SHORT FORM ORDER

INDEX No. 02-14113
CAL. No. 05-01470-OT

SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

***PRESENT:***

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10-25-05
ADJ. DATE 2-10-06
Mot. Seq. # 004 - MG; CASEDISP
# 005 - MG; CASEDISP
# 006 - MG; CASEDISP

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| DALE SABESSAR<br><br>Plaintiff,<br><br>– against –<br><br>PRESTO SALES AND SERVICE, INC., TUFF MANUFACTURING, INC. and GIANT INDUSTRIES, INC.,<br><br>Defendants. | DUBOW & SMITH<br>Attorneys for Plaintiff<br>860 Grand Concourse - 1N<br>Bronx, New York 10451<br><br>BAXTER & SMITH<br>Attorneys for Defendant Presto<br>125 Jericho Turnpike, Suite 302<br>Jericho, New York 11753l.<br><br>BIVONA & COHEN<br>Attorneys for Defendant Tuff<br>88 Pine Street<br>New York, New York 10005-1886<br><br>AHMUTY, DEMERS & McMANUS<br>Attorneys for Defendant Giant<br>200 I.U. Willets Road<br>Albertson, New York 11507 |

Upon the following papers numbered 1 to 126 read on these motions for summary judgment :Notices of Motion/ Order to Show Cause and supporting papers 1 - 39; 40 - 60; 61 - 96 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 97 - 109 ; Replying Affidavits and supporting papers 110 - 113; 114 - 120; 121 - 126 ; Other _____; it is,

***ORDERED*** that defendants' respective motions for summary judgment dismissing all claims and cross claims against them are granted.

Plaintiff Dale Sabessar (hereinafter Sabessar) commenced this action to recover damages for injuries he allegedly sustained on December 12, 1999 when a power washer he was operating apparently lost its spray nozzle resulting in hot water freely discharging onto his right foot and seriously burning it.

Sabessar testified at an examination before trial that on the date of the accident he was employed by Commercial Building Maintenance, Inc. (hereinafter CBM) as a window cleaner and general laborer. In the course of his employment, he used a particular gas operated power washing machine acquired eight months earlier about four times a week. That day, he was working with his supervisor, Roy Samsunder (hereinafter Samsunder), as he frequently did, on an assignment in Brooklyn where he was cleaning gum with the power washer from a public sidewalk.

The main part of the power washer was kept in the truck and consisted of a hot water tank, a pump, a hose connected to a shut-off gun with a trigger to control the on/off flow of water from the pump which, in turn, was attached to a three-foot long metal wand or tube which ended in an interchangeable nozzle or tip attached to the end of the wand with a quick-release fitting. They had four different nozzles which fit onto the end of the wand which provided different size sprays. Sabessar stated he thought they were using the nozzle which gave the narrowest spray that day.

Sabessar had been trained in the use of the power washer by Samsunder, had never read any instruction manual and did not remember if any warning labels were on the washer but he knew that the water was hot, pressurized and that care needed to be exercised.

After about 45 minutes of using the power washer to clean the sidewalk, Sabessar was holding the tip about three inches from the ground when he felt a jerk corresponding with the sudden unrestricted flow of hot water - apparently due to the nozzle coming off - and, as a result, he lost control of the wand and the hot water went onto his right foot causing, inter alia, a hole in his boot and a serious burn to the top of his right foot.

Following the accident, Samsunder noticed the nozzle was not on the end of the wand and they did not recover it.

Sabessar stated that he was aware of at least one or two prior incidents, one less than six months before this incident, where the nozzle had come off. At that prior time, he mentioned it to Samsunder who mentioned it to David Parsons in CBM's home office who said he would take care of it.

Sabessar testified that he thought there was an o-ring inside the piece that holds the nozzle onto the wand.

Before using the power washer that day, they checked the gas and water levels in the machine and Samsunder checked the tip to be sure it was secure. Sabessar also stated he had never seen the tip or nozzle leaking and that it was Samsunder who put the nozzle on that day.

The complaint asserts causes of action sounding in negligence, strict products liability and breach of warranty. More particularly, the bills of particulars (there are three) allege, among other things, that the defendant Presto Sales and Service, Inc. (hereinafter Presto) provided a "steam gun washer" which was defective, had a defective tip/nozzle and a defective o-ring. In addition, plaintiff alleges in the bills of particulars that the o-ring "disintegrated and/or otherwise failed, causing the gun to explode and the tip to be ejected from its housing."

