Rogers v Cosco, Inc.
2002 NY Slip Op 30050(U)
April 29, 2002
Supreme Court, New York County
Docket Number:
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

EILEEN T. ROGERS

- v -

COSCO, INC.

INDEX NO. 111515/97

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

SCANNED
MAY 13 2002

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 4/29/02

J.S.C.

EMILY JANE GOODMAN

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 17
.... X
EILEEN T. ROGERS and STEPHEN ROGERS,

Plaintiffs,

-against-

Index No. 111515/97

COSCO, INC., ODD JOB TRADING CORP. d/b/a
ODD JOB TRADING,

Defendants.
---X

EMILY JANE GOODMAN, J.:

Defendants move pursuant to CPLR 4404 (a) to set aside the jury's verdict, rendered on November 20,2001, on the grounds that it is contrary to law and against the weight of the evidence. Plaintiffs oppose this motion.

This action arose out of an accident which occurred at Plaintiffs' home on August 4, 1996. At the time of the accident, Plaintiff Eileen Rogers was using a Model 11-792 step stool (hereafter "step/stool"), manufactured by Defendant Cosco, Inc. (hereafter "Cosco") and purchased from Defendant Odd Job Trading Corp (hereafter "Odd Job"). The accident occurred when Mrs. Rogers stepped from the lower step of the stool onto the seat to arrange curtains in her living room. The seat tilted, causing her to fall to the floor and sustain a displaced impacted fracture of the right humerus.

Defendants contend that the verdict should be set aside because (1) the jury's findings were inconsistent, (2) the Court erred in giving a missing witness charge, (3) there was no evidence of Odd Job's negligence, (4) the Court erred in declaring Paul Glasgow, P.E., an expert, (5) there was no evidence that Cosco failed to adequately warn Plaintiff Eileen Rogers, and (6) there was no evidence that Mrs. Rogers would have heeded the warnings. The Court finds that Defendants failed to establish that the jury verdict should be set aside.

Reconsideration of a jury verdict "must be exercised with caution since, in the absence of an indication that substantial justice has not been done, a litigant is entitled to the benefit of a favorable verdict" (Brown v Taylor, 221 AD2d 208,209 [1st Dept 19951). To set aside a jury's verdict, there must exist "no valid line of reasoning and permissible inferences" which could lead rational persons to the conclusion reached by the jury on the basis of the evidence at trial (Cohen v Hallmark Cards. Inc., 45 NY2d 493,499 [19781). Furthermore, the movant must demonstrate that the preponderance of the evidence so greatly favors its position that the verdict could not have been reached on any fair interpretation of the evidence (see, Niewieroski v National Cleaning Contractors, 126 AD2d 424,425 [1st Dept 1987]; Chisholm v Madison Sauare Garden Center. Inc., NYLJ, May 8,2001, at 19, col 1). Evidence must be construed in the light most favorable to the non-moving party (see, Mirand v City of New York, 84 NY2d 44, 50 [19941).

Inconsistent Findings

Defendants argue that the jury's finding that Cosco was negligent in the manufacture of the step/stool was inconsistent with the finding that the step/stool was not defective and was reasonably fit for its ordinary purpose (see, Affirmation In Support of Motion [hereafter "Aff In Supp"] at para 4). Defendants further argue that the jury's finding that Cosco was negligent in failing to give adequate warning was inconsistent with the finding that Plaintiff Eileen Rogers could have, by the reasonable use of care, discovered the defect and avoided her injury (see, Aff In Supp at para 5).

Any question as to the inconsistency of the jury's findings must be raised before the jury is released in order to allow the Court the opportunity to cure the verdict by re-submission (=, Barry v Manglass, 55 NY2d 803, 806 [1981]; Gribbon v Missionary Sisters of the Sacred Heart, 244 AD2d 185 [1st Dept 19971). Moreover, the alleged inconsistency must be raised with specificity (Barry. supra, at 806 [defendant waived claim that the jury's finding on breach of warranty was inconsistent with the finding on strict liability, despite having argued at trial that the verdict on strict liability was inconsistent with the verdict on negligence]). After the verdict was taken, and prior to discharging the jury, the Court asked the attorneys whether they required anything else of the jury (Tr at 455). Both attorneys responded in the negative and accordingly, the jury was discharged (Tr at 456). Defendants' counsel's statement, "[w]ell, what was negligent–if the steps weren't defective, then it seems to me to be inconsistent" was made

after the jury was discharged and lacked the requisite specificity (Tr at 457). Accordingly, as Defendants first raised the issue after the jury was discharged and failed to raise it with specificity until Defendants' post-trial motion, any inconsistency cannot serve as a predicate for reversal (see. Barry, supra, at 806). Moreover, even if the issue was timely and adequately raised, there is no inconsistency with the jury's finding that Cosco was negligent because of its failure to warn and the finding that Mrs. Rogers could have avoided her injury by the use of reasonable care. A finding of comparative fault does not translate into a finding that Mrs. Rogers was aware of the danger such that there could be no liability imposed upon Cosco for failure to warn.

