

Alvira v Strip Tech., Inc.
2011 NY Slip Op 31581(U)
June 2, 2011
Supreme Court, Queens County
Docket Number: 13001/08
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

MARCOS ALVIRA,

Plaintiff,

-against-

STRIP TECHNOLOGY, INC.,
Defendant.

STRIP TECHNOLOGY, INC.,
Third-Party Plaintiff,

-against-

CATALYTIC CONVERTER CORP.,
Third-Party Defendant.

Index No. 13001/08

Motion
Date March 29, 2011

Motion
Cal. No. 1 and 2

Motion
Sequence No. 3 and 2

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Upon the foregoing papers it is ordered that this motion by defendant, Strip Technology, Inc. ("Strip") for summary judgment pursuant to CPLR 3212 dismissing plaintiff's causes of action for strict products liability, breach of warranty, improper design, and failure to warn, and motion by third-party defendant, Catalytic Converter Corp. ("Catalytic") for an order granting summary judgment in its favor because there exists no triable issues of material fact as to the alleged negligence on the part of the above third-party defendant and they are entitled to judgment as a matter of law are hereby consolidated solely for purposes of disposition of the instant motions and are decided as follows:

Plaintiff, Marcos Alvira, a laborer employed by third-party defendant, Catalytic, seeks damages from defendant, Strip ("Strip") resulting from alleged work-related personal injuries occurring on August 29, 2007 at 175-15 Liberty Avenue, Jamaica, New York, the location of the third-party defendant, Catalytic, when plaintiff was clearing a jam from a wire stripping machine. Plaintiff alleges causes of action sounding in strict products liability, breach of warranty, and improper design against Strip, the manufacturer of the subject wire stripping machine.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

Defendant established a prima facie case that plaintiff's cause of action for strict products liability should be dismissed. In support of this branch of the motion, Strip presents, inter alia, the examination before trial transcript testimony of plaintiff, Marcos Alvira, himself, wherein he avers that: on August 29, 2007, he was attempting to remove debris from a Strip Tech Wire Stripper, Model 5000 (the "Machine") manufactured by the defendant, a wire jammed inside the Machine, he hit the emergency shut off button and proceeded to remove the cable guide, the metal bolted front cover of the Machine, with an open-socket wrench by removing the two bolt's on the left side of the Machine's face and sliding the cover out from under the two

bolts on the right of the Machine's face, while the bolted metal guard was removed, he turned the Machine back on in order to pry the debris causing the jam from the Machine while the blades were moving, he inserted a 16-inch screw toward the top of the blade to remove the debris, he guided the screw toward the bottom of the bottom blade to pry debris from the blade while the Machine was on, and he felt his right hand being pulled into the blades of the Machine; and a copy of Strip's manual, wherein it states that the Machine was not to be operated with the guard removed.

Defendant established that plaintiff's removal of the bolted metal guard plate from the Machine constitutes a subsequent modification for which the manufacturer cannot be held liable for strict products liability. It is well-established law that a manufacturer of a product may not be cast in damages on a strict products liability cause of action, where, after the product leaves the possession and control of the manufacturer, there is a subsequent modification which substantially alters the product and is the proximate cause of plaintiff's injuries (*Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471 [NY 1980]; *Patino v. Lockformer Co.*, 303 AD2d 731 [2d Dept 2003]; *Darsan v. Guncalito*, 153 AD2d 868 [2d Dept 1989]; *Barnes v. Pine Tree Machinery*, 261 AD2d 295 [1st Dept 1999]). As such, plaintiff's removal of the bolted metal guard plate from the Machine constitutes a subsequent modification for which the manufacturer cannot be held liable for strict products liability.

Defendant established a prima facie case that plaintiff's cause of action for breach of warranty should be dismissed. In support of this branch of the motion, Strip presents, inter alia, a copy of the express warranty contained in the Machine's manual; and third-party defendant's proof of purchase and receipt.

