Bruno v Thermo King Corp.

2008 NY Slip Op 30320(U)

January 30, 2008

Supreme Court, Queens County

Docket Number: 0018348/2005

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 22**
Justice

GERALD BRUNO, Plaintiff,	Index No. 18348/05
-against-	Motion Date December 11, 2007
THERMO KING CORPORATION, METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, NOVABUS a/k/a PREVOST CAR INC., Defendants.	Motion Cal. No. 3 and 4 Motion Sequence No. C005, C004

	PAPERS NUMBERED
Notice of Motion No. 3-Affidavits-Exhibits..	1-4
Memorandum of Law of Novabus.....	5-6
Affirmation in Opposition.....	7-10
Reply Memorandum of Novabus.....	11-12
Notice of Motion No. 4-Affidavits-Exhibits..	1-4
Brief of Thermo King.....	5-6
Affidavit of Don Nielsen.....	7-8
Cross Motion.....	9-13
Affirmation in Opposition.....	14-16
Brief of Thermo King.....	17
Reply Brief of Thermo King.....	18-19
Reply Affirmation.....	20-21

Upon the foregoing papers it is ordered that these motions and the cross motion are determined as follows:

Defendants', Thermo King Corporation ("Thermo King") and Novabus a/k/a Prevost Car Inc. ("Novabus") motions for summary judgment and dismissal of plaintiff, Gerald Bruno's Complaint pursuant to CPLR 3212 are hereby granted.

On June 1, 2004, plaintiff, Gerald Bruno while employed by the New York City Transit Authority as a bus mechanic at the

Queens Village Depot, while engaged in work on the components of the air conditioning system installed on bus #4918, severely damaged his left hand. Plaintiff sues for personal injuries as the severe damage to the left hand resulted in amputation of his left small finger and damage to adjoining fingers. It is alleged that the bus was manufactured and designed by defendant, Novabus a/k/a Prevost Car Inc. and the air conditioning system for the bus was manufactured and designed by defendant, Thermo King Corporation.

Defendant, Thermo King Corporation asserts that plaintiff cannot show that any part of the air conditioning system was defective or that it caused plaintiff's injury, and that the sole proximate cause of plaintiff's injury was his deliberate actions of disregarding safety procedures and placing his hands too close to moving engine parts. Defendant claims that while it was the manufacturer of the component part (the air conditioner compressor that plaintiff was attempting to troubleshoot), it did not design the bus, the engine, the belt, the belt guard or the configuration of the compressor within the engine component, nor did it install the air conditioning system in the bus, and therefore, it has no liability to plaintiff. In support of its position, plaintiff submits, *inter alia*, the deposition transcripts of: plaintiff, Gerald Bruno, Sid Gnewikow, a bus production service manager for Thermo King, Jimmy Stout, a service manager for Novabus, the manufacturer of the subject bus, and Aubrey Moses, a superintendent in the Safety and Training Division for the New York City Transit Authority, as well as photographs. Sid Gnewikow testified that Thermo King does not manufacture or supply drive belts for the compressor of bus air conditioning systems and does not make drive pulleys. Jimmy Stout testified that belts and belt guards are not supplied by Thermo King. Aubrey Moses testified that he has never known bus mechanics to be taught to put their hands near moving parts and that a loose connection between the connector and the compressor would be determined not by holding the wire with one's hand, but by applying a multimeter to the connector.

Defendant Novabus a/k/a Prevost Car Inc. contends that summary judgment should be granted because plaintiff cannot establish a *prima facie* case without expert testimony, and plaintiff should be precluded from providing expert testimony at this point. Novabus asserts that it served plaintiff with a Demand for Expert Information on February 2, 2007, that plaintiff has failed to produce expert information "despite being requested to do so repeatedly over the [course of] seven months," and that discovery is now closed. Novabus maintains that in the absence of expert testimony, plaintiff cannot meet its burden of establishing that the product in question was defective, that there is a feasible alternative design which would have prevented the accident, and that the alleged defect proximately caused his

injuries. In support of its position, Novabus points to case law stating that in order to meet its *prima facie* burden, plaintiff must come forth with an expert to show a feasible alternative design. Furthermore, defendant Novabus maintains that it was improper for plaintiff to wiggle the air conditioning clutch wire while the engine was running, and to place his hand next to a moving part. Defendant Novabus states that "Mr. Bruno admits that he was not following safe repair procedure and that he had been trained in the proper procedure." In support of this position, Novabus cites *inter alia*, to the deposition testimony of Thermo King's representative, Sid Gnewikow, who testified, that it is never proper to hold a wire where the plaintiff did with the engine running and to the testimony of NYCTA's representative, Aubrey Moses, who testified that bus mechanics are taught to never put their hands near moving parts.

Plaintiff asserts that defendants Thermo King and Novabus have not met their burden and there are triable issues of fact precluding summary judgment. Plaintiff asserts that the defendants failed to meet their burden because they did not establish that what they manufactured, designed and assembled was safe or reasonable. Additionally, plaintiff maintains that: the bus was defectively designed; that there were alternative designs for the components of the air conditioning unit; that such alternatives were both technically and economically feasible; and that those alternatives would have clearly prevented the accident in question. In support of its position, plaintiff attaches *inter alia*, the affidavit of Dr. Jeffrey Ketchman, a licensed and registered engineer and Director of Mechanical & Safety Engineering at InterCity Testing & Consulting Corporation, as well as the affidavit of plaintiff himself. Dr. Ketchman affirms that he conducted an inspection of the subject bus and air conditioning components on October 25, 2005, and reached the following five conclusions: (1) The subject belt guard was defective from a safety standpoint, (2) The routing of the A/C clutch wire was defective, (3) The A/C belt guard lacked a safety warning which is a safety defect, (4) "The presence of the above-noted safety defects of the A/C system of the bus renders it not reasonably safe for its intended use, which includes foreseeable maintenance and trouble-shooting activities" and "these defects were substantial causative factors of this accident - and could have been eliminated by technically and economically feasible alternatives . . ." and (5) "The failure to eliminate these hazards, first by design - as was feasible - and if not, then by guarding and proper warnings, represents a negligent failure of Thermo King and Novabus to apply the *Safety Design Hierarchy*, a long-standing Principle of product design."

In its reply papers, defendant Thermo King proffers the Affidavit of Don Nielson, the Engineering Platform Manager of HVAC products for Thermo King Corporation, who states that

wiggling a wire attached to any engine-driven compressor while the engine is on is not a recommended diagnostic technique. Defendant also asserts that plaintiff's expert's affidavit of Jeffrey Ketchman, P.E. sets forth inadmissible "net opinions" with no foundation in fact or law. Thermo King avers that plaintiff's expert's affidavit refers to facts not personally known to him, and fails to cite any standards for his conclusory net opinion that the compressor was defective. Additionally, Thermo King contends that Dr. Ketchman concludes that another compressor, one made by another air conditioner manufacturer, Carrier, has a safer design, but fails to proffer any scientific proof, or any objective facts, for his conclusion. Defendant argues that Dr. Ketchman "offers no data, measurements, illustrations, photographs, or blueprints of the supposedly better-designed Carrier-compressor, and he cites no industry standards, engineering principles, or governmental regulations to show why the Thermo King design was defective." Furthermore, Mr. Nielsen contends that Dr. Ketchman fails to cite any authority for the proposition that wiggling the AC Wire with the engine on is "an efficient diagnostic practice," and states that while Dr. Ketchman argued that it was a "common practice among NYCTA bus mechanics, he does not claim that Thermo King knew of the practice." Finally, Mr. Nielsen affirms that he is familiar with Carrier compressors and contrary to the plaintiff's position, the Carrier compressor's design is essentially the same as Thermo King's design.