Each of the respective defendants now moves for summary judgment dismissing the complaint and dismissal of the respective cross claims each asserts against the others for indemnification, contribution and apportionment. The defendants claim, inter alia, that allegations based upon design defects are not supported by any evidence, that the power washer was in a condition reasonable for its intended use and safety and that any potential hazards were known to the plaintiff at the time of the accident.

On a motion for summary judgment, the moving party has the burden of setting forth evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law; anything less requires a denial of the motion even where the opposing papers are insufficient (***Coley v Michelin Tire Corp.***, 99 AD2d 795, 472 NYS2d 125 [2d Dept 1984]).

A product may be defective when it contains a manufacturing flaw, is defectively designed or is not accompanied by adequate warnings for the use of the product (***Liriano v Hobart Corp.***, 92 NY2d 232, 677 NYS2d 764 [1998]). It is well settled that distributors of defective products, as well as retailers and manufacturers, are subject to strict products liability (***Harrigan v Super Prods. Corp.***, 237 AD2d 882, 654 NYS2d 503 [4th Dept 1997]; ***Giuffrida v Panasonic Indus. Co.***, 200 AD2d 713, 607 NYS2d 72 [2d Dept 1994]). Strict products liability extends to retailers and distributors in the chain of distribution even if they "never inspected, controlled, installed or serviced the product" (***Perillo v Pleasant View Assocs.***, 292 AD2d 773, 739 NYS2d 504 [4th Dept 2002], quoting 86 N Y Jur 2d, Products Liability, § 108 ).

It is established law that a products liability case can be proven absent evidence of any particular defect by presenting circumstantial evidence excluding all causes of the accident not attributable to defendant, thereby giving rise to an inference that the accident could only have occurred due to some defect in the product (***Graham v Walter S. Pratt & Sons, Inc.***, 271 AD2d 854, 706 NYS2d 242 [3d Dept 2000]). A defendant's initial burden on the motion cannot be satisfied by merely establishing plaintiff's inability to come forward with evidence of any specific defect (*id.*). Instead, defendant must come forward with evidence in admissible form establishing that plaintiff's injuries were not caused by a manufacturing defect in the product (*id.*).

Whether an action is pleaded in strict products liability, negligence or breach of warranty, the plaintiff has the burden of establishing that a defect in the product was a substantial factor in causing the injury, and that the defect existed at the time the product left the manufacturer or other entity in the chain of distribution being sued (*see*, ***Clarke v Helene Curtis, Inc.***, 293 AD2d 701, 742 NYS2d 325 [2d Dept 2002]; ***Tardella v RJR Nabisco, Inc.***, 178 AD2d 737, 576 NYS2d 965 [3d Dept 1991]; *see also*, ***Robinson v Reed-Prentice Div.***, 49 NY2d 471, 426 NYS2d 717 [1980]; ***Dickinson v Dowbrands, Inc.***, 261 AD2d 703, 689 NYS2d 548 [3d Dept], *lv denied* 93 NY2d 815, 697 NYS2d 563 [1999]; ***James v Harry Weinstein, Inc.***, 258 AD2d 562, 685 NYS2d 471 [2d Dept 1999]).

Moreover, a manufacturer who places a defective product into the stream of commerce may be liable for injuries or damages caused by such product (***Gebo v Black Clawson***, 92 NY2d 387, 392, 681 NYS2d 221 [1998]; ***Liriano v Hobart Co.***, 92 NY2d 232, 237, 677 NYS2d 764, 766 [1998]; ***Amatulli v Delhi Constr. Corp.***, 77 NY2d 525, 532, 569 NYS2d 337, 340 [1991]).

