

Brunjes v Lasar Manufacturing Co.

2006 NY Slip Op 30439(U)

July 5, 2006

Supreme Court, Suffolk County

Docket Number: 95-21903

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 1/11/06
ADJ. DATE 3/22/06
Mot. Seq. # 004 - MD
005 - XMOT D

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CRAIG BRUNJES and BARBARA BRUNJES,	:		:	PLAINTIFF'S ATTORNEYS
	:		:	SCHEINE, FUSCO, BRANDENSTEIN &
	:	Plaintiffs,	:	RADA, P.C.
	:		:	Ray Carey, Esq.
- against -	:		:	180 Froelich Farm Boulevard
	:		:	P.O. Box 490
	:		:	Woodbury, New York 11797
LASAR MANUFACTURING COMPANY,	:		:	HAMMILL, O'BRIEN, CROUTIER,
INC., BI-COUNTY and EQUIPMENT CO.,	:		:	DEMPSEY & PENDER, P.C.
INC., FERALDI FOOD INDUSTRIES, LTD.,	:		:	Wade Dempsey, Esq.
individually and doing business as FERALDI	:		:	154 Terry Road, P.O. Box 883
FOODS, and GEORGE GAMALDI, individually	:		:	Smithtown, New York 11787
and doing Business as GEORGE GAMALDI	:		:	
MEAT FARMS,	:		:	
	:	Defendants.	:	

-----X	:		:	DEFENDANT'S ATTORNEYS
	:		:	FLEMMING ZULAK WILLIAMSON
BI-COUNTY SCALE AND EQUIPMENT CO.,	:		:	ZAUDERER LLP
INC.,	:		:	By: James R. Lynch, Esq.
	:	Third-Party Plaintiff,	:	One Liberty Plaza, 35 th Floor
	:		:	New York, New York 10006-1404
-against-	:		:	-and-
	:		:	THOMPSON HINE LLP
	:		:	Robert D. Monnin, Esq.
STAD MEAT CORP.,	:		:	Andrew H. Cox, Esq.
	:		:	3900 Key Center
	:	Third-Party Defendant.	:	127 Public Square
-----X	:		:	Cleveland, Ohio 44114-1216

	:		:	
BI-COUNTY SCALE AND EQUIPMENT CO.,	:		:	RYAN, BRENNAN & DONNOLLY
INC.,	:	Fourth-Party Plaintiff,	:	John Brennan, Esq.
	:		:	131 Tulip Avenue
-against- #24-063	:		:	Floral Park, New York 11001
	:		:	
BERKEL COMPANY,	:		:	
	:	Fourth-Party Defendant.	:	
-----X	:		:	

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Upon the following papers numbered 1 to 17, read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 2; Notice of Cross Motion and supporting papers 3 - 4; Answering Affidavits and supporting papers 5 - 6; 7 - 8; 9 - 10; 11 - 12; 13 - 14; Replying Affidavits and supporting papers 15 - 16; 17; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by fourth party defendant Berkel Company for summary judgment, pursuant to CPLR 3212, dismissing the fourth party complaint; or, in the alternative, severing the fourth party action, is denied in all respects; and it is further

ORDERED that the companion cross-motion by defendant/third party plaintiff/fourth party plaintiff Bi-County Scale and Equipment Co., Inc. likewise for summary judgment, pursuant to CPLR 3212, dismissing plaintiffs' complaint; or, in the alternative, for conditional judgment in Bi-County's favor on its fourth party claim against Berkel for indemnification and/or contribution, is denied as to summary judgment and granted, in the alternative only, to the extent indicated herein..

This is an action for personal injuries founded, essentially, on negligence, breach of warranty and strict product liability.

On April 13, 1994, plaintiff Craig Brunjes was employed as a sausage maker at the Meat Farms store in Holbrook, New York. He was operating a machine known as a Butcher Boy Meat Mixer Model 150F when his hand got caught in the moving blades, and he suffered severe and permanent hand damage.

The machine had been manufactured by defendant Lasar Manufacturing Company; and fourth party defendant Berkel was the sole distributor of that Lasar product in the United States. Berkel bought the meat mixer from Lasar in February 1989 and sold it to Bi-County in January 1990. Five days later, Bi-County re-sold it to Meat Farms, and installed it at the Holbrook store.

The other named direct defendants ("Feraldi" and "Gamaldi") were previous owners of the Holbrook Meat Farms franchise (and thus links in the chain of commerce). Both these defendants, along with Lasar, have defaulted in this action.

Third party defendant Stad Meat Corp. was plaintiff's employer, and the owner and operator of the Holbrook Meat Farms franchise at the time of the accident.

