N.P. v Town of Huntington
2018 NY Slip Op 33238(U)
December 10, 2018
Supreme Court, Suffolk County
Docket Number: 14-15996
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX No. 14-15996
CAL. No. 18-00122OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

ORIGINAL

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 4-12-18 (001)
MOTION DATE 5-24-18 (002)
MOTION DATE 6-25-18 (003)
MOTION DATE 5-10-18 (004)
ADJ. DATE 9-27-18
Mot. Seq. # 001 - MD # 003 - MD
002 - MG # 004 - MD

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N.P., an Infant Under the Age of 14 Years by His Guardian, BASAIDA PELAEZ, and BASAIDA PELAEZ, Individually,

Plaintiffs,

- against -

THE TOWN OF HUNTINGTON and DEER PARK SOCCER CLUB, GREENFIELDS OUTDOOR FITNESS, INC. and LASER INDUSTRIES, INC.,

Defendants.

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Upon the following papers numbered 1 to 207 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-32; 65-97; 112-132; 170-184 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 33-59; 98-109; 185-207 ; Replying Affidavits and supporting papers 60-64; 110-111; 167-169 ; Other ; it is,

ORDERED that the motion (seq. #001) by defendant Laser Industries, Inc., the motion (seq. #002) by defendant Deer Park Soccer Club, the motion (seq. #003) by defendant Greenfields Outdoor Fitness, Inc., and the motion (seq. #004) by defendant Town of Huntington are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Laser Industries, Inc. for summary judgment dismissing the complaint against it is denied; and it is further

ORDERED that the motion by defendant Deer Park Soccer Club for summary judgment dismissing the complaint against it is granted; and it is further

ORDERED that the motion by defendant Greenfields Outdoor Fitness, Inc. for summary judgment dismissing the complaint against it is denied; and it is further

ORDERED that the motion by defendant Town of Huntington for summary judgment dismissing the complaint against it is denied.

This is an action to recover damages for personal injuries allegedly sustained by infant plaintiff N.P. on October 20, 2013, when a piece of outdoor elliptical exercise equipment allegedly caused the partial amputation of his right middle finger. Before the accident occurred, infant plaintiff was with his mother and grandfather at Elwood Park in Huntington, New York, awaiting to play a soccer game with defendant Deer Park Soccer Club. While waiting for the soccer game to start, infant plaintiff placed his foot on the spinning wheel of an elliptical machine located in an area of the park intended for those who are at least 13 years of age, and he injured his finger when attempting to dislodge his foot. Defendant Greenfields Outdoor Fitness, Inc. ("Greenfields") manufactured the subject elliptical machine. Defendant Town of Huntington contracted defendant Laser Industries, Inc. ("Laser") to install the subject elliptical machine at Elwood Park.

Laser now moves for summary judgment in its favor, alleging that it is not in the chain of distribution as it did not design, manufacture, or distribute the subject elliptical machine. In support of its motion, Laser submits, among other things, copies of the pleadings, an affidavit by William Marletta, transcripts of the deposition testimony of infant plaintiff, Basaida Paelez, John Laird, James Marcincuk, Joseph Cline, Sam Mendelsohn and Joseph Kelly, and the transcript of the testimony of infant plaintiff and Basaida Pelaez at their General Municipal Law § 50-h hearings. In opposition to the motion, plaintiffs submit, among other things, an affidavit from Stanley Fein, and argue a triable issue exists as to whether Laser is part of the distribution chain that caused infant plaintiff's injuries.

Deer Park Soccer Club also moves for summary judgment in its favor, alleging that it had no duty to supervise infant plaintiff. In support of its motion, Deer Park Soccer Club submits, among other things, copies of the pleadings, and the transcripts of the deposition testimony of infant plaintiff, Basaida

Paelez, John Laird, James Marcincuk, Joseph Cline and Sam Mendelsohn. In opposition to the motion, plaintiffs submit, among other things, an email authored by John Laird, and argue that Deer Park Soccer Club assumed control over infant plaintiff.

