SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 7
NASSAU COUNTY

JOFFRE PESANTES and LESLIE PESANTES,

Plaintiffs,

INDEX No.: 002412/05

-against-

ORIGINAL RETURN DATE:07/19/07
SUBMISSION DATE: 10/19/07

KOMATSU FORKLIFT USA, INC., RCS CORP., and CROWN LIFT TRUCKS,

Defendants.

MOTION SEQUENCE #1,2,3

RCS ELECTRONICS EQUIPMENT CORP. i/s/h/a RCS CORP.,

Third-Party Plaintiff,

-against-

GLASS TOWN,

Third-Party Defendant.

CROWN LIFT TRUCKS,

Second Third-Party Plaintiff,

-against-

GLASS TOWN,

Second Third-Party Defendant.

KOMATSU FORKLIFT USA, INC.,

Third Third-Party Plaintiff,

-against-

GLASS TOWN,

Third Third-Party Defendant.

The following papers read on this motion:

Notice of Motion.....	1, 2-3, 4
Answering Papers.....	5, 6, 7
Reply.....	8, 9, 10

This motion [sequence #1] by defendant RCS Corp. [RCS] for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and all cross-claims against it, or, in the alternative, an order (1) dismissing plaintiff Leslie Pesantes' claims against it; (2) dismissing all of plaintiff Joffre Pesantes' claims against it with the exception of his strict products liability claim; and, (3) granting it conditional summary judgment against Komatsu Forklift USA, Inc. with respect to plaintiff's product liability claim is granted to the extent provided herein.

This motion [sequence #2] by defendant Crown Lift Trucks [Crown] for an order pursuant to CPLR 3212 granting it summary judgment dismissing all claims against it is granted.

This motion [sequence #3] by defendant Komatsu Forklift USA, Inc. [Komatsu], for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and all cross claims against it is granted to the extent provided herein.

In this action, plaintiff Joffre Pesantes seeks to recover damages for personal injuries he sustained on April 5, 2004 while working at third-party defendant Glass Town, Inc. [Glass Town] when he was struck by a forklift truck. His wife, plaintiff Leslie Pesantes, advances a derivative claim.

Defendant Komatsu distributed the forklift; defendant RCS sold the forklift to Glass Town and serviced it as well; and defendant Crown serviced the forklift two months before plaintiff's accident.

Plaintiffs seek recovery upon the following theories of strict-products and/or tort liability; (1) breach of warranty; (2) design defect; (3) breach of implied warranty of fitness for a particular purpose; (4) failure to warn; and, (5) common-law negligence. More specifically, plaintiffs allege that defendants Komatsu and RCS failed to provide a wheel guard to protect pedestrians from contact with the forklift's front/drive tires; failed to design a forklift which, when used as reasonably anticipated, does not impair the operator's visibility; and, failed to warn of the hazards associated with an intended or reasonably foreseeable use, thereby posing a danger to pedestrians or others near it. Plaintiffs additionally allege that RCS and/or Crown are responsible for a defect in the forklift's steering and that RCS is responsible for faulty brakes, both of which plaintiffs allege contributed to plaintiff's accident as well. All defendants bring third-party actions against plaintiff's employer, Glass Town.

Glass Town is a wholesale distributor of glass and mirrors. At the time of plaintiff's accident, it occupied two buildings, a warehouse and a main building. Access between the two buildings was via a public sidewalk. Glass Town has owned and operated the forklift which is the subject of this action since 1983. The forklift is used to move glass from the warehouse to the main building and to unload deliveries.

Alan Parker, a Design Engineering Manager at Komatsu, testified at his examination-before-trial that the forklift was manufactured in Japan some time before March 10, 1981. It is a sit-down counterbalance forklift which has never been the subject of a recall. He explained that the forklift has six tires: four driving tires located in the front with fenders covering half of those wheels; and, two steering tires located in the rear. The rear tires turn the vehicle, while the front drive tires remain straight. The brakes on the subject forklift are located in the front on the drive tires. Parker further explained that Glass Town purchased a boom for the forklift which was manufactured by Polar to load and offload glass, as opposed to the forks which the forklift came with. Parker explained that Komatsu did not offer a boom attachment because "they have inherent problems" including load stability and obstruction of the driver's frontward view.

