

Monroe v Playcore Wisconsin, Inc.

2007 NY Slip Op 33719(U)

November 5, 2007

Supreme Court, Suffolk County

Docket Number: 0021491/2003

Judge: Robert W. Doyle

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 5/17/07 (#003 & #004)
MOTION DATE 6/21/07 (#005)
MOTION DATE 7/20/07 (#006)
ADJ. DATE 8/27/07
Mot. Seq. #003 - MotD
Mot. Seq. #004 - XMD
Mot. Seq. #005 - XMotD
Mot. Seq. #006 - XMD

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JOHN MONROE, JR., an infant by his mother and :
natural guardian, ANN MARIE MONROE and :
ANN MARIE MONROE, individually, :
 :
Plaintiffs, :
 :
- against - :
 :
PLAYCORE WISCONSIN, INC., WOOD :
KINGDOM OF NEW YORK, LTD., NEWCO, :
INC., SWING-N-SLIDE CORP., PERFECTION :
CHAIN PRODUCTS, INC., and LAKELAND :
PLASTICS, INC.. :
 :
Defendants. :
-----X

FRANK J. LAINE, P.C.
Attorney for Plaintiffs
49 South Oyster Bay Road
Plainview, New York 11803

McANDREW, CONBOY & PRISCO
Attorney for Defendants Playcore Wis.,
Newco, Inc., and Swing-N-Slide Corp.
95 Froehlich Farm Boulevard
Woodbury, New York 11797

OHRENSTEIN & BROWN, LLP
Attorney for Defendant Wood Kingdom of N.Y.
1010 Franklin Avenue, 2nd Floor
Garden City, New York 11530

PLAYCORE WISCONSIN, INC., NEWCO, :
INC., and SWING-N-SLIDE CORP., :
 :
Third-Party Plaintiffs, :
 :
- against - :
 :
PERFECTION CHAIN PRODUCTS, INC., :
 :
Third-Party Defendant. :
-----X

JOHN P. HUMPHREYS, ESQ.
Attorney for Defendant Perfection Chain
Prods.
3 Huntington Quadrangle, Suite 102S
P.O. Box 9028
Melville, New York 11747

MOLOD SPITZ & DeSANTIS, P.C.
Attorney for Defendant Lakeland Plastics
104 West 40th Street
New York, New York 10018-3617

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 PERFECTION CHAIN PRODUCTS, INC., :
 :
 Second Third-Party Plaintiff, :
 :
 - against - :
 :
 LAKELAND PLASTICS, :
 :
 Second Third-Party Defendant. :
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Upon the following papers numbered 1 to 80 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-21; Notice of Cross Motion and supporting papers 22-41; 42-45; 46-60; Answering Affidavits and supporting papers 61-67; 68-69; 70-71; Replying Affidavits and supporting papers 72; 73; 74; 75-80; Other defendant Wood Kingdom’s memorandum of law; ~~(and after hearing counsel in support and opposed to the motion)~~ it is:

ORDERED that this motion by defendant Perfection Chain Products, Inc. (Mot. Seq. #003) for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and any counterclaims, cross claims, and third-party claims against it, is granted to the extent of granting summary judgment dismissing the claims of defendants Playcore Wisconsin, Inc., Newco, Inc., and Swing-N-Slide Corp. against it for common-law indemnification, and is otherwise denied; and it is further

ORDERED that the cross motion by defendants Playcore Wisconsin, Inc., Newco, Inc., and Swing-N-Slide Corp. (Mot. Seq. #004) for an order pursuant to CPLR 3212 granting summary judgment in their favor on their cross claims against defendants Perfection Chain Products, Inc. and Lakeland Plastics, Inc. for contractual and common-law indemnification, is denied; and it is further

ORDERED that the cross motion by defendant Lakeland Plastics, Inc. (Mot. Seq. #005) for an order pursuant to CPLR 3212 granting summary judgment dismissing all claims asserted against it, is granted to the extent of granting summary judgment dismissing the claims of defendants Playcore Wisconsin, Inc., Newco, Inc., and Swing-N-Slide Corp. against it for common-law indemnification, and is otherwise denied; and it is further

ORDERED that the cross motion by defendant Wood Kingdom of New York, Ltd. (Mot. Seq. #006) for an order pursuant to CPLR 3212 granting summary judgment (i) dismissing the plaintiffs’ causes of action sounding in strict products liability, breach of warranty, and negligent design, sale, manufacture, and failure to warn, (ii) in its favor on its cross claims against defendants Swing-N-Slide Corp., Perfection Chain Products, Inc., and Lakeland Plastics, Inc. for common-law indemnification, and (iii) in its favor against defendant Swing-N-Slide Corp. for failure to procure insurance naming Wood Kingdom of New York, Ltd. as an additional insured, is denied.

