

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

	x		Index Number <u>19558</u> 2006
FRANK SCACCIA,			
Plaintiff,			Motion Date <u>December 3,</u> 2008
-against-			
UNITED SANITATION, INC., and JAMCO IRON WORKS OF QUEENS, INC.,			Motion Cal. Numbers <u>28, 29</u>
Defendants.			Motion Seq. Nos. <u>1, 2</u>
	x		
UNITED SANITATION, INC.,			
Third-Party Plaintiff,			
-against-			
JAMCO IRON WORKS OF QUEENS, INC.,			
Third-Party Defendant.			
	x		

The following papers numbered 1 to 23 read on this motion by United Sanitation, Inc. (United), to dismiss the claims and cross claims against it pursuant to CPLR 3212; on this motion by Jamco Iron Works of Queens, Inc. (Jamco), for summary judgment in its favor dismissing all claims and cross claims against it pursuant to CPLR 3212; and on this cross motion by plaintiff to amend/clarify his bill of particulars, nunc pro tunc.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-8
Notice of Cross Motion -Affidavits- Exhibits.....	9-12
Answering Affidavits - Exhibits.....	13-21
Reply Affidavits.....	22-23

Upon the foregoing papers it is ordered that the motions are decided as follows:

Plaintiff in this negligence action seeks damages for personal injuries sustained on October 10, 2005, when plaintiff fell off of

a dumpster while jumping up and down inside of the dumpster in order to compact the rubbish therein. Plaintiff sued United Sanitation, Inc. (United), as the alleged owner, provider and service company for the dumpster, and Jamco Iron Works of Queens, Inc. (Jamco), as the alleged manufacturer of the said dumpster. United moves for dismissal of all claims and cross claims against it on the grounds that the product at issue was not defective and was not the proximate cause of the alleged accident. Jamco moves to dismiss the complaint and all cross claims against it on several grounds, including that there was no defect in the dumpster nor was there a failure to warn plaintiff of a hazard of which he was aware, to wit, that the rolling dumpster would roll. Plaintiff opposes the motions, and cross moved to amend his bill of particulars, nunc pro tunc.

Motion by United

Plaintiff alleges that defendants were negligent in furnishing him with a defective dumpster. The defects alleged are that the dumpster was not equipped with wheel locks and did not contain a warning against mounting the dumpster in order to compress garbage/refuse that had been placed inside of it. In every products liability action, whether based on negligence or strict liability, "it is a plaintiff's burden to show that a defect in a product was a substantial factor in causing the injury" (Clarke v Helene Curtis, Inc., 293 AD2d 701 [2002]; Ramirez v Sears, Roebuck & Co., 286 AD2d 428 [2001]). The plaintiff "must demonstrate, at a minimum, that [his] injuries are the direct result of the [product] . . . and that the product is the sole possible cause of those injuries" (Clarke v Helene Curtis, Inc., supra at 743. Also, at the time of the incident, the product must have been used for the purpose and in the manner normally intended, or in a manner reasonably foreseeable (Codling v Paglia, 32 NY2d 330 [1973]. If there was an intervening act that was "extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from defendant's conduct, it may well be a superceding act which breaks the causal nexus (Derdiarian v Felix Contracting Corp., 51 NY2d 308 [1980]).

Here, the record reveals that plaintiff's own conduct was the substantial factor which caused the subject accident to occur. It is undisputed that plaintiff climbed up on top of the garbage that was within the dumpster and proceeded to jump up and down in order to compress the garbage; and that while plaintiff was jumping up and down, the dumpster and/or the garbage allegedly moved, causing plaintiff to sustain injury. Furthermore, plaintiff's evidence is inconsistent and speculative in identifying the defect allegedly causing his injury and failed to establish the existence of such defect or that United had actual or constructive notice of it (see

D'Ambra v New York City Transit Auth., 16 AD3d 101 [2005]). Plaintiff's testimony that the dumpster rolled and he fell as a result provides nothing more than mere speculation as to the cause of the accident and is of no probative value in establishing that United created or had notice of the alleged hazard. Notably, the photographs of the dumpster reproduced in the record fail to depict any dangerous or defective condition, and plaintiff did not submit any expert evidence or other competent proof in support of his claim of a defective wheel. It is a consumer's burden to show that a defect in the product was a substantial factor in causing the injury" (Tardella v RJR Nabisco, 178 AD2d 737 [1991]; see Santorelli v Apple & Eve, 282 AD2d 731, 732 [2001]). Accordingly, the motion by United for summary judgment in its favor is granted.

Jamco Motion

A manufacturer who places into the stream of commerce a defective product which causes injury may be liable for such injury (see Codling v Paglia, *supra*). A defect in a product may consist of a mistake in manufacturing, an improper design or the inadequacy or absence of warnings for the use of the product (*id.*; Micallef v Miehle Co., 39 NY2d 376 [1976]; Torrogrossa v Towmotor Co., 44 NY2d 709 [1978]). For there to be a recovery for injuries or damages occasioned by a defective product, however, that defect must have been a substantial factor in bringing about the injury or damage and additionally, among other things, at the time of the occurrence, the product must have been used for the purpose and in the manner normally intended or in a manner reasonably foreseeable (Codling v Paglia, *supra*).

