

**Hansen v Gehl Co.**

2007 NY Slip Op 30333(U)

March 23, 2007

Supreme Court, Rensselaer County

Docket Number: 0211110

Judge: George B. Ceresia

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**STATE OF NEW YORK  
SUPREME COURT**

**COUNTY OF RENSSELAER**

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PETER HANSEN,

Plaintiff,

-against-

Index No.: 211110

RJI No.: 41-0612-2004

GEHL COMPANY and SALEM  
FARM SUPPLY, INC.,

Defendants.

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All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

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**DECISION/ORDER**

George B. Ceresia, Jr., Justice

Plaintiff has moved for an order directing the issuance of several sealed commissions addressed to manufacturers of competing models of round bale hay balers in order to provide a foundation for the admission at trial of numerous documents including operator's manuals and brochures and competitors' internal memoranda. Defendant Gehl opposes the motion on the grounds that the documents are not business records within the meaning of CPLR 4518 and that they are not relevant or admissible at trial. In the event the commissions are issued, defendant

Gehl seeks to have additional questions added to the commissions. Plaintiff does not oppose such request.

The instant action seeks recovery for serious injuries sustained when plaintiff became entangled in the internal drive belts and rollers of a round bale hay baler manufactured by defendant Gehl Company. Plaintiff was attempting to perform maintenance and adjustment of the hay baler with the tailgate open contrary to the instructions in the operator's manual and warnings on the machine itself. He contends that the hay baler was unreasonably dangerous because it did not have any sort of power disengagement mechanism to stop the internal belts and pulleys when the tailgate was opened. Plaintiff asserts that the requested commission will allow the admission into evidence at trial of documents relevant to the "state of the art" with respect to safety features of round balers, the feasibility of a disengagement mechanism, the existence of a dangerous condition and industry standards concerning the elimination of, guarding from or warnings of dangerous elements of machinery.

It is uncontroverted that the issuance of a commission is an appropriate method of providing a foundation for the admission of documentary evidence. However, defendant Gehl contends that product manuals and brochures are not business records within the meaning of the business record exception to the hearsay rule (CPLR 4518). Plaintiff seeks to admit the manuals and brochures for the purpose of establishing the truth of their contents, that is, that competitor's hay balers include disengagement features when the tailgate of the round balers is opened. As such, the documents constitute hearsay. The Court of Appeals has addressed the reasons for and the nature of the business records hearsay exception.

“As with other hearsay exceptions, the business records exception grew out of

considerations of necessity and trustworthiness-the necessity for alternatives to permit large and small businesses to prove debts by their records of account, and the unusual degree of trustworthiness and reliability of such records owing to the fact that they were kept regularly, systematically, routinely and contemporaneously (5 Wigmore, Evidence §§ 1421, 1422, 1546 [Chadbourn rev 1974]; see also, Note, Business Records Rule: Repeated Target of Legal Reform, 36 Brooklyn L.Rev. 241). The element of unusual reliability is supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation (McCormick, Evidence § 306 [Cleary 3d ed.]). The essence of the business records exception to the hearsay rule is that records systematically made for the conduct of a business as a business are inherently highly trustworthy because they are routine reflections of day-to-day operations and because the entrant's obligation is to have them truthful and accurate for purposes of the conduct of the enterprise (see, Williams v Alexander, 309 NY 283, 286).

These concepts appear as the foundation requirements of CPLR 4518(a): first, that the record be made in the regular course of business-essentially, that it reflect a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business; second, that it be the regular course of such business to make the record (a double requirement of regularity)-essentially, that the record be made pursuant to established procedures for the routine, habitual, systematic making of such a record; and third, that the record be made at or about the time of the event being recorded-essentially, that recollection be fairly accurate and the habit or routine of making the entries assured.” (People v Kennedy, 68 NY2d 569, 579-580 [1986]; see also People v Cratsley, 86 NY2d 81, 89 [1995]; Clarke v New York City Tr. Auth., 174 AD2d 268, 272-273 [1st Dept 1992]).

The operator’s manuals and brochures were certainly published in the regular course of the manufacturers’ business. It was the regular course of the businesses to publish the manuals and brochures. It is likely that the manuals and brochures were published pursuant to established procedures to ensure their accuracy. Finally, the manuals and brochures would have been published when the machinery was produced and sold, reflecting the as built features and design. It would certainly be in the manufacturers’ best interest to have such manuals and brochures as accurate as possible. The Court therefore finds that the manuals and brochures may be admissible as business records upon proof of a sufficient foundation.