Greenfields also moves for summary judgment in its favor, alleging that there is no evidence of any manufacturing or design defects in the elliptical machine, and that infant plaintiff's unforeseeable misuse of the machine was the sole proximate cause of his injuries. In support of its motion, Greenfields submits, among other things, copies of the pleadings, an affidavit by Jason Mattice, and transcripts of the deposition testimony of infant plaintiff, Basaida Paelez, James Marcincuk, Sam Mendelsohn and Joseph Kelly. In opposition to the motion, plaintiffs submit, among other things, an affidavit from Stanley Fein, and the transcripts of the deposition testimony of Joseph Cline and John Laird. Plaintiffs argue that questions exist as to whether the subject elliptical machine was defectively designed, and whether infant plaintiff's alleged misuse of the machine was foreseeable.

The Town of Huntington also moves for summary judgment in its favor, alleging that it did not breach any duty, as the elliptical machine was not inherently dangerous. In support of its motion, the Town submits, among other things, copies of the pleadings and an affidavit by Margaret Payne. In opposition to the motion, plaintiffs submit, among other things, an affidavit from Stanley Fein, and the transcripts of the deposition testimony of Sam Mendelsohn, James Marcincuk, Joseph Cline and Joseph Kelly. Plaintiffs argue that the Town created a dangerous condition when it purchased and maintained the subject elliptical machine at Elwood Park.

It is well-settled that the proponent of a summary judgment motion bears the initial burden of establishing his or her entitlement to judgment, as a matter of law, in his or her favor by offering admissible evidence sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of any opposition thereto (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once the movant has made the requisite showing, the burden then shifts to the opposing party, requiring him or her to present admissible evidence and facts sufficient to require a trial on any issue of fact (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*). On such a motion, the Court is charged with determining whether issues of fact exist while viewing any evidence in a light most favorable to the nonmoving party; the Court is not responsible for resolving issues of fact or determining matters of credibility (*see* ***Chimbo v Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; ***Pearson v Dix McBride, LLC***, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see* ***Chimbo v Bolivar***, *supra*; ***Benetatos v Comerford***, 78 AD3d 730, 911 NYS2d 155 [2d Dept 2010]).

A person injured by a defective product may bring a cause of action under the theories of strict products liability, negligence, or breach of warranty (***Voss v Black & Decker Mfg. Co.***, 59 NY2d 102, 463 NYS2d [1983]; ***Mangano v Town of Babylon***, 111 AD3d 801, 975 NYS2d 130 [2d Dept 2013]).

"Whether an action is pleaded in strict products liability, breach of warranty, or negligence, the plaintiffs must prove that the alleged defect is a substantial cause of the events which produced the injury" (***Fahey v A.O. Smith Corp.***, 77 AD3d 612, 615, 908 NYS2d 719 [2d Dept 2010]; ***Beckford v Pantresse, Inc.***, 51 AD3d 958, 858 NYS2d 794 [2d Dept 2008]; ***Clarke v Helene Curtis, Inc.***, 293 AD2d 701, 742 NYS2d 325 [2d Dept 2002]). "[L]iability may not be imposed for breach of warranty or strict products liability upon a party that is outside the manufacturing, selling, or distribution chain" (***Quinones v Federated Dept. Stores, Inc.***, 92 AD3d 931, 931, 939 NYS2d 134 [2d Dept 2012], quoting ***Joseph v Yenkin Majestic Paint Corp.***, 261 AD2d 512 512, 690 NYS2d 611 [2d Dept 1999]). Unless only one conclusion may be drawn from the established facts, it is for a jury to determine the issue of proximate cause (***Reece v J.D. Posillico, Inc.***, 164 AD3d 1285, 83 NYS3d 672 [2d Dept 2018]).

