Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present : HONORABLE JANICE A. TAYLOR IA Part 15
Justice

JAGGERNAUTH SUGRIM and ARUNA PERSAUD,

Plaintiffs,

- against -

RYOBI TECHNOLOGIES, INC. and HOME DEPOT USA, INC.,

Defendants.

Index Number 27664 2005

Motion Date January 22, 2008

Motions Cal. Number 30

Motion Seq. No. 1

The following papers numbered 1 to 11 read on this motion by Ryobi Technologies, Inc. and Home Depot USA, Inc., to dismiss the complaint pursuant to CPLR 3212 and, alternatively, to change the venue to Nassau County.

	Pages Numbered
Notice of Motion - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5-8
Reply Affidavits.....	9-11

Upon the foregoing papers it is ordered that the motion is decided as follows:

Plaintiffs in this products liability action seek damages for personal injuries sustained on or about February 6, 2002 by Jaggernauth Sugrim when he dismembered his finger while using a Ryobi-brand table saw. The complaint alleges that Sugrim purchased the saw from a Home Depot store in Queens. The action by Aruna Persaud is derivative. Defendants move to dismiss the complaint on the ground, inter alia, plaintiff ignored the warning labels on the saw and directions in the box which caution against the use of the saw without the blade guard. Plaintiffs oppose the motion.

It is well settled that the proponent of a motion to dismiss has the initial burden of submitting competent evidence eliminating any material issues of fact from the case (see ADD CASELAW-REVISE WORDING). In support of the motion defendants submitted, inter alia, the transcripts of the examination before trial testimony of

the plaintiff and a witness on behalf of Ryobi and a witness on behalf of Home Depot.

Plaintiff testified, in substance, that he purchased the table saw at the Home Depot on February 6, 2002 at approximately 10:30 a.m., and went home to use it. While the table saw was brand new, there was no wrap on the box and the box did not contain a blade guard. Plaintiff testified that he was aware of the fact that a blade guard was required to be on the table saw before use but that he used the saw anyway because "it was a small job." He experienced no problems in operating the saw and had observed the pictures on the box which depicted the blade guard as well as warning labels on the saw but there was no operator's manual inside the box. The table saw was in a completely sealed box, the seal was not broken and there was plastic shrink wrap on the box and tape around the seam of the box. He did not speak with any Home Depot employees at any time, he simply purchased the table saw on his own. Plaintiff further stated that he could not recall if he saw any styrofoam packing material but that there was no operator's manual, rip fence, blade guard or blade wrenches. The saw operated properly when used.

After being shown the packaging layout (the layout of the carton), plaintiff stated that the picture on the carton did display the blade guard assembly and, while there were labels on the saw that he purchased, plaintiff admitted he did not read those labels. Plaintiff testified that he used the saw in the basement. He had cut a piece of wood which was three feet long by eight inches wide by three-quarters inches thick. It was his intention to take off four inches from the length of the wood to make it thirty-two inches. He had cut two or three pieces of similar wood before the accident occurred. Specifically, plaintiff testified that he was squatting on the floor of the basement and pushing the wood through the blade with his hands (not using any push stick or other device), the lighting was "bright florescent" with sunlight also coming through the windows. Plaintiff was not wearing any gloves and testified that he was aware that a blade guard should have been on the saw and that, in fact, he saw the warning on the carton indicating the same before he started to work with the saw. The accident occurred when he was pushing the wood with his hands and dust went into his eyes and his hand got caught in the saw blade.

Thomas Wayne Hill, the Director of Product Safety for Ryobi Technologies, Inc., testified at a deposition as follows: the blade guard, blade wrenches and operator's manual are provided in the table saw box. When the table saw is manufactured and placed in the box, there is clear plastic tape over the seams of the box

and shrink wrap around the box. Home Depot does not refurbish, recondition or repackage the Ryobi table saw and the saws are not shipped without the blade guard or operator's manual. The blade guard is not affixed to the saw itself when it is shipped because there is a risk of damaging it in shipment and also because the blade guard is not necessarily used for every operation, such as for non-through cuts. Hill also testified that when he inspected the table saw at the office of plaintiff's attorney, it was missing several pieces including the blade guard, the operator's manual and the packaging material.

Defendants also submitted the packaging layout (i.e. the layout of the carton), and the warning labels which were on the saw.

Keith Green, the store manager for the Home Depot store where plaintiff purchased the saw, was deposed and testified as follows: in response to a number of questions regarding the return policy of Home Depot, Green testified that "we [Home Depot] take back everything." Home Depot does not repackage the table saw and does not sell reconditioned or refurbished Ryobi table saws. The box is covered in a clear shrink wrap and if the shrink wrap is broken upon delivery, the product is sent back to the manufacturer. If a table saw is returned by a customer because a part is missing, the returned saw is marked "damaged" and returned to the vendor. The product cannot be sold to another customer.

In opposition plaintiff submitted, inter alia, an affidavit by an engineer indicating, in substance, that there are alternatively designed devices which perform the same function and do not carry the same risk of injury where the guard is not used or removed, as the table saw at issue.

The branch of defendants' motion which seeks summary judgment dismissing the negligence and strict products liability causes of action against Ryobi based on a manufacturing defect, is granted. Defendants established that the table saw had no manufacturing or assembly defect, and plaintiff failed to raise an issue of fact (see generally Caprara v Chrysler Corp., 52 NY2d 114 [date]; Henry v General Motors Corp., Chevrolet Motor Div., 201 AD2d 949, lv denied 84 NY2d 803 [date]).

The branch of defendants' motion which seeks summary judgment dismissing the negligence and strict products liability causes of action against Ryobi based upon defective design, is denied. Here, unlike David v Makita U.S.A. (233 AD2d 145) and Banks v Makita, U.S.A. (226 AD2d 659, lv denied 89 NY2d 805), relied on by defendants, the affidavit of plaintiff's expert raises issues of

fact whether the table saw was not reasonably safe due to a design defect and whether there were feasible alternative designs at the time of manufacture (see, Eiss v Sears, Roebuck & Co., 275 AD2d 919 [2000]; Smith v Minster Mach. Co., 233 AD2d 892 [1996]; see also Sanchez v Otto Martin Maschinenbau GmbH & Co., 281 AD2d 284 [2001]; see generally Lopez v Precision Papers, 67 NY2d 871 [1986]).

The branch of defendants' motion which seeks summary judgment dismissing the negligence and strict products liability causes of action against Ryobi based upon the failure to warn, is granted. Plaintiff clearly testified that warning labels were affixed to the saw cautioning against using the saw without a guard and advised the user to read the instruction manual. Plaintiff failed to demonstrate that these warnings were inadequate (see, Lombard v Centrico, Inc., 161 AD2d 1071 [1990]). Moreover, a plaintiff whose claim is based on inadequate warnings must prove causation, i.e., that if adequate warnings had been provided, the product would not have been misused (see Johnson v Johnson Chem. Co., 183 AD2d 64 [1992]). Here, plaintiff has made no such showing. Even assuming plaintiff's factual assertions are true, he has failed to come forward with evidence that he would have used the guard had it been made available to him. Absent proof of causation, the claims based upon failure to warn are dismissed.

The branch of the motion which seeks to change the venue of the action is denied as barred under, inter alia, the doctrine of laches (see McBride v St. Vincent's Hospital and Medical Center of N.Y., et al., 271 AD2d 581 [2000]; Lawrence v Williams, et al., 158 AD2d 369 [1990]).

Accordingly, the branch of defendants' motion which seeks summary judgment dismissing the negligence and strict products liability causes of action against Ryobi based on a manufacturing defect, is granted. The branch of defendants' motion which seeks summary judgment dismissing the negligence and strict products liability causes of action against Ryobi based upon the failure to warn, is granted. The branch of defendants' motion which seeks summary judgment dismissing the negligence and strict products liability causes of action against Ryobi based upon defective design, is denied. The branch of the motion which seeks to change the venue of the action is denied.

Dated: April 15, 2008

J.S.C.

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