Defendant Gehl also contends that the manuals and brochures are not relevant in this

action because the disengagement devices were not provided as safety measures, but rather were used to prevent damage to the hay bales or to aid in ejecting the bales. However, the reason for the design is irrelevant to whether a particular feature is feasible. Certainly, evidence which establishes that an alternative design was feasible is admissible (see Doty v Navistar Intl. Transp. Corp., 219 AD2d 32, 37-38 [4th Dept 1996]; Liquori v Hollymatic Corp., 230 AD2d 893, 894 [2d Dept 1996]). Defendant Gehl's arguments merely go to the weight of the evidence, not its admissibility. Accordingly a commission to establish a foundation for the manuals and brochures is warranted.

Plaintiff also seeks to establish a foundation for three documents from one of Defendant Gehl's competitors. The first consists of an accident report from 1995 in which an operator had his hand caught in a net wrap system when the tailgate was open and the baler running. The second involves a similar accident report for an incident which occurred in 2004, two years after plaintiff's accident. The third involves a product safety alert issued after plaintiff's accident which includes instructions for installing a safety guard on similar internal belts and rollers. Defendant Gehl objects to the admissibility of records of which it was unaware and which were not available to the public and of records of subsequent accidents. However, the fact of subsequent accidents or modifications may be admissible to show the existence of a dangerous condition or to show the feasibility of a safer design (see Woodhouse v Bombardier Motor Corp. of Am., 5 AD3d 1029, 1030 [4th Dept 2004]; Liquori v Hollymatic Corp., 230 AD2d at 894 [2d Dept 1996]; Doty v Navistar Intl. Transp. Corp., 219 AD2d at 38). Moreover, the documentary evidence may be relevant to issues of the "state of the art" of hay baler manufacturing. A manufacturer's actual knowledge need not be established. Rather, proof of what a manufacturer

should have known based upon industry expertise or being in contact with others in the industry may give rise to liability (see Frankson v Brown & Williamson Tobacco Corp., 4 Misc 3d 1002(A), Sup Ct, Kings County 2004] mod on other grounds Frankson v Philip Morris Inc., 31 AD3d 372, [2d Dept 2006]; Seventh Jud. Dist. Asbestos Litig., 2 Misc 3d 518, 521 [Sup Ct, Monroe County 2003]). The requested documents are clearly relevant to general industry knowledge and expertise as well as the feasibility of guards.

Finally, plaintiff seeks to establish a foundation for competitors' documents which set forth a design standard hierarchy requiring a designer first to eliminate a dangerous condition, second to guard it if it can not be eliminated, and lastly, to warn if it can not be eliminated or effectively guarded. Such documents appear to be relevant to the issue of industry standards and practices which are admissible to establish a duty of care (AG Capital Funding Partners, L.P. v State St. Bank & Trust Co., 5 NY3d 582, 594 [2005]; Jones v City of New York, 32 AD3d 706, 707 [1st Dept 2006]; Carlino v Triboro Coach Corp., 22 AD3d 624, 625 [2d Dept 2005]).

Defendant Gehl objects that it did not have access to such standards, that the documents are from the 1970's and are not relevant to practices in the 1990's, when the subject hay baler was designed, and that the standards were applicable to writing warnings, not designing equipment. As above, the fact that defendant Gehl did not have access to the documents does not render them inadmissible or irrelevant. Moreover, the remaining objections are conclusory and appear to go to the weight of the evidence, not its admissibility.

Defendant Gehl also objects to the use of commissions to obtain court documents. However, a careful reading of plaintiff's motion papers and the proposed commissions shows that the complaints in the two out of state actions were merely submitted as exhibits. There is no

relief requested with respect to such documents nor do the proposed commissions address such documents.

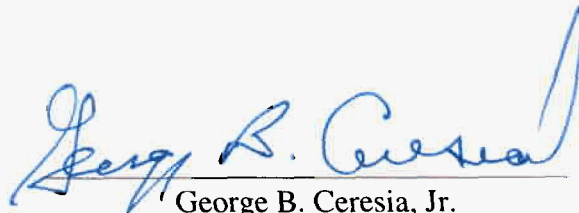
Accordingly it is

**ORDERED** that plaintiff's motion for the issuance of sealed commissions is hereby granted, and it is further

**ORDERED** that plaintiff shall submit proposed sealed commissions incorporating the written questions submitted by defendant Gehl as Exhibits G-I to the Court on notice to defendants within 30 days of the date hereof. The parties shall thereafter follow the procedures set forth in CPLR 3109.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for the plaintiff, who are directed to enter this Decision/Order without notice and to serve defendants' counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York  
March 23, 2007



George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

Notice of Motion dated January 17, 2007; Affirmation of James Alexander Burke, Esq. dated January 17, 2007; Affirmation of James Alexander Burke, Esq. dated January 17, 2007 with Exhibits A-Z annexed;

Affidavit of Stephanie A. Henry, Esq. sworn to February 6, 2007 with Exhibits A-I annexed; Affidavit of Lance Henrickson sworn to February 6, 2007;

Reply Affirmation of James Alexander Burke, Esq. dated February 12, 2007 with Exhibits A-B annexed.