

Calandra v Crane Plumbing

2007 NY Slip Op 31027(U)

April 27, 2007

Supreme Court, Suffolk County

Docket Number: 0006344/1999

Judge: Melvyn Tanenbaum

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY**

PRESENT:

Hon. MELVYN TANENBAUM
Justice

MOTION #006, 007 - Mot D

R/D: 061306

S/D 021307

DONNA CALANDRA, formerly known as, DONNA LONG,

PLTF'S/PET'S ATTY:
MESCALL MAFFEI & CONDON, LLP
25 Candee Avenue
Sayville, New York 11782

Plaintiff,

- against -

CRANE PLUMBING, JOHN DOE 1 and/or RICHARD ROE 1, the name being fictitious, true names of defendants being fictitious, true names of defendants being unknown to plaintiff, the persons intended being owners and principals d/b/a CRANE PLUMBING, FIAT PRODUCTS, JOHN DOE 2 the name being fictitious, true names of defendants successor being fictitious, true names of defendants being unknown to plaintiff, the persons intended being owners and principals d/b/a FIAT PRODUCTS, EDWARDS, PLAT & DEELY, INC., and BLACKMAN PLUMBING SUPPLY COMPANY, INC.

DEFT'S/RESP'S ATTY:
(Atty for Blackman Plumbing Supply)
JOHN P. HUMPHREYS, ESQ.
P.O. Box 9028
Melville, New York 11747

(Atty for CR/PETITIONER L.L.C d/b/a Crane Plumbing, in interest to Fiats Products, Edwards and Platt & Deely Inc.)
SMITH MAZURE DIRECTOR WILKINS YOUNG & YAGERMAN, P.C.
111 John Street, 20th Floor
New York, New York 10038-3198

Defendants.

CP/PETITIONER, L.L.C d/b/a CRANE PLUMBING and as successor in interest FIAT PRODUCTS and EDWARDS, PLATT & DEELY, INC.,

(Atty for Hamilton Glass)
BIEDERMANN, HOENING, MASSAMILLO, & RUFF, P.C.
90 Park Avenue, 36th Floor
New York, New York 10016

Third-Party Plaintiffs,

-against -

HAMILTON GLASS PRODUCTS, INCORPORATED,

Third-Party Defendant.

In support of its motion defendant "Crane" submits three affirmations of counsel and argues that plaintiff lacks proof of proximate cause and cannot establish a prima facie case of negligence. "Crane's" position is that the shower doors were in use for almost 12 years prior to the accident and the accident could result from other factors including improper installation, plaintiffs use of the door over an extended period of time (wear and tear) and plaintiff's actions at the time of injury. Defendant argues that the submission of an attorney's affirmation without submission of an expert's affidavit explaining how the door assembly was in fact defective, fails to provide an adequate and sufficient evidentiary foundation to sustain "Calandra's" negligence claim. Defendant also argues that plaintiff's failure to retain the tracking mechanism and tub unit is a "spoliation of evidence" and forms another basis for dismissal of plaintiff's complaint.

In opposition to both motions plaintiff submits an attorney's affirmation and claims that substantial issues of fact exist surrounding defendant's negligence sufficient to require a plenary trial. Plaintiff claims that defendant failed to meet their burden and establish that there was no defect in the shower door and glass which shattered causing severe injuries to "Calandra". Plaintiff also claims that defendant has failed to submit expert testimony to prove that the door shattered for reasons not attributable to a defect in the glass and have failed to offer proof that "Calandra" misused the door track. It is plaintiff's position that summary judgment dismissing the complaint is not warranted absent submission of relevant, admissible proof to show that the door track assembly and door glass was not defective. Plaintiff claims that her sworn testimony forms an evidentiary basis for "Calandra's" products liability claim based upon her description of the hanger coming off its track and the glass then shattering. Plaintiff maintains that it is clear that by shattering in the manner described, the glass from the shower door did not fracture in the manner intended for that type of glass and therefore material questions of fact exist warranting denial of defendant's applications. It is plaintiff's contention that circumstantial evidence established the defects sufficient to require a plenary trial. Plaintiff contends that no basis exists to dismiss "Calandra's" claims based upon spoliation of evidence since plaintiff has produced for inspection a companion intact door, the hanger and pieces of the remaining broken glass. Plaintiff asserts that defendant elected not to have an expert examine these materials and cannot complain that they have been prejudiced by the loss of the shower track since the loss of the track is not essential to plaintiff's claim of defective safety glass.

CPLR §3212(b) states that the motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (OLAN v. FARRELL LINES, INC., 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); SPEARMAN v. TIMES SQUARE STORES CORP., 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, NEW YORK CIVIL PRACTICE Sec. 3212.09)). Moreover, it is well settled that a party opposing a motion for summary judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (CASTRO v. LIBERTY BUS CO., 79 AD 2d 1014, 435 NYS 2d 340 (2nd Dept., 1981).

A party injured as a result of a defective product may seek relief against the product manufacturer or others in the distribution chain if the defect was a substantial factor in causing injury (Speller ex rel. Miller v. Sears, Roebuck & Co., 100 NY2d 38, 760 NYS2d 79 (2003)). 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, 237, 677 NYS2d 764 (1998)); Robinson v. Reed-Prentice, 49 NY2d 471, 426 NYS2d 717 (1980)).

