

Yanez v Raphael

2008 NY Slip Op 30413(U)

February 6, 2008

Supreme Court, Kings County

Docket Number: 0030210/2005

Judge: Martin M. Solomon

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

At an IAS Part 22 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of February, 2008

P R E S E N T:

HON. MARTIN SOLOMON,

Justice.

-----X

JUAN YANEZ, et ano,

Plaintiff(s),

- against -

Index No. 30210/05

CHARMAINE RAPHAEL, et ano,

Defendant(s).

-----X

The following papers numbered 1 to 10 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition Cross Motion and Affidavits (Affirmations) Annexed _____	_____ 1 - 4 _____
Opposing Affidavits (Affirmations) _____	_____ 5 - 8 _____
Reply Affidavits (Affirmations) _____	_____ 9 - 10 _____
_____ Affidavit (Affirmation) _____	_____ _____
Other Papers _____	_____ _____

Upon the foregoing papers, defendant ESAB Group, Inc. (ESAB), moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the amended complaint of plaintiffs Juan Yanez (plaintiff) and Rosa Siguenza and all cross claims against it.

Facts and Procedural Background

Plaintiffs commenced this action seeking to recover compensatory and derivative damages sustained on July 5, 2005 when plaintiff suffered burns arising out of his use of a

welding torch, the Purox W-300, with a cutting attachment, CW-3000, designed and manufactured by ESAB. At the time of the accident, plaintiff was employed by JIW, Inc., working at 2076 Fifth Avenue in New York City, a building owned by defendant Charmaine Raphael. In their amended complaint, plaintiffs assert claims alleging that the torch was defectively designed and/or manufactured, it lacked adequate warnings and it breached express and implied warranties.

The Deposition Testimony

Plaintiff

Yanez testified that he came to the United States about 12 years ago, when he began to work as a welder. Plaintiff was taught how to weld by his employers; he never received any formal training. On the day of the accident, he arrived at work, loaded the truck and drove to the site. It was the third day of the job at the subject premises, where he and a co-worker were changing and repairing a door and metal gating. Plaintiff took the equipment off of the truck and attached the torch to the hoses for the acetylene and oxygen tanks; the hoses to the torch were already connected. He then started to cut.

Immediately before he was injured, plaintiff was using the welding torch to cut the metal. When he turned the torch on, plaintiff testified that:

“I started regulating and the flame was fine. As the pole was getting hot, I then squeezed [the trigger] to cut it and then at that moment, the machine exploded and I went on fire. . . .

“As I was cutting, the hose exploded and then it just started spewing gas at me and it lit me up and I started running

and screaming on fire.

“At the moment that it exploded [one of the hoses separated from the torch and] then it just hit all of this. . . .

“At the moment that I squeezed [the trigger], it exploded.”

Plaintiff further testified that he did not know what caused the hose to separate from the torch and that he did not pull on the torch just before the accident. When asked if he saw the hose separate from the torch, plaintiff testified that “it exploded and then it started to move and then I went on fire and I left.”

John Dawson

Dawson testified on behalf of ESAB that he holds a bachelor’s degree in engineering, but declined to maintain his license because it was not beneficial to him; he began to work for Union Carbide, a predecessor of ESAB, in 1967. Dawson testified that the apparatus that plaintiff was utilizing at the time of the accident was comprised of a welding handle and a cutting attachment; these pieces are sold separately by ESAB or as part of an outfit which would include regulators and possibly hoses, a striker and goggles. Dawson also testified that the torch and cutting attachment were probably purchased as part of an outfit because the two regulators were those that typically came in an outfit. Dawson stated that the hoses should be attached to the torch using a ferrule, i.e., a brass cap that is deformed in the manufacturing process to provide force all the way around the hose; the ferrule comes out the same length as the nipple to support the hose and keep it from being damaged.