This is an action to recover damages, *inter alia*, for personal injuries allegedly sustained by plaintiff John Monroe, Jr. (“the plaintiff”), then eight years old, on a play set in the backyard of his house on May 3, 2002, when one of the chains on the outdoor swing on which he was playing snapped, causing him to fall. Defendant Swing-N-Slide Corp. (“SNS”) designed and assembled the play set from parts purchased from outside manufacturers and produced according to its express specifications. The model involved had a weldless chain made of galvanized carbon steel wire that was encased in vinyl to prevent children from getting their fingers caught in the chain. Defendant Perfection Chain Products, Inc. (“Perfection”) manufactured the chain. Defendant Lakeland Plastics, Inc. (“Lakeland”) applied the vinyl casing to the chain and delivered it to SNS on large wooden spools. According to Mark Johnson, SNS’s product engineering manager, SNS would inspect the chain upon delivery and reject it if there was any evidence of rust corrosion beneath the vinyl casing. Defendant Playcore Wisconsin, Inc. (“Playcore”) is SNS’s parent company. Defendant Newco, Inc. (“Newco”) was SNS’s predecessor and is no longer in existence. The plaintiffs claim to have purchased the play set from defendant Wood Kingdom of New York, Ltd. (“Wood Kingdom”) but have no receipt evidencing the purchase.¹ The plaintiffs also claim to have experienced no other problems with the swing and to have made no alterations, modifications or repairs to the swing prior to the accident.

The plaintiffs initially commenced this action naming only SNS, Playcore, Newco, and Wood Kingdom as defendants. After SNS, Playcore, and Newco commenced a third-party action against Perfection, the plaintiffs served a supplemental summons and amended complaint asserting a direct claim against Perfection. Perfection then brought a second third-party action against Lakeland, and the plaintiffs served a second supplemental summons and amended complaint asserting a direct claim against Lakeland. As all of the parties have now appeared in the main action, the Court deems it appropriate to convert the complaints and cross-complaints in the third-party actions to cross claims in the main action and to amend the caption by deleting reference to the third-party actions, and the caption is amended accordingly.

Perfection now moves for summary judgment dismissing the complaint and all other claims against it, contending that the plaintiff’s accident did not result from any defect in the chain or the vinyl casing but rather from SNS’s negligent design. Perfection submits the affidavit of Richard F. Lynch, an engineer with a Ph.D. in metallurgy and materials science who examined the broken chain in May 2006. According to his affidavit, (i) the chain itself did not exhibit any defects or deficiencies and was able to perform its intended function, (ii) the part of the chain which was not encased in the vinyl sleeve bore no evidence of red rust corrosion, (iii) the part of the chain which was not encased in the vinyl sleeve resisted corrosion in a satisfactory manner despite exposure to outdoor conditions, (iv) in the section of

¹ Apart from the issue of where the play set was purchased, there is an unexplained gap of four years between the date of purchase and the date of installation. At the deposition of Christopher J. Arendt, Lakeland’s president, the plaintiffs’ attorney represented that the play set was purchased in 1995, with supporting reference to a bill of particulars (furnished by the plaintiffs in response to Lakeland’s demand) in which it was alleged that the play set was purchased on or about July 13, 1995, or approximately seven years prior to the accident. According to the plaintiff, however, the plaintiff’s father installed the play set only three years prior to the accident.

the chain that failed, there was evidence of premature red rust corrosion, (v) the premature corrosion was the result of encasing the chain in a vinyl sleeve, which trapped water and created a highly corrosive environment, and (vi) the failure of the chain was the result of the design which required that it be encased in a vinyl sleeve which trapped water and created a highly corrosive environment.²

Lakeland cross-moves for summary judgment dismissing the complaint and all other claims against it, alleging that the plaintiffs cannot establish that the vinyl casing was defective in any way.

Perfection's motion and Lakeland's cross motion are granted to the extent of granting summary judgment dismissing the cross claims of Playcore, Newco, and SNS against them for common-law indemnification, since any potential liability on the part of SNS would be premised upon its own wrongdoing and would not be purely vicarious (*see, Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 492 NYS2d 371 [1985]; *County of Westchester v Becket Assoc.*, 102 AD2d 34, 478 NYS2d 305, *appeal dismissed* 64 NY2d 734, 485 NYS2d 752 [1984], *aff'd* 66 NY2d 642, 495 NYS2d 364 [1985]).

Perfection's motion is otherwise denied. Notwithstanding the expert's opinion, there is no proof on this record that the condition of the chain which he examined four years after the accident was the same as it was at the time of the plaintiff's accident (*see, DeCarlo v Village of Dobbs Ferry*, 36 AD3d 749, 828 NYS2d 532 [2007]; *Cruz v Deno's Wonder Wheel Park*, 297 AD2d 653, 747 NYS2d 242 [2002]). Absent such proof, there remains an issue of fact, sufficient to defeat summary judgment, whether the chain failed because of corrosion attributable to a design flaw or, at least in part, because of a defect inherent in its manufacture.