In its reply papers, defendant Novabus argues that the affidavit of plaintiff's expert, Dr. Jeffery Ketchman, should be rejected for four reasons. First, it is alleged that plaintiff deliberately withheld the expert information from defendants until months after the filing of the note of issue and only disclosed it in response to defendants' summary judgment motions. It is alleged that plaintiff hired Dr. Ketchman as early as October 2005, but refused to respond to requests for expert information requests served in February 2007, and misrepresented to the parties and the Court on June 15, 2007, that no expert had been retained. Second, it is alleged that Dr. Ketchman's assertions are inadmissible because he has failed to demonstrate that his methodologies have gained general acceptance in the scientific community. Third, it is alleged that Dr. Ketchman fails to provide any facts regarding industry standards, complaints, or injuries; and therefore, plaintiff cannot demonstrate the existence of a feasible alternative design that would have prevented the accident, and is unable to establish a *prima facie* case. Fourth, Novabus contends that Dr. Ketchman has failed to test his proposed alternative design and he cannot demonstrate that an alternative proposed design is feasible without testing it; and therefore, plaintiff is unable to defeat a motion for summary judgment.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v Klein*, 24 AD2d 920 [3d Dept 1965]. Even the color of a triable issue forecloses the remedy (*Newin Corp. v Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact *(see Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2nd Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v DiNapoli*, 134 AD2d 235 [2nd Dept 1987]).

This Court finds that defendant Novabus has established a *prima facie* case that there are no triable issues of fact. As a preliminary matter, as of the time of service of the instant motion for summary judgment, plaintiff had failed to respond to requests from Novabus for information regarding expert testimony, and had failed to proffer any reason for the delay in responding. Novabus served plaintiff with a Demand for Expert Information on February 2, 2007, to which plaintiff did not respond. Thereafter, counsel for Novabus sent letters and left telephone messages requesting the expert information, but plaintiff failed to respond. Even though discovery was outstanding, plaintiff proceeded to file a Note of Issue on May 11, 2007. On June 15, 2007, a Court conference was held where Novabus again requested that plaintiff provide expert information, and plaintiff responded at that time that he had not yet retained an expert. Pursuant to CPLR 3101(d)(1)(i) upon request, a party shall identify whom he or she expects to call as an expert witness. Pursuant to case law, preclusion of expert testimony is warranted in such a situation. In *Cramer v Spada*, 203 AD2d 739 (3d Dept 1994), the Court found that preclusion of expert testimony was warranted where plaintiff failed to show that he did not intentionally withhold disclosure. Accordingly, plaintiff's expert testimony shall be precluded.

Defendant Novabus has established a *prima facie* case that in the absence of expert testimony, plaintiff will be unable to establish its *prima facie* case. Defendant established that

"[u]nder New York law, in a design defect case a plaintiff is required to prove the existence of a feasible alternative which would have prevented the accident; and that plaintiff must use an expert to show a feasible alternative design and to meet its *prima facie* case (*Rypkema v Time Mfg. Co.*, 263 F Supp 2d 687 [S.D.N.Y. 2003][citations omitted]). Novabus has established that at the time of service of the instant motion, plaintiff had failed to proffer any expert testimony to show that there was a feasible alternative design which would have prevented plaintiff's injuries *(see Massiello v Efficiency Devices, Inc.*, 776 NYS2d 578 [2d Dept 2004]). Accordingly, defendant Novabus has established its *prima facie* case that there are no triable issues of fact.

Plaintiff failed to present sufficient evidentiary proof in admissible form to establish a triable issue of fact against defendant Novabus. Plaintiff proffers opposition papers which consist solely of an attorney's affirmation, plaintiff's own affidavit, and an affirmation of Dr. Jeffrey Ketchman, P.E., who affirms that he conducted an inspection of the bus in question on October 25, 2005, which inspection was for the purpose of his "viewing and photographing and evaluating the condition and configuration of the bus in question, in particular the air conditioning system." Plaintiff does not dispute: that he failed to respond to defendants request for Expert Witness Disclosure served in February, 2007; that he filed a note of issue on May 11, 2007; that he failed to provide expert witness disclosure prior to the opposition to the instant motion; and that he stated at the Court Conference on June 15, 2007 that he had not yet retained an expert. Plaintiff fails to proffer a reasonable excuse as to why there was the lengthy delay in providing the expert witness disclosure. He merely attributes the delay to the fact that he believed certain discovery was still outstanding from Thermo King, stating that his failure to disclose was attributable to the failure of Thermo King to disclose, and he makes no mention of Novabus. This Court rejects the plaintiff's expert witness affidavit since plaintiff "failed to identify the expert in pretrial disclosure, and served the affidavit, which was elicited solely to oppose the defendants' motion for summary judgment, after filing a note of issue and certificate of readiness attesting to the completion of discovery." (*Safrin v DST Russian & Turkish Bath, Inc.*, 16 AD3d 656 [2d Dept 2005] [citations omitted]; *see also Soldano v Bayport-Blue Union Free School District*, 29 AD3d 891 [2d Dept 2006]). As it is established law that plaintiff will be unable to establish a *prima facie* case without the benefit of an expert who can testify to *inter alia*, an alternative feasible design (*see Rypkema, supra*), summary judgment is warranted and plaintiff's Complaint is dismissed as against defendant Novabus.

This Court finds that defendant Thermo King has established

its *prima facie* entitlement to summary judgment. Thermo King has submitted sufficient proof that it did not improperly design the product, defectively manufacture the product, or fail to warn of an inherent danger in the product, and therefore, plaintiff will be unable to establish a case of products liability. Thermo King has established that plaintiff has not shown that any part of the Thermo King air conditioning system as designed was not reasonably safe for its intended use, or how the system as manufactured deviated from that which was intended, or how either the design or manufacture of any of the Thermo King equipment was a substantial factor in causing his injury *(see Gonzalez v Delta Int'l Mach. Corp.*, 307 AD2d 1020 [2d Dept 2003]; *Carprara v Chrysler Corp.*, 52 NY2d 114 [1981]). Furthermore, defendant presented sufficient proof that a cautionary warning was posted inside the engine compartment, and plaintiff acknowledged in his deposition that the warning which was posted close to the generator, was equally applicable to the compressor pulley and drive belt. Thermo King presented proof that there was no failure to warn on the part of itself that was the proximate cause of plaintiff's injuries. Finally, Thermo King has proffered proof that the sole proximate cause of plaintiff's injury was his own decision to consciously disregard an obvious danger, and to place his hands so close to moving engine parts. In plaintiff's deposition, he testifies that he knowingly put his hands on the wires while the engine was running. When a plaintiff consciously disregards known dangers or deliberately and knowingly chooses not to follow available safety measures, his conduct can be considered to be so careless or reckless that it is deemed an "unforseeable intervening act sufficient to break the causal chain, thus absolving defendants of any claimed liability." (*Haughton v T&J Elect. Corp.*, 309 AD2d 1007 [3d Dept 2003]).

Plaintiff has failed to show that there are any triable issues of fact against defendant Thermo King. In support of its position, plaintiff merely submits: the affidavit of Dr. Jeffrey Ketchman, P.E. a licensed and registered engineer and Director of Mechanical & Safety Engineering at InterCity Testing & Consulting Corporation, photographs, an attorney's affirmation, and plaintiff's own affidavit. This Court has found the affidavit of Dr. Jeffrey Ketchman to be precluded as discussed *supra*. The attorney's affidavit cannot show a triable issue of fact as the attorney does not have personal knowledge of the facts in the matter *(see CPLR 3212)*. Plaintiff's affidavit fails to raise any triable issues of fact.

Accordingly, defendant Thermo King's motion for summary judgment is granted.

Plaintiff, Gerald Bruno's cross motion for an Order striking the answer of defendant Thermo King Corporation ("Thermo King")

as a result of its willful failure to comply with the "So-Ordered" Stipulation dated June 15, 2007 and its failure to respond to the Court-Directed Interrogatory served upon it in accordance with that Stipulation is hereby denied as moot in light of the fact that this Court has granted defendant Thermo King's motion for summary judgment.

This constitutes the Decision and Order of the Court.

Dated: January 30, 2008

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Howard G. Lane, J.S.C.