

**2017 NY Slip Op 30523(U)**

**CHRISTOPHER PERKINS, by and through KATHLEEN PERKINS, as Guardian of his Person and Property, Plaintiffs,**

**v.**

**COUNTY OF TOMPKINS, ROBERT L. ZIMMER, SR., ROBERT L. ZIMMER JR., ROBERT L. ZIMMER, JR. d/b/a FINGER LAKES MASONRY FLM Defendants.**

**ROBERT L. ZIMMER, SR. Third-party Plaintiff,**

**v.**

**JOSEPHINE HINES and the COUNTY OF TOMPKINS, Third-party Defendants.**

Docket No. 2014-0037, RJI No. 2014-0509-C.

**Supreme Court, Tompkins County.**

March 23, 2017.

DEMPSEY & DEMPSEY, By: Catherine Dempsey, Esq., 561 Franklin Street, Buffalo, NY 14202, COUNSEL FOR PLAINTIFFS.

COSTELLO, COONEY & FEARON, PLLC, By: James J. Gascon, Esq., 5701 West Genesee Street, Camillus, NY 13031, COUNSEL FOR DEFENDANT/THIRD PARTY PLAINTIFF. ROBERT L. ZIMMER, SR.

Paul Tavelli, Esq., 405 North Tioga Street, Ithaca, NY 14850, COUNSEL FOR DEFENDANTS, ROBERT L. ZIMMER, JR. and ROBERT L. ZIMMER JR. d/b/a, FINGER LAKES MASONRY FLM.

COUNTY ATTORNEY'S OFFICE, By: William Troy, III, Esq., 125 East Court Street, Ithaca, NY 14850, COUNSEL FOR DEFENDANT/THIRD PARTY DEFENDANT, COUNTY OF TOMPKINS.

LAW OFFICE OF KEITH D. MILLER, By: Keith D. Miller, Esq., 1000 7th North Street, Suite 120, Liverpool, NY 13088, COUNSEL FOR THIRD PARTY, DEFENDANT JOSEPHINE HINES.

## **DECISION AND ORDER**

EUGENE D. FAUGHNAN, Judge.

This matter comes before the Court upon a motion brought by Third Party Defendant Josephine Hines ("Hines") for Dismissal and Summary Judgment as against Defendant and Third Party Plaintiff Robert L. Zimmer, Sr.<sup>[1]</sup> ("Zimmer") pursuant to CPLR § 3211 and CPLR § 3212.

The facts of this case, in relation to this motion, are not in significant dispute. On or about August 10, 2012, Plaintiff Christopher Perkins<sup>[2]</sup> ("Perkins") borrowed a 2006 Yamaha motorcycle owned by his sister, Hines. Perkins was over thirty years old and no one alleges any mental or physical incapacity at the time he borrowed Hines' motorcycle. At a deposition, Hines testified that Perkins had owned a motorcycle that she characterized as a "fixer upper" that was not repaired to the point that it could be ridden. She recalled Perkins riding a motorcycle in the past. Hines was unaware whether Perkins had a motorcycle license or had any other training in riding a motorcycle. Hines did review the operation of the motorcycle with Perkins for about ten minutes prior to him riding away.

On August 15, 2012, Perkins was riding Hines' motorcycle on South Main Street, Groton, New York when he was involved in an accident. The parties dispute how and whether Zimmer was a cause of the accident. On January 16, 2014, Perkins, through his guardian, commenced an action for negligence against, among others, Zimmer. On December 17, 2015, Zimmer filed a Third Party Complaint against Hines seeking indemnification and contribution. Based upon Zimmer's submissions, it appears that the claim for indemnification and contribution against Hines is premised upon a theory of negligent entrustment.

When seeking summary judgment, the movant must make a prima facie case showing its entitlement to judgment as a matter of law, by offering evidence which establishes there are no material issues of fact. Amedure v. Standard Furniture Co., 125 AD2d

170 (3rd Dept. 1987); Bulger v. Tri-Town Agency, 148 AD2d 44 (3rd Dept. 1989). Once this burden is met, the burden shifts to the respondent to establish that a material issue of fact exists. Dugan v. Sprung, 280 AD2d 736 (3rd Dept. 2001); Sheppard-Mobley v. King, 10 AD3d 70, 74 (2nd Dept. 2004) *aff'd as mod.* 4 NY3d 627 (2005); Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v. N.Y. Univ. Med. Ctr., 64 NY2d 851, 853 (1985).