Lakeland's cross motion is otherwise denied as well. To obtain summary judgment it is necessary that a party establish its cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in its favor (CPLR 3212 [b]), and that it do so "by tender of evidentiary proof in admissible form" (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790, 792 [1979]; *accord, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Thus, "a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (*Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 615, 585 NYS2d 894, 895 [1992]). Although Lakeland asserts that "plaintiffs did testify that there were no rips or tears in the vinyl casing," the Court is aware of no such testimony. Nor, in any event, would such testimony be conclusive as to the

² Although not submitted in conjunction with Perfection's motion, the affidavit of the plaintiffs' metallurgic expert, James W. Pugh, is to similar effect. He contends that the opaque plastic covering on the chain promoted the "preferential" corrosion of the links within the covering, not only by trapping moisture on the links but also by creating "oxygen-concentration cells" which caused the corrosion or rusting of the links within the covering at an accelerated rate without the need for any moisture to contact the chain. He also opines that the covering operated to conceal the existence of the corrosion and prevent its identification.

existence of perforations which might be invisible to the naked eye but detectable by testing.³

Playcore, Newco, and SNS cross-move for summary judgment in their favor on their cross claims against Perfection and Lakeland for contractual and common-law indemnification. According to the written terms and conditions of their respective agreements to supply products to SNS, Perfection and Lakeland were required to

indemnify and hold SNS, its subsidiaries and agents and employees, harmless from and against any and all claims, damages, losses and expenses. Including, but not limited to, claims for bodily injury, sickness, disease, death, damage to property and attorneys fees, which arise from, result from, or in any way relate to the supplier's product(s) *with the exception of such claims, damages, losses and expenses which arise solely from the negligence of SNS* [emphasis added].

The cross motion by Playcore, Newco, and SNS is denied. Having already granted summary judgment dismissing their cross claims for common-law indemnification against Perfection and Lakeland, the Court need only consider whether Playcore, Newco, and SNS are entitled to summary judgment on their cross claims for contractual indemnification; based on the affidavits of Richard F. Lynch and James W. Pugh, and on the maxim that "the right to contractual indemnification depends upon the specific language of the contract" (*Gillmore v Duke/Fluor Daniel*, 221 AD2d 938, 939, 634 NYS2d 588, 590 [1995]), the Court finds an issue of fact whether SNS is solely at fault in the happening of the accident and, hence, whether Perfection or Lakeland is contractually obligated to indemnify SNS.

Finally, Wood Kingdom cross-moves for summary judgment on the grounds (i) that the plaintiffs' claim based on its alleged failure to warn is without merit because the defect was not known or reasonably foreseeable at the time of sale, (ii) that a retailer cannot be held liable for injuries sustained from the contents of a sealed product, (iii) that the plaintiffs cannot maintain a cause of action sounding in strict products liability because they cannot prove a feasible design alternative would have made the product safer, (iv) that it did not breach any express or implied warranty, (v) that it is entitled to common-law indemnification from SNS, Perfection, and Lakeland, and (vi) that SNS is required to indemnify and defend it as an additional insured.

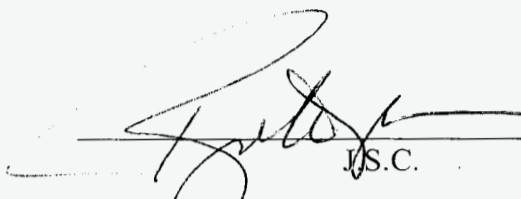
Wood Kingdom's cross motion is denied as untimely, having been made more than 120 days after the filing of the note of issue without any showing of good cause for the delay (*see*, CPLR 3212 [a]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]). Although Wood Kingdom claims that its delay was justified because an outstanding notice existed to take the deposition of the plaintiff's father, it has not established how the absence of this testimony hindered its ability to timely move for summary judgment. Moreover, while a court may entertain a belated cross motion for summary

³ According to Christopher J. Arendt, Lakeland "continuously" performed visual tests for pinhole breaks, or "leakers," prior to delivery. If there was a leaker in the vinyl casing, water could enter during the cooling process, and a Lakeland employee would be able to detect a leak as the chain was being wound on a spool. In that event, Lakeland would cut the chain and discard the defective portion.

judgment if a timely motion for such relief has been made on “nearly identical” grounds (*Grande v Peteroy*, 39 AD3d 590, 592, 833 NYS2d 615, 617 [2007]; *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 497, 793 NYS2d 176 [2005]), here it cannot be said that the grounds on which Wood Kingdom seeks summary judgment are nearly identical or even, for the most part, remotely similar to the grounds on which the timely motion-in-chief and cross motions are based.

The Court directs that all remaining claims in this action be severed and continued.

Dated: NOV 05 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION