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Short Form Order
NEW YORK SUPREME COURT -QUEENS COUNTY

Present: Hon. JOHN A. MILANO, PART IAS 3
Justice

-----x Index # 2511/96
KENNETH KHAN & PATRICK KHAN,
Plaintiff, Motion date: 10/2/01
-against-
SHIV RAGHUNAATH & SEARS Cal. # 18
ROEBUCK & CO.
Defendants.

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The following papers numbered 1 to 14 read on this motion for summary judgment.

N/M, AFF., EXHIBITS A-J AND SERVICE	1-4
AFF. IN OPP., EXHIBIT A AND SERVICE	5-7
MEMO OF LAW AND SERVICE	8-9
REPLY, EXHIBITS A-C AND SERVICE	10-12
SUR-REPLY AND SERVICE	13-14

Upon the foregoing papers it is ordered that this motion is decided as follows:

This is an action commenced by plaintiff to recover for personal injuries sustained when his fingers were injured when they came into contact with the blade of a spinning power saw. Plaintiff was helping hold some wood for his neighbor, defendant Shiv Raghunauth, the saw operator, when plaintiff's fingers contacted the saw blade. Defendant Sears and Roebuck is the party who sold the saw to Raghunauth.

Sears has now moved for summary judgment alleging, essentially, that plaintiff has established, not a scintilla of evidence against it. Sears is, however, what is commonly known as a "deep pocket".

Before addressing the legal issues herein, this court feels it to be appropriate to set forth some of the history of this motion. The original motion brought by Sears consisted of an attorney's affidavit, supported by pleadings, Bill of Particulars, deposition testimony, photographs, and documentary evidence. The thrust of the motion was to establish what Sears believed to be the inadequacies of plaintiff's case.

Plaintiff's affidavit in opposition consisted of an affidavit of plaintiff himself. Plaintiff, first contends that he did not understand circular saws sufficiently enough to know that one must

keep one's fingers away from the spinning blade. Plaintiff then changes gears and testifies about design defects of the saw as if he were a circular saw design engineer. Attached as exhibits were photographs and technical specifications of a number of saws which incorporated the design modifications suggested by the plaintiff. A memorandum of law in opposition to the motion was also submitted by plaintiff's counsel. Although the memorandum properly addressed legal issues, these legal arguments were based largely on technical claims concerning alleged failure to warn, defective design and defective manufacture. While failure to warn, defective design and manufacture are legal issues, they must be based on expertise in the area of circular saw mechanics, design and manufacture. The underlying facts to support plaintiff's legal theories are more properly set forth by a court qualified expert rather than plaintiff or his counsel. Especially, a plaintiff who is pleading total and complete ignorance as a basis for his claims.

In reply to the arguments raised in plaintiff's opposition papers, Sears responded with an affirmation of its counsel, supported by an affidavit of an expert, the Manager of Product Safety for the manufacturer of the saw.

Ordinarily, this court would not countenance an expert's affidavit appearing for the first time in a motion reply. Under usual circumstances, this would preclude the other party from responding to the expert affidavit. However, predicated upon the contents of plaintiff's opposition this court allowed the expert affidavit contained in the Sears' reply. It seemed to this court that there was no other way for Sears to respond to the arguments of plaintiff except by expert testimony.

A lengthy conference was held in court on the return date of this motion. This court believed that plaintiff should have an opportunity to respond to the Sears' expert's affidavit in the form of a sur reply. It was made crystal clear to both counsel that plaintiff's sur reply was to be a brief, perhaps three or four page affidavit in response only to the technical issues raised in the three and one half page Sears' expert's affidavit. There were to be no new issues raised or a rehashing of plaintiff's prior arguments.

Notwithstanding these crystal clear guidelines, plaintiff had the temerity to submit a nineteen page sur reply which was designed to bolster the entirety of plaintiff's prior statements. No expert's affidavit was submitted. The sur reply consisted only of plaintiff counsel's affirmation.

Sears vigorously objected. The objection was noted with the court advising that only after reviewing the submitted papers could it rule on the propriety of plaintiff's sur reply. Clearly however, plaintiff did not comply with the court's direction and plaintiff counsel's behavior can only be deemed to be "dirty pool" or "sharp practice".

Turning now to the merits of this motion, this court has reviewed the pleadings, Bill of Particulars, deposition testimony and other evidence as well as the Sears' counsel's arguments. This court finds that Sears has made a prima facie showing that there is insufficient legally sustainable evidence to support a finding of liability against Sears.

As such, the burden has now shifted to plaintiff to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. See Prince v. Di Benedetto, 189 AD2d 757, 592 NYS 388 2d(2nd Department, 1993).

It is clear that the wood which was being cut was not supported and or clamped as required for safe operation of the saw. This can not in any way be imputed against Sears who clearly set forth proper support and clamping procedures in their manual.

Plaintiff testified that the saw "kicked back" causing his injury. A "kick back" is a recognized cause of injuries arising out of power saw use. One of plaintiff's theories of improper design and manufacture is that the saw should have been supplied with a "riving knife". A riving knife is a mechanical device designed to minimize the possibility of "kick back".