Initially, Hines argues that Zimmer lacks standing to pursue a claim for contribution or indemnification from her premised on negligent entrustment. She asserts that since Zimmer is not a third party injured by the "entrustment", he cannot make a claim for indemnification. Unquestionably, "the harm to third parties in this case is not the direct, physical injury ordinarily caused by dangerous instruments". Nolechek v. Gesuale, 46 NY2d 332, 339 (1978). However, "financial harm resulting from potential liability of a 'concurrent' tort-feasor" is sufficient to give rise to a cause of action for indemnification and contribution. Guldy v. Ford Motor Co., 99 AD2d 625 (3rd Dept. 1984), *citing Nolechek* at 339.

Perkins commenced an action against Zimmer sounding in negligence. Zimmer alleges that Hines is either wholly, or partially, responsible for the accident based upon her negligently entrusting the motorcycle to Perkins. Zimmer's exposure is exactly the kind of potential financial harm addressed by the court in Nolechek. Therefore, the Court finds that Zimmer has standing to pursue a claim for indemnification and contribution from Hines. Hines' motion for Summary Judgment on the basis of standing is DENIED.

Zimmer is alleging a claim for contribution or indemnification based upon the theory that Hines negligently entrusted the motorcycle to Perkins. "The tort consists of entrusting or permitting the use of an instrument made dangerous by the age, intelligence, infirmity, disposition or training of the user which causes injury to a third party." Larsen v. Heitmann, 133 AD2d 533 (4th Dept. 1987), 1B NY PJl3d 2:260 at 775 (2017). Most cases of negligent entrustment involve an adult entrusting a dangerous instrumentality to a minor. *see e.g. Nolecheck, supra*; Chiccino v. Hartman, 87 AD2d 1002 (4th Dept. 1982), *affirmed* 57 N.Y.2d 732; Costa v. Hicks, 98 AD2d 137 (2nd Dept. 1983), Len v. Cohoes, 144 AD2d 187 (3rd Dept. 1988). However, more generally, "[t]he tort of negligent entrustment is based on the degree of knowledge the supplier had or should have had concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion" Splawnik v. Di Caprio, 146 A.D.2d 333, 335 (3rd Dept. 1989). Put another way, "[a] person who has control over a motor vehicle may be held liable for injuries to third persons for entrusting it to a person who the person knew, or in the exercise of reasonable care should have known, was not competent to operate it safely". 8B NY Jur Automobiles and Other Vehicles § 1154 (2017).

In the present matter, Hines argues that she was aware that Perkins had previously owned a motorcycle and had ridden. However, she denies any knowledge of whether Perkins had a license to operate a motorcycle. Prior to loaning the motorcycle, she reviewed the "dashboard" and general operation of the motorcycle with Perkins for about ten minutes. She was unaware whether Perkins had undergone any training or instruction on motorcycle operation. In sum, Hines knew of Perkins past ownership of a motorcycle and reviewed the operation of the vehicle with Perkins. However, she never even inquired as to whether Perkins had a license to operate a motorcycle.

On this record, it cannot be said, as a matter of law, that Hines exercised reasonable care in determining whether Perkins possessed the intelligence or training necessary to operate a motorcycle. Hines merely assumed Perkins was competent to operate a motorcycle based upon his prior ownership of a motorcycle. Hines did not even ask Perkins whether he possessed a motorcycle license or permit. She only learned after the accident that he was unlicensed and in possession of only a permit. The Court concludes that such an inquiry would have been the bare minimum Hines would need to establish to sustain her burden on summary judgment.

Therefore, the Court finds that Hines failed to establish, as a matter of law, that she exercised reasonable care to determine that Perkins was competent to operate the motorcycle safely. There remains a question of fact as to the level of care Hines exercised prior to loaning her motorcycle to Perkins. Hence, Hines has failed to sustain her burden to establish that there are no triable questions of fact and as such, Summary Judgement is DENIED.

This constitutes the DECISION AND ORDER of the Court. The transmittal of copies of this Decision and Order by the Court shall not constitute notice of entry (see CPLR 5513).

[1] During the pendency of this action, Robert Zimmer, Sr. passed away and his estate has been substituted as a party, by separate Order of the Court.

[2] Kathleen Perkins has been appointed guardian of Christopher Perkins' person and property.

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