In this case plaintiff claims that as she was cleaning the shower door, the metal tracking attached to the top of the door came off its track causing the door to fall and the glass to shatter. The broken glass caused severe lacerations to plaintiff's hand. Plaintiff's liability theory is premised upon a claim that the shower door was defective either due to a defect in the shower door tracking assembly or due to a defect in the safety glass which shattered upon impact as it fell from the tracking. Because plaintiff disposed of the tracking assembly and tub unit the parties were unable to examine and test it to determine the precise nature of an alleged defect. The adjoining glass shower door was made of tempered glass but only pieces of the glass which shattered remained and were not examined. Plaintiff seeks to prove her claim circumstantially by establishing that the shower glass unsafely shattered into pieces causing her injury.

In New York a plaintiff is not required to prove the specific defect and proof of necessary facts may be circumstantial (Codling v Paglia, 32 NY2d 330, 337, 345 NYS2d 461 (1973)). In order to proceed in the absence of evidence identifying a specific flaw a plaintiff must prove that the product did not perform as intended and exclude all other causes for the product's failure that are not attributable to defendants (See Halloran v. Virginia Chemical, 41 NY2d 386, 388, 393 NYS2d 341 (1977)). The Court of Appeals in Speller ex rel Miller v. Sears, supra, ruled therefore that New York Law is consistent with the Restatement which reads:

"It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:

"(a) was of a kind that ordinarily occurs as a result of product defect; and

"(b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution: (Restatement [Third] of Torts: Products Liability § 3 [1998])."

At trial, it is incumbent upon plaintiff to exclude all causes of the accident not attributable to defendants and to therefore circumstantially prove that the shower door tracking unit and the glass door failed to perform as intended, proximately causing the accident. However, in the context of a summary judgment motion the defendants, as parties seeking relief, bear the initial burden of demonstrating their entitlement to judgment on a matter of law by submitting evidentiary proof in admissible form (Taft v. Sports Page Shop, 226 AD2d 974, 640 NYS2d 698 (3rd Dept., 1996) citing Zuckerman v. City of New York, 49 NY2d 557, 562).

A spoliator of key physical evidence may be punished by the striking of a pleading provided that proof exists to show that the party was on notice that the evidence might be needed for future litigation. (See DiDomenico v. C & S Aeromatic Supplies, 252 AD2d 41, 682 NYS2d 452 (2d Dept., 1998); Curran v. Auto Lab Service Center, 280 AD2d 636, 721 NYS2d 662 (2d Dept., 2001)). The sanction can be applied

even if the destruction occurred through negligence rather than wilfulness since a party's negligent loss of evidence can be just as fatal to another party's ability to present a case or a defense. (See Squitieri v. City of New York, 248 AD2d 201, 669 NYS2d 589 (1st Dept., 1998); Mudge v. Penguin Air Conditioning, 221 AD2d 243, 633 NYS2d 493 (1st Dept., 1995)).

Plaintiff "Calandra" testified that she sprayed Lysol and was wiping the shower door with a sponge for approximately a second when the glass door dropped from its tracking mechanism and shattered upon impact. The glass pieces cut plaintiff's hand. "Calandra" testified that a silver metal strip with attached wheels designed to roll within the tracking mechanism broke apart causing the door to fall. However no proof is submitted in the form of an expert's affidavit setting forth an opinion to establish a causal link between the door falling and glass shattering with plaintiff's claims that the door tracking mechanism was defective. The record in this case only establishes that while plaintiff was cleaning the shower door, it fell and glass shattered.. The door functioned without incident for twelve years and there was no proof submitted on this motion to establish: 1) whether the doors were properly installed; 2) whether the doors were damaged during the 12 year period prior to the incident, or; 2) whether plaintiff herself caused the door to fall. Absent any proof that the door was defective "Calandra" cannot establish a prima facie case with respect to tracking mechanism defects since plaintiff is required to establish a causal link between her alleged injuries and the claimed defective product (Speller ex rel Miller v. Sears, supra).

Plaintiffs complaint is also not sustainable as to the tracking mechanism defect since without any reasonable explanation "Calandra" conceded that she discarded the shower door track and tub unit after the alleged incident. Those items were significant pieces of evidence and a physical examination would have been probative of plaintiff's products defects claim. Plaintiff's conduct has prejudicially deprived defendants of the ability to examine and test the claimed defective products. This substantial and irreparable prejudice provides another basis upon which to grant defendants' motions to dismiss plaintiff's claim (See Neal v. Easton Aluminum, 15 AD3d 459, 790 NYS2d 70 (2nd Dept., 2005)).

Plaintiff's remaining claim based upon the shower door's defective glass cannot be dismissed since significant factual issues remain concerning the cause(s) for the door glass shattering upon impact. Although the tracking mechanism and tub unit were discarded by "Calandra", pieces of the broken door glass were salvaged for examination by the parties. Absent submission of an affidavit from an expert to establish an evidentiary foundation to support a determination that the door glass was not defective, substantial questions of fact remain concerning the safety glass which must be determined during a plenary trial. Defendant's motion for an order dismissing plaintiffs claim asserting the door glass was defective must therefore be denied. Accordingly, it is

ORDERED that the motions by defendant "Blackman" and "Crane" each seeking an order pursuant to CPLR §3212 & 3126 dismissing plaintiff's complaint is granted solely to the extent that plaintiff claims that the accident was allegedly caused by the shower door's defective tracking mechanism are hereby dismissed. All other requests for relief are denied.

Dated: April 27, 2007

NON-FINAL DISPOSITION

MELVYN TANENBAUM

J.S.C.