SUPREME COURT - PART 50
COUNTY OF SUFFOLK - STATE OF NEW YORK

PRESENT

HON. ANDREW G. TARANTINO, JR.
A.J.S.C.

Index No. 7439/2012
Orig. Date: 3/18/2014
Adj. Date: 4/29/2014
Motion Dec. **001: MD**

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PABLO TORRES,

Plaintiff(s),

ORDER DENYING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS

-against-

LONG ISLAND MOTOCROSS ASSOCIATION INC. and LONG ISLAND MOTOCROSS, INC.,

Defendant(s).

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Upon consideration of the Notice of Motion for summary judgment in favor of the defendant, Long Island Motocross, Inc. s/h/a Long Island Motocross Association, Inc. and Long Island Motocross, Inc. [collectively "the defendant"], the supporting affirmation, and exhibits A through G, the affirmation and affidavits in opposition, and exhibits A through D submitted on behalf of the plaintiff, Pablo Torres ["the plaintiff"], and the defendant's Reply Affirmation and exhibits A through D, it is now

ORDERED that the defendant's motion for summary judgment is denied.

This action arises out of an accident that occurred on July 16, 2011 after the plaintiff had paid an admission fee to compete in a motorcycle/motocross race at Long Island Motocross track in Yaphank, New York owned by the defendant. The sport of motocross consists of people riding motorcycles on a track with hills, jumps, turns, obstacles and straightaways. According to the plaintiff, the track has turns, jumps, bumps, "whoops", inclines, declines, and a bridge to jump over.

Although the plaintiff asserts that at the time of the race in 2011 he was considered a "novice rider", the evidence is undisputed that at the time of the accident the plaintiff was an experienced rider of approximately fourteen years, had owned at least four motorcycles, and had competed in this type of event, including at the very track where the accident occurred, on many occasions. The plaintiff testified that he stopped racing for a period of time in 2002 after he had an accident at the Long Island Motocross track. In addition, over the years the plaintiff had other

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accidents during practices. Nevertheless, before the accident giving rise to this lawsuit, the plaintiff resumed riding and racing and paid a ten dollar entry fee to compete in the race on the day of the accident.

Approximately one week before the accident, the plaintiff signed a release of liability agreeing to hold the defendant harmless in the event of an accident. The release provided that plaintiff

> "Acknowledges, agrees, and represents that he have or will immediately upon entering any of such RESTRICTED AREAS, and will continuously thereafter, inspect the RESTRICTED AREAS which he enters, and he further agrees and warrants that, if at any time, he is in or about RESTRICTED AREAS and he feels anything to be unsafe, he will immediately advise the officials of such and if necessary will leave the RESTRICTED AREAS and/or refuse to participate further in the EVENT(S).
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> HEREBY RELEASES, WAIVES, DISCHARGES, AND COVENANTS NOT TO SUE the promoters, participants, racing associations, sanctioning organizations or any subdivision thereof, track operators, track owners, officials, motorcycle owners, riders, pit crews, rescue personnel, any persons in any RESTRICTED AREA, promoters, sponsors, advertisers, owners and lessees of premises used to conduct the EVENT(S), premises and event inspectors, surveyors, underwriters, consultants and others who give recommendations, directions, or instructions or engage in risk evaluation or loss control activities regarding the premises or EVENT(S) and each of them, their directors, officers, agents and employees, all for the purposes herein referred to as "Releasees," FROM ALL LIABILITY TO THE UNDERSIGNED, his personal representatives, assigns, heirs, and next of kin FOR ANY AND ALL LOSS OR DAMAGE, AND ANY CLAIM OR DEMANDS THEREFORE ON ACCOUNT OF INJURY TO THE PERSON OR PROPERTY OR RESULTING IN DEATH OF THE UNDERSIGNED ARISING OUT OF OR RELATED TO THE EVENT(S), WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE.
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> HEREBY AGREES TO INDEMNIFY AND SAVE AND HOLD HARMLESS the Releasees and their insurance carrier, and each of them FROM ANY LOSS, LIABILITY, DAMAGE, OR COST they may incur arising out of or related to the EVENT(S) WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE.
>
> HEREBY ASSUMES FULL RESPONSIBILITY FOR ANY RISK OF BODILY INJURY, DEATH OR PROPERTY DAMAGE, arising out of or related to the EVENT(S) whether caused by the NEGLIGENCE OF RELEASEES or otherwise.

