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SHORT FORM ORDER

INDEX No. 04-28976
CAL. No. 08-00052-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 5-20-08
ADJ. DATE 7-25-08
Mot. Seq. # 001 - MotD

EDWARD O'BRIEN and HELEN O'BRIEN,

Plaintiffs,

- against -

BAKER EQUIPMENT a division of JGB INDUSTRIES, INC.,

Defendant.

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BAKER EQUIPMENT a division of JGB INDUSTRIES, INC.,

Third-Party Plaintiff,

- against -

DONLEN CORPORATION AND EMCOR GROUP, INC.,,

Third-Party Defendant.

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Upon the following papers numbered 1 to 44 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 33 ; Notice of Cross Motion and supporting papers __ ; Answering Affidavits and supporting papers 34 - 40 ; Replying Affidavits and supporting papers 41 - 44 ; Other ___ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant's motion for summary judgment dismissing the complaint is

granted only to the extent set forth herein, and is otherwise denied.

Plaintiffs commenced this action, personally and derivatively, to recover damages for personal injuries allegedly sustained by plaintiff Edward O'Brien, who was injured when he fell from a tailshelf of a bucket van owned by his employer, Welsbach Electric Corporation (hereinafter Welsbach). The van is equipped with a vehicle-mounted aerial lift system with a bucket for elevating employees who perform work tasks above ground level. The tailshelf, a metal platform attached to the rear bumper of the van, is used by employees to access the bucket. A grab handle and an access step below the tailshelf are mounted on the van's curbside, and a storage bin capable of holding two wheel chocks is mounted under the tailshelf. Although the van was manufactured by Ford Motor Company, defendant Baker Equipment installed the aerial lift system, tailshelf and other accessories on the van. The van was purchased from Baker Equipment by Dolen Corporation, which then entered into a lease agreement for the vehicle with Welsbach's parent company, Emcor Group, Inc. The vehicle was shipped by Baker Equipment to Welsbach, formerly known as JWP Buding Electric, in January 1997.

At the time of the subject accident, plaintiff, an electric journeyman, had performed streetlight maintenance work for Welsbach for 15 years and had driven the subject van for more than one year. Plaintiff testified at a deposition that the subject accident occurred in the Town of Brookhaven on December 28, 2001, after he had used the bucket to perform repairs on an overhead streetlight. He testified that after completing his work he lowered the bucket and stepped out onto the tailshelf. Plaintiff, who was working alone the day of the accident, testified he next grabbed the handle mounted on the side of the van with his right hand and turned his body around to proceed backwards down the access step. He testified that as he was attempting to step down from the tailshelf to the access step with his right foot, his left foot slipped on the surface of the tailshelf. He testified his right foot, which had not yet made contact with the access step when his left foot slipped, missed the step and hit the handle of a chock stored under the tailshelf, causing him to fall off of the van and onto the ground. Plaintiff testified the tailshelf was covered with diamond-plate sheet metal, and the access step was constructed of perforated, diamond-shaped metal. He also testified that on the day of the accident the ground was covered with snow and he was wearing Timberland work boots. When asked what caused his left foot to slip, plaintiff testified that "it was probably slippery, probably water on there or something." In addition, plaintiff testified that had not chocked the wheels of the van before working in the bucket on the streetlight, and that both chocks were inside the storage area under the tailshelf when the fall occurred.

The complaint asserts causes of action sounding in negligence, strict products liability, and breach of warranty. More particularly, plaintiffs allege in their bills of particulars, among other things, that Baker Equipment failed to provide proper warnings, particularly with respect to the surface of the tailshelf, also referred to as "the rear work platform"; that it designed, manufactured and placed into the stream of commerce "an inherently and unreasonably

dangerous product when used in the ordinary and usual manner"; that it designed, manufactured and placed into the stream of commerce a truck "which was unfit for its intended purposes and was dangerous and unsafe in regard to the surface of the rear work platform and 'diamond-plating' surface"; that it designed, manufactured and assembled "a rear platform out of non-skid resistant material"; and that it designed and assembled "an uneven, unbalanced and unstable walking surface" for the van. The Court notes that a stipulation discontinuing the third-party action against Donlen Corp. and Emcor Group was entered into by the parties in December 2007.

