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SHORT FORM ORDER

INDEX No. 09-20364
CAL. No. 13-00138OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 6-14-13
ADJ. DATE 10-21-13
Mot. Seq. # 003 - MG
004 - MG; CASEDISP

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ANTHONY RISOLO and MELISSA RISOLO, his wife,

Plaintiffs,

- against -

THE RAYMOND CORPORATION, ABEL WOMACK, INC. and NU-RAC ASSOCIATES, LLC,

Defendants.

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Upon the following papers numbered 1 to 41 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-12, 13-24; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 25-28, 29-31 ; Replying Affidavits and supporting papers 32-34, 35-41; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Nu-Rac Associates, LLC ("Nu-Rac") for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross-claims insofar as asserted against it is granted; and it is further

ORDERED that the motion by defendants The Raymond Corporation ("Raymond") and Abel Womack, Inc. ("Womack") for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross-claims insofar as asserted against them is granted.

Plaintiffs commenced this action to recover damages for personal injuries allegedly sustained by plaintiff Anthony Risolo ("Risolo") on June 1, 2006, while employed at the premises, leased and operated by Alside Supply Center ("Alside") located at 1830 Lakeland Avenue, Ronkonkoma, New York. It is alleged that Risolo was operating a Raymond 4-D stand-up forklift when he lost control, crashed into shelving and was injured. Plaintiffs allege negligence on the part of the defendant Nu-Rac, the owner of the property. Plaintiffs' claims against Raymond, the manufacturer of the forklift, sound in strict products liability, negligence, failure to warn and breach of warranty. Plaintiffs allege a negligent repair/maintenance claim against Womack, which provided maintenance on the forklift.

Defendant Nu-Rac now moves for summary judgment dismissing the complaint and all cross-claims against it. In support of the motion, it submits, *inter alia*, its attorney's affirmation, the pleadings, the verified bill of particulars, the depositions of the plaintiffs, and the deposition David Norton, as a witness on behalf of the defendant Raymond, the deposition Albert T. Genduso, as a witness on behalf of the defendant Womack, the deposition Louis Colletti, as a witness on behalf of the defendant Nu-Rac and photographs of the accident site. Defendants Raymond and Womack also move for summary judgment dismissing the complaint and all cross claims against them. In support of the motion, they submit, *inter alia*, their attorney's affirmation, the pleadings, the deposition of the plaintiff Anthony Risolo, as well as the affidavit of David Norton, sworn to in May 17, 2013. In opposition, the plaintiffs submit their attorney's affirmations, four service job sheets, and the affidavits of Ben Railsback, sworn to on September 20 and September 29, 2013.

Plaintiff Anthony Risolo testified that he began his employment at Alside in 2000. He had operated forklifts at prior jobs. At Alside, he was certified to operate the Raymond 4-D stand-up forklift. The operation manual was kept in the forklift. The first employee to operate a forklift each day ran through a checklist on the machine to make sure its systems were operating properly. Later he himself trained five to seven other employees to operate the forklift. His accident occurred on June 1, 2006. He performed the daily checklist on the forklift he was using. Every single item was satisfactory, except that he noted there was some wear on the rear tire. He operated the forklift as part of the inspection process. The brake was working properly. The accident occurred after he pulled a skid of siding with the forklift and took it to the front of the warehouse. There, he took several boxes from the skid and proceeded to head back down the aisle with the partially unloaded skid. About halfway back down the aisle, traveling sideways, he started veering to the left. He tried steering his way out with the joystick by toggling it back to get it straight. When it didn't straighten out, he lifted his foot off the brake. Before he knew it, he was in the storage rack. At the time of the accident he was going three to five miles per hour, about walking speed. He was only a foot or so from the rack. After he struck the rack, portions of his body were pinned against it. He did not know if the steering or brakes malfunctioned. He described his speed as "slow" as the accident occurred. He testified that there had been a similar accident six months before his. He had never complained about the forklift he was using, but he had made many complaints about the floor to the operations manager for Associated Materials, Jeff Newman. Plaintiff was also employed by that company, which is the parent company of Alside. He

felt that the drive wheel of the forklift came off the ground came off the ground during the accident. He admitted that he did not know why the forklift did not turn or stop. He stated that when they rode over the concrete slab with the machine, the concrete slab would move. There were dead spots in the floor also, that would make the machine jump. He also ran over a "dip" in the floor. He believed that something in that section of the floor caused the drive wheel to come off the floor. He had also complained about these problems to Jeff Newman.

