SHORT FORM ORDER

INDEX No. 04-880
CAL. No. 06-02636-OT

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

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 4-16-07
Mot. Seq. # 004 - MG; CASEDISP

MARY JANE BUDDE and DONALD BUDDE,	:	HOROWITZ, TANNENBAUM & SILVER, P.C.
	:	Attorneys for Plaintiffs
Plaintiffs,	:	2001 Marcus Avenue
- against -	:	Lake Success, New York 11042
	:	
ROLS C. HAGEN. INC., HAGEN PET FOODS, INC. and PETLAND DISCOUNTS,	:	MIRANDA SOKOLOFF SAMBURSKY, et al.
	:	Attorneys for Defendants
	:	240 Mineola Boulevard
Defendants.	:	Mineola, New York 11501

Upon the following papers numbered 1 to 50 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 35 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 36 - 45 ; Replying Affidavits and supporting papers 45 - 50 ; Other defendants memorandum of law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant's motion for summary judgment dismissing plaintiffs' complaint is granted.

Plaintiff Mary Jane Budde commenced this action sounding in negligence and products liability for injuries she sustained on November 10, 2001 when she fell after her dog ran across the street in order to attack another dog and thereby caused her to be flung to the ground when the dog's Trakt 80 retractable leash produced a sudden powerful jolt upon reaching its maximum extension. Plaintiff alleges that both Trakt 80's distributor, Rolf C. Hagen Inc. and its retailer, Petland Discounts ("Defendants"), are liable for her injuries insofar as they negligently designed and retailed the retractable leash and failed to warn the public of the foreseeable danger of using the item.

Defendants now move for summary judgment dismissing plaintiff's complaint on the grounds that the plaintiff has failed to specify any defect in Trak 80's design or that the alleged defect was the proximate cause of her injury. Defendants also contend that an independent non-party witness also confirms that the Trakt 80 leash was not the cause of the plaintiff's accident. In support of their motion defendants submits, *inter alia,* copies of the pleadings; an expert affidavit from James F. Vigani P.E., as well as deposition testimony from plaintiff Mary Budde, non-party witness Bruno Caturani and Trevor Hagen, Chief Operating Officer of Rolf C Hagen Inc. Defendants also submitted copies of an instruction manual and user's guide for the Trakt 80 leash.

In opposition plaintiffs contend that defendants' motion should be denied because defendants have failed to establish their prima facie entitlement to summary judgment and there are numerous issues of fact concerning whether the leash was defectively designed. In addition to her own affidavit, plaintiff also submitted an expert affidavit from Paul J. Glasgow P.E.

It is well settled that a manufacturer is under a nondelegable duty to design and produce a product that is not defective (*see*, ***Denny v Ford Motor Co.,*** 87 NY2d 248, 639 NYS2d 250 [1995]; ***Sage v Fairchild-Swearingen Corp.***, 70 NY2d 579, 523 NYS2d 418 [1987]) and that a defectively designed product is one which is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use (*see*, ***Robinson v Reed-Prentice Div. of Package Mach. Co.,*** 49 NY2d 471, 426 NYS2d 717 [1980]). To establish a strict liability claim based on a defective design, a plaintiff must show the product as designed posed a substantial likelihood of harm, that it was feasible for the manufacturer to design the product in a safe manner, and that the defective design was a substantial factor in causing plaintiff's injury (*see*, ***Voss v Black & Decker Mfg. Co.***, *supra*; ***Gonzalez v Delta Intl. Mach. Corp.***, 307 AD2d 1020, 763 NYS2d 844 [2d Dept 2003]; ***Ramirez v Sears, Roebuck & Co.***, 286 AD2d 428, 729 NYS2d 503 [2d Dept 2001]). Moreover, where liability is predicated on a failure to warn, New York views negligence and strict liability claims as equivalent (***Martin v Hacker***, 83 NY2d 1, 8, 607 NYS2d 598 [1993]; ***Estrada v Berkel Inc.,*** 14 AD3d 529, 789 NYS2d 172 [2005] *lv denied* 4 NY3d 709 [2005]).

Additionally, while the existence of a design defect may be proven by circumstantial evidence that the product had a defect at the time it left the manufacturer's control (***Fox v Corning Glass Works Inc.***, 81 AD2d 826, 438 NYS2d 602 [1981]; ***Klein v Ford Motor Co.***, 303 AD2d 376, 756 NYS2d 271 [2003]; ***Slater v Sears, Roebuck & Co.***, 280 AD2d 950, 721 NYS2d 203 [2001]; ***Sabella v Vaccarino***, 236 AD2d 450, 691 NYS2d 907 [1999]), a defendant may counter this inference by demonstrating that the accident was not necessarily attributable to any defect in its product, or offers an alternative cause to the accident other than the alleged design defect (***Galletta v Snapple Bev. Corp.***, 17 AD3d 530, 793 NYS2d 467 [2005]; ***Castro v Delta Int'l Mach. Corp.***, 309 AD2d 827, 766 NYS2d 65 [2003]; ***Sideris v Simon A. Rental Servs.,*** 254 AD2d 408, 678 NYS2d 771 [1998]; ***Winckel v Atlantic Rentals & Sales***, 159 AD2d 124, 557 NYS2d 951 [1990]).

Here, defendants have met their burden by demonstrating that the accident was not necessarily caused by any defect in their product (***Galletta v Snapple Bev. Corp.***, *supra*; ***Castro v Delta Int'l Mach. Corp.***, *supra*; ***Sideris v Simon A. Rental Servs.,*** *supra*). Defendants expert, James Vigani, P.E., indicated that his inspection and testing of the subject leash revealed that the locking mechanism was intact and operational. Mr. Vigani also indicated that plaintiff's assertion that the leash was defective because it did not provide a cushioned restraint was without merit because such a device would be incompatible with the leash's locking function and negate its ability to effectively restrain an animal. Mr. Vigani further opined that even if the leash had a cushioned restraint, there would always be a jolt once the leash's cord was fully extended. Indeed, Mr. Vigani asserts that the accident may have been caused by plaintiff tripping when she chased after her dog, or by her failure to let go of the leash before it extended to its fullest length upon recognizing that her dog was loose and running across the street. In opposition plaintiff failed to proffer sufficient evidentiary proof in admissible form to establish a material issue of fact as to whether the product was defective and was a substantial factor in causing plaintiff's accident (***Galletta v Snapple Bev. Corp.***, *supra*; ***Castro v Delta Int'l Mach. Corp.***, *supra*).

The assertion of plaintiff's expert that a cushioned restraint would have prevented the accident is speculative since the expert–whose resume was not submitted–failed to conduct any tests or present any data to verify his assertion (***Zaremba v GMC***, 360 F3d 355, 2004 US App Lexis 2422). Furthermore, the expert's opinion regarding the existence of a "phantom lock" position on the leash's locking mechanism is also without probative value as it was not supported by foundational facts such as actual testing of the lock, or consumer complaints regarding the existence of such a defect (*see*, ***Romano v Stanley***, 90 NY2d 444, 661 NYS2d 589 [1997]; ***Castro v Delta Inat'l Mach. Corp***., *supra*; ***Martinex v Roberts Consol. Indus***., 299 AD2d 399, 749 NYS2d 279 [2002]; ***Cervone v Tuzzolo***, 291 AD2d 426, 738 NYS2d 60 [2002]; *see also* ***Delgado v Markwort Sporting Goods Co.***, 13 Misc3d 1227A, 831 NYS2d 347 [2006]).