Dawson explained that a flashback results when improper operation of the torch allows gas to get into the fuel hose or fuel to get back into the oxygen hose, if there is a leak in the hose or if the hose comes off. In the early 1970s, he began to work on avoiding flashbacks. A backfire occurs when the flame is blocked from coming out of the torch by making contact with the piece being cut. Dawson further testified that neither a non-trained pedestrian on the street or a trained professional would be able to tell if he or she observed a flashback or a backfire, since an incident occurs in approximately one thousandth of a second.

Dawson opined, after looking at the photos taken after plaintiff's accident, that he could not tell whether the acetylene hose disconnected before or after the event. He was of the opinion, however, that if a backfire occurred and the hoses were properly connected, nothing would have happened. If a flashback occurred and the hoses were properly connected, there could have been an explosion, but the hose would not come loose as it did. In this case, it appears that the hose was improperly repaired in that it was not properly connected, since improper clamps were used; the hose was pushed up too far so that the nut did not turn properly; and the hose might not have been properly tightened. Dawson concluded that the cause of plaintiff's accident was an improper hose connection; he also noted that the cutting tip was abused.

Dawson further stated that there were no warnings on the equipment so that the user would know how to use it. ESAB instead provides other written material; it also has a safety

manual printed in Spanish.

Dawson stated that the torch that plaintiff was using was not equipped with a flashback arrestor, although ESAB sells both flash arrestors and check valves in its catalogue. A flash arrestor is attached to the welding handle and is a concentration of metal that takes the heat out of the flame and extinguishes it as the pressure waves pass through it. A flash arrestor is only required by law in California and Oregon. Victor, a competitor of ESAB, has had a flashback arrestor or reverse flow check valve as standard equipment for ten or 15 years. Dawson was of the opinion that if a flash arrestor had been installed on the equipment used herein, the accident would not have been prevented.

Raphael

In the excerpts of her deposition testimony provided in opposition to the motion, Raphael testified that she saw plaintiff test the torch and then he was instantly engulfed in flames when he turned it on; as soon as he touched it, it blew up in his face. She did not notice whether the hose was connected to the torch when plaintiff was testing it.

ESAB's Contentions

In support of its motion, ESAB argues that it is entitled to summary judgment on the ground that some unknown third-party made a material modification to the connection between the acetylene hose and the torch, thus altering it from its original state of manufacture. More specifically, someone cut the original hose fitting assembly from the acetylene hose and reattached it to the torch using an ordinary garden or automotive hose

clamp, instead of the proper clamp/ferrule in accordance with the industry standard established by the Compressed Gas Association (GCA). At the time of manufacture, a hose for oxygen and a hose for the acetylene are connected to the torch by means of a crimped brass clamp/ferrule. ESAB contends that this makeshift attachment caused the acetylene hose to detach, which resulted in the release of pure acetylene into the air; the existing flames caused the acetylene to form a plume of fire; and plaintiff was burned.

ESAB also alleges that the literature provided when the W300 welding torch is purchased expressly states:

“Only use hoses fitted with connections made especially for oxygen-fuel gas equipment. . . .

“Damaged nuts and nipples can be replaced using appropriate clamps or ferrules. Damaged sections of a hose should be removed and discarded, and then the good sections of a hose should be assembled with proper hose splice and clamps. . . .

“Replace parts only with manufacturer’s recommended replacement parts. . . .

“The equipment is designed to work safely and effectively. Do not substitute, modify, or use unauthorized parts. Use of the wrong part may cause the equipment to fail, regulators to burn out, or gases to leak.”

The instruction manual also states that when repairs are needed, a request should be made to the authorized distributor for advice, the equipment should not be altered without the prior written approval of the manufacturer and the equipment should not be modified in any manner. In addition, the hose manufacturer, Parker Hannifin, also warns “COUPLE WITH

1 INCH FERRULES ONLY.”

In so arguing, ESAB relies upon an affidavit submitted by Dawson, in which he states that he inspected the subject torch and determined that it was manufactured in 2002. He further states that the automotive/garden hose clamps that were found on the hoses after the accident were not of original ESAB manufacture and were not approved for such use. Dawson further alleges that he is familiar with the warning labels attached to the hoses by Parker Hannifin Corp.