HEREBY acknowledges that THE ACTIVITIES OF THE EVENT(S) ARE VERY DANGEROUS and involve the risk of serious injury and/or death and/or property damage. Each of the UNDERSIGNED also expressly acknowledges that INJURIES RECEIVED MAY BE COMPOUNDED OR INCREASED BY NEGLIGENT RESCUE OPERATIONS OR PROCEDURES OF THE RELEASEES.

IF, DESPITE THIS RELEASE, I OR ANYONE ON MY BEHALF MAKES A CLAIM AGAINST THE "RELEASEES" NAMED ABOVE, I AGREE TO INDEMNIFY AND SAVE AND HOLD HARMLESS THE RELEASEES AND THEIR INSURANCE CARRIER, AND EACH OF THEM FROM ANY LITIGATION EXPENSES, ATTORNEYS' FEES, LOSS, LIABILITY, DAMAGE OR COSTS THEY MAY INCUR DUE TO THE CLAIM MADE AGAINST ANY OF THE "RELEASEES" NAMED ABOVE, WHETHER THE CLAIM IS BASED ON THE NEGLIGENCE OF THE RELEASEE OR OTHERWISE.

Hereby agrees that in the event that I sustain any injury while in any Restricted Areas that any rescue personnel or medical personnel may release such medical information about my condition to representatives of the promoter, sanctioning organization, track operator, or track owner, as necessary to allow such individuals to properly report that information to appropriate representatives of the sanctioning organization and/or insurance carriers.

HEREBY agrees that this Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement extends to all acts of negligence by the Releasees, INCLUDING NEGLIGENT RESCUE OPERATIONS and is intended to be as broad and inclusive as is permitted by the laws of the Province or State in which the Event(s) is/are conducted and that if any portion hereof is held invalid, it is agreed that the balance shall, notwithstanding continue in full legal force and effect.

I HAVE READ THIS RELEASE AND WAIVER OF LIABILITY, ASSUMPTION OF RISK AND INDEMNITY AGREEMENT, FULLY UNDERSTAND ITS TERMS, UNDERSTAND THAT I HAVE GIVEN UP SUBSTANTIAL RIGHTS BY SIGNING IT, AND HAVE SIGNED IT FREELY AND VOLUNTARILY WITHOUT ANY INDUCEMENT, ASSURANCE OR GUARANTEE BEING MADE TO ME AND INTEND MY SIGNATURE TO BE A COMPLETE AND UNCONDITIONAL RELEASE OF ALL LIABILITY TO THE GREATEST EXTENT ALLOWED BY LAW.

In addition to this release, the plaintiff signed three similar, all-encompassing releases before the subject accident.

The defendant's track consists of a starting gate that leads to a sweeping turn of 180 degrees, which then goes into a second turn that bears right. The plaintiff's accident occurred in the vicinity of the second turn. The area of the accident is built up with a dirt berm, which is elevated approximately two feet in height. According to the defendant's principal, Joseph Merrill, if a rider were to lose control at the second turn "... he is probably going to go off the track."

On the other side of the berm at the second turn is where the accident occurred. The ground there is flat and composed of dirt. There is a fence approximately twelve feet from the berm. There are no rocks or boulders in this area. Although Merrill inspects the track on a regular basis during the course of the day, he does not inspect the area where the accident occurred because "[t]here is nothing to inspect. It's usually good all day."

According to the defendant's testimony, Long Island Motocross used an irrigation system to water the dirt track to minimize dust. The track's irrigation system is supplemented by County water supplied by a nearby hydrant. The water from the hydrant is connected to a three-inch PVC pipe that is on the edge of the property which in turn is connected to the main water source. Merrill denied that the PVC equipment was installed in the area of the plaintiff's accident.

According to the plaintiff's affidavit, the accident occurred in the area of the second curve of the track. On the day of the accident all of the novice riders lined up at the starting line. At the second turn the plaintiff was bumped from behind and lost control of his motorcycle. He drove off the track on to the side of the track and then fell on his left side. The plaintiff's body continued to propel forward whereupon he collided with the "hard-like-rock" equipment that the plaintiff identified in photographs as fair and accurate representations of PVC pipe which his body contacted after he lost control of the motorcycle. [1]

The plaintiff testified that he had never seen the equipment in the vicinity of this area of the track before the accident, that it was extremely close to the track, and was in an area where riders had fallen in the past. When the plaintiff returned to the scene of the accident approximately one week later, the equipment had been removed and a hole or trench remained in its place. The plaintiff also identified a post accident photograph depicting what appeared to him to be the same PVC equipment but in a different location further away from where the accident occurred.