Under the doctrine of strict products liability, a manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in causing the injury or damages, provided

> (1) that at the time of the occurrence the product is being used * * * for the purpose and in the manner normally intended, (2) that if the person injured or damaged is himself [or herself] the user of the product he [or she] would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted [his or her] injury or damages

(***Codling v Paglia***, 32 NY2d 330, 342, 345 NYS2d 461 [1973]; *see* ***Amatulli v Delhi Constr. Corp.***, 77 NY2d 525, 569 NYS2d 337 [1991]). "Manufacturers may be held strictly liable for injuries caused by their products 'because of a mistake in the manufacturing process, because of defective design or because of inadequate warnings regarding use of the product' " (***Singh v Gemini Auto Lifts, Inc.***, 137 AD3d 1002, 1002, 27 NYS3d 637 [2d Dept 2016], quoting ***Sprung v MTR Ravensburg***, 99 NY2d 468, 472, 758 NYS2d 271 [2003]). "[A] defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use, and whose utility does not outweigh the danger inherent in its introduction into the stream of commerce" (***Gorbatov v Matfer Group***, 136 AD3d 745, 745, 26 NYS3d 92 [2d Dept 2016], quoting ***Voss v Black & Decker Mfg. Co.***, *supra* at 107; ***Santorelli v Apple & Eve, L.P.***, 282 AD2d 731, 724 NYS2d 352 [2d Dept 2001]). A plaintiff may prevail regardless of whether the defectively designed product was "[u]sed for its intended purpose or for an unintended but reasonably foreseeable purpose" (***Hoover v New Holland N. Am., Inc.***, 23 NY3d 41, 53, 988 NYS2d 543 [2014], quoting ***Lugo v LJN Toys***, 75 NY2d 850, 852, 552 NYS2d 914 [1990]). It is for a jury to determine, generally, whether a product is defectively designed in that its utility outweighs its inherent danger (***Hoover v New Holland N. Am., Inc.***, *supra*). "Where a plaintiff is injured as a result of a defectively designed product, the product manufacturer or others in the chain of distribution may be held strictly liable for those injuries" (***Gorbatov v Matfer Group***, *supra* at 745, quoting ***Hoover v New Holland N. Am., Inc.***, *supra* at 53; *see also* ***Amatulli v Delhi Constr. Corp.***, *supra* at 532).

A plaintiff may prove a defect by circumstantial evidence, establishing that the product did not perform as intended while excluding all other causes of failure that are not attributable to the manufacturer, giving rise to an inference that the accident could only have been caused by a defect in the product (***Speller v Sears, Roebuck & Co.***, 100 NY2d 38, 760 NYS2d 79 [2003]; ***Guzzi v City of New York***, 84 AD3d 871, 923 NYS2d 170 [2d Dept 2011]; ***Riglioni v Chambers Ford Tractor Sales, Inc.***, 36 AD3d 785, 828 NYS2d 520 [2d Dept 2007]). "The circumstantial evidence of identity of the manufacturer of a defective product causing personal injury must establish that it is reasonably probable, not merely possible or evenly balanced, that the defendant was the source of the offending product" (***Escarria v American Gage & Mfg. Co.***, 261 AD2d 434, 434, 690 NYS2d 86 [2d Dept 1999], quoting ***Healey v Firestone Tire & Rubber Co.***, 87 NY2d 596, 601-602, 640 NYS2d 860 [1996]). "Speculative or conjectural evidence of the manufacturer's identity is not enough" (***Healey v Firestone Tire & Rubber Co.***, *supra*).

A determination of negligence requires the Court to first consider the duty owed before any breach of that duty can be contemplated (***Sukljian v Charles Ross & Son Co., Inc.***, 69 NY2d 89, 97, 511 NYS2d 821 [1986]; *see* ***Hernandez v Biro Mfg. Co.***, 251 AD2d 375, 674 NYS2d 72 [2d Dept 1998]). A plaintiff must establish that a defendant owed a specific duty to him or her and the defendant's breach of that duty resulted in damages (*see* ***Hamilton v Beretta U.S.A. Corp.***, 69 NY2d 222, 727 NYS2d 7 [2001]; ***Strauss v Belle Realty Co.***, 65 NY2d 399, 492 NYS2d 555 [1985]). To prove negligent design, a plaintiff must show that the manufacturer acted unreasonably in designing the product, focusing on the manufacturer's conduct (***Voss v Black & Decker Mfg. Co.***, *supra*). "Inasmuch as the defect [is] in the design, the manufacturer [is] the logical party in a position to discover the defect and correct it to avoid injury to the public" (***Sage v Fairchild-Swearingen Corp.***, 70 NY2d 579, 587, 523 NYS2d 418 [1987]).

In addition to designing a product that is not defective, a manufacturer is also required to produce a product without defects at the time the product leaves the manufacturer's hands (***Robinson v Reed-Prentice Div.***, 49 NY2d 471, 479, 426 NYS2d 717 [1980]). A plaintiff is required to prove that the harm arose from the product's failure to perform in its intended manner due to a flaw in the manufacturing process (***Preston v Peter Luger Enterprises, Inc.***, 51 AD3d 1322, 858 NYS2d 828 [3d Dept 2008]). Further, "a manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product[s] of which it knew or should have known," including dangers related to reasonably foreseeable unintended uses (***Young v Daglian***, 63 AD3d 1050, 1051, 883 NYS2d 75 [2d Dept 2009], quoting ***Liriano v Hobart Corp.***, 92 NY2d 232, 237, 677 NYS2d 764 [1998]; ***Singh v Gemini Auto Lifts, Inc.***, *supra*). Whether a misuse is reasonably foreseeable and whether a warning is adequate to deter such a use are typically questions for the jury (***Young v Daglian***, *supra*). Both the distributor and retailer may also be held liable for the failure of the manufacturer to provide warnings (***Reece v J.D. Posillico, Inc.***, *supra*). However, "[a] cause of action based upon a failure to warn cannot stand when the injured party is already aware of the specific hazard, or where the danger is discernible" (***Secone v Raymond Corp.***, 240 AD2d 391, 392, 658 NYS2d 1021 [2d Dept 1997]).

Laser failed to establish its *prima facie* entitlement to judgment as a matter of law. James Marcincuk, a designer for the Town, testified that the Town purchased the subject exercise equipment that was placed in the park from Laser. The purchase order, identified by Marcincuk at his deposition

also denotes exercise equipment being sold by Laser to the Town. Joseph Kelly, Laser's construction project manager, identified an invoice between Laser and American Recreational Products for the subject equipment installed at the park. Kelly also testified that Laser then provided the Town with a bill for the equipment that was installed. Therefore, Laser's argument that it was not within the chain of distribution as it was only a service provider is unavailing, since a distributor that also provides a service may be held strictly liable for a defective product (*see* ***Fernandez v Riverdale Terrace***, 63 AD3d 555, 882 NYS2d 50 [1st Dept 2009]). As more than one conclusion may be drawn from the facts herein, it is for a jury to decide what proximately caused infant plaintiff's injuries (*see see* ***Yun Tung Chow v Reckitt & Coleman, Inc.***, 17 NY3d 29, 926 NYS2d 377 [2011]; ***Reece v J.D. Posillico, Inc.***, 164 AD3d 1285, 83 NYS3d 672 [2d Dept 2018]). Accordingly, the motion by defendant Laser for summary judgment dismissing the complaint against it is denied.

Greenfields failed to establish its *prima facie* entitlement to judgement as a matter of law. Jason Mattice, professional engineer, simply stated that "[t]here is no evidence of any design or manufacturing defect that contributed to the accident," opining that infant plaintiff's injuries were the result of his own unforeseeable misuse of the subject elliptical machine. This affidavit is conclusory in nature, and defendant cannot meet its burden by pointing to gaps in plaintiffs' proof (*see* ***Montemarano v Atlantic Exp. Transp. Group, Inc.***, 123 AD3d 675, 997 NYS2d 700 [2d Dept 2014]; ***Preston v Peter Luger Enters., Inc.***, 51 AD3d 1322, 858 NYS2d 828 [3d Dept 2008]). Sam Mendelsohn, president of Greenfields, testified that Greenfields chose not to enclose the disks on the machine because it was anticipated that such an enclosure may trap debris, which would impede the functionality of the elliptical machine. Mendelsohn acknowledged that the risk of debris impeding the functionality of the machine did not apply to the circumstances of this case because the subject machine was installed on a concrete surface, rather than mulch. Mendelsohn further testified that Greenfields never consulted with an engineer regarding whether the disks should be enclosed to preclude human contact, as it did not foresee someone misusing the elliptical machine in such a way prior to the accident. Therefore, Greenfields has failed to demonstrate, as a matter of law, that the subject elliptical's utility outweighed its risks when it was designed, or that such risks were reduced to the greatest extent possible without jeopardizing it's inherent usefulness (*see* ***Yun Tung Chow v Reckitt & Coleman, Inc.***, *supra*; ***Voss v Black & Decker Mfg. Co.***, *supra*; *cf.* ***Barclay v Techno-Design, Inc.***, 129 AD3d 1177, 10 NYS3d 665 [3d Dept 2015]). Accordingly, the motion by defendant Greenfields for summary judgment dismissing the complaint against it is denied.

