

Mandel v Toys R Us, Inc.

2008 NY Slip Op 31762(U)

June 12, 2008

Supreme Court, Nassau County

Docket Number: 5668-07/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

ZAHAVA MANDEL,
Plaintiff,

TRIAL / IAS PART 32
NASSAU COUNTY

- against -

Index No. 5668/07

TOYS R US, INC., d/b/a BABIES R US and TOYS
R US-DELAWARE, INC., d/b/a BABIES R
US...THE BABY SUPERSTORE and THE FIRST
YEARS, INC.,

Motion Sequence No. 001, 002

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3, 4, 5</u>
Replying Affidavits	_____
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendant First Years, Inc. moves for an order pursuant to CPLR 3212 granting summary judgment, and dismissing the verified complaint on the ground the three year statute of limitation expired. The plaintiff opposes this motion. The co-defendants/third party plaintiff Toys "R" Us-Delaware, Inc., i/s/h/a Toys "R" Us, Inc. d/b/a Babies "R" Us and Toys "R" Us-Delaware, Inc. d/b/a Babies "R" Us...The Babies Superstore partially oppose this motion by the defendant First Years, Inc., to wit conceding the defendant First Years, Inc. correctly set forth the statute of limitations as to personal injury thus the plaintiff's personal injury claim is barred, however the co-defendant/third party plaintiff submits its third party claims for contractual an common law indemnification, including

costs, attorney's fees, disbursements and interest are timely and valid.

The plaintiff moves for an order pursuant to CPLR 3124 compelling production of a duplicate copy of the videotape of the incident, and a copy of the manager's report of the incident, or in the alternative an order pursuant to CPLR 3126 striking the answer of the defendants Toys "R" Us-Delaware, Inc., i/s/h/a Toys "R" Us, Inc. d/b/a Babies "R" Us and Toys "R" Us-Delaware, Inc. d/b/a Babies "R" Us...The Babies Superstore due to the failure of those defendants to produce those materials, and directing the entry of judgment against them by default. The plaintiff also moves for an order scheduling an inquest for the purposes of assessing damages against the defendants Toys "R" Us-Delaware, Inc., i/s/h/a Toys "R" Us, Inc. d/b/a Babies "R" Us and Toys "R" Us-Delaware, Inc. d/b/a Babies "R" Us...The Babies Superstore, or in the alternative, an order pursuant to CPLR 3126 precluding these defendants from offering testimony or evidence at the trial of this action. The plaintiff also moves for an order imposing on the defendants Toys "R" Us-Delaware, Inc., i/s/h/a Toys "R" Us, Inc. d/b/a Babies "R" Us and Toys "R" Us-Delaware, Inc. d/b/a Babies "R" Us...The Babies Superstore costs and sanctions, including attorney's fees, as appropriate. The co-defendants/third party plaintiff Toys "R" Us-Delaware, Inc., i/s/h/a Toys "R" Us, Inc. d/b/a Babies "R" Us and Toys "R" Us-Delaware, Inc. d/b/a Babies "R" Us...The Babies Superstore oppose this motion by the plaintiff.

The underlying personal injury action stems from an alleged incident which took place at a Baby's "R" Us store, Gateway Mall, Brooklyn, New York, on November 11, 2003. The plaintiff claims injury from lifting a box containing a child's stairway gate from a shelf there. The plaintiff avers lifting the large, flat box while grasping its sides; the gate

slid out of the open, unsealed box; and it landed upon the plaintiff's left foot and large toe, lacerating and fracturing them.

The attorney for the defendant First Years, Inc. states, in a supporting affirmation dated December 13, 2007, to this defendant's motion, the amended verified complaint dated July 13, 2007, impleading this defendant as a direct defendant was not asserted timely. The attorney for the defendant First Years, Inc. states the plaintiff had ample opportunity to amend its complaint to add the defendant First Years, Inc., and the plaintiff's failure to properly investigate to identify parties to an action is no excuse.

The attorney for the plaintiff states, in a opposing affirmation dated February 14, 2008, to this defendant's motion, although the three year period of limitations for common law negligence action did expire prior to the commencement of the third party action against this defendant, and prior to the plaintiff's service of the amended verified complaint, the plaintiff's claim against this defendant is also based upon a statutory claim of breach of the implied warranty of merchantability and fitness for purpose pursuant to Uniform Commercial Code §§ 2-314 and 2-315 which is governed by a four year limitation period from the time of accrual under Uniform Commercial Code § 7-725. The attorney for the plaintiff contrasts the CPLR three year limitations period for common law negligence which runs from the date of the injury with the UCC four year limitations period which begins to run from the date when the defendant tenders delivery of the product. The attorney for the plaintiff asserts, in order for this defendant to prevail on this point, the defendant First Years, Inc. would need to prove the plaintiff's cause of action for implied warranty accrued more than four years prior to July 13, 2007, to wit prior to July 13, 2003, and this defendant

has failed to prove that point.

The attorney for the plaintiff states, in a supporting affirmation dated February 8, 2008, to the plaintiff's motion, the defendants Toys "R" Us-Delaware, Inc., i/s/h/a Toys "R" Us, Inc. d/b/a Babies "R" Us and Toys "R" Us-Delaware, Inc. d/b/a Babies "R" Us...The Babies Superstore failed to obey this Court's prior orders directing the production of all discovery documents. The attorney for the plaintiff states, in detail, the plaintiff's attempts to resolve this non-production issue, and the prejudice by these defendants' dilatory tactics with respect to trial preparation. The attorney for the plaintiff submits this matter is an appropriate case for the imposition of sanctions against these defendants for failing to comply with court orders.

The attorney for the defendants Toys "R" Us-Delaware, Inc., i/s/h/a Toys "R" Us, Inc. d/b/a Babies "R" Us and Toys "R" Us-Delaware, Inc. d/b/a Babies "R" Us...The Babies Superstore states, in a opposing affirmation dated March 17, 2008, to the plaintiff's motion, the defendants Toys "R" Us-Delaware, Inc., i/s/h/a Toys "R" Us, Inc. d/b/a Babies "R" Us and Toys "R" Us-Delaware, Inc. d/b/a Babies "R" Us...The Babies Superstore have already responded to the plaintiff's demand dated October 23, 2006 for the production of any and all videotapes, and accident reports of the accident. The attorney for the defendants Toys "R" Us-Delaware, Inc., i/s/h/a Toys "R" Us, Inc. d/b/a Babies "R" Us and Toys "R" Us-Delaware, Inc. d/b/a Babies "R" Us...The Babies Superstore states there was no surveillance video of the plaintiff's incident. The attorney for the defendants Toys "R" Us-Delaware, Inc., i/s/h/a Toys "R" Us, Inc. d/b/a Babies "R" Us and Toys "R" Us-Delaware, Inc. d/b/a Babies "R" Us...The Babies Superstore points to the August 13, 2007 deposition

testimony of the defendants' manager, Sale Lobosco, who had general knowledge of the store's security cameras location, and states there was no camera situated in the baby gate section in 2007. The attorney for the defendants Toys "R" Us-Delaware, Inc., i/s/h/a Toys "R" Us, Inc. d/b/a Babies "R" Us and Toys "R" Us-Delaware, Inc. d/b/a Babies "R" Us...The Babies Superstore asserts, thorough searches of the store' video library and the claims office video library were made by and at the direction of Glenn Forbes, the defendants' regional loss prevention manager, and he reported no video of the incident. The attorney for the defendants Toys "R" Us-Delaware, Inc., i/s/h/a Toys "R" Us, Inc. d/b/a Babies "R" Us and Toys "R" Us-Delaware, Inc. d/b/a Babies "R" Us...The Babies Superstore avers, regarding the plaintiff's allegation there exists a manager's report of the incident, the manager's report was phased out prior to the accident as a policy matter, and replaced by a guest incident report. The attorney for the defendants Toys "R" Us-Delaware, Inc., i/s/h/a Toys "R" Us, Inc. d/b/a Babies "R" Us and Toys "R" Us-Delaware, Inc. d/b/a Babies "R" Us...The Babies Superstore states the plaintiff has not submitted any proof the action by the defendants was willful, deliberate or contumacious.

This Court has carefully reviewed and considered all of the papers by all of the parties regarding both motions. This Court finds, on the defendant First Years, Inc.'s motion, the plaintiff's personal injury claim only against the defendant First Years, Inc. is time barred (*see* CPLR 214 [5]). The defendant First Years, Inc. has established a prima facie showing with respect to the personal injury claim of the plaintiff, who has not come forth with evidence to show otherwise, and has conceded this point to this defendant (*see* CPLR 3212). This Court finds the defendants Toys "R" Us-Delaware, Inc., i/s/h/a Toys "R"

Us, Inc. d/b/a Babies "R" Us and Toys "R" Us-Delaware, Inc. d/b/a Babies "R" Us...The Babies Superstore have complied with the discovery demands of the plaintiff (see CPLR 3124, 3126) . This Court finds the plaintiff has not met the burden regarding the request for sanctions (see 22 NYCRR § 130.-1.1).

Accordingly, the defense motion is granted only to the extent as above-mentioned regarding the plaintiff's personal injury claim against the defendant First Years, Inc., and is denied in all other respects. The plaintiff's motion is denied in all respects.

So ordered.

Dated: June 12, 2008

ENTER:

J. S. C.

FOR ANTONIO I. BRANDVEER

FINAL DISPOSITION

NON FINAL DISPOSITION

ENTERED

JUN 19 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**