Missing Witness Charge

Odd Job, the retailer, did not produce any witness to testify on its behalf. Defendants claim that the jury may have found that Odd Job was negligent because of the Court's missing witness charge concerning Harold Snyder (see, Memorandum of Law Submitted in Support of Defendant's Motion To Set Aside Verdict at 4-5 [hereafter "Def Mem"]). Defendants argue that the charge was improper because although Howard Snyder was the manager of the Odd Job store which sold the step/stool at the time that he was subpoenaed in July, 2001, he was no longer so employed at the time of trial (Def Mem at 4-5). Accordingly, Defendants, who did not contest the validity of the subpoena, contend that Mr. Snyder was not under Odd Job's control, and further, that there was no proof that he possessed relevant information.

[* 6]

Plaintiffs' attorney indicates that it was only after the start of trial that Defendants' counsel informed him that Mr. Snyder was no longer employed by Odd Job (see, Affirmation In Opposition at 11). Defendants' counsel admitted that he was first informed of this situation when he telephoned Odd Job on Wednesday November 14, 2001 (Tr at 77,210). In response to the Court's question regarding when Mr. Snyder ceased to be in the employ of Odd Job, counsel admitted that he did not know, because he did not inquire (Tr at 210). The Court noted the importance of this information given that the subpoena required the witness to be in court on September 5,2001 and on all other return dates (Tr at 210-211).

The missing witness charge was appropriate. Once the party seeking the charge establishes a prima facie case that the witness is knowledgeable about a material issue and would be expected to testify favorably to the opposing party, the burden shifts to the opposing party to demonstrate the charge is not appropriate (see, People v Gonzalez, 68 NY2d 424, 427-428 [19861). The opposing party can demonstrate the inappropriateness of the charge by showing, among other things, that the witness is not knowledgeable, or, is not under that party's control (see, Gonzalez, supra, at 428).

Plaintiffs met their burden to show that Mr. Snyder was in a position to have knowledge material to this case. As the manager of store which sold Mrs. Rogers the step/stool, Mr. Snyder could testify about the store's policies and procedures, including product inspection. Defendants did not rebut this showing.

As to the issue of control, Defendants admit that Mr. Snyder was employed by Odd Job when he was served with the subpoena, and there was no evidence that he was not so employed on the return date of the subpoena. Plaintiffs therefore have made a sufficient showing that Mr. Snyder would be expected to testify favorably to Odd Job. Defendants however, failed to meet their burden to show that Mr. Snyder was no longer under Odd Job's control at the time of trial. Counsel's statements, based upon information he received from an undisclosed source at Odd Job, were vague and insufficient (see, Brewster v Prince Apartments, Inc., 264 AD2d 611, 616-617 [1st Dept 1999] [missing witness charge was appropriate because counsel's vague assertions that a witness informed him by telephone prior to trial that he was traveling, was insufficient to show his unavailability and that diligent efforts were made to locate him]). Defendants never produced any evidence substantiating counsel's statements (see, Chandler v Fynn, 111 AD2d 300, 302 [2d Dept 1985] [new trial was required for failure to give a missing witness charge concerning former treating physician because the record was devoid of any indication that patient was no longer under the physician's care at trial]).

Even assuming that Mr. Snyder was no longer under the control of Odd Job at the time of trial, Defendants' dilatory behavior in waiting until trial to inform Plaintiffs of that fact should not be countenanced (cf., Rafael Diamond Jewelry Import. Inc. v Lloyds of London, 189 AD2d 613 [1st Dept 19931 [complaint was properly dismissed where plaintiff failed to produce an absent witness it had agreed to produce; Court noted that it

was only after the witness' deposition was adjourned numerous times, and a motion to strike was made, that the plaintiff claimed the witness was a former employee, not subject to plaintiffs control]). Further, even assuming that the Court erred in giving the charge, it was harmless error because the jury could have found that Odd Job was negligent based upon other evidence (see, infra).