It is well established that "[a] manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known" (***Liriano v Hobart Corp.***, *supra*). "The adequacy of the warning in a products liability case based on a failure to warn is, in all but the most unusual circumstances, a question of fact to be determined at trial" (***Cooley v Carter-Wallace, Inc.***, 102 AD2d 642, 478 NYS2d 375, 376 [4th Dept 1984]). "The nature of the warning and to whom it should be given depend upon a number of factors including the harm that may result from use of the product without the warnings, the reliability and adverse interest of the person to whom notice is given, the kind of product involved and the burden in disseminating the warning" (***Frederick v Niagara Mach. & Tool Works***, 107 AD2d 1063, 1064, 486 NYS2d 564 [4th Dept 1985], citing ***Cover v Cohen***, 61 NY2d 261, 276, 473 NYS2d 378, 386 [1984]). In addition, "where the injured party was fully aware of the hazard through general knowledge, observation or common sense, * * * lack of a warning about that danger may well obviate the failure to warn as a legal cause of an injury resulting from that danger" (***Liriano v Hobart Corp.***, *supra*, at 241, 677 NYS2d at 768; ***Dickerson v Meyer Mfg.***, 248 AD2d 970, 971, 669 NYS2d 1001, 1002 [4th Dept 1998]).

The respective roles of the defendants are alleged to be as follows:

Tuff Manufacturing, Inc. (hereinafter Tuff) was the manufacturer of the power washer but was not the manufacturer of the wand, nozzles or the fitting which held the nozzle to the wand.

Giant Industries, Inc. (hereinafter Giant) was the manufacturer of shut-off guns (attached between the hose and wand).

Presto is a wholesaler, not a manufacturer, which dealt in the sale of, among other products, power washers made by Tuff.

In support of defendant Presto's motion for summary judgment, Presto submits, inter alia, the pleadings, the bill of particulars in response to its demand and the deposition transcripts of the plaintiff Sabessar, Gregory S. Presto on behalf of Presto, and Ray Edward Simon on behalf of Giant.

Mr. Presto stated in his deposition that he was the founder and president of Presto which was in the business of selling and servicing power washing equipment. In 1999, Presto was a distributor for Tuff but not for Giant. The machine in question - a "Tuff 4.5/4000 Super Skid." - was purchased and picked up by CBM in April of 1999 (about eight months before the accident). An operator's manual was provided upon pick-up. In addition, about an hour was spent going over the proper use of the machine as well as the hazards involved (the "do's and don't's"). A trigger assembly, not manufactured by Tuff was included along with two nozzles and a quick-release fitting for the nozzles - also not made by Tuff. Further instruction was given during that hour on how to disassemble the trigger and wand.

According to Mr. Presto, the nozzles were made by "Spraying Systems" (not a party hereto) and were attached by a simple snap-in quick release fitting. Mr. Presto also testified that there were no o-rings in the nozzle.

Prior to the accident, Presto had never been advised of any problems with the nozzles, o-rings or the Tuff power washer. Indeed, according to Mr. Presto, he was not aware of there ever being any complaints of nozzles coming off the Tuff Super Skid system In addition, there were no service maintenance contracts offered and, in any event, no maintenance or service provided with regard to the machine in question between the date of the sale and the date of the accident.

Mr. Presto was not sure who manufactured the trigger gun but stated it appeared to be a Giant product.

In the deposition of the president of Giant, Ray Edward Simon, Mr. Simon stated that Giant manufactured and distributed high pressure pumps and accessories and that included, in 1999, shut-off guns.

Of particular significance was Mr. Simon's statement that in 1999 Giant had no dealings with Tuff (the maker of the Super Skid power washer) although it did have a relationship with a company known as "Victor Midland" which was a wholesaler of pressure washer pumps (including Tuff's), parts and accessories. In addition, Giant did not make tips or nozzles for use with power washers.

Regarding its shut-off guns, all were tested for safety and leaks before sale or distribution. As to the nozzle at issue, he did not know who manufactured it. Also, he had no knowledge of complaints regarding nozzles or tips, wands or shut-off guns.

The Giant-made shut-off guns were sold with an instruction manual and warning labels on the gun. The wands which were attached to their guns were supplied by other companies in accordance with industry standards and had male threadings on the end to allow for the direct attachment of nozzles or quick-release fittings for nozzles.

His only knowledge of tip or nozzle dislodgings were in the context of user errors, that is; a person not inserting them correctly. Moreover, it appears that the result of a worn o-ring is a leak; not a build up of pressure causing the shut-off gun to explode and/or the nozzle to be ejected.

In support of defendant Tuff's motion for summary judgment, the defendant submits, inter alia, the pleadings, the bill of particulars in response to its specific demand, the depositions of Mr. Presto, Mr. Simon, Sabessar and the deposition of Marlo L. Dean (hereinafter Dean) on behalf of Tuff.

Plaintiff's bill of particulars alleged a defective tip (nozzle), defective o-ring and that o-ring failure caused the shut-off gun to explode and that the tip and o-ring assembly were improper.

Dean is a vice president in charge of quality and technical support for a company known as "C-Tech." C-Tech is a name under a company known as "Spray Mart" which is owned by a company known as "Harbor" which bought Tuff in 2000 when it was owned by the Victor Midland company. This acquisition of Tuff occurred after the unit in question was manufactured and purchased. "Spray Mart" is not the same as "Spraying Systems" which is a separate and unaffiliated company in the business of making nozzles. With the purchase of Tuff, the manufacturing of the Tuff line by Tuff was terminated and the "Tuff Super Skid" was thereafter manufactured by C-Tech after some minor cosmetic tweaking but under the old Tuff name. Dean was knowledgeable with the Tuff product, the acquisition of Tuff and the transition to C-Tech manufacturing of the power washers under the Tuff name.

Dean observed at the old Tuff's plant that the power washers were tested in accordance with industry standard procedures.

Dean stated that the former Tuff company did not make wands, nozzles or shut-off guns; it only made the "frame" of the power washer itself.

In support of defendant Giant's motion for summary judgment, the defendant submits, inter alia, the pleadings, the bill of particulars in response to its demand and the deposition transcripts included in the other motions herein.

Here, the defendants met their respective burdens on their motions by coming forward with admissible evidence showing that they were not responsible under any of the causes of

action alleged for the injuries to the plaintiff. Keep in mind that the gravaman of the complaint is that Sabessar was injured when the nozzle or tip came off the end of the wand and it is alleged that a defective o-ring was responsible in whole or in part for this circumstance.

With regard to defendant Tuff, the manufacturer of the power washer, the competent evidence showed that it did not manufacture or supply the attachments to the power washer, to wit; the shut-off gun, the wand, o-rings and the nozzles. Accordingly, Tuff can not be found to be liable under the theories put forth by the plaintiff for the accident herein.

With regard to the defendant Presto, the seller/distributor of the power washer and its attachments, the competent evidence showed that it supplied the items, that the items were tested for use and safety, that they supplied a manual of instruction and maintenance, that they had no notice of any prior problems relative to any of the parts and that they provided an hour of verbal instruction and warnings upon providing the unit to the plaintiff's employer. In addition, from the plaintiff's own deposition, it was established that Sabessar used the power washer frequently (about four times a week) since it was purchased and put into use some eight months before the accident. Moreover, Sabessar knew the machine issued hot water under high pressure and that caution was required in operating it. Sabessar also stated that he had never noticed leaks at the time of the accident or before (which would be related to the o-rings) and was aware that the tip or nozzle had come off before. The prior incident with the nozzle coming off was brought to CBM's attention but not to the attention of any of the defendants.

In addition, any of the circumstantial evidence found in the deposition of Sebessar which could possibly attribute any liability to the defendants did not rise to the level of excluding causes for the accident not attributable to the defendants. Indeed, the most likely explanation for the accident was that the equipment functioned properly but that the nozzle being used for that job was not properly affixed when it was last put on by the plaintiff or someone else in CBM's employ.

With regard to the defendant Giant, the manufacturer of shut-off guns who supplies its guns attached to wands not manufactured by it but without nozzles or tips, the competent evidence showed that it had nothing to do with the supply or manufacture of nozzles or tips or quick-release fittings attaching such nozzles or tips to the wands.

Lastly, the deposition of Sabssar shows that he was fully aware of the hazards of using the power washer through his training and extensive experience in its use. Thus, any alleged lack of warning about such a hazard was obviated as a legal cause of any injury resulting from such a hazard (*see* ***Liriano v Hobart Corp,*** *supra,* at 241, 677 NYS2d at 768; ***Dickerson v Meyer Mfg.,*** 248 AD2d 970, 971, 669 NYS2d 1001, 1002 [4th Dept 1998]).

Accordingly, the defendants have met their burdens on these motions by coming forward with admissible evidence showing that their products were not a proximate cause of the accident

(*see*, ***Castro v Delta Intl. Mach. Corp.***, 309 AD2d 827, 766 NYS2d 65 [2d Dept 2003]; ***Clarke v Helene Curtis, Inc.***, *supra*; ***Villariny v Aveda Corp.***, 264 AD2d 415, 693 NYS2d 446 [2d Dept 1999]; *see also*, ***Brown-Phifer v Cross County Mall Multiplex***, 282 AD2d 564, 723 NYS2d 393 [2d Dept], *lv denied* 96 NY2d 721, 733 NYS2d 373 [2001]; ***Robinson v Lupo***, 261 AD2d 525, 690 NYS2d 640 [2d Dept 1999] ) and are entitled to summary judgment dismissing the complaint and the respective cross complaints.