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[1] The challenged you-tube video of the accident scene referred to in the plaintiff's opposing papers was neither viewed nor considered by the Court in reaching its decision.

The affidavits of two eye-witnesses were also submitted in opposition to the motion. Both affiants competed in the race where the plaintiff was injured; both confirmed the location of the PVC pipe as being at the second turn in the vicinity of the accident. One of the witnesses averred that he had gone to the track to practice the day before the accident and the PVC pipe was not there. The same witness attested that in the three years he raced on the track before the accident, he never observed a pipe anywhere on the track. The other witness averred that his bike hit the plaintiff's bike from behind and that he saw the plaintiff fall and hit a pipe sticking out of the ground.

The defendant moves for summary judgment dismissing the complaint insofar as asserted against it, based on the agreements signed by the plaintiff purporting to release, inter alia, the defendant from liability for his injuries, and on the doctrine of primary assumption of risk.

General Obligations Law §5-326 entitled, "Agreements exempting pools, gymnasiums, places of public amusement or recreation and similar establishments from liability for negligence void and unenforceable" provides:

> "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 the absence of a contravening public policy, exculpatory provisions in a contract, purporting to insulate one of the parties from liability resulting from that party's own negligence, although disfavored by the law and closely scrutinized by the courts, generally are enforced, subject however to various qualifications (*see, Gross v. Sweet*, 49 N.Y.2d 102, 424 N.Y.S.2d 365, 400 N.E.2d 306; *Van Dyke Prods. v. Eastman Kodak Co.*, 12 N.Y.2d 301, 239 N.Y.S.2d 337, 189 N.E.2d 693; *Ciofalo v. Vic Tanney Gyms*, 10 N.Y.2d 294, 220 N.Y.S.2d 962, 177 N.E.2d 925; *see also Deutsch v. Woodridge Segway, LLC,* 117 A.D.3d 776, 985 N.Y.S.2d 716 [2d Dept. 2014]. Where the language of the exculpatory agreement expresses in unequivocal terms the intention of the parties to relieve a defendant of liability for the defendant's negligence, the agreement will be enforced (*id.*, at 297, 220 N.Y.S.2d 962, 177 N.E.2d 925). Such an agreement will be viewed as wholly void, however, where it purports to grant exemption from liability for willful or grossly negligent acts or where a special relationship exists between the parties such that an overriding public interest demands that such a contract provision be rendered ineffectual (*see, Gross v. Sweet*, *supra*, and cases cited therein).

Thus, an otherwise enforceable release will not insulate a party from grossly negligent conduct (*see Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 544, 583 N.Y.S.2d 957, 593 N.E.2d 1365; *Gross v. Sweet*, *supra* at 106; *see also Schwartz v. Martin,* 82 A.D.3d 1201, 919 N.Y.S.2d 217 [2d Dept. 2011]). The evidence in the record that on the day of the accident an exposed PVC pipe(s) was recently located/placed in an area of the track known to be an area where riders are likely to fall raises a triable issue of fact that the placement of the PVC pipe was grossly negligent precluding summary judgment in the defendant's favor based on the releases (*Gross v Sweet, supra*).

The defendant urges that the plaintiff is not entitled to invoke the protection of G.O.L. §5-326 because notwithstanding his rating as a "novice", he is an experienced motorcycle/motocross rider, and therefore, not a "user" as that term has been construed in the Courts. If the placement of the PVC pipe can be regarded as gross negligence, whether the plaintiff is a statutory user is academic as the statute does not exempt a party's gross negligence. However, even if the placement of the pipe is considered to be mere ordinary negligence, this Court still finds that the plaintiff is entitled to the protection of the statute since 1) the plaintiff is a "user" as defined by the statute and construed by the Second Department (*see Sisino v. Island Motocross of New York, Inc.,* 41 A.D.3d 462, 841 N.Y.S.2d 308 [2d Dept. 2007]; *Petrie v. Bridgehampton Road Races Corp.*, 248 A.D.2d 605, 670 N.Y.S.2d 504 [2d Dept. 1998]; *see also Tuttle v. TRC Enterprises, Inc.,* 38 A.D.3d 992, 830 N.Y.S.2d 854 [3d Dept. 2007]), 2) the defendant is an owner or operator of a place of amusement or similar establishment (*see Lago v Krollage,*78 N.Y.2d 95, 575 N.E.2d 107, 571 N.Y.S.2d 689 [1991]), and 3) the plaintiff paid a fee to participate in the race (*cf. Stone v Bridgehampton Race Circuit,* 217 A.D.2d 541, 629 N.Y.S.2d 80 [2d Dept. 1995]).