As to the claim of strict liability based on defendants' failure to provide adequate warnings regarding the leash's stop switch, a manufacturer may be held liable for the failure to warn of the latent dangers resulting from the foreseeable uses of its product which it knew or should have known (*see*, ***Liriano v Hobart Co.***, *supra*; ***Rastelli v Goodyear Tire & Rubber Co.***, 79 NY2d 289, 582 NYS2d 373 [1992]). Liability may be imposed based on either the complete failure to warn of a particular hazard or the inclusion of warnings that are inadequate (*see*, ***DiMura v City of Albany***, 239 AD2d 828, 657 NYS2d 844 [1997]; ***Johnson v Johnson Chem. Co.***, 183 AD2d 64, 588 NYS2d 607 [1992]). However, a manufacturer has no *duty to warn product users of dangers that are obvious, readily discernable or apparent* (*see*, ***Martino v Sullivan's of Liberty***, 282 AD2d 505, 722 NYS2d 884 [2001]; ***Pigliavento v Tyler Equip. Corp.***, 248 AD2d 840, 669 NYS2d 747 [1998]; ***Lonigro v TDC Elec.***, 215 AD2d 534, 627 NYS2d 695 [1995]). Nevertheless, a court can decide as a matter of law that there was no duty to warn or that the duty was discharged (*see*, ***Passante v Agway Consumer Prods.***, 294 AD2d 831, 741 NYS2d 624 [2002]; ***Silveira Dias v Marriott Intl.***, 251 AD2d 367, 674 NYS2d 78 [1998]; ***Schiller v National Presto Indus.***, *supra*; ***Jackson v Bomag GmbH***, 225 AD2d 879, 638 NYS2d 819 [3d Dept], *lv denied* 88 NY2d 805, 646 NYS2d 985 [1996]; ***Oza v Sinatra***, 176 AD2d 926, 575 NYS2d 540 [1991]). As with a claim of design defect, a plaintiff alleging liability based on a failure to warn must establish that the manufacturer had a duty to warn and that the failure to warn was a substantial cause of the event which produced the injuries (*see*, ***Banks v Makita, U.S.A.***, *supra*; ***Billsborrow v Dow Chem.***, 177 AD2d 7, 579 NYS2d 728 [1992]).

Defendants have also established their prima facie entitlement to summary judgment dismissing plaintiff's failure to warn claim by demonstrating that they provided adequate warning with their product (*see*, ***Vega v Stimsonite Corp***., 11 AD3d 451, 783 NYS2d 605 [2004]; ***Garcia v Crown Equip. Corp***., 13 AD3d 335, 786 NYS2d 109 [2004]; ***Ryan v Arrow Leasing Corp***., 260 AD2d 565, 688 NYS2d 638 [1999]; ***General Motors Corp***., 216 AD2d 507, 628 NYS2d 403 [1995]; ***Ruggles v R.D. Werner Co. Inc***., 203 AD2d 913, 611 NYS2d 84 [1994]). Defendants submitted a copy of warnings provided with the Trakt 80 device which stated in bold capital letters:

> CAUTION: EXTREME ACTIVITY SUCH AS VERY HARD PULLS, LUNGES OR RUNNING TO EXTENDED LENGTH CAN GENERATE MANY HUNDRED POUNDS OF FORCE. CARE SHOULD BE EXERCISED IN THE USE AND ENJOYMENT OF THIS LEASH, AS EXCESSIVE FORCE MAY LEAD TO BREAKAGE OF PRODUCT OR HARM TO PET.

The Court finds that as a matter of law this warning was adequate to convey to the plaintiff the dangers related to sudden lunges and pulling by uncontrolled pets (*see, **Liriano v Hobart Co.***, *supra*; *see also, **Vega v Stimsonite Corp.***, *supra*; ***Ryan v Arrow Leasing Corp.***, *supra*).

Accordingly, defendants' Rolf C. Hagen Inc. and Petland Discounts motion for summary judgment dismissing plaintiffs' complaint is granted.

Dated: SEP 18 2007

J.S.C.

_X_ FINAL DISPOSITION _____ NON-FINAL DISPOSITION