

**Mallin v Carlier**

2025 NY Slip Op 30727(U)

February 24, 2025

Supreme Court, Kings County

Docket Number: Index No. 528195/2023

Judge: Richard J. Montelione

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At IAS Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the 24th day of February 2025.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 99

-----X  
ROBERT MALLIN and MELISSA ROSENFELD,

Plaintiffs,  
-against-

**DECISION  
and  
ORDER**

TACO CARLIER, TIES CARLIER,  
VANMOOF GLOBAL HOLDING B.V.,  
VANMOOF GLOBAL SUPPORT B.V.,  
CARLIER GROUP B.V., MIDAS B.V., TACHTIG B.V.,  
DAVID SHOEMACK, JOB STEHMANN, FRANK GOOVAERTS,  
STEVEN KLOOSTER, DANIEL REKKERS,  
VANMOOF ASIA LTD., VANMOOF ASIA LTD. TAIWAN,  
HK VANMOOF ASIA LIMITED,  
HK VANMOOF ASIA LIMITED TAIWAN BRANCH,  
SINBON, SINBON GROUP, SINBON ELECTRONICS CO. LTD.,  
T-CONN PRECISION CORPORATION,  
TAIKANG PRECISION CO. LTD., GIN LIAN GROUP,  
G&L INTERNATIONAL CO. LTD.,  
CHING CHERN INDUSTRIAL CORP. and  
HANGKUANG HARDWARE ENT. CO.,

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Motion Date: 12/4/2024  
Mot. Seq. 2-8

Defendants.

-----X  
After oral argument, the following papers were read on this motion pursuant to CPLR 2219(a):

<u>Papers</u>	<u>NYSCEF DOC. #</u>
Plaintiff's Motion to join for trial action (MS#2) under index no. 509006/2021 and 528195/2023, for default judgment against defendants Daniel Rekkers and Steven Klooster in the second action(MS#2).....	18-40
Defendants Steven Klooster and Daniel Rekkers' Cross Motion (MS#3) pursuant to CPLR 3012(d) granting an extension of time to serve a responsive pleading and in opposition to plaintiff's motion (MS#2).....	41-45
Plaintiffs' reply and opposition to cross-motion (MS#2-3).....	154
Plaintiffs' opposition to MS#3.....	153
Defendants Steven Klooster and Daniel Rekkers' motion to dismiss plaintiffs' amended complaint pursuant to CPLR 2214(b) for failure to state a cause of action (MS#4).....	46-47
Plaintiffs Opposition to MS#4.....	58-73, 141

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Defendants Steven Klooster and Daniel Rekkers' reply (MS#4).....	174-176
Defendant Job Stehmann's motion to dismiss the amended complaint against defendant Taco Carlier pursuant to CPLR 3211(a)(7) for failure to state a cause of action (it is unknown what defendant Stehmann's standing is regarding to dismiss against defendant Taco Carlier)(MS#5).....	52-53
Plaintiffs' opposition to MS#5.....	74-89, 143
Defendant Taco Carlier's Reply (original motion brought by defendant Job Stehmann)(MS#5).....	177-178
Defendant Tachtig B.V., Midas B.V. and Carlier Group, B.V.'s motion to dismiss the amended complaint against defendants Tachtig B.V., Midas B.V., and Carlier Group B.V. pursuant to CPLR 3211(a)(7) for failure to state a cause of action and pursuant to CPLR 3211(a)(8) for lack of jurisdiction (MS#6).....	54-55
Plaintiffs' opposition to MS#6.....	122-137, 144
Defendant Tachtig B.V., Midas B.V. and Carlier Group, B.V.'s Reply (MS#6).....	179-180
Defendant Job Stehmann's motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action (MS#7).....	50-51
Plaintiffs' opposition to MS#7.....	90-105, 142
Defendant Job Stehmann's reply (MS#7).....	181-182
Defendant David Shoemack's motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action (MS#8).....	56-57
Plaintiffs' opposition to MS#8.....	106-121, 145
Defendant David Shoemack's Reply (MS#8).....	185-186

MONTELIONE, RICHARD J., J.

Plaintiffs commenced this action by filing the summons and complaint on September 28, 2023, alleging personal injuries because of being provided an electric bicycle which was either defectively designed and/or contained defective parts which caused an accident on or about October 3, 2020. The defendants are alleged to be companies or individuals involved in the management and/or the manufacture, production and/or distribution of the "VanMoof" branded electric bicycles.

