

**Tedesco v Warner**

2009 NY Slip Op 33129(U)

December 23, 2009

Supreme Court, Suffolk County

Docket Number: 06-17480

Judge: Peter H. Mayer

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INDEX NO. 06-17480  
CAL. NO. 09-0479-MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. PETER H. MAYER  
Justice of the Supreme Court

MOTION DATE 8-12-09 (#004)  
MOTION DATE 8-10-09 (#005)  
ADJ. DATE 8-26-09  
Mot. Seq. # 004 - MG  
# 005 - MG

-----X  
CORINNE TEDESCO, :  
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 Plaintiff, :  
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 - against - :  
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 :  
 JENNIFER L. WARNER, ELRAC, INC., :  
 ENTERPRISE RENT-A-CAR, INC., and :  
 J.C. PENNEY. :  
 :  
 Defendants. :  
-----X

MEYER, SUOZZI, ENGLISH & KLEIN, P.C.  
Attorneys for Plaintiff  
990 Stewart Avenue, P.O. Box 9194  
Garden City, New York 11530-9194  
  
BRAND GLICK & BRAND, P.C.  
Attorneys for Defendant Jennifer L. Warner  
600 Old Country Road, Suite 440  
Garden City, New York 11530  
  
CARMAN, CALLAHAN & INGHAM, LLP  
Attorneys for Defendant Elrac, Inc. d/b/a  
Enterprise Rent-A-Car, Inc.  
266 Main Street  
Farmingdale, New York 11735  
  
MINTZER SAROWITZ ZERIS LEDVA &  
MEYERS, LLP  
Attorneys for Defendant J.C. Penney  
39 Broadway, Suite 950  
New York, New York 10006

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Elrac, Inc., dated July 10, 2009, and supporting papers (including Memorandum of Law dated \_\_\_); Notice of Motion/Order to Show Cause by the defendant J.C. Penney, dated July 14, 2009, and supporting papers (including a Memorandum of Law dated \_\_\_); (2) Affirmation in Opposition by the plaintiff, dated August 19, 2009 (including a Memorandum of Law dated August 10, 2009, and supporting papers; Affirmation in Opposition by the defendant Jennifer L. Warner, dated August 25, 2009, and supporting papers; Reply Affirmation by defendant Elrac, Inc., dated August 25, 2009, and supporting papers, and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that the motion by defendant Elrac, Inc. is granted; and it is further

**ORDERED** that the motion by defendant J.C. Penney is granted.

Defendant Elrac, Inc. (“Elrac”) moves for an order dismissing a claim by plaintiff Corrine Tedesco (“plaintiff”) and submits copies of the pleadings, the pretrial deposition transcripts of defendant Jennifer L. Warner (“Warner”) and Gregg Perry (“Perry”), a decision of this court dated January 7, 2009, and an Enterprise rental contract dated March 10, 2006. Plaintiff and Warner have submitted affirmations in opposition and Elrac has replied. Defendant J.C. Penney (“J.C. Penney”) also moves for summary judgment and submits copies of the pleadings, an excerpt from plaintiff’s deposition testimony, a copy of a retail tag from a pair of sunglasses, a copy of a pretrial deposition given by Carrie Bevers (“Bevers”), and a memorandum by William Marletta Safety Consultants. Plaintiff and Warner have submitted affirmations in opposition and J.C. Penney has replied. Plaintiff and J.C. Penney have submitted memoranda of law.

The underlying lawsuit arises from a car accident which occurred on March 17, 2006 in Brookhaven, New York. Plaintiff was the owner and operator of a 2002 Mazda. Warner was the operator of a vehicle titled to Elrac. The respective drivers were traveling on the South Service Road of the Sunrise Highway in opposite directions and collided in the westbound lane of the Service Road. Warner owned a 2003 Kia which, at the time of the accident, was being serviced at a body shop. The Kia was insured by Geico Insurance Company. Warner rented a car from Elrac on March 10, 2006 and indicated that she was licenced to drive provided she did so while wearing corrective glasses. She also provided information with respect to her automobile insurance coverage. The car rental agreement, which Warner signed, included a provision requiring the driver to certify that her driver’s license was valid.