Defendant established that plaintiff cannot establish a breach of warranty because Strip's express and implied warranties were expressly limited in time and scope and did not cover this incident and that plaintiff cannot establish a breach of warranty of merchantability because of the subsequent modification and because plaintiff operated the device in a manner for which it was not intended. Under the New York Uniform Commercial Code ("UCC"), a manufacturer of goods can disclaim and/or limit express and implied warranties. New York UCC 2-314, 2-316(2). The implied warranty of merchantability may only be disclaimed by use of the language mentioning the word "merchantability" and, in the case of a writing, such language must be conspicuous. (*Id.*). Strip's disclaimer of warranties appears in all capital letters within the body of the express warranty and specifically mentions the express and implied warranties of merchantability and fitness for a particular purpose. Capital letters are sufficient to make

a message conspicuous in a form (*Victor v. Mammana*, 101 Misc2d 954 [Sup Ct, Nassau County 1979]). The express warranty provides that it is only effective for ninety (90) days from the date of purchase and the disclaimer provides that no other warranties, express or implied, exist beyond that time. The third-party defendant purchased the Machine on March 27, 2007 and the plaintiff was injured on August 29, 2007, seventy (70) days after the expiration of the warranty. Strip's warranty also expressly provides that it does not cover misuse and "unauthorized repair, alteration, modification". Defendant established that plaintiff engaged in unauthorized modification of the Machine in removing the bolted metal guard and he misused the product by placing a screw within the Machine with the guard removed while the Machine was on. As such, defendant established a prima facie case that no express or implied warranty was in effect at the time of the incident. Furthermore, even if the warranty was in effect at the time of the incident, the plaintiff cannot recover for breach of warranty of merchantability because the plaintiff cannot show that the Machine does not satisfy the merchantability requirements of New York's UCC (see, *Demy v. Ford Motor Co.*, 87 NY2d 248 [NY 1995]). A product must be "fit for the ordinary purposes for which such goods are used" to be considered merchantable under the UCC (NY UCC 2-314[2][c]). In the instant case, the product was altered after leaving the manufacturer, and as such, Strip cannot be held liable for breach of warranty, since a manufacturer's warranty cannot cover the Machine in an altered physical state from when it was manufactured, and the warranty of merchantability cannot cover the operation of the Machine in a manner which was not intended. As such, defendant established a prima facie case that plaintiff's cause of action for breach of warranty should be dismissed.

Defendant established a prima facie case that plaintiff's cause of action for failure to warn should be dismissed. In support of this branch of the motion, defendant submits, inter alia, the examination before trial transcript testimony of plaintiff, himself, wherein he testified that: he was aware that there were spinning blades within the Machine which would grind together to make fine cuts into wires, where he was placing his hands, and he attempted to service the machine while it was connected to electricity and turned on; the affidavit of Ronald Alexander, the Chief Executive Officer of Strip, Strip placed warnings in English, Spanish, and French warning the operator not to service the Machine while it was connected to live electricity; a copy of the warning to keep hands clear from within the Machine, as it appears in Strip's manual; and a copy of the warning not to service the Machine while connected to electricity, as it appears in Strip's manual.

Defendant established that plaintiff cannot succeed on its

failure to warn cause of action because the dangers were readily discernible and obvious and because plaintiff ignored all the manufacturer's warnings. A manufacturer has no duty to warn of an obvious danger of a product (Restatement (Second) of Torts, § 388, comment (k); *Petrie v. B.F. Goodrich Co.*, 175 AD2d 669 [4th Dept 1981]). In the instant case, the danger of removing the bolted metal safety guard and placing a hand into the spinning blades within the Machine is obvious. Pursuant to the affidavit of Mr. Alexander, the Machine contains a blade and is designed to cut or grind objects and the Machine is designed to cut wires and thus has heavy metal blades spinning within it. Furthermore, plaintiff cannot succeed on a failure to warn theory because the plaintiff ignored all the manufacturer's warnings provided by Strip. Strip equipped the Machine with warnings and labels providing that the Machine should not be operated without the guard in place and to keep hands clear from within the device. As such, defendant established a prima facie case that plaintiff's cause of action for failure to warn should be dismissed.

In opposition, plaintiff raises a triable issue of fact on its claims of strict products liability, improper design, and failure to warn. Plaintiff established that under New York law, a manufacturer can be liable for improper design of a product if the product is not reasonably safe (see, *Demy v. Ford Motor Co.*, *supra*). In opposition, plaintiff submits, inter alia, the affidavit of plaintiff, himself, wherein he testified that: he received no instruction on the use of the Machine and was not given any written materials concerning the Machine, often the cut plastic insulation would remain inside the Machine, adhering to the shafts and blades, causing a jam, the Machine would be particularly vulnerable to jamming when thicker wires were fed into it, he would have to clear jams and clean debris as frequently as every half hour, he would clear the jam with the Machine running, since that was the only way it could be cleared, there was no handwriting above the steel guard warning against removing the guard, prior to the accident; the examination before trial transcript testimony of Ronald Alexander who testified that: the Machine did not contain any instruction on the Machine as to how to clean it, and plaintiff's removal of the guard at the time of the accident was appropriate; the examination before trial transcript testimony of Steve Shalit, principal of Catalytic, who testified that Catalytic which is in the business of inter alia, scrap metal and buying used automobile catalytic converters, cutting them open and salvaging the precious metals, platinum and radium, plaintiff was never instructed on how to clear a jam in the Machine, he never received any instruction from Strip on how to clear wire and plastic that accumulated, he never instructed plaintiff on how to clean the Machine from accumulated plastic debris; the affidavit of engineering expert,