Baker Equipment now moves for summary judgment dismissing the complaint, arguing that there is no evidence in the record the tailshelf on the bucket van was in a defective condition or that plaintiff Edward O'Brien's injuries were caused by the alleged defective condition. It also asserts that plaintiffs cannot establish that the chock storage under the tailshelf created a dangerous condition, arguing "[h]ad plaintiff utilized the chocks behind the wheels in order to stabilize the vehicle . . . his right foot would not have hit anything" when he attempted to put his right foot onto the access step. Baker Equipment further argues that there is no evidence a failure to warn of the alleged defective condition on the tailshelf was a proximate cause of plaintiff's injuries, and that the breach of warranty claim is barred by the statute of limitations. Baker Equipment's submissions in support of the motion include copies of the pleadings; transcripts of the deposition testimony of the parties and of non-party witnesses; photographs purporting to show the condition of the van when it was delivered to Welsbach; photographs of a warning label and operating instructions allegedly affixed to the outside of subject van; and the sales order for the subject van. Also submitted on the motion are affidavits of Skip Baker and Salvatore Malguarnera, Ph.D. Retained by defendant to provide expert testimony, Dr. Malguarnera, a mechanical engineer, reviewed various documents and records related to the instant matter and conducted a physical inspection of the bucket van in March 2007.

Plaintiffs oppose the portions of the motion seeking to dismiss the products liability cause of action, arguing that Baker Equipment failed to demonstrate prima facie both that the rear platform and the chock storage were not defectively designed, and that the warnings it provided for the bucket van were adequate. Alternatively, plaintiffs allege that their submissions in opposition to the motion, especially the affidavit of their engineering expert, Peter Pomeranz raise triable issues of fact as to whether the rear platform and the chock storage area were defectively designed by Baker Equipment. They also allege that material questions exist as to whether Baker Equipment failed to warn of the existence of a slippery condition on the tailshelf, failed to warn of the need to reapply anti-skid products to the surface of the tailshelf, and failed to warn stored chocks may interfered with use of the access step. The portion of defendant's motion seeking summary judgment dismissing the cause of action for breach of the warranty, therefore, is granted, as plaintiffs concede no issues of fact exist regarding this claim (*see* ***Keuhne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; ***McNamee Constr. Corp. v City of New Rochelle***, 29 AD3d 544, 817 NYS2d 295 [2d Dept 2006]; *see also* ***Heller v U.S. Suzuki Motor Corp.***, 64 NY2d 407, 488 NYS2d 132 [1985]).

A manufacturer who places a defective product into the stream of commerce may be liable for injuries or damages caused by such product (***Gebo v Black Clawson***, 92 NY2d 387, 392, 681 NYS2d 221 [1998]; ***Liriano v Hobart Corp.***, 92 NY2d 232, 235, 677 NYS2d 764 [1998]; ***Amatulli v Delhi Constr. Corp.***, 77 NY2d 525, 532, 569 NYS2d 337 [1991]). Depending upon the factual circumstances, a person injured by a defective product may maintain causes of action under the theories of strict products liability, negligence or breach of warranty (*see* ***Voss v Black & Decker Mfg. Co.***, 59 NY2d 102, 463 NYS2d 398 [1983]). Whether an action is pleaded in strict products liability, negligence or breach of warranty, the plaintiff has the burden of establishing that a defect in the product was a substantial factor in causing the injury, and that the defect existed at the time the product left the manufacturer or other entity in the chain of distribution being sued (*see* ***Clarke v Helene Curtis, Inc.***, 293 AD2d 701, 742 NYS2d 325 [2d Dept 2002]; ***Tardella v RJR Nabisco***, 178 AD2d 737, 576 NYS2d 965 [3d Dept 1991]; *see also*, ***Robinson v Reed-Prentice Div. of Package Mach. Co.***, 49 NY2d 471, 426 NYS2d 717 [1980]; ***Dickinson v Dowbrands, Inc.***, 261 AD2d 703, 689 NYS2d 548 [3d Dept], *lv denied* 93 NY2d 815, 697 NYS2d 563 [1999]).