Motion Sequence #2 and #3

Plaintiffs seek pursuant to CPLR 602(a) to join for trial *Mallin, et al. v. Vanmoof, B.V. and Vanmoof USA, Inc.*, Index No. 509006/2021 (Action #1) and *Mallin, et al v. Taco Carlier, et al*, Index No. 528195/2023. Both matters involve the same plaintiffs, arise out of the same accident and involve common questions of law and fact and therefore should be joined for discovery and trial. See *Ashwood v Uber USA, LLC*, 219 AD3d 1289, 195 NYS3d 762 (2d Dept 2023). The parties stipulated on the record that defendants shall provide an "affidavit of erosion"<sup>1</sup> regarding any insurance policy that covers the subject accident.

<sup>1</sup> The court assumes this is an affidavit detailing whether the policy has been diminished by claims or defense or other costs.

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Plaintiffs also seek a default judgment against Defendants Steven Klooster and Daniel Rekkers. Plaintiffs have provided the court with prima facie evidence that (1) defendants were properly served with a copy or copies of the summons and the complaint, (2) the facts constituting the claim, and (3) the defendants' default (*see* CPLR 3215 [f]). *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 59-60 [2d Dept 2013]).

Defendant Steven Klooster (Klooster) asserts he was served with the summons and complaint in this action on November 3, 2023. Immediately after being served, he called defendant Daniel Rekkers (Rekkers) who informed him they were being represented by Wilson Elser. At the time, Klooster was the interim CFO of VanMoof Global Holding B.V. and VanMoof Global Support B.V. beginning in December 2019 on a freelance contract basis. Defendant Daniel Rekkers likewise asserts that he originally believed he was being represented by Wilson Elser who assured him that they were "on it." It was only on or about February 14, 2024 that he learned from Toon Spanisks, an insurance advisor for VanMoof, that he was not being represented by counsel. When the insurance companies failed to assign an attorney to represent them, they both retained David Baumwoll, Esq. on or about March 8, 2024.

The legal standards for vacating a default or default judgment are found in *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 59-60 [2d Dept 2013]):

To defeat a facially adequate CPLR 3215 motion, a defendant must show either that there was no default, or that it has a reasonable excuse for its delay and a potentially meritorious defense (*see Wassertheil v Elburg, LLC*, 94 AD3d 753, 753 [2012]; *New Seven Colors Corp. v White Bubble Laundromat, Inc.*, 89 AD3d 701, 702 [2011]; *Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789, 789 [2011]; *cf.* CPLR 5015 [a] [1]; *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). Whether a proffered excuse is "reasonable" is a "sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (*Harcztark v Drive Variety, Inc.*, 21 AD3d 876, 876-877 [2005]; *see Zanelli v JMM Raceway, LLC*, 83 AD3d 697, 697 [2011]; *Grinage v City of New York*, 45 AD3d 729, 730 [2007]; *Greene v Mullen*, 39 AD3d 469, 469-470 [2007]).

The court finds that a sufficient explanation as to the default has been provided. However, there are no affidavits of merit or proposed verified answer and therefore the court is constrained to deny defendants' motion to compel plaintiffs to accept their answer. *Fried v Jacob Holding, Inc.*, *supra.*; *47 Thames Realty, LLC v Robinson*, 61 AD3d 923, 878 NYS2d 752, 2009 NY Slip Op 03476, 2009 WL 1154106 [2d Dept 2009]; and *Juseinoski v Bd. of Educ. of City of New York*, 15 AD3d 353, 790 NYS2d 162, 2005 NY Slip Op 00984, 2004 WL 3171137 [2d Dept 2005]

Motion Sequence #s 4-8

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Defendants Steven Klooster and Daniel Rekkers move to dismiss plaintiffs' amended complaint pursuant to CPLR 2214(b) for failure to state a cause of action (MS#4).

Defendant Taco Carlier moves to dismiss the amended complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action (MS#5).

Defendants Tachtig B.V., Midal B.V. and Carlier Group, B.V. move to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action and pursuant to CPLR 3211(a)(7) for lack of jurisdiction (MS#6).

Defendant Job Stehmann moves to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action (MS#7).

Defendant David Shoemack moves to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action (MS#8).