Eric Heiberg, P.E., who avers that: the interlock system was inadequate, since it could easily be bypassed, the manufacturer should have employed a "keypad interlock", employing a keypad interlock would conform with good engineering practice, it was feasible to employ a keypad interlock without significant cost and without compromising the function of the machine, because a higher order of protection was feasible, but was not provided, the machine design is defective. Strip failed to comply with the applicable Underwriter's Laboratories standard ANSI/UL73 Standard for Safety, Motorized Appliances and generally accepted safety and engineering practices, since the interlock system could easily be defeated by depressing the interlock switch either by hand or with an object, this deviation from good and accepted safety and engineering practices constituted a proximate cause of the accident, good and accepted safety and engineering practices include warning the user of the hazards that are associated with the product, the warnings provided on the subject machine were inadequate and in violation of ANSI Z535.4-220 Product Safety Signs and Labels, the warning against operating the machine was defective with respect to conspicuousness, and this deviation from good and accepted engineering and safety practices was a proximate cause of the accident; and photographs of the subject machine.

Plaintiff established that removal of the safety guard does not per se constitute a subsequent modification so as to foreclose liability, since Courts will examine whether the Machine was intended to be used without the guard and whether the Machine incorporated an appropriate interlock mechanism, that would de-energize the machine in the absence of the guard (*Adams v. Genie Industries, Inc.*, 14 NY3d 535 [2020]; *Lopez v. Precision Papers, Inc.*, 107 AD2d 667 [2d Dept 1985]). Plaintiff establishes that removing the guard to clear a jam was an intended use of the Machine, since the guard could be easily removed, and so it did not constitute a post design modification. Plaintiff established that there is a triable issue of fact as to whether the failure to incorporate an interlock system that could not be easily bypassed, constituted a design defect. (See, *Adams v. Genie Industries, supra*). Finally, plaintiff established that "[a] manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known . . ." (*Liriano v. Hobart Corp.*, 92 NY2d 232 [1998]). "The adequacy of the instruction or warning is generally a question of fact to be determined at trial" (*Harrigan v. Super Products Corp.*, 237 AD2d 882 [4th Dept 1997]).

Accordingly, there are triable issues of fact as to, inter alia, the safety of the subject machine's design, the adequacy of the warnings, and whether there was a subsequent modification made to the product. As there are triable issues of fact

regarding plaintiff's causes of action for strict products liability, failure to warn, and improper design, said causes of action cannot be dismissed summarily, and defendant's motion is denied regarding these causes of action.

However, plaintiff failed to raise a triable issue of fact regarding his cause of action for breach of warranty, as it is not even addressed in his opposition papers, and as such, a trial is not necessary on this cause of action, and the cause of action is dismissed.

The motion by third-party defendant, Catalytic Converter Corp. for an order granting summary judgment in its favor because there exists no triable issues of material fact as to the alleged negligence on the part of the above third-party defendant and they are entitled to judgment as a matter of law is denied.

Third-party plaintiff, Strip Technology, Inc. brought suit against third-party defendant, Catalytic Converter Corp. alleging contribution and common law indemnification. As the issue of whether or not Strip was negligent has not been decided, the issues of contribution and common law indemnification are not yet ripe. Therefore, Catalytic's request for summary judgment is denied. Dismissal of the third-party complaint is premature. As it has not yet been adjudged as to whether defendant is liable to plaintiff, the issue of whether third-party defendant is liable to third-party plaintiff is not yet ripe (*Marano v. Commander Electric, Inc.*, 12 AD3d 571 [2d Dept 2004]; *Tulovic v. Chase Manhattan Bank, N.A.*, 309 Ad2d 923 [2d Dept 2003]; *Prenderville v International Service Systems*, 10 AD3d 334 [1st Dept 2004]; *Gomez v. National Center for Disability Services, Inc.* 306 AD2d 103 [1st Dept 2003]; *Northland Associates v. Joseph Baldwin Construction Co., Inc.*, 6 AD3d 1214 [4th Dept 2004]).

This constitutes the decision and order of the Court.

Dated: June 2, 2011

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Howard G. Lane, J.S.C.