All discovery has been completed.

The original meat mixer is no longer available; the parties' disclosure was conducted on an exemplar.

The two major issues in this case are (1) whether the meat mixer was a defectively made product, or whether it was modified subsequent to its manufacture; and (2) the availability of third party relief, by way of indemnification and/or contribution, as between two passive links in a product liability chain.

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We address first the product liability question.

The parties agree that the meat mixer works this way.

A large quantity of pork meat, up to 100 pounds, is put into the machine's tub, or bucket, which has rotary blades inside, and a lid on top that closes. The device operates electrically, and it is started by pulling a knob at the lower right part of the machine. It is designed so that the blades will not engage when the lid is open. Above that starter knob is another similar looking knob that, when pulled out, allows the operator to tilt the tub, or bucket, to the horizontal so that the minced meat, now mixed with the spices, can be removed, once the lid is lifted.

With the tub, or bucket, so tilted, and the blades disengaged, the operator can safely put his hand into it, and either help remove the mixture or decide it needs more mincing.

The accident, according to the plaintiff,¹ happened like this.

With the tub tilted to the horizontal and the lid open, the plaintiff stuck his hand into it, felt around, and decided it needed more mincing. Accordingly, he reached for the top knob to pull it, and return the tub to the vertical position. By mistake, however, he pulled the button knob, which - - if the lid is closed - - engages the blades, but which - - if the lid is open - - is supposed to do nothing. In the instant case, the blades started up, badly injuring plaintiff's hand.

The heart of the matter is plaintiff's contention that the button knob, he had learned from experience, will indeed start the blades even with the lid open, if the knob is pulled out, and held in the pulled-out position; vis-a-vis the defense contention that the machine must have been mechanically tampered with to by-pass the safety mechanism.

The defense rests its claim on three items of purported evidence: (1) the opinion of its engineering expert; (2) a violation citation issued to Meat Farms by OSHA for using a disabled machine; and (3) the EBT testimony of defendant Stad and defendant Bi-County that Meat Farms employees sometimes altered machinery, without management's knowledge, to let them work faster.

The opinion of the defense expert is countered by that of plaintiffs' expert, who concludes that the "locking device" is a simple mechanical construct that can fail, or wear out, or malfunction without any man-made intercession.

The OSHA citation, on its face, finds a disabled machine, but does not identify who disabled it, or how it became disabled.

As for the testimony of Stad's president, he explained that the plaintiff - - and/or other employees - - apparently "by-passed" the security switch by finding a way to engage the blades with the

¹ We must, of course, on a motion for summary judgment, credit, arguendo, that version of the facts propounded by the resisting party.

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lid open, but there is no evidence they mechanically tampered with the machine. The plaintiffs argue that a machine made to allow this is defectively made - - the user's possible contributory negligence notwithstanding.

The law on strict product liability is referenced below. Only Berkel cites extensive authority - - all of it accurate. However, this motion, as to liability rests on the record facts.

We find and hold that questions of fact exist as to the possibly defective condition of the meat mixer.

That leaves for discussion Bi-County's cross-claim against Berkel for conditional judgment for indemnification/contribution.

The questions involved are controlled, entirely, by the recent decision of the Second Department in *Godoy v Abamaster of Miami, Inc.*, 302 AD2d 57, 754 NYS2d 301 (2003), motion for leave to appeal dismissed 100 NY2d 614, 767 NYS2d 396 (2003). Accordingly, we cite and quote *Godoy* at length.

In *Godoy*, the plaintiff had lost all four fingers of her right hand while she was operating a manually fed, electrically powered commercial meat grinder. She sued (1) the retailer that sold the machine to her employer; (2) Abamaster, as a wholesale distributor of restaurant equipment which had sold the machine to the retailer, and (3) Carfel, as an importer/wholesale distributor which had sold the machine to Abamaster. The manufacturer of the machine was a Taiwan company that was not amenable to New York jurisdiction.

Abamaster cross-claimed against Carfel for indemnification/contribution.

After trial, the jury apportioned fault - - based on strict product liability - - 40% to the plaintiff, 50% to Abamaster and only 10% to Confel. In post-verdict motion practice, Carfel argued that it should not be made to indemnify Abamaster, the more culpable tortfeasor. Abamaster rejoined that both Carfel and it were mere sequential distributors who passed the product along the distribution chain without knowledge of the defect. The trial court agreed with Abamaster.

The Appellate Division reversed, holding squarely, in a case of first impression, that a distributor of a defective product is entitled to indemnification from an importer/wholesale distributor of the product which is higher in the chain of distribution, where both are strictly liable in tort to the plaintiff.