The standard to apply when considering a motion to dismiss is found in *Doe v Educ. Inst. Oholei Torah*, 2025 NY Slip Op 00948, 2025 WL 542053, at \*1 [2d Dept Feb. 19, 2025]:

On a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint for failure to state a cause of action, a court must 'accept the facts as alleged in the complaint 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' (*Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; see *Rubin v. Poly Prep Country Day Sch.*, 227 A.D.3d 741, 742, 211 N.Y.S.3d 177). However, 'allegations consisting of bare legal conclusions ... are not entitled to any such consideration' (*Simkin v. Blank*, 19 N.Y.3d 46, 52, 945 N.Y.S.2d 222, 968 N.E.2d 459 [internal quotation marks omitted]; see *Doe v. Hauppauge Union Free Sch. Dist.*, 213 A.D.3d 809, 810, 184 N.Y.S.3d 150).

Whether a plaintiff can ultimately establish the allegations within the complaint is of no consequence to whether a potential cause of action is stated. (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, (Ct. of Ap. 2005).

Taco Carlier, Ties Carlier, David Shoemack, Job Stehmann, Frank Goovaerts and Steven Klooster are referred to in the complaint as "the Management Team." These defendants are alleged, inter alia, to be (Complaint, ¶ 338):

personally responsible for implementing a policy (that would)...continue to sell S3's around the world and in New York City, while refusing to warn consumers or members of the public of the significant dangers posed by the defective production run and or while refusing to issue a recall of the electric bicycles comprising the defective production run.

Plaintiffs cite *Sisino v Is. Motocross of New York, Inc.*, 41 AD3d 462, 464-

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65, 841 NYS2d 308 (2d Dept 2007), and argue that the individual defendants may be found personally liable even though the product was marketed and sold through a corporate structure:

Corporate officers may be held personally liable for torts they commit while acting in their official capacities (*see Bellinzoni v Seland*, 128 AD2d 580, 581 [1987]; *Clark v Pine Hill Homes*, 112 AD2d 755 [1985]; *Cleland v Fort Ticonderoga Assn.*, 71 AD2d 740 [1979]). The plaintiff does not merely allege that the Merrills were vicariously liable for the negligence of Island Motocross. Rather, the plaintiff proffered evidence that the Merrills were personally responsible for the policy that permitted ATVs and motocross bikes to simultaneously share the same track during practice sessions, one of the allegations underlying the plaintiff's contention that the defendants increased the risks inherent in the sport of motocross.

The individual defendants argue that the complaint does not have any facts implicating individual liability because there are no allegations of either misfeasance or malfeasance citing *Bassin-Schneider v Stutler*, 39 Misc 3d 1214(A), 975 NYS2d 365, 2013 NY Slip Op 50608(U), 4, 2013 WL 1703983 [Sup Ct 2013]:

Here, plaintiff is suing the Individual Defendants in their individual capacity. Personal liability may be imposed on a corporate officer for misfeasance or malfeasance. However, personal liability cannot be imposed on a corporate officer for nonfeasance. *See Peguero v 601 Realty Corp.*, 58 AD3d 556, 559 (1st Dept 2009).

*See also Peguero v 601 Realty Corp.*, 58 AD3d 556, 558-59, 873 NYS2d 17, 2009 NY Slip Op 00443, 2, 2009 WL 196314 [1st Dept 2009]:

Even assuming that (individual defendant) is correct that he was acting solely in his capacity as an officer of the Corporation, he would not be entitled to dismissal of the complaint as against him on that ground. That he acted solely in his capacity as an officer of the Corporation is not a sufficient ground for dismissal. Rather, 'a corporate officer who participates in the commission of a tort may be held individually liable, *regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced*' (*Espinosa v Rand*, 24 AD3d 102, 102 [2005] [emphasis added, internal quotation marks omitted]; *see W. Joseph McPhillips, Inc. v Ellis*, 278 AD2d 682 [2000]). The 'commission of a tort' doctrine permits personal liability to be imposed on a corporate officer for misfeasance or malfeasance, i.e., an affirmative tortious act; personal liability cannot be imposed on a corporate officer for nonfeasance, i.e., a failure to act (*Michaels v Lispenard Holding*

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*Corp.*, 11 AD2d 12, 14 [1960]; *see MLM LLC v Karamouzis*, 2 AD3d 161 [2003]).

*See also MLM LLC v Karamouzis*, 2 AD3d 161 (1st Dept 2003). The second department does not appear to require an allegation of misfeasance or malfeasance (*Sisino v Is. Motocross of New York, Inc.*, 41 AD3d 462 [2nd Dept 2007]) but to the extent this test was applied, the court finds the complaint taken as a whole alleges a corporate policy implemented by the individual defendants of offering test-rides of bicycles known to be defective which meets this standard. *Cf. MLM LLC v Karamouzis*, 2 AD3d 161, (1st Dept 2003).

The complaint, taken as a whole, alleges causes of action against both the corporate and the individual defendants. (*See SWKI 1 Doe v Watchtower Bible and Tract Socy. of Pennsylvania*, 232 AD3d 850, 851 [2d Dept 2024], “(i)n considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the sole criterion is whether from the complaint's ‘four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law’ [*Gale v. Animal Med. Ctr.*, 108 A.D.3d 497, 499, 968 N.Y.S.2d 563] [internal quotation marks omitted].” The defendants have not provided any documentary or testimonial evidence that would allow the court to go beyond the four corners of the complaint, and therefore have not met their burden, as a matter of law, for dismissal under CPLR 3211. (*See Altman v Orseck*, 2025 NY Slip Op 00940, 2025 WL 542043, at 2 [2d Dept Feb. 19, 2025], “ ‘A motion pursuant to CPLR 3211(a)(1) to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law’ ” (*Ripa v. Petrosyants*, 203 A.D.3d 770, 772, 164 N.Y.S.3d 168, quoting *Mawere v. Landau*, 130 A.D.3d 986, 987, 15 N.Y.S.3d 120; *see Bedford–Carp Constr., Inc. v. Brooklyn Union Gas Co.*, 215 A.D.3d 907, 908, 188 N.Y.S.3d 554).”

Based on the foregoing, it is

ORDERED that the portion of plaintiffs' motion sequence no. 2 (NYSCEF Doc. No. 17), made pursuant to CPLR 602(a), to consolidate *Mallin, et al. v. Vanmoof, B.V. and Vanmoof USA, Inc.*, Index No. 509006/2021 (Action #1) and *Mallin, et al v. Taco Carlier, et al*, Index No. 528195/2023 is GRANTED TO THE EXTENT THAT *Mallin, et al. v. Vanmoof, B.V. and Vanmoof USA, Inc.*, Index No. 509006/2021 and *Mallin, et al v. Taco Carlier, et al*, Index No. 528195/2023 (Action #2) are joined for the purposes of discovery and trial (*see* separate Joint Trial Order issued simultaneously with this Decision and Order); and it is further

ORDERED that the portion of plaintiffs' motion sequence no. 2 (NYSCEF Doc. No. 17) made pursuant to CPLR 3215(a), is GRANTED TO THE EXTENT THAT a default judgment against defendants Steven Klooster and Denial Rekkers is GRANTED, inquest at time of trial; and it is further

ORDERED that the remaining portion plaintiffs' motion sequence no. 2 (NYSCEF Doc. No. 17) for the relief requested in paragraphs “c.”, “d.” “e.”, and “f.” of plaintiff's Notice of Motion (*id.*) is DENIED without prejudice to re-filing in Part CCP for its determination of the remaining discovery-related relief; and it is further

ORDRED defendants Steven Klooster and Daniel Rekkers' motion to compel plaintiffs

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to accept their answer (MS#3) is DENIED as moot and Steven Klooster and Deniel Rekkers' motion to dismiss plaintiffs' amended complaint pursuant to CPLR 2214(b) for failure to state a cause of action (MS#4) is DENIED; and it is further

ORDERED that defendant Taco Carlier's motion to dismiss the amended complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action is DENIED (MS#5); and it is further

ORDERED that defendants Tachtig B.V., Midas B.V. and Carlier Group, B.V.'s motion pursuant to CPLR 3211(a)(7) for failure to state a cause of action is DENIED (MS#6); and it is further

ORDERED that defendant Job Stehman's motion to dismiss pursuant to CPLR 3211(a)(7) is DENIED (MS#7); and it is further

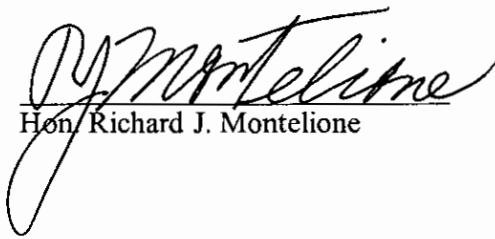
ORDERED that defendant David Shoemack's motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action is DENIED (MS#8); and it is further

ORDERED that to the extent any issues were raised at oral argument regarding discovery compliance and sanctions for alleged violations of discovery compliance, the court DENIES any such applications without prejudice to bringing a motion in PART CCP; and it is further

ORDERED that defendants' counsel shall provide an "affidavit of erosion" regarding the insurance policies that cover the subject accident; and it is further

ORDERED that all other requests for relief are DENIED.

This constitutes the decision and order of the Court.

  
Hon. Richard J. Montelione

KINGS COUNTY CLERK  
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