SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. KENNETH A. DAVIS,**

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

MICHAEL DELLICARPINI, an infant by his Mother and natural guardian, BARBARA DELLICARPINI and BARBARA DELLICARPINI, individually

Plaintiff,

-against-

BETH GOWER and JOHN CORSO,

Defendants.

SUBMISSION DATE: 10/10/08
INDEX No.: 9529/06

MOTION SEQUENCE # 2

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BETH GOWER and JOHN CORSO,

Third Party Plaintiffs,

-against-

GREGG DELLICARPINI,

Third Party Defendants.

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The following papers read on this motion:

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|---|---|
| Notice of Motion/ Order to Show Cause..... | X |
| Answering Papers..... | X |
| Reply..... | X |
| Briefs: Plaintiff's/Petitioner's..... | |
| Defendant's/Respondent's..... | |

Motion by defendants Beth Corso, s/h/a/ Beth Gower and John Corso for summary judgment dismissing the complaint is granted.

Plaintiffs commenced this action to recover for personal

injuries sustained by then 13-year old Michael Dellicarpini, when the all terrain vehicle ("ATV") he was operating crashed into a utility pole on September 3, 2004. Defendant Beth Corso is the owner of the 21-acre premises in Barryville, New York, where plaintiff Michael Dellicarpini was staying as a guest with his father, brother, and a friend. Defendant John Corso is the owner of the subject ATV.

Neither defendant was present at the time of the accident. Defendant John Corso testified that he was a business associate of Greg Dellicarpini, Michael Dellicarpini's father, and that he had given Greg permission to use the premises for the Labor Day Weekend in 2004 (Corso transcript, pp. 9 and 17). Greg Dellicarpini, the third-party defendant, has defaulted.

Michael had operated the same ATV the previous year when he visited the premises with his father for a weekend. On September 3, 2004, he and his brother took turns taking rides on the ATV, and they rode it for about an hour before the accident occurred. He testified that the vehicle felt different from when he had operated it in 2003, in that "the brakes were like softer than they - - they weren't as - - they didn't stop as fast" (Michael Dellicarpini transcript, p. 47). He noticed it right from the start when they were driving around; when he stepped on the brake it didn't stop right away, it just slowed down (Id.).Michael did not get the sense that the brakes were wearing out or working less effectively each time he applied them; the brakes consistently "weren't working that

good" (Michael Dellicarpini transcript, p.77-78). As he drove the ATV to the garage and stepped on the brakes, he didn't "feel anything" so he swerved to the right to avoid hitting his father's car, at which time he drove the ATV into a utility pole (Michael Dellicarpini transcript, pp. 80-82). Michael testified that he remembers telling his father that the brakes were not working as well as they had in 2003, but he doesn't remember what his father said in response (Michael Dellicarpini, transcript, pp. 78, 84).

Mr. Corso had purchased the ATV when it was new in 1999 (John Corso transcript, p. 10). It was a Kawasaki Prairie ATV. He used the ATV on many occasions, and his children did also (John Corso transcript, pp. 18 and 20). At the time of the accident he was not aware of any problems with the ATV generally, nor any difficulties with the braking system specifically (John Corso transcript, p. 21). Maintenance on the ATV was performed on an as-needed basis (John Corso transcript, p. 22), although Mr. Corso did not know if the brakes were ever adjusted (John Corso transcript, p.23).

Mrs. Corso testified that she, her husband and her children all drove the ATV, and she had never received any complaints or experienced any difficulties with the brakes (Beth Corso transcript, pp. 8-9).

Summary judgment is the procedural equivalent of a trial [*S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974)]. The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law,

offering sufficient evidence to demonstrate the absence of any material issues of fact [see *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *Zuckerman v City of New York*, 49 NY2d 557 (1980)]. Once the movant makes its *prima facie* showing, the burden shifts to the opponent, who must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial [*Alvarez; Zuckerman*]. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient [*Zuckerman*]. Summary judgment will not be defeated by surmise, conjecture or suspicion [*Shaw v Time-Life Records*, 38 NY2d 201, 207 (1975)].

Negligence is the absence of care, according to the circumstances [*Palsgraf v Long Island R. Co.*, 248 NY 339, 341(1928)]. On their motion defendants have established that they had no knowledge of any problems with the brakes of the subject ATV, and according to Mr. Corso, maintenance on the ATV was performed as needed. The Corsos and their children all used the ATV without problems. Furthermore, plaintiff Michael Dellicarpini and his brother used the ATV for an hour before the accident occurred, and Michael Dellicarpini testified that the brakes were not getting worse as that hour progressed. On this record, defendants have presented a *prima facie* case that under the circumstances as they knew them, defendants were not negligent. There is no evidence that defendants caused, created, or had knowledge of any allegedly dangerous or defective condition [see *Pena v Women's Outreach*

*Network, Inc.*, 35 AD3d 104 (1st Dept. 2006)]. The burden shifts to plaintiffs to come raise a triable issue of fact.

Plaintiffs submit no additional evidence. In opposition to defendants' motion they rely upon Michael's testimony, together with the circumstantial evidence of the accident, to raise a triable issue of fact as to whether the brakes of the ATV were functioning properly, and whether defendants had a duty to warn of this dangerous condition or take remedial measures (Wehrheim affirmation in opposition, par. 12).

In order to defeat summary judgment, a plaintiff who is relying on circumstantial evidence to prove his case has to establish that it was more likely or more reasonable that the injury was caused by the defendant's negligence than by some other agency [see *Grob v Kings Realty Associates, LLC*, 4 AD3d 394, 395 (2nd Dept. 2004); *Collins v City of New York*, 305 AD2d 529 (2003)]. The proof must render other causes sufficiently remote to enable a jury to reach its verdict based upon logical inferences to be drawn from the evidence, rather than speculation [*Gayle v City of New York* , 92 NY2d 936, 937 (1998)].Where brakes worked before the accident and after earlier repairs, the happening of the accident is not enough to raise a triable issue of fact as to adequacy of earlier repairs [*Tufano v Nor-Heights Service Center, Inc.*, 15 AD3d 470 (2nd Dept. 2005); *Breslin v Rij*, 259 AD2d 458 (2nd Dept. 1999)]. *A fortiori*, where as here, brakes worked before the accident, the happening of the accident should not be enough to raise a triable

issue of fact as to negligence of the owner where no evidence of prior brake problems were made known to the owner.

On this record there is absolutely no evidence of notice to defendants of any brake problems whatsoever. Under these circumstances they cannot be found liable for negligence. Any finding to the contrary would rest upon speculation and surmise. Consequently, defendants' motion for summary judgment dismissing the complaint against them must be granted.

Based on the foregoing, there is no need to consider the remainder of defendants' contentions.

This decision constitutes the order of the court.

Dated: DEC 11 2008

KENNETH A. DAVIS J.S.C.