In a thorough and careful analysis of the issues, the Godoy appeals Court wrote:

"In strict products liability, a manufacturer, wholesaler, distributor, or retailer who sells a product in a defective condition is liable for injury which results from the use of the product regardless of privity, foreseeability or the exercise of due care. The plaintiff need only prove that the product was defective as a result of either a manufacturing flaw, improper design, or a failure to provide adequate warnings regarding the use of the product and that the defect was a substantial factor in bringing about the injury. Distributors and retailers may be held strictly

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liable to injured parties, even though they may be innocent conduits in the sale of the product, because liability rests not upon traditional considerations of fault and active negligence, but rather upon policy considerations which dictate that those in the best position to exert pressure for the improved safety of products bear the risk of loss resulting from the use of the products. Strict products liability is not vicarious liability, but like vicarious liability, it creates an exception to the usual rule which limits one's liability to one's own wrongdoing." (302 AD2d at 60-61, 754 NYS2d at 304-05) (citations omitted)

The Court then related the law to defendants Abamaster and Carfel, concluding that neither was actively negligent, but each was liable for plaintiff's injuries by imputation of law, and thus there was no material way to apportion the damages between them - - i.e., no claim for contribution, but for indemnification only. As to that remedy, the Court went on to say:

"One who is liable for an injury by imputation of law may seek common-law indemnity from a person primarily liable for the injury. Where an entity has discharged a duty which is owed by [it] but which as between [it] and another should have been discharged by the other a contract to reimburse or indemnify is implied by law. Thus, it is well settled that a seller or distributor of a defective product has an implied right of indemnification as against the manufacturer of the product. In the instant case, both Carfel and Abamaster have the benefit of the implied right of indemnification as against the manufacturer of the defectively-designed meat grinder. Unfortunately, the manufacturer is not amenable to the jurisdiction of the Supreme Court. In the absence of the manufacturer, we must determine whether, as Abamaster contends, the importer/distributor, Carfel, as the party closest to the negligent manufacturer, should indemnify the distributor lower in the commercial chain of distribution of the product." (302 AD2d at 62,754 NYS2d at 306) (citations omitted).

As to the merits of strict liability indemnification, the *Godoy* Court concluded:

"In New York, strict products liability evolved as an exception to the usual rule limiting liability to one's own wrongdoing for policy reasons related to the allocation of the risk of loss and deterrence. Manufacturers are in the best position to know when products are suitably designed and properly made, as well as to diffuse the cost of safety in design and production. The rule imposing strict liability upon retailers and distributors advances the policy of encouraging improved product safety because, by reason of their continuing relationships with manufacturers, sellers and distributors are in a position to exert pressure on them to produce safe products. Of those in the chain of distribution, the distributor or importer closest to the manufacturer (at the top of the chain of distribution) is in the best position to further the public policy considerations underlying the doctrine of strict products liability.

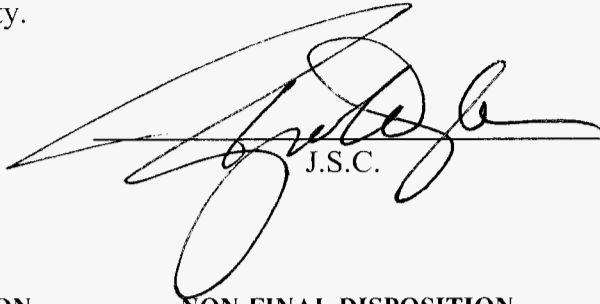
Here, the upstream distributor, Carfel, selected the Taiwanese manufacturer and dealt exclusively with it through Carfel's offices in Taiwan. Carfel is in a better position to exert pressure on the Taiwanese manufacturer to make a safer product and, thus, to eliminate the danger posed by the meat grinder at issue in this case. Carfel is also in a better position to seek indemnification from the Taiwanese manufacturer for the loss, thereby shifting the cost of the loss to the entity best able to distribute the cost to all users of the product. Thus, the Supreme Court should have granted judgment as a matter of law to Abamaster on its cross claim for indemnification." (302 AD2d at 63, 754 NYS2d at 307 (citations omitted)

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In light of the unique similarities, in fact and in law, between **Godoy** and the case at bar, we find unpersuasive Berkel's attempts to distinguish **Godoy** using common law indemnification arguments.

The cross-motion by defendant Bi-County against Berkel is granted to the extent that we declare, on the record before us, that Bi-County may collect full indemnification from Berkel for any damages the plaintiff may win from Bi-County.

Dated: JUL 05 2006



J.S.C.

FINAL DISPOSITION _____ NON-FINAL DISPOSITION _____