ESAB also relies upon an affidavit submitted by William Barlen, who has 45 years experience in the compressed gas industry, in which he opines, after inspecting the torch, that a material modification was made to it, i.e., an ordinary automotive or garden hose clamp was used instead of the proper clamp/ferrule, and that the modification was the proximate cause of plaintiff's accident. Barlen further opines that since the original clamp/ferrule connection was observed on the other ends of the hoses, the proper connections were in place at the time of original manufacture, and that the hose was thereafter cut and replaced. In addition, these modified connections did not meet the standards established for this type of connection by the CGA.

Barlen is also of the opinion that plaintiff's accident occurred when the acetylene hose disconnected from the welding torch due to the modification, which resulted in the release of acetylene into the air, so that the existing flame caused the plume of acetylene to ignite, burning plaintiff. Further, the accident would have occurred even if the torch had been

equipped with a flashback arrestor, since there is no evidence that a flashback or backfire occurred and a flashback arrestor would not have prevented the acetylene hose from disconnecting from the torch. In addition, there is no federal regulation that requires the use of flashback arrestors on welding torches and only California and Oregon have such a regulation. Barlen accordingly concludes that the movements that plaintiff was making with the torch caused the acetylene hose to disconnect, which occurred because of the improper modification.

Plaintiffs' Contentions

Plaintiffs oppose the motion, arguing that the affidavits submitted by ESAB's experts should be disregarded on the ground that Barlen has a felony conviction for providing false statements to a government agency. Hence, since Barlen's opinion is the only basis upon which ESAB relies to conclude that the use of an improper clamp was the cause of the accident, the motion should be denied. Further, Barlen has no basis for his conclusion that the hose separated from the torch first. In fact, at his deposition, Barlen testified that "[a]s far as the sequence of events is concerned, I do not believe that anyone on the street can sit there and look and tell you what the sequence of events was."

Plaintiffs further argue that Dawson's affidavit should similarly be disregarded because he is no longer a licensed professional engineer and the source of the clients for his consulting business is ESAB and its customers.

More significantly, plaintiffs argue that ESAB cannot eliminate a flashback as the

cause of the accident. In addition, ESAB's failure to equip the torch with a flashback arrestor as standard equipment, as is done by its major competitor, rendered the torch defective and not reasonably safe and was a concurrent cause of plaintiff's accident. Dawson also testified that he could not look at the photographs of the accident scene and determine whether a flashback occurred, he could not tell whether a flashback caused the hose to disconnect and there was no testing or examination which would show whether there had been a flashback.

Plaintiffs further rely upon an affidavit from their expert, Neil A. Gowney, P.E., a licensed professional engineer having 39 years experience in the field, in which he opines that the subject accident was the result of the torch not being equipped with a flashback arrestor, which would have prevented the accident; that the acetylene hose attachment of the torch was not equipped with the proper clamp, known in the industry as a ferrule; that the torch should have been sold with warnings imprinted on it stating that it should not be used without being equipped with a flashback arrestor and one inch clamps/ferrules which meet the CGA standards; and that without a flashback arrestor, the torch was rendered not reasonably safe and defective.

Gowney explains that a flashback is "a momentary or sustained retrogression of the flame upstream of the mixer usually in the torch or hoses" and is a potentially hazardous situation, particularly if the flame reaches the hoses where an explosion will result, causing a rupture or separation of the hose, which can then cause a fire to ensue. A flashback can be

prevented by a flashback arrestor; ESAB filed a patent for a flashback arrestor on August 27, 2001. Growney further alleges that the largest manufacturer of torches, Victor, built flashback arrestors and check valves into its torches as standard equipment because “you don’t want to leave safety to chance.” In this regard, Growney notes that ESAB charges approximately \$80 for a pair of flashback arrestors, one for the acetylene hose and one for the oxygen hose, although the cost of manufacturing the part is a couple of dollars, while the cost of the torch is approximately \$350.

In rejecting ESAB’s conclusion that the hose separated from the torch before the explosion, Growney notes that plaintiff testified that the explosion occurred first and Raphael testified that she did not see the hose disconnect first. Further, both witnesses testified that the explosion occurred immediately upon pushing the trigger, which is also consistent with a flashback, not with a separation of the acetylene hose from the torch. Moreover, Dawson testified that the cutting tip of the torch was “abused,” which is another cause of a flashback. Growney further opines that the assertion that the acetylene hose simply disconnected as a result of plaintiff’s movements is not valid because the Siamese configuration of the two hoses would have led both to disconnect, not just the acetylene hose; there is no evidence of any discrete force causing only one hose to disconnect, except for a flashback; and the oxygen hose on the torch is still intact and exhibits substantial force in holding. Further, a flashback would create sufficient pressure to disconnect one hose, particularly if it was attached with an improper clamp and/or ferrule.

Growney also opines that a flashback arrestor, which was widely available and required in certain jurisdictions and is standard on torches made by a leading manufacturer, would have prevented plaintiff's accident. Hence, the absence of such a device on the torch that injured plaintiff rendered it defective. In addition, there is no warning on the torch itself that would tell the user how to make a proper connection, particularly since operators of the torches are not the purchasers, and thus have no access to any manuals provided at the time of sale. Growney is also of the opinion that the torch should have been manufactured with warnings not to use it if it was not equipped with a flashback arrestor.

Finally, plaintiffs do not refute ESAB's claim that the use of an improper clamp on the torch was a cause of the accident, but instead conclude that the failure to provide a flashback arrestor is a concurrent cause. Plaintiffs further allege that there is no proof that the torch at issue herein was sold with the hoses attached with a ferrule, so that ESAB cannot establish that there was a modification in the first instance. Plaintiffs also argue that adding a hose to the torch is not a substantial modification of the product, since it is not the equivalent of disabling a safety feature.

Raphael's Contentions

In opposition to the motion, Raphael argues that the use of what ESAB describes as a "garden hose clamp," or a worm hose gear clamp, is not a material modification, since the clamp may be used on the torch in accordance with CGA guidelines and standards. In addition, the failure to manufacture the torch with a flashback arrestor is a separate cause of

the accident. Moreover, an alteration does not give rise to summary judgment where a product is purposefully manufactured so as to permit its use without a readily removable safety feature. More specifically, since it could be anticipated that the torch could be used without the clamps/ferrules that were originally on the hose, ESAB cannot escape liability because the use of a different clamp/ferrule was foreseeable and no warnings were placed on the torch regarding the need to employ proper clamps/ferrules. Further, ESAB fails to establish proximate cause. Rapheal also adopts plaintiffs' arguments with regard to the known dangers and availability of flashback arrestors, failure to warn and the defective nature of the product.

In support of her position, Rapheal relies upon the affidavit of Dale J. Cagwin, a professional engineer having more than 24 years experience in the field, to argue that the use of worm gear hose clamps is a typical, appropriate and well accepted method of repairing welding torches and did not substantially modify the torch.

The Law

It is well established that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any triable issue of fact (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

As is relevant herein:

“A party injured as a result of a defective product may seek relief against the product manufacturer or others in the

distribution chain if the defect was a substantial factor in causing the injury. ‘A product may be defective when it contains a manufacturing flaw, is defectively designed or is not accompanied by adequate warnings for the use of the product’ (*Liriano v Hobart Corp.*, 92 NY2d 232, 237 [1998]; *Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 478 [1980]).”

(*Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 41 [2003]). Further, an accident may have more than one proximate cause (see e.g. *Argentina v Emery World Wide Delivery*, 93 NY2d 554, 560, n 2 [1999]).

