *Alvarez* at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 (1980). The papers submitted in the context of the summary judgment application are always viewed in the light most favorable to the party opposing the motion. *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). If the prima facie burden has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of

fact requiring a trial. CPLR § 3212 (b); *see also Alvarez* at 324; *Zuckerman* at 562. Generally, the party seeking to defeat a motion for summary judgment must tender evidence in opposition in admissible form, and "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Zuckerman* at 562.

It is axiomatic that "before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff. In the absence of duty, there is no breach and without a breach there is no liability." *Pulka v Edelman*, 40 NY2d 781, 782 (1976) (internal citations omitted). Although a contractual obligation, standing alone, is generally insufficient to give rise to tort liability in favor of a non-contracting third party, there are three exceptions to this general rule: "(1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm or creates or exacerbates a hazardous condition; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely." *Hagan v City of New York*, 166 AD3d 590, 592 (2d Dept 2018); *see also Reeves v Welcome Parking Limited Liability Company*, 175 AD3d 633, 634 (2d Dept 2019); *Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 140 (2002). Furthermore, "[b]efore an injured party may recover as a third-party beneficiary for failure to perform a duty imposed by contract, it must clearly appear from the provisions of the contract that the parties thereto intended to confer a direct benefit on the alleged third-party beneficiary to protect him or her from physical injury." *Ramirez v Genovese*, 117 AD3d 930, 931 (2d Dept 2014); *see also Kotchina v Luna Park Housing Corp.*, 27 AD3d 696, 697 (2d Dept 2006).

Here, the Corporate Defendants have established their entitlement to judgment as a matter of law. Although the plaintiff contends that the licensing agreements demonstrate that the Corporate Defendants are liable for the accident herein, this argument is unavailing. The defendants have established that the plaintiff is not a party to the agreements between PPA and Lakeside, or between Lakeside and Freetime, and that the defendants did not owe a duty of care to the plaintiff because she was not an intended third-party beneficiary of these agreements. *See Ramirez* at 931. Furthermore, the defendants are not required to establish that the three exceptions set forth in *Espinal* do not apply, as the plaintiff has not alleged facts in her complaint or bill of particulars to show that any of the exceptions are applicable here. *See Foster v Herbert Slepoy Corp.*, 76 AD3d 210 (2d Dept 2010).

While the plaintiff seeks to interpret the contracts to mean that the Corporate Defendants accept all responsibility, a plain reading of these agreements suggests that the intent was to ensure that the licensor is not held liable for damages arising from the potential negligence of the licensees or sublicensees. For example, the agreement between PPA and Lakeside states as follows: "[a]s between [Lakeside] and PPA, [Lakeside] shall be solely responsible for injuries to any and all persons, including death, and damage to any and all property arising out of or related to the operations undertaken by [Lakeside] on the Licensed Premises under this Sublicense…." *See* NYSCEF Doc. No. 98 (emphasis added). The plaintiff's argument, which is in essence that this clause suggests that Lakeside will be held solely responsible to the exclusion of all other potentially liable parties, is without merit. The defendants have further established, prima facie, that the contracts at issue were not intended to confer direct benefits on the plaintiff or on any other unidentified third party, and the plaintiff failed to raise a triable issue of fact in this regard. *See Ramirez* at 931. The plaintiff has also failed to establish that the conduct of any of the Corporate Defendants falls within the scope of one of the three exceptions set forth in *Espinal*. Here, the plaintiff failed to raise a triable issue of fact as to whether the defendants launched a

force or instrument of harm or created or exacerbated a hazardous condition, as a quad bicycle itself is not necessarily a force or instrument of harm. *See Espinal* at 140; *see also Foster* at 213. Likewise, the plaintiff failed to raise triable issues of fact as to whether she detrimentally relied on the continued performance of the contracting parties' duties, or whether a contracting party has entirely displaced another party's duty to maintain the premises safely. *Id.*

Similarly unavailing is the plaintiff's argument that Freetime was negligent because it rented the quad bicycle to a person under the age of 18 in violation of its internal rules, as a "[v]iolation of a company's internal rules is not negligence in and of itself, and where such rules require a standard that transcends reasonable care, breach cannot be considered evidence of negligence." *Gilson v Metropolitan Opera*, 5 NY3d 574, 577 (2005), quoting *Sherman v Robinson*, 80 NY2d 483 (1992). Notably, Mr. Lundy-Hernandez was over 17 on the date of the accident and produced a valid New York State driver's license to rent the quad bicycle. To the extent that the plaintiff argues that Freetime negligently entrusted the quad bicycle to Mr. Lundy-Hernandez, the defendants have shown that they did not have either "some special knowledge concerning a characteristic or condition peculiar to the person to whom a particular chattel is given which renders that person's use of the chattel unreasonably dangerous, or some special knowledge as to a characteristic or defect peculiar to the chattel which renders it unreasonably dangerous." *Cook v Schapiro*, 58 AD3d 664, 666 (2d Dept 2009) (emphasis and alterations omitted), quoting *Zara v Perzan*, 185 AD2d 236 (2d Dept 1992). The plaintiff has therefore failed to raise a triable issue of fact with regard to negligent entrustment or any other theory of negligence on the part of the Corporate Defendants. Accordingly, the defendants' motion is granted, and the plaintiff's motion is denied.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the plaintiff's motion for summary judgment (Motion 05) is DENIED; and it is further

ORDERED, that the motion for summary judgment by defendants Freetime, Inc., Lakeside Brooklyn, LLC, and Upsilon Ventures, LLC (Motion 06) is GRANTED and the complaint is dismissed as against them.

This constitutes the decision and order of the Court.

DATED: March 4, 2022

Lillian Wan

HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.