Plaintiff began working at Glass Town in 1995 as a glass handler. His duties included unpacking glass, placing it on racks and delivering it to stores. George Prosser and Milo Conklin own Glass Town. Plaintiff was trained mostly by Prosser. At his examination-before-trial, Prosser testified that the forklift safety book admonished operators to be sure that pedestrians were outside of the danger zone of the machine. He recalled advising plaintiff to be sure that the forklift was not operated near pedestrians and that no one should ever walk near the forklift when in operation. He testified that Glass Town's rules regarding the position of the machine while transporting crates of glass in 2004 were to "always stand free of the machine, never go in front of the machine, never go in back of the machine" and never walk next to the machine.

Plaintiff admitted at his examination-before-trial that he had been told to stay away from the forklift while it was moving and to make sure no pedestrians were nearby. He admitted being told to always stay in front of the crate being transported. Plaintiff testified at his examination-before-trial that since 1999, sometimes the forklift would roll a foot further when he applied the brakes and that although he complained about that to Prosser, Prosser would simply say that he'd get back to him. Plaintiff also testified that the steering wheel did not turn properly for seven to twelve months before his accident and that again, although he complained to Prosser about that as well, Prosser again simply told him that he would get back to him on it.

George Prosser denied having experienced any problems or complaints concerning the forklift's operation, brakes, steering or hydraulics during his 19 years of employment at Glass Town. He testified at his examination-before-trial that Glass Town used the boom more frequently than the forks. Prosser explained that in order to offload glass from a trailer or move glass from the warehouse to the main building, the crates are suspended from cables attached to the forklift's boom. He further explained that crates of glass are typically transported suspended two to three inches from the ground to prevent someone's foot from getting caught underneath the crate. One

employee operates the forklift while another guides the crate to prevent the crate from moving or swaying, as was done on the date of plaintiff's accident. Prosser testified that the forklift operator and the individual guiding the crate are supposed to always maintain eye contact. He further explained that the forklift is supposed to transport crates at a slow rate of speed to prevent anyone, including the person guiding the crate, from getting hurt. Prosser explained "you don't want to bump someone into the wall, or something like that. You have 3000 pounds and it's suspended by a hook, so you don't want to hit someone or pin someone, the case would swivel."

Both plaintiff and Prosser testified at their examinations-before-trial that on the date of the accident they used the forklift for several hours filling orders and accepting deliveries in the morning. And, both testified that they did not have any problems with the forklift that day.

At approximately 10 AM, Prosser was using the forklift in the warehouse when someone in the main building asked plaintiff to go tell Prosser that he had a phone call. It is not disputed that plaintiff did so and that plaintiff left the warehouse and walked along the sidewalk back towards Glass Town's main building, however, plaintiff and Prosser do not agree on the precise sequence of events.

At his examination-before-trial, Prosser recalled driving the forklift out of the warehouse with Julio guiding the 1-2 ton 48" by 130" crate of glass that was hanging from the forklift's boom while plaintiff remained inside the warehouse speaking to Omar. Prosser testified that he turned right on to the sidewalk, proceeded straight and that he never saw plaintiff until after Julio told him to stop because plaintiff had been hit by the forklift.

In contrast, plaintiff testified at his examination-before-trial that he exited the warehouse and that he was walking on the sidewalk in front of the forklift but then he saw the glass crate which was hanging from the forklift's boom pass him. He testified that as the forklift came up alongside of him, he moved closer to the wall–in fact he abutted the wall–and that he then heard a loud noise from the forklift and the right front wheel hit his left leg and the forklift overtook him.

The forklift was not taken out of service during the interim period between plaintiff's accident and the parties' inspection of it.

Crown installed the forklift's rebuilt steering pump which was supplied by RCS on January 21, 2004, approximately two months before plaintiff's accident. Chris Monaghan, a Service Manager for Crown, has attested that he inspected the forklift on March 13, 2006 (two months before plaintiff's expert did), and that he found the steering to operate properly; there was no free-play in the steering wheel. In any event, Ronald Brewer, the Manager of Operating Training at Crown, opines that the power steering pump does not affect the free-play in the steering wheel. He explains that free-play in the steering wheel is purely mechanical and results from gear tooth engagement in the steering gear box. In fact, Monaghan states that steering is tested before the forklift is turned on and before the power steering pump even becomes operative. Therefore, free-play in the steering wheel has no relationship to the power steering pump. In addition, Monaghan

notes that the forklift manual provides that: "Excessive steering wheel play" is caused by "improper adjustment" or "loosened joint link," which require "adjusting" or "retightening." It is not caused by the power steering pump.

All defendants seek summary judgment.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985)). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (Alvarez v Prospect Hosp., supra, at p. 324). The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference (see, Demishick v Community Housing Management Corp., 34 AD3d 518 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990)).

"Under New York law, it is well settled that a manufacturer may be held liable for placing into the stream of commerce a defective product which causes injury" (Gebo v Black Clawson Company, 92 NY2d 387, 392 (1998)). "Where a defective product is sold by a seller, dealer or distributor engaged in its normal course of business, the burden of strict liability has been imposed" (Id., citing Stiles v Batavia Atomic Horseshoes, Inc., 81 NY2d 950, rearg den., 81 NY2d 1068 (1993)). "[A] manufacturer, wholesaler, distributor, or retailer who sells a product in a defective condition is liable for injury which results from the use of the product 'regardless of privity, foreseeability or the exercise of due care.'" (Godoy v Abamaster of Miami, Inc., 302 AD2d 57, 60 (2nd Dept. 2003), lv dism. 100 NY2d 614 (2003), quoting Gebo v Black Clawson Co., supra, at p. 392, citing Sukljian v Charles Ross & Son Co., 69 NY2d 89, 94-95 (1986); Nichols v Agway, Inc., 280 AD2d 889 (4th Dept. 2001); Bielicki v T.J. Bentey, Inc., 248 AD2d 657 (2nd Dept. 1998); Mead v Warner Pruyn Div., Finch Pruyn Sales, 57 AD2d 340 (3rd Dept. 1977)). "A product may be defective by reason of a manufacturing flaw, an improper design, or a failure to provide adequate warnings for the product's use" (Gebo v Black Clawson Company, supra, citing Liriano v Hobart Corp., 92 NY2d 232 (1998)). "The plaintiff need only prove that the product was defective as a result of either a manufacturing flaw, improper design, or a failure to provide adequate warnings regarding the use of the product and that the defect was a substantial factor in bringing about the injury" (Godoy v Abamaster of Miami, Inc., supra, at p. 60, citing Sukljian v Charles Ross & Son Co., supra; Voss v Black & Decker Mfg. Co., supra; Robinson v Reed-Prentice Div. of Package Mach. Co., 49 NY2d 471, 478-479 (1980)).

A product is defectively designed when the design of the entire product line is unreasonably dangerous for its intended use or for an unintended but reasonably foreseeable use (see, Sage v Fairchild-Swearingen Corp., 70 NY2d 579, 585 (1987); Voss v Black & Decker Mfg. Co., 59 NY2d 102, 107-108 (1983); Robinson v Reed-Prentice Div. of Package Mach. Co., supra, at p. 480; Micallef v Miehle Co., 39 NY2d 376, 386 (1976)). The standard for determining whether a product is reasonably safe requires an assessment of whether, " 'if the design were known at the time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner.'" (Denny v Ford Motor Co., 87 NY2d 248, 257 (1995), rearg den. 87 NY2d 669 (1996), quoting Voss v Black & Decker Mfg. Co., supra). "In balancing the product's risks against its utility and cost, the following factors must be considered: '(1) the utility of the product to the public as a whole and to the individual user; (2) the nature of the product–that is, the likelihood that it will cause injury; (3) the availability of a safer design; (4) the potential for designing and manufacturing the product so that it is safer but remains functional and reasonably priced; (5) the ability of the plaintiff to have avoided injury by careful use of the product; (6) the degree of awareness of the potential danger of the product which reasonably can be attributed to the plaintiff; and (7) the manufacturer's ability to spread any cost related to improving the safety of the design'". (Anaya v Town Sports International, Inc., ___AD3d ___, 843 NYS2d 599, 601 (1st Dept. 2007), citing Voss v Black & Decker Mfg. Co., supra, at p. 109).

"A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known" (Liriano v Hobart Corp., supra, at p. 237, citing Rastelli v Goodyear Tire & Rubber Co., 79 NY2d 289, 297 (1992)). "A manufacturer also has a duty to warn of the danger of unintended uses of a product provided these uses are reasonably foreseeable" (Liriano v Hobart Corp., supra, at p. 237 citing Lugo v LJN Toys, Ltd., 75 NY2d 850 (1990); McLaughlin v Mine Safety Appliances Co., 11 NY2d 62 (1962)). "This rule applies with equal force to distributors and retailers" (Anaya v Town Sports International, Inc., supra, at p. 602, citing Godoy v Abamaster of Miami, supra).

"One who is liable for an injury 'by imputation of law may seek common-law indemnity from a person primarily liable for the injury.' " (Godoy v Abamaster of Miami, Inc., supra, at p. 62 quoting 23 N.Y. Jur. 2d Contribution, Indemnity and Subrogation § 90). "Where an entity 'has discharged a duty which is owed by [it] but which as between [it] and another should have been discharged by the other' a contract to reimburse or indemnify is implied by law" (Godoy v Abamaster of Miami, Inc., supra, at p. 62, citing McDermott v City of New York, 50 NY2d 211, 217 (1980), rearg den. 50 NY2d 1059 (1980), quoting Restatement of Restitution § 76). "Thus, it is well settled that a seller or distributor of a defective product has an implied right of indemnification as against the manufacturer of the product" (Godoy v Abamaster of Miami, Inc., supra, at p. 62, citing McDermott v City of New York, supra; Nutting v Ford Motor Co., 180 AD2d 122, 132 (3rd Dept. 1992); Spector v K-Mart Corp., 99 AD2d 605 (3rd Dept. 1984); Infante v Montgomery Ward & Co., Inc., 49 AD2d 72, 75 (1975); Meade v Warner Pruyn Div., Finch Pruyn Sales, 57 AD2d 340 (3rd Dept. 1977)).

By So-Ordered Stipulation dated January 5, 2007, the parties agreed that plaintiff Leslie Pesantes would be precluded from testifying at trial if she failed to appear for a deposition on or before January 31, 2007 . She never appeared. Her complaint is stricken and her claims are dismissed.

Komatsu

There is no evidence of any manufacturing defect as there is no evidence that the forklift was not built to specifications or that it deviated from them (McArdle v Navistar Intern. Corp., 293 AD2d 931 (3rd Dept. 2002)).

John Johnson, a licensed professional engineer and certified safety professional, has submitted an affidavit in support of Komatsu's motion. He opines that he has participated in the development and promulgation of numerous safety standards and recommended practices concerning forklifts including those put forth by American Society of Mechanical Engineers ("ASME"), the Industrial Truck Standards Development Foundation ("ITSDF"–formerly under ASME), and the International Standards Organization ("ISO") and that he currently serves on the ITSDF B56 Standards Committee for Powered and Nonpowered Industrial Trucks. He attests that he has examined the pertinent legal documents as well as the subject forklift itself, three years post-accident. He attests to having found the forklift to have excessive free-play in the steering wheel in violation of applicable ANSI/ASME federal standards. Nevertheless, he notes that the forklift was 23 years old at the time of plaintiff's accident and that that is normally a maintenance problem, not a manufacturing problem. More importantly, he notes that there is no evidence that this existed in 2004 when plaintiff's accident occurred and that even the plaintiff himself testified that the steering wheel was fine on the morning of his accident. Johnson similarly notes that the alleged braking problem, like the power steering problem, is a maintenance, not manufacturing or design defect. And, the brake problem also has not been shown to exist when plaintiff's accident occurred. In any event, the evidence establishes that Prosser never saw plaintiff and never tried to stop or turn until after plaintiff had been hit; accordingly, the quality of the brakes and steering played no role in plaintiff's accident.

As for the lack of front wheel guards, Johnson notes that not only have plaintiffs failed to identify a signal forklift manufacturer that uses them, there are no statistics or evidence to support his assertion that they are practical and would have prevented plaintiff's accident. Johnson further notes that the forklift was state of the art at the time of its design and manufacture, and that the design was similar in concept to accepted industry standards. It met the design and construction requirements for powered industrial trucks established by the American National Standard for Powered Industrial Trucks. Johnson notes that there were and are no applicable regulations or provisions that require the inclusion and use of such cover guards on industrial lift trucks. Johnson also noted that numerous things must be considered before making a change like the one proposed by plaintiff's expert. He opined that "there is no engineering basis to reasonably conclude that a guard over the forklift's right front tire would have reduced plaintiff's injury or prevented it altogether, as Dr. Ojalvo asserts." In addition, Parker testified at his examination-before-trial that

the existing fender covered more than half the tire and that no complaints about it were ever received. Parker testified that all other forklift manufacturers utilized a design like Komatsu's. Parker further explained that:

> "There's reasons design-wise not to install a complete cover. You need to check the air pressure in the tires. You need to periodically change the tires. Also the carriage of the mast comes very close to the front of the tires. One of the design objectives is to minimize that distance between the tires and the carriage.

Johnson also notes that the applicable regulations require warnings about pedestrians in areas where the forklift is operated and that the forklift's operation and maintenance manual included them, to wit, it provided: "[b]e careful of those around you, and always confirm that there is no person or obstacle in the way before starting the engine and driving or turning the machine."

Komatsu has established that neither the alleged steering nor the alleged brake defects are a result of the forklift's design, but rather, are the result of repair and/or maintenance. In any event, plaintiff's expert's inspection took place over two years after plaintiff's accident and accordingly his findings regarding the steering and brakes fail to establish a link between the condition of the forklift and plaintiff's accident. Komatsu has also established that the forklift was state of the art when it was manufactured. With respect to the protective fender, no manufacturer designed or used the type of fender cover that plaintiff's expert faults defendants for failing to have, nor did any applicable regulations require one.

Nevertheless, Komatsu has failed to address plaintiffs' claim that the use of the boom – which was reasonably anticipated by Komatsu – created a blind spot which may have resulted in the operator never seeing plaintiff prior to contact. This failure is fatal to defendant Komatsu's and concomitantly RCS' application for summary judgment on plaintiffs' claims premised upon design defect and failure to warn. Moreover, even considering Komatsu's belated response in Reply regarding the boom, Komatsu has still failed to establish its entitlement to summary judgment. That federal regulations and ANSI/ASME rules required that a forklift be operated with the load trailing when the load being carried objects the operator's view does not establish that the forklift in question was able to be operated in that fashion nor does it demonstrate that Komatsu issued such a warning, or that it warned about the blind spot.

The Statute of Limitations for breach of warranty is four years (Uniform Commercial Code § 2-725(1), (2)). Such a claim accrues upon tender of delivery, which occurred here in 1983. The breach of warranty claims are time barred (Heller v U.S. Suzuki Motor Corp., 64 NY2d 407 (1985); Weiss v Polymer Plastics Corp., 21 AD3d 1095 (2nd Dept. 2005)). In any event, the breach of implied warranty claim must be dismissed as there is no evidence that the forklift was being used for a particular as opposed to ordinary purpose (UCC § 2-315 n.2; see also, Saratoga Spa & Bath, Inc. v Beeche, 230 AD2d 326 (3rd Dept. 1997)).

RCS

In view of RCS' role here, it too may be liable for plaintiff's strict products liability claim regarding the defective design and failure to warn of the boom's affect on visibility. However, it is conditionally entitled to indemnification from Komatsu should plaintiff prevail on either or both of those claims.

As for the steering and brake mechanism defects, RCS told Glass Town on April 8, 2003 that the forklift's brakes needed servicing: Glass Town, however, refused to have the work done because a loaner wasn't available. As for the steering, RCS was called upon to repair the power steering pump but was unable to do so. Crown Lift ultimately installed a rebuilt steering pump which Glass Town provided on April 21, 2004. Neither the brake nor steering problems can be attributed to RCS. In any event, again, the discovery of these problems by plaintiff's expert over two years after the April 5, 2004 accident was too attenuated from plaintiff's accident to permit a finding that either or both of those conditions played any role in causing it. In addition, and also as previously noted, there is no evidence that the brakes or steering played any part in plaintiff's accident.

Crown Lift Trucks

Crown Lift Trucks' only involvement with the forklift was its repair on January 21, 2004 when it installed a rebuilt power steering pump provided by Glass Town. While plaintiff now acknowledges that the steering pump is not related to the freeplay in the steering wheel, he avers that Crown could have created a risk of danger by installing a rebuilt steering pump without inspecting it, especially since plaintiff had noticed the steering intermittently stiffening up and loosening. This theory, however, rests purely upon surmise. Crown's service order invoice indicates that "machine tests o.k." Contrary to plaintiffs' objection, that document is admissible as a business record under CPLR 4518. More importantly, again, there is no evidence whatsoever that the steering of the forklift played any role whatsoever in plaintiff's accident. Therefore, assuming, *arguendo*, that Crown was negligent with respect to the power steering pump, proximate cause is nevertheless lacking. And, contrary to plaintiff's argument, Crown has not violated a duty to warn of a defective condition. There is no evidence such a defect existed when Crown did the repair. In any event, it did not have a routine servicing relationship with Glass Town (see, Pollock v Toyota Motor Sales, U.S.A., Inc., 222 AD2d 766 (3rd Dept. 1995); Giustino v Hollymatic Corporation, 202 AD2d 161 (1st Dept. 1994); Ayala v V & O Press Co., 126 AD2d 229 (2nd Dept. 1987)).

The complaint and any and all cross-claims against Crown Lift Trucks are dismissed.

In conclusion, plaintiff Leslie Pesantes' complaint is dismissed. The complaint and all cross-claims are dismissed in their entirety against defendant Crown Lift Trucks. With the exception of plaintiff's claims of design defect and failure to warn regarding the boom modification, all claims against defendants Komatsu and RCS are dismissed. All dismissals are without costs.

Defendant RCS is granted indemnification against defendant Komatsu.

Consistent with the foregoing, the title of this action is amended to read as follows:

"JOFFRE PESANTES,

Plaintiff,

-against-

KOMATSU FORKLIFT USA, INC. and RCS CORP.,

Defendants.

RCS ELECTRONICS EQUIPMENT CORP. i/s/h/a RCS CORP.,

Third-Party Plaintiff,

-against-

GLASS TOWN,

Third-Party Defendant.

KOMATSU FORKLIFT USA, INC.,

Second Third-Party Plaintiff,

-against-

GLASS TOWN,

Second Third-Party Defendant."

This decision constitutes the order of the court.

Dated: 11-28-07

HON THOMAS P. PHELAN
J.S.C.

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