The Town also has failed to establish its entitlement to judgement as a matter of law. The Town was under a duty to maintain the park in a reasonably safe condition (*see generally* ***Rhabb v New York City Hous. Auth.***, 41 NY2d 200, 391 NYS2d 540 [1976]). As aforementioned, it is for a jury to decide whether the subject elliptical machine proximately caused infant plaintiff's injuries and whether it was defectively designed. Thus, there remains an issue of fact regarding whether the Town maintained an "[i]nherently dangerous article without exercising a high degree of care to prevent foreseeable injury to others" (*see* ***Goldstein v Board of Ed. Union Free School Dist. No. 23, Town of Hempstead***, 24 AD2d 1015, 1016, 266 NYS2d 1 [2d Dept 1965]). The Town has failed to demonstrate that it did not have notice of the alleged dangerous condition or that it did not create it (*cf.* ***White v Incorporated Vil. of Hempstead***, 41 AD3d 709, 838 NYS2d 607 [2d Dept 2007]; ***Goetz v Town of Smithtown***, 303 AD2d 367, 755 NYS2d 669 [2d Dept 2003]; ***Vollmer v Town of Wawayanda***, 247 AD2d 610, 669 NYS2d 226

[2d Dept 1998]). Accordingly, the motion by the Town for summary judgment dismissing the complaint against it is denied.

Deer Park Soccer Club has established its entitlement to judgment as a matter of law. A nonparent custodian has a duty to protect a child from harm, and such a duty is concomitant with the custodian's physical custody of and control over the child (***Pratt v Robinson***, 39 NY2d 554, 560, 384 NYS2d 749 [1976]; ***Sheila C. v Povich***, 11 AD3d 120, 781 NYS2d 342 [1st Dept 2004]). When the nonparent no longer has custody of the child such that the parent is free to resume control over the child's protection, the nonparent's duty ceases (***Pratt v Robinson***, *supra*; ***Sheila C. v Povich***, *supra*; ***Bertrand v Board of Ed. of City of New York***, 272 AD2d 355, 707 NYS2d 218 [2d Dept 2000]). Infant plaintiff's mother, Basaida Pelaez, was present at the time of the accident, approximately 15 minutes before the soccer game. She had instructed infant plaintiff not to play in the subject exercise area multiple times. No official team related activity had taken place before the accident. The record demonstrates that infant plaintiff was not within Soccer Club's custody and control at the time of the accident, as he was still within the custody and control of his mother prior to the game's commencement (*see* ***Winter v Board of Ed. of City of New York***, 270 AD2d 343, 704 NYS2d 142 [2d Dept 2000]; ***Alvero v Allen***, 262 AD2d 434, 692 NYS2d 116 [2d Dept 1999]; ***Ruiz v Life Skills School, Ltd.***, 267 AD2d 182, 700 NYS2d 456 [1st Dept 1999]; ***Berlin v Nassau County Council, Boy Scouts of Am.***, 229 AD2d 414, 654 NYS2d 90 [2d Dept 1996]). Plaintiffs failed to raise a triable issue as to Deer Park Soccer Club's liability, as they acknowledge that infant plaintiff was within his mother's custody and control when she instructed him not to play on the subject elliptical machine immediately prior to the accident. Accordingly, the motion by Deer Park Soccer Club for summary judgment dismissing the complaint against it is granted.

Dated: December 10, 2018

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**