David Norton testified as a witness on behalf of the defendant Raymond. He is the Director of Product and Manufacturing Engineering for Raymond. He has worked for Raymond for 23 years, in a variety of positions. He is certified to operate all of Raymond's forklifts. He was involved in the design and testing of the 4-D Reach Truck (forklift). He described the operation of the Raymond 4-D stand-up forklift, which can operate both forwards and in reverse, as well as side to side. He testified that the highest speed for this forklift is 7.5 miles per hour. The normal mode of braking is to pull all the way back on the joystick. This would bring the forklift to a halt in about five seconds at full speed. It would travel approximately 15 feet in this amount of time. In an emergency situation, operators are taught to step off the "dead man" pedal which applies the mechanical brake. This will stop the truck in the shortest possible distance, approximately 8 to 10 feet, but closer to 10. The brake is tested every time the truck is turned on by the control system. If there is a problem with the brake, it would show as an error code on the driver's display. Raymond 4-D stand-up forklift is subject to the American National Standard Institute Regulation B56.1, which is the industrial truck safety standard for North America. It is actually a requirement for the user of the truck. The Occupational Health and Safety Administration ("OSHA") requires that standard for all users of forklifts. The B56.1 truck requirements are checked for every forklift before the product is sold. He also testified that steel posts can be attached to the rear frame of the forklift in the event that the customer's vehicle may be able to go underneath a horizontal beam. They are not a standard feature because there are significant drawbacks to their use, including visibility issues. They are offered as an option if the purchaser wishes to add them. It is up to the customer to determine if their use requires the option. OSHA makes a very strong case that rear posts are probably the third or fourth choice when looking at an environment and whether or not one should install them. Alternatives include lowering the first storage rack to the height of or below the tractor frame or to add a rack beam, both of which would prevent the machine from going under the rack. These alternatives are found in the B56.1 truck requirements. The Raymond 4-D stand-up forklift is designed for smooth, flat, concrete or asphalt. If not, it could lose traction. This information is contained, among other places, in the operators manual. The forklift was rented or purchased by Alside Supply Center. Accidents such as this are not reported by the manufacturer, the customer reports the accident to OSHA.

Mr. Norton also submitted an affidavit in support of the motion by defendants Raymond and Womack for summary judgment. Among other duties, he is responsible for the manufacturing processes in Raymond's facilities and involved in the design and design reviews related to Raymond forklift products, such as the model that is the subject of this action. He has also been a member of the B56.1 safety committee since 2000. This committee is made up of representatives from labor, OSHA, purchasers, independent engineers, and engineers from fork lift manufacturers with a goal of minimizing overall risks in the use of this product. He states that the forklift involved in this accident was built in compliance with several safety standards, including the American National Standard B56.1 Safety

standard for High and Low Lift Trucks. The 1969 version of this standard was incorporated into the OSHA Rules at 29 CFR 1910.78. The subject forklift meets or exceeds the standard, as well as the 2000 version of the standard that was in effect in 2003 when the subject forklift was sold. Raymond generally manufactures a forklift only after receiving an order from one of its independent dealers. The order details the specifications requested by the customer based upon its needs and the environment in which it will operate. Raymond is not involved in the specifications process. Raymond has a Special Features brochure which sets forth options, including rear vertical posts, which may be required in a particular environment. Raymond will not build a customer's forklift until its dealer affirms, in writing, that this brochure has been shared with the customer. The section of the brochure regarding rear vertical posts discusses that there may be environments where the first level horizontal rack beam is higher than the tractor or top of the of the operator's compartment. If this situation exists, then there is a possibility that a forklift could under ride the rack beam and cause an injury. He set forth three alternative ways (contained in an OSHA safety bulletin) that the warehouse racks may be constructed to prevent such under ride and make the rear vertical posts unnecessary. In this case, rear vertical posts actually increases the risk to the operator. The problems they could cause, are set forth in the Special Features brochure. He also noted that Alside, the purchaser of the forklift, is a highly sophisticated forklift user, since it knows its environment of use better than anyone and is a long time purchaser/user of forklift equipment. He confirmed that when the subject forklift left Raymond's control it had passed all necessary quality control tests, including a test that the brakes were functioning properly.