Product Modification

The Law

It is now well established that:

“a manufacturer of a product may not be cast in damages, either on a strict products liability or negligence cause of action, where, after the product leaves the possession and control of the manufacturer, there is a subsequent modification which substantially alters the product and is the proximate cause of plaintiff’s injuries.”

(*Robinson*, 49 NY2d at 475). Stated differently, “[m]aterial alterations by a third party which work a substantial change in the condition in which the product was sold by destroying the functional utility of a key safety feature, however foreseeable that modification may have been, are not within the ambit of a manufacturer’s responsibility” (*Mackney v Ford Motor Co.*, 251 AD2d 298, 299 [1998]; see generally *Vega v Stimsonite*, 11 AD3d 451, 452 [2004], *lv dismissed* 4 NY3d 759 [2005], *lv dismissed* 6 NY3d 805 [2006] [defendant was entitled to summary judgment dismissing the negligence and strict products liability claims because

it demonstrated that the substitution of certain factory-equipped parts on the machine with certain other items was a material modification which proximately caused the alleged injuries]). “Nevertheless, post-sale modifications to a product do not defeat a products liability claim unless those modifications rendered a safe product defective and caused the injuries” (*Smith v Minster Mach. Co.*, 233 AD2d 892, 893 [1996], citing *Lamey v Foley*, 188 AD2d 157, 168 [1993]; accord *Tavares v Hobart Waste Compactor*, 151 AD2d 251, 252 [1989]).

Discussion

Herein, in reliance upon its experts’ opinion,¹ ESAB establishes that the torch was reasonably safe for its intended use as designed and thus establishes its entitlement to summary judgment dismissing plaintiffs’ causes of action against it by demonstrating that the product was safe (*see generally Rutherford v Signode*, 11 AD3d 922, 923 [2004], *lv denied* 4 NY3d 702 [2005]). Further, Dawson’s deposition testimony establishes that the connections to the torch were not those supplied by the manufacturer, but were modified after the product was sold. The evidence also establishes that the hose to the acetylene tank

¹ In considering the opinions offered by both experts, the court finds that the experts’ qualifications and background go to the issue of credibility, not admissibility (*see e.g. Williams v Halpern*, 25 AD3d 647, 648 [2006] [the expert’s qualifications and any prior immoral acts or suspensions of his or her license bear on his or her credibility, but do not preclude him or her from testifying as an expert]; *see also Shainwald v Barasch*, 29 AD3d 337, 337 [2006] [the trial court properly permitted defense counsel to cross-examine the treating physician regarding a prior bad act, i.e., the facts underlying his guilty plea to a harassment violation in connection with his unwelcome touching of and lewd comments to a nurse at the hospital]).

detached, causing the gas to form a plume, which ignited and engulfed plaintiff in flames. In light of these alleged facts, ESAB's showing that the hose separated from the torch because of the improper use of an automotive or garden clamp, instead of a brass ferrule, is sufficient to make a prima facie showing of entitlement to summary judgment on the ground that the accident occurred as the result of a third-person improperly modifying the torch.

In opposition, however, plaintiffs' expert argues that a flashback occurred, which caused an explosion, which then caused the hose to separate from the torch. Hence, plaintiff's accident was concurrently caused by the flashback and by the use of an improper clamp. Thus, even assuming that the alteration was a material modification, plaintiffs have raised an issue of fact as to whether the modification was the proximate cause of the accident, which cannot be resolved upon the papers now before the court (*see generally Rios v Johnson V.B.C.*, 17 AD3d 654, 655-656 [2005] [the court erred in granting plaintiffs' motion for judgment as a matter of law against the defendant third-party plaintiff on the issue of liability since the jury could have found that the alleged defect in the subject machine that caused the injured plaintiff's accident, as well as the danger against which defendant failed to warn, allegedly arose from the alterations to the machine]).