To succeed on a motion for summary judgment involving a claim for strict products liability, a defendant must show prima facie that its product was not defective or that there were other causes of the accident not attributable to it (see Sabessar v Presto Sales & Serv., Inc., 45 AD3d 829 [2007]). If a defendant submits any evidence that the accident was not necessarily attributable to a defect, the plaintiff then must produce direct evidence of a defect (see Riglioni v Chambers Ford Tractor Sales, Inc., 36 AD3d 785 [2007]). Jamco established its prima facie entitlement to judgment as a matter of law regarding the strict products liability cause of action by demonstrating that the dumpster was not defective and was functioning in accordance with industry standards. Indeed, Jamco contends that the act of plaintiff jumping up and down in the dumpster which he knew rolled, was the sole proximate cause of his injury and, therefore, the complaint must be dismissed as against them (see Smith v Stark, 67 NY2d 693 [1986]; Boltax v Joy Day Camp, 67 NY2d 617 [1986]; Howard v Poseidon Pools, 72 NY2d 972 [1988]).

In opposition, plaintiff failed to raise a triable issue of fact (see Ramos v Howard Indus., 10 NY3d 218 [2008]). Again, other than plaintiff's conclusory allegations, he submitted no evidence (e.g. expert affidavit) demonstrating how the dumpster was defectively manufactured.

Furthermore, it is well settled that "there is no necessity to warn a customer already aware--through common language or learning--of a specific hazard'" (Oza v Sinatra, 176 AD2d 926 [1991]; Landrine v Mego Corp., 95 AD2d 759 [1983]). In other words, users need not be warned of obvious dangers, i.e., those dangers which they would have or should have "appreciated to the same extent as a warning would have provided'" (Caris v Mele, 134 AD2d 475, 476 [1987]; see e.g. Smith v Stark, *supra*). Because the danger of the dumpster rolling was obvious, particularly in light of plaintiff's working experience with the dumpster and his attendant familiarity with the use of the dumpster to roll the debris-filled container to the street for pick-up, it cannot be seriously contended that Jamco owed a duty to warn him that the dumpster could roll. Moreover, the record reflects that plaintiff himself utilized the dumpster on a regular basis for several years before the accident without any difficulty, complaint, or injury (see Martinez v Roberts Consolidated Industries, Inc., 299 AD2d 399 [2002]). Accordingly, the motion by Jamco to dismiss all claims and cross claims against it is likewise granted.

Cross Motion

Plaintiff's cross motion to amend/clarify his bill of particulars, nunc pro tunc, is denied. Specifically, plaintiff seeks to amend his bill of particulars to now assert that the dumpster was dangerous because of a defective wheel. All pleadings up to this point in time contained allegations made by plaintiff concerning a products liability claim against the defendants, without any claims concerning "general negligence" or lack of maintenance/repair. Specifically, in the verified bill of particulars, plaintiff asserts the following:

the defendant, UNITED SANITATION, INC., was negligent in furnishing a dangerous and defective dumpster to Cloos Auto Collision, Ltd., which was defective by reason of the fact that it did not contain a lock on the wheels to prevent it from rolling and did not contain warnings against mounting the dumpster to compress refuse which it is claimed was a foreseeable use of the dumpster and which posed a risk of personal injury if the dumpster moved while a person was on the dumpster attempting to compress the refuse.

There were no prior claims concerning a bent or broken wheel on the dumpster, nor any allegations of negligence involving the maintenance of the dumpster. Indeed, plaintiff did not amend his claims at the close of discovery and instead filed the Note of Issue and Certificate of Readiness thereby indicating to defendants that he would be proceeding forward with the intention of proving the claims made in his Verified Bill of Particulars. Plaintiff now belatedly seeks to have his verified bill of particulars amended, nunc pro tunc.

Defendant opposes the cross motion on the ground that it is prejudicial at this juncture in that plaintiff is now asserting a new theory of liability not raised either in the complaint or in the original bill of particulars and now improperly asserted on the eve of trial (see Barrera v City of New York, 265 AD2d 516 [1999]). While leave to amend a bill of particulars is ordinarily to be freely given in the absence of prejudice or surprise (see CPLR 3025[b]), when, as here, leave is sought on the eve of trial, judicial discretion in allowing such amendments should be discrete, circumspect, prudent, cautious and exercised sparingly (see Cohen v Ho, 38 AD3d 705 [2007]; Glickman v Beth Isr. Med. Center-Kings Highway Division, 309 AD2d 846 [2003]; Torres v Educational Alliance, 300 AD2d 469, 470 [2002]). Moreover, where, as here, there has been an unreasonable delay in seeking leave to amend, the plaintiff must establish a reasonable excuse for the delay and submit an affidavit to establish the merits of the proposed amendment (see Torres v Educational Alliance, supra; Volpe v Good Samaritan Hosp., 213 AD2d 398 [1995]). In this case, the plaintiff failed to satisfy either requirement. In any event, substantial prejudice to the defendants is apparent in that the amendment seeks to add a new theory of recovery which was not readily discernible from the allegations in the complaint and the original bill of particulars (see Leon v Central Gen. Hosp., 156 AD2d 338 [1989]).

Conclusion

Accordingly, based upon the foregoing, the respective motions by defendants United Sanitation, Inc. and Jamco Iron Works of Queens, Inc. (United), to dismiss the claims and cross claims asserted against them, pursuant to CPLR 3212, are granted. The complaint and all cross claims hereby are dismissed. Plaintiff's cross motion to amend his bill of particulars, nunc pro tunc, is denied.

Dated: March 25, 2009

J.S.C.