Albert T. Genduso testified as a witness on behalf of the defendant Womack. He has worked as a field technician for defendant Womack for 16 years. He is certified to operate the Raymond 4-D stand-up forklift (as well as others). His job is to perform maintenance on customers' forklifts. Womack had a scheduled maintenance agreement with Alside. Among other things, he would test the brakes and steering. In his estimation, if the dead man pedal is released at six miles per hour, the forklift would stop in two seconds and travel about four feet. When testing the brakes, he would start at a slow speed and work his way up to full speed. He also responded to questions with regard to maintenance reports for the forklift involved in the accident. His maintenance report after the accident lists repairs that were necessary, including the installation of safety bars. He later learned that they were called upright posts. He noted that it was an option that is rarely seen on many forklifts. The forklift needed a few minor repairs but otherwise was in operating condition. The tires were good, the brakes were working, everything was functioning fine. Later an oil leak from a cracked o-ring was found and the brake assembly was replaced at Alside's request. In one of his reports, he noted that the floors in the warehouse were uneven. He also testified that the forklift was meant to be used on a flat surface. He never received any complaints about this forklift prior to the accident. He also never received any complaints about the condition of the floor in the warehouse.

Louis Colletti testified as a witness on behalf of the defendant Nu-Rac. He testified that he is employed by and is the president of Nov-Rac corporation, a property management company. He is also a managing member and part owner of the defendant Nu-Rac. Nu-Rac owns the building located at 1830 Lakeland Avenue, Ronkonkoma, New York, and leased it to Alside beginning in January of 2005. Alside was responsible for general maintenance of the property, but Nu-Rac was responsible for structural repairs to the building, which would be performed upon notice from Alside that a problem existed. The storage racks were placed in the building by Alside. Anytime repairs were needed at the

building, he would send his employee, Kevin Burke, to inspect the problem. No repairs were done to the building between January of 2005 and June 1, 2006, the date of the alleged accident. To his knowledge there were no complaints received with regard to the floor of the building prior to the date of the June 1, 2006. The first time he learned of the accident was in 2008. At that time he went to the building with Kevin Burke, who showed him where the accident occurred. He saw a very small crack in the floor, not even 1/8 of an inch wide, maybe two feet in length. There were no prior lawsuits against Nu-Rac with regard to the building.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Generally, an out-of-possession owner or lessor is not liable for injuries that occur on the premises unless the owner or lessor has retained control over the premises or is contractually obligated to repair unsafe conditions (***Lindquist v C & C Landscape Contrs.***, 38 AD3d 616, 831 NYS2d 523 [2d Dept 2007]; ***Gibson v Bally Total Fitness Corp.***, 1 AD3d 477, 767 NYS2d 135 [2d Dept 2003]. Control of the premises may be established by proof of a promise by the owner or lessor to keep the premises in repair or by a course of conduct demonstrating that the owner or lessor has assumed responsibility to maintain a particular portion of the premises (***Ever Win, Inc. v 1-10 Indus. Assoc., LLC***, 33 AD3d 845, 827 NYS2d 63 [2d Dept 2006]; ***Gelardo v ASTHMA Realty Corp.***, 137 AD2d 787, 525 NYS2d 334 [2d Dept 1988]). Owners may be held liable for injuries arising from a dangerous condition on their property if they created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it (*see* ***Halpern v Costco Warehouse/Costco Wholesale,*** 95 AD3d 828, 943 NYS2d 567 [2d Dept 2012]; ***Sowa v SJNH Realty Corp.***, 21 AD3d 893, 800 NYS2d 749 [2nd Dept 2005]; ***Curiale v Sharrotts Woods, Inc.*** 9 AD3d 473, 781 NYS2d 47 [2d Dept 2004]; ***Patrick v Bally's Total Fitness***, 292 AD2d 433, 739 NYS2d 186 [2d Dept 2002]). In order to constitute "constructive notice" a defect "must be visible and apparent and it must exist for a sufficient length of time prior to the accident" to discover and remedy it (*see* ***Chianese v Meier,*** 98 NY2d 270, 746 NYS2d 657 [2002], *citing* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Negri v Stop & Shop***, 65 NY2d 625, 491 NYS2d 151 [1985]).

The defendant Nu-Rac has established its entitlement to summary judgment. It has submitted testimonial evidence that it had no notice of any need to repair the flooring in the Alside building.

Plaintiffs, in response have failed to submit any evidence that Nu-Rac had either actual or constructive notice of any alleged defect in the floors. It is noted that plaintiffs' allegation that Nu-Rac's witness testified that there was a crack in the floor prior to the date of the accident caused by a broken roof leader is simply without basis in the record. The witness testified as to what he observed during his 2008 inspection of the property. This is not relevant to the accident that occurred in June of 2006. In light of these facts and the applicable law, defendant Nu-Rac is entitled to summary judgment herein.