In addition, plaintiffs annex to their moving papers a copy of ESAB's catalogue to establish that the torch could also be purchased without hoses attached, so that use of the alleged improper clamp would not constitute a modification. Since ESAB contends, however, that the hoses were attached to the torch when it was purchased because the hoses

that connect to the regulator were connected with ferrules, an issue of fact is also raised with regard to whether the torch was modified in the first instance.²

Further, Raphael's expert is of the opinion that the clamp used on the torch was permissible pursuant to the CGA regulations and was not a modification. This opinion similarly raises issues of fact that cannot be determined on the papers now before the court. In this regard, the court finds ESAB's assertion that clamp and ferrule, as used in the CGA guidelines, refer only to a ferrule to be unconvincing.

Manufacturing Defect

The Law

It has been held that:

“[I]n strict products liability cases involving manufacturing defects, the harm arises from the product's failure to perform in the intended manner due to some flaw in the fabrication process” (*Denny v Ford Motor Co.*, 87 NY2d 248, 257 n 3), i.e., a plaintiff must establish that the product was not built to specifications or that the product, ‘as constructed, deviated from any such specifications or design’ (*Searle v Suburban Propane Div. of Quantum Chem. Corp.*, 263 AD2d 335, 340; see, *Van Deusen v Norton Co.*, 204 AD2d 867)”

(*McArdle v Navistar Intl.*, 293 AD2d 931, 932 [2002]).

Further:

“On motion for summary judgment, a defendant seeking

² Although plaintiffs further argue that the torch was not safe when manufactured because it was purposefully manufactured to function without the requisite clamps/ferrules, plaintiffs offer no evidence to establish that a design alternative was available, particularly since the parties acknowledge that it is foreseeable that hoses would need to be replaced.

the dismissal of a strict products liability claim based on a manufacturing defect must submit admissible proof establishing, as a matter of law, that the product was not defective (*see, Rachlin v Volvo Cars of N. Am.*, 289 AD2d 981, 982). If the defendant presents such proof, the burden shifts to the plaintiff to demonstrate the existence of a triable issue as to whether, in fact, there was a defect (*see, id.*). Notably, in order to do so, a ‘plaintiff cannot rely solely upon the occurrence of the accident, but must submit some direct evidence that a defect existed’ (*Brown v Borruso*, 238 AD2d 884, 885).

(*McArdle*, 293 AD2d at 932-935).

Discussion

ESAB’s experts establish that the torch was safe as manufactured. In opposition, plaintiffs do not establish that the torch was defective, apart from their claim that it should have been equipped with a flashback arrestor and some safety device requiring the use of a proper clamp/ferrule. In fact, plaintiffs do not address the issue of a manufacturing defect at all.

Accordingly, ESAB is granted summary judgment dismissing plaintiffs’ cause of action as premised upon a manufacturing defect.

Design Defect

The Law

“To establish a prima facie case in a strict products liability action predicated on a design defect, a plaintiff must show that the manufacturer marketed a product which was not reasonably safe in its design, that it was feasible to design the product in a safer manner, and that the defective design was a substantial factor in causing the plaintiff’s injury” (*Magadan*

v Interlake Packaging, 45 AD3d 650 [2007], quoting *Gonzalez v Delta Intl Mach.*, 307 AD2d 1020, 1021 [2003]).

“A defectively designed product ‘is one which, at the time it leaves the seller’s hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use; that is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce’ (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107). A manufacturer can be held liable for selling a defectively designed product because the manufacturer ‘is in the superior position to discover any design defects and alter the design before making the product available to the public’ (*id.*, at 107).”

(*Scarangella v Thomas Built Buses*, 93 NY2d 655, 659 [1999]).

Further:

“It is well settled that a manufacturer is duty bound ‘to exercise that degree of care in his plan or design so as to avoid any unreasonable risk of harm to anyone who is likely to be exposed to the danger when the product is used in the manner . . . intended . . . [or] an unintended yet reasonably foreseeable use.’”

(*Garrison v Clark Mun. Equip.*, 241 AD2d 872, 873 [1997], quoting *Micallef v Miehle Co.*, 39 NY2d 376, 385-386 [1976] [citations omitted]). A manufacturer, however, does not have a duty to design invincible, fail-safe, and accident-proof products incapable of wearing out (see e.g. *Aparicio v Acme Am. Repair*, 33 AD3d 480, 481 [2006], citing *Mayorga v Reed-Prentice Packaging Mach. Co.*, 238 AD2d 483, 484 [1997]).

As is also relevant herein:

“Where . . . a qualified expert opines that a particular product is defective or dangerous, describes why it is dangerous,

explains how it can be made safer, and concludes that if it is feasible to do so, it is usually for the jury to make the required risk-utility analysis (*see Garrison v Clark Mun. Equip.*, 241 AD2d 872, 874 [1997]; *Gokey v Castine*, 163 AD2d 709, 711 [1990]; *Gardner v Dixie Parking Corp.*, 80 AD2d 577, 578 [1981]).”

(*Milazzo v Premium Tech. Servs.*, 7 AD3d 586, 587-588 [2004]; *accord Magadan*, 2007 NY Slip Op 9002; *Wengenroth v Formula Equip. Leasing*, 11 AD3d 677, 680 [2004]; *Ramirez v Sears Roebuck & Co.*, 286 AD2d 428, 430 [2001]). Expert testimony with reference to proximate causation is not always required (*see e.g. Voss*, 59 NY2d at 110).

Discussion

Herein, ESAB makes a prima facie showing that the torch was fit for the ordinary purpose for which it was used and that no industry standards or provisions of law were violated (*see generally McAllister v Raymond Corp.*, 36 AD3d 768, 768 [2007]; *Rosen v Tanning Loft*, 16 AD3d 480 [2005]; *Trojahn v O’Neill*, 5 AD3d 472, 473 [2004]; *Martinez v Roberts Consol. Indus.*, 299 AD2d 399, 400 [2002]).

In opposition, however, plaintiffs offered their expert’s affidavit establishing that the torch was not reasonably safe in the absence of a flashback arrestor and that it was feasible to design it in a safer manner. Hence, it is for the jury to make the required risk-utility analysis (*see Milazzo*, 7 AD3d at 587-588; *see generally Rutherford*, 11 AD3d at 923 [where plaintiff’s injuries were caused by an improper connection of an air hose and not by any defect in the tool itself, defendant established that any alleged defect in the design of the tool was not a proximate cause of plaintiff’s injuries]).

Duty to Warn

The Law

“Liability may be premised upon the complete absence of warnings as to a particular hazard (e.g., *Alfieri v Cabot Corp.*, 17 AD2d 455, *affd* 13 NY2d 1027), or upon the inclusion of warnings which are insufficient (see, e.g., *Fox v Wyeth Labs.*, 129 AD2d 611)” (*Johnson v Johnson Chem. Co.*, 183 AD2d 64, 69 [1992]). “A cause of action based upon a failure to warn cannot stand when the injured party is already aware of the specific hazard, or where the danger is discernible” (*Secone v Raymond Corp.*, 240 AD2d 391, 392 [1997], citing *Banks v Makita*, 226 AD2d 659 [1996]; *Lonigro v TDC Elecs.*, 215 AD2d 534 [1995]; *Neri v John Deere Co.*, 211 AD2d 915 [1995]). Further, “[i]n cases where reasonable minds might disagree as to the extent of a plaintiff’s knowledge of the hazard, the question is one for the jury” (*Lichtenstein v Fantastic Mdse.*, ___ AD3d ___, 2007 NY Slip Op 10111, 3 [2007], citing *Liriano*, 92 NY2d at 241; *accord Bruker v Fischbein*, 2 AD3d 254, 255 [2003]). It has also been held that “in all but the most unusual circumstances, the adequacy of a warning is a question of fact” (*Nagel v Brothers Intl. Food*, 34 AD3d 545, 547-548 [2006], quoting *Montufar v Shiva Automation Serv.*, 256 AD2d 607 [1998]; *Polimeni v Minolta*, 227 AD2d 64, 67 [1997]).

Discussion

Herein, ESAB makes a prima facie showing of entitlement to summary judgment by establishing that the manual accompanying the torch clearly warned against modifying the

product or using any parts not recommended by the distributor (*see generally Vega*, 11 AD3d at 453 [manufacturer's duty to warn was satisfied where the manual for the subject road marking machine specified that the manufacturer should be contacted if any servicing or replacement of parts was required]; *Ryan v Arrow Leasing*, 260 AD2d 565, 566 [1999] [the manual for the subject post-hole digger specified that a clevis pin should be used to attach the two components, satisfying any duty it may have had to warn about substitution]; *Aghabi v Sebro*, 256 AD2d 287, 288 [1998] [there was no liability for failure to warn where the dangers of a soft top on a vehicle were open and obvious and a warning label was affixed to the roof of the vehicle and repeated on the cover of the owner's manual]).

In opposition, plaintiffs raise an issue of fact with regard to whether a warning that only one inch ferrules should be used to attach the hoses to the torch should have been imprinted on the torch itself and whether the purchaser/user should have been warned of the dangers of using the torch without a flashback arrestor (*see generally Magadan*, 45 AD3d 650 [plaintiff raised a triable question of fact with respect to whether the defendants should have affixed a label to the subject stitcher warning against operating the machine without first adjusting the finger guard]). In this regard, although plaintiff had been employed as a welder for over 12 years, ESAB has not established that he should have been aware of the dangers of attaching the hoses with a clamp instead of a ferrule (*cf. Secone*, 240 AD2d at 392 [defendants established that an appropriate warning label was affixed to the subject forklift and that plaintiff was a knowledgeable and experienced forklift operator who had operated

the forklift in question on many occasions over many years; a cause of action based upon a failure to warn cannot stand when the injured party is already aware of the specific hazard, or where the danger is discernible]).

Breach of Warranty

The Law

In discussing the issue of whether a breach of warranty claim and a strict products liability claim are identical, the Court of Appeals has explained that:

“While the strict products concept of a product that is ‘not reasonably safe’ requires a weighing of the product’s dangers against its over-all advantages, the UCC’s concept of a ‘defective’ product requires an inquiry only into whether the product in question was ‘fit for the ordinary purposes for which such goods are used’ (UCC 2-314 [2] [c]).”

(*Denny*, 87 NY2d at 258). The court went on to state, however, that “[a]s a practical matter, the distinction between the defect concepts in tort law and in implied warranty theory may have little or no effect in most cases” (*id.* at 262).

Discussion

Herein, plaintiffs point to no express warranty that was breached. Further, they fail to establish that the torch was not fit for the ordinary purposes for which it is used. In addition, plaintiffs make no breach of warranty claims which are not coextensive with their tort based claims, so that the breach of warranty cause of action likewise cannot stand (*see Wyda v Makita Elec. Works*, 232 AD2d 407, 408 [1996]).

Accordingly, ESAB is granted summary judgment dismissing plaintiffs’ causes of

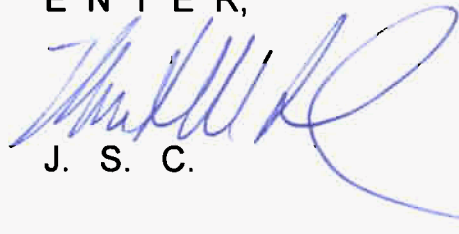
action as they are premised upon breach of express and implied warranty.

Conclusion

ESAB's motion for summary judgment is granted only to extent of dismissing those causes of action premised upon a manufacturing defect and the breach of an express or implied warranty. The remaining causes of action are severed and shall continue.

The foregoing constitutes the order and decision of this court.

E N T E R,

A handwritten signature in blue ink, appearing to be 'M. M. Solomon', written over the text 'E N T E R,' and 'J. S. C.'.

J. S. C.

Hon. Martin M. Solomon S.C.J