Thus, evidence of a kickback would help to establish a predicate for plaintiff's theory of a design and/or manufacturing defect. Co defendant Raghunauth testified that there was no kick back. This is in essence an admission against interest. A kick back could be argued to be an unexpected occurrence which caused the injury. In the absence of a kick back it can be claimed that Raghunauth simply ran over the plaintiff's fingers with the saw. Were Raghunauth motivated to lie to avoid liability, he would be tempted to testify as to a kick back.

Plaintiff would be similarly motivated to testify that a kick back occurred were he to disregard his oath to tell the truth. Ordinarily, "it is improper to resolve questions of credibility on a summary judgment motion, unless it clearly appears that the issues are 'not genuine, but feigned". (Glick and Dolleck v Tri-Pac Export Corp., 22 NY 2d 439,441)." Con Ed v Jet Asphalt Corp., 132 AD2d 296, 299 (1st Dept, 1987). In this case, plaintiff who claims not to know enough to keep his fingers out of the way of a power saw also testifies as to proper design

features of such saw as well as identifying the phenomena of “kick back”.

The issue of whether a kick back occurred or not is insufficient, in and of itself, to defeat a motion for summary judgment. However, notwithstanding the *Con Ed vs Jet Asphalt* decision, this court will provide every favorable inference to plaintiff, the party opposing summary judgment, and will not rule, as a matter of law, that plaintiff has “feigned an issue”. However, this court remains skeptical of plaintiff’s contention.

Establishing that the saw “kicked back” would only be a preliminary step in establishing defective design and/or manufacture. Plaintiff would also have to establish that Sears did not act reasonably in attempting to minimize the danger of “kick back”. To establish this issue, plaintiff must present competent and credible evidence. Sears contends that such competent and credible evidence must be presented by an expert and not by plaintiff or his counsel. Although the vast majority of reported cases support the Sears position, this court will again provide every favorable inference to plaintiff and consider the case cited by plaintiff on this issue. That case is Jackson v Melvey, et al., 56 AD2d 836 (2nd Dept., 1977). Plaintiff cited the portion of that decision that stated “we reject GM’s contention that, absent expert testimony, or at least some competent direct evidence of a defect, the lay testimony herein was insufficient to establish a prima facie case against it. No doubt utilization of expert testimony is the rule rather than the exception in this type of case, but, in the end, each case must be judged upon its own facts. (citations omitted)” This court agrees that every case must be judged on its own facts. As set forth in *Jackson v Melvey*, circumstantial evidence can sometimes be used in defective products cases. However, in the particular case, sub judice, plaintiff and his counsel are simply not qualified to present competent evidence to establish insufficient warnings or design and/or manufacturing defects.

As an example that plaintiff and his counsel are not competent to present evidence in this area of expertise, consider plaintiff’s submission of the aforementioned photos and specification sheets of a number of circular saws which incorporate design features consistent with plaintiff’s contentions. These saws all include an anti kickback riving knife. Conspicuous on the bottom of each of these product sheets is a Universal Resource Locator or URL. In layman’s terms a URL is an address on the Internet. These product sheets were obviously downloaded from the World Wide Web. The World Wide Web or Internet includes content from all over the planet. It is not

limited to content from the United States. The saws submitted as examples of what plaintiff considers proper are not products for use in the United States. The sites from which these product sheets were downloaded contain in their URL addresses, the designation “uk” or “jp”. As such, the saws which came from uk retail sites are offered for sale in the United Kingdom and the “jp” sites are Japanese. The Hitachi C 6 DD, which is the only saw which comes from a site which does not contain “uk” or “jp” in its URL address specifically sets forth in its specifications that it is a “Saw for Europe”.

The credible and competent affidavit from the Sears expert advises that no saw in the United States comes with a riving knife because the presence of a riving knife would prevent such saws from passing the stringent Underwriters Laboratory tests which are required in the United States, but not in other parts of the world. Plaintiff was given every opportunity to rebut the Sears expert’s affidavit but plaintiff chose not to retain an expert.

Again, providing every favorable inference to plaintiff this court will conclude that plaintiff’s arguments based upon technology not applicable to saws available in this country is due to the lack of any expertise on the part of plaintiff. The alternative would be a finding that plaintiff was deliberately attempting to mislead the court.

Thus, this court finds that unlike the Jackson v Melvey case, the facts in this particular action lend themselves to expert testimony. Plaintiff contends a lack of warnings about the danger of allowing one’s hands to come in contact with a spinning saw blade. The users’ manual and the saw itself are replete with such warnings. Plaintiff’s contention that the warnings provided by Sears are inadequate, absent expert testimony or some other form of competent and credible evidence are nothing more than the plaintiff’s layman opinion. Plaintiff is entitled to his own opinion but it is not sufficient to sustain a Supreme Court law suit.

The same would apply to plaintiff’s opinions concerning the claims of design and/or manufacturing defects.

Plaintiff is certainly free to claim that the co defendant Raghunauth may have breached a duty as the owner/operator of the saw. While plaintiff can not be charged with a duty to read the saw operator’s manual, with its included warnings, Raghunauth, as the owner/operator of the saw may be liable for not passing those warnings on to plaintiff.

Raghunauth has not responded to this motion and as such, the action against him is not

affected by this decision. Sears, however, as the movant herein, is entitled to summary judgment. All claims made against defendant Sears are accordingly dismissed.

Dated _____

John A. Milano J.S.C.