Negligence of Odd Job

Defendants argue that the verdict should be set aside as to Odd Job because there was no evidence that the retailer was negligent (see, Aff In Supp at para 3; Def Mem at 4-5). A retailer may be held liable for the failure to warn of defects which are not obvious to the consumer, if the retailer knew or had reason to know that the article was defective (see, Rogers v Sears. Roebuck and Co., 268 AD2d 245 [1st Dept 20001; Lehmann v Macy & Co., 207 Misc 833 [1st Dept 19551). A seller has a duty to make a reasonable physical inspection, unless the product is in a sealed container or package (see, Donaho v HRF Construction. Inc., 196 AD2d 805 [2nd Dept 19931; Brownstone v Times Square Stage Lighting Co., 39 AD2d 892 [1st Dept 19721). Mrs. Rogers testified that when she purchased the step/stool, it was on display and was not in a sealed carton (Tr at 32). Cosco's former employee, Robert Craig, testified that step stools were shipped in three ways, including twelve to one carton (Tr at 240). He also testified that the step/stool had a warning label cautioning "do not stand on padded seat" (Tr at 238-239) which the jury was free to believe or disbelieve. Accordingly, the jury could have determined that

because the step/stool was not in a sealed carton, Odd Job was negligent because it could have discovered, by reasonable inspection, that either the step/stool tilted, had an inadequate warning, or had no warning at all.

Admission of Expert Testimonv

Defendants contend that the Court erred in admitting the expert testimony of Paul Glasgow, P.E. because he failed to demonstrate that he was an expert in step stools (Def Mem at 10-12). Defendants contend that this error improperly influenced the jury to find that Cosco was negligent. Mr. Glasgow was properly declared an expert. Defendants unsuccessfully attempted to undermine Mr. Glasgow's expertise on cross examination by showing that his Curriculum Vitae did not specifically list any experience with step stools (Tr at 170-173). However, in responding to questions on cross, Mr. Glasgow credibly indicated that some of the areas listed on his Curriculum Vitae (semiautomatic machinery, dental equipment and hydraulic equipment) included step stools (171-173). Even if the Court erred in declaring Mr. Glasgow an expert, the jury could have found that Cosco was negligent based on other evidence. The jury could have found that based upon a Cosco memorandum concerning a step stool model substantially similar to the one at issue, the manufacturer knew that the seat was more likely to be stood upon than a folding chair but nevertheless failed to properly secure it or affix an adequate warning (Tr at 272; Ex **6).** In addition, based on the absence of warnings in Cosco's design drawings and brochures, the jury could have found that Cosco never affixed any warning to the

step/stool (Tr at 282-283; **Ex** 7, Ex 10).

Adequate Warning

Defendants allege that the jury's finding that Cosco was negligent in failing to adequately warn was not supported by the evidence (Def Mem at 9). However, as noted above, the jury could have determined that Cosco did not place any warning on the step/stool, or if Cosco did, the warning "do not stand on padded seat," was inadequate to warn of the danger of tilting.

Causation

Defendants further claim that the jury's finding that Cosco was negligent in failing to warn was not supported by the evidence because Mrs. Rogers was already aware of the hazard, and, there was no evidence that she would have heeded the warning (Def Mem at 8-9). However, the jury's finding that Mrs. Rogers could have, by the use of reasonable care, avoided her injury, does not support Defendants' contention that Mrs. Rogers was already aware of the hazard. Defendants did not request a charge or interrogatory on assumption of the **risk,** and in fact, Defendants' contention that Cosco placed a warning on the step/stool belies the position that the defect was open and obvious. Johnson v Johnson Chemical Co., (183 AD2d 64 [2d Dept 19921) does not dictate a contrary result. The Court in Johnson (supra, at 70-72) held that a plaintiff who misuses a product, cannot recover on the theory of failure to warn, unless the plaintiff proves that the warning would have been heeded. In Johnson however, the plaintiff admitted that she did not read

the warning, whereas here, there was no such admission. Moreover, here the jury could have determined that there was no warning to read. In addition, in Johnson (supra, at 70), the Court held that even where a plaintiff admits that she did not read a warning, there remains a jury issue whether the warning was adequate because the plaintiff may have heeded a different, more prominent, warning. Accordingly, even if the jury found that Cosco affixed a warning to the step/stool, and even if Mrs. Rogers did not prove that she would have heeded the warning, there was sufficient evidence for the jury to find that the warning was inadequate because it was not prominently displayed (Tr at 281-282).

Accordingly, it is

ORDERED that this motion pursuant to CPLR 4404 (a) is denied in all respects; and it is further

ORDERED that Plaintiffs submit a proposed Judgment With Notice of Settlement to the Court. Defendants may submit a proposed Counter-Judgment within 15 days after receipt of the proposed Judgment.

This constitutes the Decision and Order of the Court.

Dated: April 29, 2002

ENTER:

J.S.C.

EMILY JANE GOODMAN