The burden, then, shifted to the plaintiff to produce evidentiary proof in admissible form sufficient to establish, inter alia, a material issue of fact as to whether the alleged defect in the power washer system was a substantial factor in causing Sabessar's injuries (*see*, ***Speller v Sears, Roebuck & Co.***, 100 NY2d 38, 760 NYS2d 79 [2003]; ***Voss v Black & Decker Mfg. Co.***, 59 NY2d 102, 463 NYS2d 398 [1983]; *see generally*, ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]).

The court notes that the plaintiff only submitted opposition to the summary judgment motions of defendants Presto and Tuff. As to the summary judgment motion of defendant Giant, counsel for the plaintiff states that rather than opposing it, he is "taking no position."

Since the plaintiff, in effect, concedes no issues of fact exist regarding the claims against defendant Giant as to negligence, breach of warranty and strict products liability, summary judgment is granted to the defendant Giant (*see*, ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]).

The plaintiff, in opposition to the other two motions, relies, inter alia, on the depositions already referred to of Sabessar, Presto and Dean as well as the deposition of a proferred expert, Donald E. Wise (hereinafter Wise).

Wise is a Professional Engineer who describes himself as a mechanical engineer with extensive experience in designing, constructing, operating and maintaining hot water generation and delivery systems. He stated his conclusions were based upon his experience and expertise and the reviewing of the various depositions in this case as well as a viewing of a video of the operation of the power washer in question.

Wise observed that the piece of equipment was a hot water pressure washer known as a Tuff Super Skid made by Tuff. The unit had a handheld wand with a pistol grip and a "quick-disconnect coupling" at the end of the wand which allowed for fitting interchangeable nozzles of various spray widths.

Wise commented on the Tuff operating manual in the context of references made to the Canadian Standards Association which published standards for oil/gas-fired commercial/industrial pressure washers and steam cleaners (he did not refer to any United States issued standards). He noted that such standards require manuals to alert users to the thermal

hazards involved with the use of these machine. His observations, however, did not take into account the separateness of the nozzle-wand assembly from the power washer itself or the knowledge Sabessar had with regard to the uses and hazards of the unit based upon his initial training in its use and his experience in using it about four times a week over the course of eight months.

Accepting for the purposes of these motions that Wise qualifies as an expert in this area, the court notes that Wise did not actually inspect the power washing unit. His knowledge of the specific unit is only from a video and, thus, he did not have the benefit of examining it first hand as to the functioning, construction or condition of it or its accessories (*see* ***Cassano v Hagstrom,*** 5 NY2d 643, 187 NYS2d 1 [1959]; ***Banks v Freeport Union Free School Dist.,*** 302 AD2d 341, 753 NYS2d 890 [2d Dept 2003]; ***Davidson v Sachem Cent. School Dist.,*** 300 AD2d 276, 751 NYS2d 300 [2d Dept 2002];). Moreover, the video he observed was of the unit functioning and could not, in any event, support any findings of an alleged defect in use or design.

In short, Wise's affidavit lacks evidentiary value, his conclusions are not based upon an actual inspection of the power washer and its accessories and his comments regarding the operating manual are merely academic since the operating manual was not seen or relied upon by the plaintiff who, in any event, acknowledged he was aware of the hazards of using this hot water pressurized power washer. Moreover, the plaintiff has also failed to show that an o-ring failure contributed in any way to the accident or that any of the defendants was in any way liable for an alleged failure regarding the nozzle or tip.

Accordingly, the plaintiff has failed to meet his burden to produce evidentiary proof in admissible form sufficient to establish a material issue of fact as to whether an alleged defect in the power washer system was a substantial factor in causing Sabessar's injury, as to any breach of warranty or as to any strict products liability.

The defendants' respective motions for summary judgment are, therefore, granted and the complaint and the respective cross claims are all dismissed in their entireties.

Dated: APR 24 2006

J.S.C.

**__X__ FINAL DETERMINATION ____ NON-FINAL DETERMINATION**