Elrac seeks summary judgment as to plaintiff’s third cause of action claiming that it was negligent in renting a vehicle to an unlicensed driver. It points to the testimony of Perry, the regional loss manager for Elrac, during which he described the company-mandated steps taken by Elrac representatives when renting vehicles to its customers. Specifically, according to Perry, it was the policy of Elrac to require its employees to input information appearing on the face of a customer’s driver’s license into its computer system. According to Perry’s testimony, Elrac did not have a computer database which would have enabled an Elrac employee at a rental location to determine whether a customer’s driver’s license was suspended. Such information was available, however, according to Perry, at the loss control location and was used for obtaining insurance information from damaged vehicles after an accident. It is Elrac’s position that its business practice of requiring customers to both present facially valid drivers’ licenses and to confirm that the licenses were valid by having the customer sign the acknowledgment section of the rental agreement satisfied its obligation to ensure that it rented vehicles only to competent drivers. Elrac further contends that it was under no duty to investigate Warner’s status as a licensed driver. Elrac also claims that plaintiff cannot show a proximate cause between its alleged breach of a duty and the accident.

Most significantly, Elrac relies upon a determination by this court in the context of the underlying proceeding, *Tedesco v Warner, Elrac, Inc. Enterprise Rent-A-Car, Inc. and J.C. Penny,*

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Mayer, J., Supreme Court, Suffolk County, January 9, 2009. There the issue addressed was an application by plaintiff to amend her complaint to include a claim for punitive damages based upon an allegation that Elrac's actions manifested a high degree of moral culpability or flagrant, willful, or wanton negligence or recklessness. Specifically, Elrac points to the language of the decision in which it is noted that "the evidence suggests that prior to renting its vehicle to defendant, Jennifer L. Warner, Ms. Warner presented a facially valid New York State driver's license to Enterprise. The plaintiff wishes to amend her complaint to add a claim for punitive damages on the theory that Enterprise did not independently investigate and verify that Ms. Warner's license was not suspended when she presented it to Enterprise at the time of the vehicle rental. Pursuant to Vehicle and Traffic Law § 509(4), the owner of a motor vehicle shall not *knowingly* authorize or permit his or her vehicle to be operated by one who is not a licensed driver. The plaintiff has failed to submit any evidence to show that Enterprise either knowingly rented its vehicle to Ms. Warner while her license was suspended, or that Enterprise had an affirmative duty to conduct an independent investigation to verify the validity of an otherwise facially valid driver's license (emphasis in the original)."

Plaintiff, by her opposition, disputes Elrac's assertion that it was under no duty to investigate a prospective renter's driving record. Specifically, she claims that Elrac's actions in renting a car to Warner violated New York Vehicle and Traffic Law 509(4), which prohibits a car owner from permitting an individual who does not have a valid driver's license to operate its car. Plaintiff also contends that Elrac has failed to sustain its burden in the context of a summary judgment application.

Warner, by her opposition, "[f]or purposes of judicial economy, . . . incorporates and adopts the facts and legal arguments set forth in the opposition papers by plaintiff's counsel . . ." She also notes the oft quoted truism that summary judgment is a "drastic" remedy only to be employed in the absence of a triable issue.

Plaintiff's sole cause of action against Elrac is for negligence premised upon its alleged duty to investigate the status of Warner's driver's license. The so-called Graves Amendment (USC § 30106 [a][1] and [a][2]) provides that an owner of a rental vehicle shall not be liable under state law for harm to persons or property resulting from the use, operation or possession of the vehicle during the rental period. Plaintiff, by her cause action, seeks to impose a duty upon Elrac to research its customers' driving histories beyond verifying the existence of a valid driver's license. Inasmuch as no such obligation exists, plaintiff's complaint, as to Elrac must be dismissed.

J.C. Penney, by its motion, seeks dismissal of plaintiff's third and fourth causes of action based on her allegation that the sunglasses which she was wearing at the time of her accident "broke and shattered[,] causing severe eye injury." Plaintiff claims to have purchased the sunglasses at J.C. Penney. J.C. Penney points, in part, to the respective testimony given by plaintiff and Bevers, an accessory buyer for J.C. Penney. According to plaintiff, she purchased the sunglasses in February 2006 at a store in Bay Shore, New York. Beavers testified that she, on behalf of J.C. Penney, determined the brands of sunglasses which the store would carry. According to Bevers, in the event a particular brand was national, J.C. Penney would not conduct an independent evaluation as to the safety of the glasses nor would the "breakability" of the glasses be taken into consideration because it was believed that the manufacturer of the product would follow applicable guidelines. J.C. Penney, according to Bevers, did

not promulgate guidelines which were different from those employed by a given manufacturer. Nor did it, according to Bevers, make any representations with respect to whether the glasses were suitable for driving. J.C. Penney did not make any guarantees or warranties concerning the sunglasses nor did it place its own labels on the glasses.

J.C. Penney also addressed, in the context of the instant application, a report by Leo DeBobes (“DeBobes”), plaintiff’s expert. DeBobes concluded that in his “professional opinion within a reasonable degree of certainty [the glasses] were the direct and proximate cause of [plaintiff’s] injury.” The injury allegedly occurred when the glasses shattered when plaintiff’s air bag deployed upon impact with Warner’s vehicle. As noted by J.C. Penney, DeBobes’s analysis included a comparison between plaintiff’s glasses and a nearly identical pair of glasses. It is J.C. Penney’s position that DeBobes failed to conduct any tests which would have provided a basis for his conclusion that the glasses were “defective and . . . not commensurate with the reasonably anticipated hazard associated with front impact airbags.” J.C. Penney also notes that in actions pleaded in strict products liability, breach of warranty or negligence, it is plaintiff’s burden to establish that the alleged product defect was a substantial factor in causing the claimed injury citing *Clark v Helene Curtis*, 293 AD2d 701 [2002]). It also sets forth the “cornerstone rule” in products liability cases that the existence of injury, standing alone, does not establish a basis for an inference that the product was defective for its intended use citing *Olsovi v Salon DeBarney*, 118 AD2d 839 (2003). Although DeBobes’s claimed expertise is in the field of product safety, J. C. Penney notes that his report was based solely on observations of the shattered sunglasses worn by plaintiff at the time of her accident and another pair of similar glasses purchased at the store after the accident and are unsupported by testing. It thus contends that DeBobes’s conclusions are simply speculative. In addition, J.C. Penney points to the language used by DeBobes in his report particularly his somewhat equivocal assertion that the sunglasses were defective because the screws in the lens “may” weaken. It is also claimed that although DeBobes articulated industry standards with respect to sunglasses, he failed to demonstrate how, if at all, the plaintiff’s glasses did not comport with those standards. For the same reason, J.C. Penney claims that DeBobes has failed to support his allegation that purchasers of the glasses were not provided with adequate warnings or that they were defective when sold.

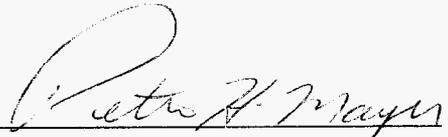
Plaintiff, by her opposition, argues that summary dismissal is inappropriate inasmuch as it is impossible to conclude, as a matter of law, that she was “fully aware of the danger” of the sunglasses. She also contends that reliance upon an attorney’s affidavit is insufficient to rebut her expert’s opinion. In addition, plaintiff refers to “The Guidance Document for Nonprescription Sunglasses.” The text of that document was supplied by J.C. Penney in its reply. Warner, too, opposes J.C. Penney’s motion and relies both on plaintiff’s arguments and an affidavit by DeBobes.

It is plaintiff’s burden, as a consumer of the allegedly defective product, to show that the defect was a substantial factor in causing her injury (*see Rizzo v Sherwin-Williams Company*, 49 AD3d 847 [2008]). The threshold question here is whether the opinion proffered by plaintiff’s expert is unsupported by foundational facts and, therefore, without probative value (*see D’Auguste v Shanty Hollow Corp.*, 26 AD3d 403, 405 [2006]). Foundational facts include the results of actual testing, an articulated deviation from industry standards, or statistics demonstrating the frequency of consumer complaints or injuries resulting from the alleged product defect (*see Castro v Delta Intern. Machinery*

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*Corp.*, 309 AD2d 827 [2003]). It does not appear that any such foundational facts were relied upon by plaintiff's expert in formulating his opinion. In addition, as noted by J.C. Penney in its reply, the reliance by an expert upon guidelines is of no moment inasmuch as guidelines are not rules and do not establish the existence of an accepted industry standard (see *Diaz v New York Downtown Hospital*, 99 NY2d 542 [2002]). Also, as noted by J.C. Penney, the guidelines themselves undermine plaintiff's position with respect to her allegation that she was unaware of the potential hazard because it states, in pertinent part, that "nonprescription sunglasses can usually be marketed without comprehensive directions for use because their common uses are generally known to the ordinary individual." The motion by J.C. Penney is granted.

Dated: 4/29/09

  
PETER H. MAYER, J.S.C.