Under the doctrine of strict products liability, a manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in causing the injury or damages, provided

> (1) that at the time of the occurrence the product is being used * * * for the purpose and in the manner normally intended, (2) that if the person injured or damaged is himself [or herself] the user of the product he [or she] would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted [or her] injury or damages

(***Codling v Paglia***, 32 NY2d 330, 342, 345 NYS2d 461 [1973]; *see* ***Amatulli v Delhi Constr. Corp.***, *supra*). A product may be defective due to a mistake in the manufacturing process, an improper design, or a failure to provide adequate warnings regarding the use of the product (***Sprung v MTR Ravensburg***, 99 NY2d 468, 472, 758 NYS2d 271 [2003]; ***Gebo v Black Clawson Co.***, *supra*, at 392, 681 NYS2d 221; ***Liriano v Hobart Corp.***, *supra*, at 237, 677 NYS2d 764; ***Voss v Black & Decker Mfg. Co.***, *supra*, at 106-107, 463 NYS2d 398). A plaintiff in a strict products liability action is not required to prove the exact nature of the defect (***Caprara v Chrysler Corp.***, 52 NY2d 114, 123, 436 NYS2d 251 [1981]; ***Halloran v Virginia Chems.***, 41 NY2d 386, 388, 393 NYS2d 341 [1977]), and proof of liability may be established by direct or circumstantial evidence (*see* ***Speller v Sears, Roebuck & Co.***, 100 NY2d 38, 760 NYS2d 79 [2003]; ***Pollock v Toyota Motor Sales U.S.A.***, 222 AD2d 766, 634 NYS2d 812 [3d Dept 1995]; ***Narciso v Ford Motor Co.***, 137 AD2d 508, 524 NYS2d 251 [2d Dept 1988]).

A defectively designed product is one in 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 (***Robinson v Reed-Prentice Div.***, *supra*, at 479, 426 NYS2d 717; *see* ***Voss v Black & Decker Mfg. Co.***, *supra*; ***Bombara v Rogers Bros. Corp.***, 289 AD2d 356, 734 NYS2d 617 [2d Dept 2001]). Stated differently, a defective product is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce (***Robinson v Reed-Prentice Div.***, *supra*, at 479, 426 NYS2d 717; *see* ***Denny v Ford Motor Co.***, 87 NY2d 248, 639 NYS2d 250 [1995]; ***Voss v Black & Decker Mfg. Co.***, *supra*). To establish a strict liability claim based on a defective design, a plaintiff must show the product as designed posed a substantial likelihood of harm, that it was feasible for the manufacturer to design the product in a safe manner, and that the defective design was a substantial factor in causing plaintiff's injury (*see* ***Voss v Black & Decker Mfg. Co.***, *supra*; ***Gonzalez v Delta Intl. Mach. Corp.***, 307 AD2d 1020, 763 NYS2d 844 [2d Dept 2003]; ***Ramirez v Sears, Roebuck & Co.***, 286 AD2d 428, 729 NYS2d 503 [2d Dept 2001]).