Raymond and Womack have established their entitlement to summary judgment with regard to the cause of action in the complaint which alleges that the subject forklift was defectively designed. In a strict products liability action against the manufacturer for a design defect, the plaintiff must show that the manufacturer breached its duty to market safe products when it marketed a product designed so that it is not reasonably safe and that the defective design was a substantial factor in causing the plaintiff's injury (***Voss v Black & Decker Mfg. Co.***, 59 NY2d 102, 463 NYS2d 398 [1983]. "A cause of action for negligent design additionally requires that the manufacturer acted unreasonably in designing its products." (***McArdle v Navistar Intern. Corp.***, 293 NY2d 931, 742 NYS2d 146 [3d Dept 2002]; citing ***Voss v Black & Decker Mfg. Co.***, *supra*, 59 NY2d at 107).

In considering whether a product's design was defective, a court must consider: (1) the product's utility to the public as a whole, (2) its utility to the individual user, (3) the likelihood that the product will cause injury, (4) availability of a safer design, (5) the possibility of designing and manufacturing the product so that it is safer but remains functional and reasonably priced, (6) the degree of awareness of the product's potential danger that can reasonably be attributed to the injured user, and (7) the manufacturer's ability to spread the cost of any safety-related design changes (***Denny v Ford Motor Co.*** 87 NY2d 248, 639 NYS2d 250 [1995]; ***Fitzpatrick v Currie***, 52 AD3d 1089, 861 NYS2d 431 [3d Dept 2008]); ***Wengenroth v Formula Equipment Leasing, Inc.***, 11 AD3d 677, 784 NYS2d 123 [2d Dept 2004]).

Here the record establishes that no defect existed when the subject forklift left Raymond's possession and control and that any alleged defect was not the proximate cause of plaintiff's injuries. The American National Standard Institute Regulation B56.1 (incorporated into the OSHA Rules at 29 CFR 1910.78) is the industrial truck safety standard for North America. Rear posts, which Raymond offered as optional equipment, were not required by B56.1 or any state or federal regulations. The standards place the onus on the purchaser of the forklift, who has the most relevant knowledge to determine which safety features are appropriate for the work environment in which it will be used. The existing case law supports this view. The fact that an optional safety device on a product was not made standard does not render a products's design defective, where evidence and reasonable inferences therefrom show that (1) the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available, (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment, and (3) the buyer is in a position, given the range of uses of the product, to balance the benefits and risks of not having the safety device in the specifically contemplated circumstances of the buyer's use of the product (***Scarangella v Thomas Built Buses, Inc.***, 93 NY2d 655, 695 NYS2d 520 [1999]; ***Cordani v Thompson & Johnson Equipment Co., Inc.***, 16 AD3d 1002, 792 NYS2d 675 [3rd Dept 2005). The record establishes that Alside and its parent company, Associated Materials were longtime purchasers/users of forklifts and thus

are highly sophisticated with regard to their use. The subject forklift was purchased in 2003 and in use for more than two years before the plaintiff's accident. Part III of American National Standard Institute Regulation B56.1 states, in relevant part that "[u]nder certain operating conditions, either more or less guarding may be required for safe operation. These operating conditions, as identified by the user shall be addressed in cooperation with the manufacturer." (Emphasis added). Alside was aware that the rear post was an option with regard to this forklift. The record reveals that there were at least three warehouse rack designs available to Alside that not only would have prevented the accident that occurred herein, but would have made even the consideration of rear posts unnecessary. Alside was clearly in the best position to balance the risks of not having the safety device under the circumstances in which the forklift was being used. Furthermore, it was a aware of a similar accident six months prior to the plaintiff's, but chose to do nothing, despite the obvious danger. Legal responsibility, if any, for injury caused by machinery which has possible dangers incident to its use should be borne by the one in the best position to have eliminated those dangers (***Biss v Tenneco, Inc.***, 64 AD2d 204, 409 NYS2d 873 [4th Dept 1978]; ***Patane v Thompson & Johnson Equipment Co., Inc.***, 233 AD2d 905, 649 NYS2d 547 [4th Dept 1996]; *see* ***Scarangella v Thomas Built Buses, Inc.***, *supra*). Thus, it was the negligence of plaintiff's employer, Alside, which led to plaintiff's accident, not a defect in the design or manufacture of the forklift by the defendant Raymond.

The movants Raymond and Womack have established their entitlement to summary judgment with regard to those causes of action in the complaint which allege breaches of express and implied warranties. The evidence submitted establishes the absence of any express warranty upon the which the plaintiffs relied, as well as the absence of contractual privity with the plaintiffs, an essential element to a claim of implied warranty (***Mangano v Town of Babylon***, 111 AD3d 801, 975 NYS2d 130 [2d Dept 2013]; ***Parker v Raymond Corporation***, 87 AD3d 1115, 930 NYS2d 27 [2d Dept 2011]; ***Valley Cadillac Corporation v Dick***, 238 AD2d 894, 661 NYS2d 105 [4th Dept 1997]. Defendants also established that these claims are time barred pursuant to UCC 2-725 (*see* ***Donuk v Sears, Roebuck & Co.***, 52 AD3d 456, 859 NYS2d 701 [2d Dept 2013]; ***Heller v US Suzuki Motor Corp.***, 64 NY2d 407, 488 NYS2d 132 [1985]).

The movants Raymond and Womack have established their entitlement to summary judgment with regard to the cause of action in the complaint which alleges a failure to warn. 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 (***Young v Daglian***, 63 AD3d 1050, 883 NYS2d 75 [2d Dept 2009]; ***Liriano v Hobart Corp.***, 92 NY2d 232, 677 NYS2d 764 [1988]). In order to prevail on a failure to warn theory, a plaintiff must establish that the defendant had a duty to warn, that the duty was breached, and the failure to warn was a substantial or proximate cause of the injury (*see* ***Singh v G & A Mounting and Die Cutting, Inc.***, 276 AD2d 617, 715 NYS2d 320 [2d Dept 2000]). Defendant Raymond has established that it met this duty by providing the owner/operator manual, giving detailed instructions and warnings about the use of the forklift, including the options available and training in the use of the forklift, including the methods of stopping the forklift under normal conditions, and the emergency use of the "deadman" brake. Contrary to the claims of the plaintiff, the plaintiff was, in fact an experienced forklift operator, was certified in the use of the subject forklift, and able to train other employees to also become certified in its use. In addition to this, plaintiff was aware of a similar accident at Alside some six months before. There is no duty to warn against a known hazard (***Glockenberg v Costco Wholesale***

Corporation, 110 AD3d 952, 973 NYS2d 360 [2d Dept 2013]; ***Parker v Raymond Corporation***, *supra;* ***Vail v Kmart Corp.***, 25 AD3d 549, 807 NYS2d 399 [2d Dept 2006]).

The defendant Womack has established its entitlement to summary judgment with regard to the cause of action in the complaint which alleges that it negligently maintained the forklift involved in the subject accident herein. Defendant Womack has submitted evidence showing that there is no evidence of negligence on its part in the record herein. Furthermore, plaintiffs have failed to adduce any evidence of negligence on the part of this defendant in their opposition to these motions (*see* ***Parker v Raymond Corporation***, *supra).*

In response, the plaintiffs' have failed to raise any issue of fact with regard to the defendants Raymond and Womack.

Defendants seek to have the court reject and/or disregard the affidavit of Ben Railsback, the plaintiffs' expert in response to the motions for summary judgment on the grounds that the expert was not disclosed prior to the filing of the note of issue herein (*see e.g.,* ***Construction by Singletree, Inc v J.C. Construction Mgmt. Co.***). The court declines to address that issue because the affidavit is excluded as speculative, conclusory, and not based on facts in the record (*see* ***Delgado v New York City Housing Authority***, 51 AD3d 570, 858 NYS2d 163 [1st Dept 2008]; *see also* ***Castillo v Wil-Cor Realty Co., Inc.***, 109 AD3d 863, 972 NYS2d 578 [2d Dept 2013]; ***Martin v Village of Tupper Lake***, 282 AD2d 975, 723 NYS2d 715 [3d Dept 2001). A number of examples will suffice. Plaintiffs' expert opines that had the brakes and steering of the forklift been more effective, the accident would not have occurred. However, this conclusion is not supported by the record. The plaintiff ran through a checklist of tests prior to using the forklift and found the brakes and steering to be working well. When he took his foot off the "dead man" pedal, the forklift stopped. After the accident, the forklift was checked out by defendant Womack's technician. The steering worked properly and the brakes worked, but had a slight oil leak from a cracked o-ring in the brakes' master cylinder. At that time, the brakes were tested at full speed and the machine stopped in 11 feet instead of the standard 8-10 feet (defendants' expert stated that 10 feet was more accurate). Based on this the expert concludes that the brakes were a cause of the accident. However, the accident occurred when the plaintiff was traveling three to five miles an hour (not top speed of 7 1/2 miles per hour) and was 2 feet or less from the rack into which it crashed. Plaintiff testified that the forklift started to veer into the rack. He first tried to steer out of trouble and, only when that failed, did he release the brake. By that time, it was too late and he went into the rack. Plaintiff testified that he did not know if the steering or brakes malfunctioned. There is no evidence in the record to support a finding that the steering on the forklift malfunctioned in any manner, since it was working properly both before and accident. As to the brakes, plaintiffs' expert fails to establish how the test of the brakes at full speed, after the accident, leads to a conclusion that the brake's failure, at a speed plaintiff described his speed as "slow", as the accident occurred, less than two feet from the rack, was a cause of the accident. The brakes were checked by plaintiff prior to use and were working, there was no error code on the machine's display, which would have indicated a brake problem. Plaintiffs' expert also fails to consider that the brakes may have been damaged as a result of the accident. Nor was consideration given to the possibility that the accident was the result of driver error. Plaintiffs' expert's conclusion is speculative at best, and insufficient to raise an issue of fact.

Next Railsback alleges that it is his "understanding", based on past investigations and the current case, that accident reports received by Raymond's legal department are not shared with its design engineers, which he apparently believes is a breach of industry ethics. Plaintiffs' expert provides not one iota of underlying evidence to show how he came to this "understanding." Railsback opines as to the state of the flooring in the area where the accident occurred based upon photographs he viewed, but these photographs are not submitted with his affidavit. He also asserts that Alside switched to a different type of forklift after the accident. However, the plaintiff's own testimony makes it clear that Alside continued to use the forklift for at least two years after the accident. Railsback contends that accident reports he viewed show that the operators of Raymond forklifts are routinely involved in accidents, yet he provides not a single copy of any such report.

Plaintiffs' expert also claims that Alside was not a sophisticated user of forklifts. This claim is belied by the record. Alside and its parent company, Associated Materials, were large scale, longtime purchasers/users of forklifts. The plaintiff had prior experience with forklifts, was trained and certified in the use the subject forklift worked with it for more than a year, and trained others who became certified. In light of these facts, plaintiffs' expert's assertion is without basis.

As a final example, plaintiff's expert has not disputed defendant Raymond's claim that the forklift involved in this accident was built in compliance with several safety standards, including the American National Standard B56.1, the standard for High and Low Lift Trucks. Instead, he claims that meeting the design standards is only achieving the minimum requirement. Not only does he not provide any factual support for this opinion, but this claim does not comport with the case law (*see* ***McAllister v Raymond Corporation***, 36 AD3d 768, 827 NYS2d 705 [2d Dept 2007] (Expert failed to identify any violation of industry wide standards or accepted practices regarding the design of a forklift, and thus his conclusions with regard to the safety of the forklift were insufficient to raise an issue of fact with respect to the liability of the forklift's manufacturer or distributor); ***Vannucci v Raymond Corporation***, 258 AD2d 198, 693 NYS2d 347 [3d Dept 1999] (Finding that a Raymond standup forklift, with or without the safety posts, met the governing industry standard, and was reasonably safe as designed, leaving the ultimate determination as to whether to install the safety feature to the user of the equipment); *see also* ***Patane v Thompson & Johnson Equipment Co., Inc.***, *supra*). In ***Cordani v Thompson & Johnson Equipment Co., Inc.***, *supra*, the Appellate Division upheld the grant of summary judgment to a forklift manufacturer on the basis that the safety device in question was optional and not standard; the lessee was thoroughly knowledgeable about forklifts and their use, and was aware of available safety options; the forklift met all national and industry standards and was safe for its intended use when properly maintained and operated. The Court went on to state: "[g]iven all these factors, particularly evidence that the dangers of forklifts vary depending on the jobsite (citations omitted), we conclude, as have other courts which have considered the issue (citations omitted), that [the named party], as its purchaser, was in the best position to evaluate the need for any optional safety features (citations omitted)." Such is the case here, and any negligence must be attributed to Alside and not any of the parties herein.

Beyond the rejected affidavit of their expert, plaintiffs have failed to submit any evidence sufficient to raise an issue of fact and, therefore, the defendants Raymond and Womack are entitled to summary judgment dismissing the complaint.

Dated: 2/12/14

THOMAS F. WHELAN, J.S.C.