

King v Gregruss Mgt. Corp.

2007 NY Slip Op 31999(U)

June 26, 2007

Supreme Court, Suffolk County

Docket Number: 0007988/2003

Judge: Robert W. Doyle

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publication.

ORDERED that the within motion (001) by Kaskam Chemicals, Inc. d/b/a United Specialties of America and Matschel of Flagler, Inc. for summary judgment, is denied absent prima facie proof of entitlement and the existence of issues which warrant jury determination. In 1997 this defendant succeeded to the Gregruss/Sun Belt Chemicals corporation by purchase of the assets. The prior corporation had manufactured the windshield washer fluid which may have contributed to plaintiff's injury. Dispute exists regarding the source of the windshield fluid and the type of drum. Judgment prior to trial is precluded where issues in dispute concern the source, manufacture and distribution of the product in question and the transfer of assets is unclear (*Winegrad v NYU Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 597 [1980]; CPLR 3212[b]); and it is

ORDERED that the motion (002) by defendant William J. Jones, Inc. s/h/a William Jones & Sons for summary judgment, is denied absent prima facie proof of entitlement and the existence of material issues regarding inspection, warning, probable cause and comparable negligence. Defendant Jones reconditioned the 55-gallon drum which held the windshield washer fluid involved in this incident and judgment is premature (*Refermat v A.C. & S., Inc.*, 15 AD3d 928, 789 NYS2d 576 [2005]; *Kennard v Welded Tank & Constr. Co.*, 27 AD2d 578, 277 NYS2d 817 [1966]; *Peris v Western Reg'l. OTB Corp.*, 255 AD2d 899, 680 NYS2d 346 [1998]; *Winegrad v NYU Medical Center*, *supra*; *Zuckerman v City of New York*, *supra*; CPLR 3212[b]); and it is

ORDERED that the respective cross motions (003) by defendants Kaskam /Matschel and (004) by Jones to preclude plaintiff's expert from offering testimony and evidence, are also denied. Defendants contend that the plaintiff's expert examined the drum for defect and the presence of fluid on September 30, 1999. The expert allegedly had failed to disclose the substance of the examination until November 9, 2006. Defendants claim the opportunity to inspect the drum no longer exists since the plaintiff's employer disposed of the drum after years of storage upon the belief that this matter was resolved, (See Exhibit B, EBT non party witness, Pete Catarelli, TR35, 36, Monaco, Affirmation in Opposition for plaintiff dated January 18, 2007, CPLR 3101[d][1], 4515; 22 NYCRR 202.16[g], 22 NYCRR 202.17). The plaintiff has complied with statutory mandates. The defendants clearly had the same opportunity for independent expert examination prior to the inadvertent disposal of the product, not by plaintiff, but by plaintiff's employer, Ryder Service Corp. Moreover, the opportunity to depose or examine plaintiff's expert at their discretion within 30 days prior to, or at trial.

Plaintiff commenced the instant action sounding in products liability, breach of express and implied warranty and for negligence in Kings County on or about December 27, 2001. Plaintiff was injured on June 25, 1999 while engaged in employment with the Ryder Transportation Services at 10-20 44th Road, Long Island City, New York 11101. Plaintiff was instructed to dispose of a reconditioned, used 55-gallon steel drum. The drum previously held windshield washer fluid manufactured by one of the defendants and was allegedly unfit for further use. The empty drum was expected to be disassembled, crushed and discarded. Plaintiff cut into the steel drum using a Makita hand-held electric saw. Vapors purportedly remained inside the drum ignited, exploded, caused plaintiff serious burns and the extensive loss of employment (EBT 4/12/02, Ex.A; Affidavit in Opposition Antonio Monaco, Jr. 1/18/07).

Testimony was provided by Raymond Matuza, President since February 18, 1997 of Kaskam Chemicals Inc., d/b/a United Specialities of America and Matschel of Flagler, Inc., d/b/a Sunbelt Chemicals, (Exhibit D, TR7-11, Tumelty Affirmation in Opposition, 11/9/06). Matuza contends that prior owners, Gregruss or Russgreg sold the assets of Gregruss Management Corporation/Sun Belt Chemicals, Inc. on or about January 10, 1997, stopped "doing" chemicals and converted into a real estate business. However, prior to the sale Gregruss/Sun Belt Chemical Inc. sold and stored 55-gallon drums of windshield washer concentrate. Matuza claims that no inventory of the 55-gallon drums was in stock at the time of transfer. Gregruss attorney, Robert Fryd, admits in a letter dated April 12, 2002 that it sold the windshield washer concentrate in 1997, though not in these particular drums. If Sun Belt did not manufacture and sell the 55-gallon drums of concentrate just prior to sale of the Gregruss/Sun Belt assets, only Kaskam/Matschel could have manufactured the fluid in the 55-gallon drum. The drum was reconditioned later in 1997 by Jones and was not filled with the fluid or sold until reconditioning was complete. Thus, inference may be drawn that Matschel previously d/b/a Sunbelt Chemicals was the only authorized manufacturer/distributor to the Ryder Transportation company. The testimony provided by Raymond Matuza, President of Matschel, on February 16, 2006, reflects that after the purchase of Sun Belt Chemical inventory, the same type product continued to be manufactured.

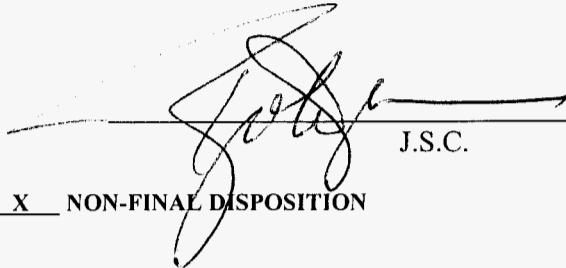
Sun Belt attorney Sergiacomi contends that after the sale of assets to Kaskam/Matschel in 1997, Sun Belt did not sell the product. Nevertheless, the contents of the 55-gallon drums of windshield fluid previously manufactured by Sun Belt Chemicals must have been transferred upon sale to Kaskam/Matschel of Flagler. Although the Sun Belt attorney alleges the corporation did not make or stock the windshield fluid in 1997, the inventory on hand was transferred. The drums which also transferred were then reconditioned by Jones in 1997 and filled with windshield washer. This type manufacture was continued by Matschel, if not by Sun Belt and the product was sold to Ryder, as marked on MSDS sheet dated November 28, 1999 (Exhibit D, Reply Affirmation, Daniel G. Sergiacomi, Esq, December 6, 2006, for Kaskam/Matschel). Markings reflected in the photos of the drum identify that reconditioning was performed by Jones in 1997 and repackaging occurred in 1998. Matschel was the only authorized manufacturer and distributor of the former Sun Belt products between the date of assignment, January 10, 1997, and the date of accident, June 23, 1999. Matschel's President, admits the purchase of the Sun Belt Chemical inventory and the continued manufacture of the same product (EBT 2/16/06, Raymond Matuza, president since 2/18/97). Despite exclusive possession and control, the Kaskam/Matschel defendants disclaim distribution to Ryder.

The Jones defendant reconditions drums. This process is analogous to a laundry service and is subject to warning and labeling regulations mandated by the U.S. Department of Transportation and OSHA, 29 CFR Part 1910.1200. Jones reconditioned this particular drum. Thus, Jones was required by regulation to identify, inspect, reject, and repair the drum, the barrels including the chimes (joints between lids), to blast off labels, re-label, wash interior, check for defects and to leak test as appropriate. Some duties were completed, others appear neglected, and jury consideration is necessary.

Finally, the motions to preclude plaintiff's offer of expert proof are wholly without merit. This action arose on June 23, 1999. The drum remained on the Ryder premises for an extended period. Plaintiff's expert, G.J. Raymus, examined and inspected the drum on September 30, 1999 and March 31, 2000. Raymus taped, secured and photographed the drum which was reported by affidavit November 9,

2006 (Ex.A, Affidavit in Opposition, Schedule A). The drum was preserved by Ryder. Pete Catarelli, a nonparty witness who was the maintenance manager employed at Ryder for 23 years, testified September 28, 2006 that the drum was stored at the Ryder location for many years (EBT Catarelli, Tr.27; Affidavit in Opposition, Monaco Jr., Ex.B). Defendants had equal access and opportunity to inspect the drum on the Ryder premises. They chose not to proceed. Such failure will not be imputed to penalize plaintiff by preclusion. Plaintiff did not have possession or control over the drum or the disposition. Although the plaintiff's expert is purported to be in failing health, deposition prior to trial may be available and testimony preserved for use at trial if necessary (CPLR 3113).

Dated: JUN 26 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION