

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D28769
O/prt

_____AD3d_____

Argued - October 7, 2010

STEVEN W. FISHER, J.P.
FRED T. SANTUCCI
RANDALL T. ENG
SANDRA L. SGROI, JJ.

2009-08019

DECISION & ORDER

Curtis Wallace, respondent, v
Sitma U.S.A., Inc., appellant.

(Index No. 6514/06)

Quirk and Bakalor, P.C., New York, N.Y. (Jeanne M. Boyle of counsel), for appellant.

Sacco & Fillas, LLP, Whitestone, N.Y. (Lamont K. Rodgers of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Kings County (Schmidt, J.), dated June 2, 2009, which denied its motion for summary judgment dismissing the complaint.

ORDERED that the order is reversed, on the law, with costs, and the defendant's motion for summary judgment dismissing the complaint is granted.

The defendant established its prima facie entitlement to judgment as a matter of law dismissing the plaintiff's cause of action alleging that he was injured as a result of a manufacturing defect in the machine he was operating, by demonstrating that the product was not defective when it left its control (*see Mincieli v Pequa Indus., Inc.*, 56 AD3d 627; *Sabessar v Presto Sales & Serv., Inc.*, 45 AD3d 829). In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff failed to come forward with competent evidence demonstrating that the product had a specific flaw which caused the accident or, in the alternative, demonstrating that the machine did not perform as intended while excluding all possible causes for the malfunction not attributable to the defendant (*see*

October 26, 2010

Page 1.

WALLACE v SITMA U.S.A., INC.

Speller v Sears, Roebuck & Co., 100 NY2d 38, 42; *Riglioni v Chambers Ford Tractor Sales, Inc.*, 36 AD3d 785, 786; *D'Auguste v Shanty Hollow Corp.*, 26 AD3d 403, 404).

Further, the defendant established prima facie that the machine was not defectively designed, and it satisfied its duty to warn of latent dangers of the product. In opposition, the plaintiff relied upon an unsworn engineer's report, which was not competent proof of the assertions made therein (see *Peters v Colwell*, 61 AD3d 729, 731). The plaintiff's submissions failed to raise a triable issue of fact as to whether the safety devices of the machine could be disabled without a material alteration of it (see *Lopez v Precision Papers*, 67 NY2d 871; *Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 481), or that the defendant violated any duty to warn.

The defendant also established its entitlement to judgment as a matter of law dismissing the causes of action alleging a breach of an express warranty and a breach of an implied warranty, and the plaintiff failed to raise a triable issue of fact in opposition thereto (see *Denny v Ford Motor Co.*, 87 NY2d 248, 259; *Davis v New York City Hous. Auth.*, 246 AD2d 575, 576).

The plaintiff's remaining contentions are without merit or need not be addressed in light of our determination.

FISHER, J.P., SANTUCCI, ENG and SGROI, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan
Clerk of the Court