The defendant's argument that the plaintiff failed to raise an issue of fact because he did not oppose the motion with an expert affidavit attesting that the track was unsafe is unavailing. The burden on the motion is on the movant, not the opponent. If the defendant asserts that the location of the PVC pipe in the area of the accident did not pose an unreasonably increased risk of injury to riders, it was incumbent on the defendant as movant to support its motion with an expert affidavit (*see L & D Service Station, Inc. v. Utica First Ins. Co.,* 103 A.D.3d 782, 962 N.Y.S.2d 187
[2d Dept. 2013] [as a general rule, party does not carry its burden in moving for summary judgment by pointing to gaps in opponent's proof, but must affirmatively demonstrate merit of its claim or defense).

As to the defendant's second basis for summary judgment, the doctrine of primary assumption of the risk provides that " 'by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation' " (*Kirkland v. Hall*, 38 A.D.3d 497, 498, 832 N.Y.S.2d 232, *quoting Morgan v. State of New York*, 90 N.Y.2d 471, 484, 662 N.Y.S.2d 421, 685 N.E.2d 202; *see Anand v. Kapoor*, 15 N.Y.3d 946, 947–948, 917

N.Y.S.2d 86, 942 N.E.2d 295). The principle of primary assumption of risk extends to those risks associated with the construction of a playing field and any open and obvious condition thereon (*see Sykes v. County of Erie*, 94 N.Y.2d 912, 913, 707 N.Y.S.2d 374, 728 N.E.2d 973; *Palladino v. Lindenhurst Union Free School Dist.*, 84 A.D.3d 1194, 1195, 924 N.Y.S.2d 474; *Brown v. City of New York*, 69 A.D.3d 893, 895 N.Y.S.2d 442; *Manoly v. City of New York*, 29 A.D.3d 649, 649–650, 816 N.Y.S.2d 499). "Moreover, it is not necessary to the application of the doctrine that the injured plaintiff may have foreseen the exact manner in which the injury occurred 'so long as he or she is aware of the potential for injury of the mechanism from which the injury results' " (*Joseph v. New York Racing Assn.*, 28 A.D.3d 105, 108, 809 N.Y.S.2d 526, *quoting Maddox v. City of New York*, 66 N.Y.2d 270, 278, 496 N.Y.S.2d 726, 487 N.E.2d 553).

The doctrine, however, does not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased (*see Morgan v. State of New York*, 90 N.Y.2d at 485, 662 N.Y.S.2d 421, 685 N.E.2d 202; *see also Mussara v. Mega Funworks, Inc.*, 100 A.D.3d 185, 952 N.Y.S.2d 568; *Toro v. New York Racing Assn., Inc.*, 95 A.D.3d 999, 944 N.Y.S.2d 229; *Joseph v. New York Racing Assn.*, 28 A.D.3d 105, 108, 809 N.Y.S.2d 526; *cf. Herman v. Lifeplex, LLC*, 106 A.D.3d 1050, 966 N.Y.S.2d 473).

The plaintiff raised a triable issue of fact that the considerable risks inherent to the sport of motocross racing were unreasonably increased by the defendant's recent placement of the PVC pipe, without warning, in an area known to be one where competitors frequently fall. Whether the condition was open and obvious to users including the plaintiff is also an issue of fact based on the non-party witness affidavit that the pipe was not there the day before the accident, and the plaintiff's affidavit that he had never seen it before the accident occurred. Thus, summary judgment in favor of the defendant is denied.

Dated: July 14 2014

ANDREW G. TARANTINO, JR., A.J.S.C.

____ FINAL DISPOSITION **_XX_NON-FINAL DISPOSITION**