As to the claim of strict liability based on Baker Equipment's alleged failure to provide adequate warnings regarding the tailshelf and access step on the bucket van, a manufacturer may be held liable for the failure to warn of the latent dangers resulting from the foreseeable uses of its product which it knew or should have known (*see* ***Liriano v Hobart Corp.***, *supra*; ***Rastelli v Goodyear Tire & Rubber Co.***, 79 NY2d 289, 582 NYS2d 373 [1992]). Liability may be imposed based on either the complete failure to warn of a particular hazard or the inclusion of warnings that are inadequate (*see* ***DiMura v City of Albany***, 239 AD2d 828, 657 NYS2d 844 [3d Dept 1997]; ***Johnson v Johnson Chem. Co.***, 183 AD2d 64, 588 NYS2d 607 [2d Dept 1992]). However, a manufacturer has no duty to warn product users of dangers that are obvious, readily discernable or apparent (*see* ***Martino v Sullivan's of Liberty***, 282 AD2d 505, 722 NYS2d 884 [2d Dept 2001]; ***Pigliavento v Tyler Equip. Corp.***, 248 AD2d 840, 669 NYS2d 747 [3d Dept], *lv dismissed in part, denied in part* 92 NY2d 868, 677 NYS2d 773 [1998]; ***Lonigro v TDC Elecs.***, 215 AD2d 534, 627 NYS2d 695 [2d Dept 1995]). The duty to warn of a specific hazard also does not arise if the injured person, through common knowledge or experience, already is aware of such hazard (*see* ***Warlikowski v Burger King***, 9 AD3d 360, 780 NYS2d 608 [2d Dept 2004]; ***Banks v Makita, U.S.A.***, 226 AD2d 659, 641 NYS2d 875 [2d Dept 1996]; ***Payne v Quality Nozzle Co.***, 227 AD2d 603, 643 NYS2d 623 [2d Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279 [1996]).

"Failure to warn liability is intensely fact-specific," involving issues such as the obviousness of the risk, the knowledge of the product user, and proximate cause (***Liriano v Hobart Corp.***, *supra*, at 243, 677 NYS2d 764; *see* ***Brady v Dunlop Tire Corp.***, 275 AD2d 503, 711 NYS2d 633 [3d Dept 2000]; ***Rogers v Sears, Roebuck & Co.***, 268 AD2d 245, 701 NYS2d 359 [1st Dept 2000]). Nevertheless, a court can decide as a matter of law that there was no duty to warn or that the duty was discharged (*see* ***Passante v Agway Consumer Prods.***, 294 AD2d 831, 741 NYS2d 624 [4th Dept], *appeal dismissed* 98 NY2d 728, 749 NYS2d 478 [2002]; ***Dias v***

Marriott Intl., 251 AD2d 367, 674 NYS2d 78 [1998]; ***Schiller v National Presto Indus.***, *supra*; ***Jackson v Bomag GmbH***, 225 AD2d 879, 638 NYS2d 819 [3d Dept], *lv denied* 88 NY2d 805, 646 NYS2d 985 [1996]; ***Oza v Sinatra***, 176 AD2d 926, 575 NYS2d 540 [2d Dept 1991]). As with a claim of design defect, a plaintiff alleging liability based on a failure to warn must establish that the manufacturer had a duty to warn and that the failure to warn was a substantial cause of the event which produced the injuries (*see* ***Banks v Makita, U.S.A.***, *supra*; ***Billsborrow v Dow Chem.***, 177 AD2d 7, 579 NYS2d 728 [2d Dept 1992]).

In addition, a plaintiff injured by an alleged defective product seeking recovery under a negligence theory must, as in any negligence action, establish the existence of a legal duty of care, a breach of that duty, and damages resulting from such breach (*see* ***Micallef v Miehle Co., Div. of Miehle-Goss Dexter***, 39 NY2d 376, 384 NYS2d 115 [1976]; *see generally* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Luina v Katharine Gibbs School N.Y.***, 37 AD3d 555, 830 NYS2d 263 [2d Dept 2007]). A manufacturer is under a nondelegable duty to design and produce a product that is not defective (***Robinson v Reed-Prentice Div.***, *supra*, at 479, 426 NYS2d 717).

Baker Equipment demonstrated prima facie that plaintiff's injuries were not proximately caused by its alleged failure to give warnings regarding the surface of the tailshelf and the storage of chocks under the tailshelf. Plaintiff's deposition testimony shows that he had worked on the subject bucket van repairing overhead street lights for at least one year prior to the subject accident, and that he was aware of both the surface of the tailshelf and the presence of the chocks handles between the tailshelf and the access step. Thus, given plaintiff's actual knowledge of the alleged hazardous conditions, any warning which Baker Equipment could have issued with respect to the tailshelf and the stored chocks would have been superfluous (*see* ***Heimbuch v Grumman Corp.***, 51 AD3d 865, 858 NYS2d 378 [2d Dept 2008]; ***Rodriguez v Sears, Roebuck & Co.***, 22 AD3d 823, 803 NYS2d 184 [2d Dept 2005]; ***Wesp v Carl Zeiss, Inc.***, 11 AD3d 965, 783 NYS2d 439 [4 th Dept 2004]; ***Warlikowski v Burger King***, *supra*). As plaintiffs' submissions in opposition fail to raise a triable issue with respect to plaintiff's knowledge of the alleged defective conditions, the strict products liability cause of action is dismissed insofar as it is predicated on a failure to warn (*see* ***Heimbuch v Grumman Corp.***, *supra*; ***Wesp v Carl Zeiss, Inc.***, *supra*; ***Warlikowski v Burger King***, *supra*).

However, summary judgment dismissing the claims for negligence and strict products liability based on design defect is denied. Initially, the Court notes that as Baker Equipment failed to provide an evidentiary foundation for the photographs submitted with the moving papers as Exhibits M and O, such photographs were not considered in the determination of the motion. Although Skip Baker, President of Baker Equipment, avers that the rear platform had a diamond-plated metal surface, and that this surface was coated with a non-skid compound, defendant's expert, Dr. Malguarnera, does not opine in his affidavit that such a surface was reasonably safe for workers using the bucket van and that no safer alternative surface was feasible at the time the

aerial lift system was installed on the van (*see* ***Watson v Scott McLaughlin Truck & Equip. Sales***, 23 AD3d 1051, 804 NYS2d 185 [4th Dept 2005]; ***Milazzo v Premium Tech. Servs. Corp.***, 7 AD3d 586, 777 NYS2d 167 [2d Dept 2004]; ***Potaczala v Fitzsimmons***, 171 AD2d 1015, 568 NYS2d 983 [4th Dept 1991]; *cf.* ***Ramos v Howard Indus., Inc.***, 10 NY3d 218, 855 NYS2d 412 [2008]; ***Preston v Peter Lugar Enters., Inc.***, 51 AD3d 1322, 858 NYS2d 828 [3d Dept 2008]; ***Magadan v Interlake Packaging Corp.***, 45 AD3d 650, 845 NYS2d 443 [2d Dept 2007]; ***Terry v Erie Foundry Co.***, 235 AD2d 414, 652 NYS2d 308 [2d Dept 1997]). While recognizing that a manufacturer is not expected to design products with components that do not wear out, and that purchasers are expected to use reasonable care to maintain products, Dr. Malguarnera's finding that in March 2007 the anti-skid coating on the metal surface "was worn away" does not establish that the bucket van delivered by Baker Equipment to Welsbach was not defectively designed. Moreover, defendant's expert's affidavit fails to address the allegations that the van was defectively designed by Baker Equipment, because the handles of chocks stored under the tailshelf extend out over the tread of the access step, and that the handles interfered with plaintiff's ability to use the step. Instead, the expert's affidavit states only that plaintiff "materially misused a safety device, the wheel chocks, on the day of his purported accident, by failing to chock the rear wheels of the vehicle," and that "the Baker products on the vehicle were not defective in design or manufacturing and were reasonably safe for their intended purposes."

Dated: 10-1-08

DENISE F. MOLIA

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION