Hebrew Academy of Five Towns v Herald Community Newspaper
2009 NY Slip Op 31034(U)
April 24, 2009
Supreme Court, Nassau County
Docket Number: 014613/05
Judge: Daniel Martin

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 30
NASSAU COUNTY

HEBREW ACADEMY OF FIVE TOWNS.

Plaintiff.

- *against* -

Sequence No.: 013 & 014
Index No.: 014613/05

HERALD COMMUNITY NEWSPAPER, RICHNER COMMUNICATIONS, INC., WESTBURY PAPER STOCK CORP. And NANOIA RECYCLING EQUIPMENT, INC.

Defendants.

PG INSURANCE COMPANY OF NEW YORK, as subrogee of RICHNER COMMUNICATIONS, INC.

Plaintiff.

Index No.: 110509/05

- *against* -

WESTBURY PAPER STOCK CORP. And NANOIA RECYCLING EQUIPMENT, INC.

Defendants.

HANOVER INSURANCE COMPANY a/s/o RECOGNITION SYSTEMS, INC.

Plaintiff.

Index No.: 003291/05

- *against* -

WESTBURY PAPER STOCK CORP. And NANOIA RECYCLING EQUIPMENT, INC.

Defendants.

CHUBB INDEMNITY INSURANCE COMPANY a/s/o HARRIET SWIEDLER.

Plaintiff.

- *against* -

Index No.: 012708/06

RICHNER COMMUNICATIONS, INC., WESTBURY PAPER STOCK CORP. And NANOIA RECYCLING EQUIPMENT, INC.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motions and Affidavits Annexed	X
Notice of Cross-Motion and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

The defendant Westbury Paper Stock Corp. ("Westbury Paper Stock") moves for an order pursuant to CPLR 3212 granting it summary judgment dismissing plaintiff's complaint. As an alternate branch of relief the movant seeks an order of preclusion. The defendant Herald Community Newspaper and Richner Communications, Inc. ("Richner Communications") cross moves for an order pursuant to CPLR 3212 granting it summary judgment dismissing defendant Westbury Paper Stock and Nanoia Recycling Equipment's cross-claim in Action No. 1 and Chubb Indemnity Insurance Company as subrogee of Harriet Swiedler's complaint in Action No. 4.

In these four actions, the plaintiffs HAFT, PG Insurance Company of New York as subrogee of Richner Communications, Hanover Insurance Company as subrogee of Recognition Systems, Inc. and Chubb Indemnity as subrogee of Harriet Swiedler seek to recover damages they or their insureds suffered as a result of a fire at Richner's premises on June 15, 2004. The plaintiffs allege, *inter alia*, that the fire was caused by the mechanical failure of a used replacement paper baling machine ("the replacement baler") located at Richner's plant. The complaints allege that replacement baler had been recently supplied and installed by the defendant Nanoia Recycling Equipment at the direction of the defendant Westbury Paper Stock and that the installation was negligently done causing a fire risk. In Action No. 1, HAFT seeks to recover from Westbury Paper Stock and Nanoia Recycling Equipment, Inc. for negligence, breach of contract, strict product liability, gross negligence, *res ipsa loquitur* and trespass. Westbury Paper Stock and Nanoia have cross-claimed against Richner Communications and Herald Community Newspapers for, *inter alia*, negligence and seek apportionment.

In Action No. 2, PG Insurance Company as subrogee of Richner Communications seeks to recover of Westbury Paper stock for negligence,breach of implied warranty, breach of contract and strict products liability. PG Insurance Company seeks to recover of Nanoia for negligence.

In action No. 3, Hanover, as subrogee of Recognition Systems Inc., seeks to recover monies paid to its insured Recognition Systems to compensate it for property which was present at Richner's plant and was damaged by the fire. It advances causes of action sounding in

negligence, breach of implied warranty, failure to maintain the baler, and strict liability against Westbury Paper Stock. Hanover advances causes of action sounding in negligence and breach of express or implied warranty against Nanoia.

In Action No. 4, Chubb Indemnity Insurance Company as subrogee of Harriet Swiedler seeks to recover of Richner Communications, Westbury Paper Stock and Nanoia for monies paid to its insured Swiedler for property damage suffered as a result of the fire. Its claim sounds in negligence.

The defendant Westbury Paper Stock seeks dismissal of "the plaintiffs' claims in their entirety:" It therefore seeks dismissal of HAFT's complaint (Action No. 1); PG Insurance Company of New York a/s/o Richner Communications' complaint (Action No. 2); Hanover Insurance Company a/s/o Recognition Systems, Inc.'s complaint (Action No. 3); and, Chubb Indemnity Insurance Company a/s/o Harriet Swiedler's complaint (Action No. 4).

Via its Notice of Motion, the defendant Westbury Paper Stock seeks dismissal of "the plaintiffs' claims in their entirety:" It therefore seeks dismissal of HAFT's complaint (Action No. 1); PG Insurance Company of New York a/s/o Richner Communications' complaint (Action No. 2); Hanover Insurance Company a/s/o Recognition Systems, Inc.'s complaint (Action No. 3); and, Chubb Indemnity Insurance Company a/s/o Harriet Swiedler's complaint (Action No. 4).

The defendants Richner Communications and Herald Community Newspaper seeks summary judgment dismissing Westbury Paper Stock and Nanoia's cross-claim as well as Chubb Indemnity Insurance Company as subrogee of Harriet Swiedler's ("Chubb") complaint.

The facts as gleaned from the voluminous papers submitted, to the extent pertinent, appear to be as follows: The defendant Richner Communications entered into a written agreement with the defendant Westbury Paper Stock to service Richner's baler. In exchange for servicing the baler, Westbury Paper paid Richner $600 a month and acquired the rights to receive Richner's baled paper which Westbury Paper Stock recycled. Westbury Paper Stock sometimes hired the defendant Nanoia to service Richner's baler and at other times it serviced the machine in house.

In 2004, the maintenance costs of Richner's 25+ year-old baler became prohibitive. Westbury Paper Stock offered to replace Richner's baler with one of its own used balers and to continue maintaining it in accordance with their prior written agreement. On or about May 3, 2004, Richner and Westbury Paper Stock orally agreed to this arrangement. In furtherance of this agreement, Westbury Paper Stock instructed Nanoia, its customary baler installation, maintenance, repair and refurbishing company, to install its used baler at Richner's premises and to remove Richner's baler. When it was discovered that Westbury Paper Stock's used baler was not of a suitable size, Nanoia offered to swap one of its used replacement balers for Westbury Paper Stocks' used baler and to install its baler at Richner's premises. Westbury Paper Stock and Nanoia so agreed and Nanoia installed its replacement baler at Richner's premises on May 4,

2004. Nanoia retained both Westbury Paper Stock's as well as Richner's used balers. Richner used Nanoia's replacement baler for a few weeks until a fire brke out on June 15, 2004, which destroyed Richner's building and damaged neighboring properties.

It is not disputed that Nanoia obtained the replacement baler which it installed at Richner's premises from its prior owner Sundown Sports on April 27, 2004. The replacement baler, which itself was 20+ years old, had not been maintained for over eight years and had been kept outside. In fact, a few years earlier, Sundown Sports attempted to sell the baler to Nanoia which is in the business of buying, refurbishing and reselling such used equipment but Nanoia declined. It was only when Sundown Sports offered to give Nanoia the baler to get rid of it that Nanoia accepted it. These facts were verified by depositions of witnesses from Sundown and Nanoi.

Ken Sillifant, Westbury Paper Stock's general manager in 2004, testified at his examination-before-trial that part of Westbury Paper Stock's business was buying baling machines and compactors. He testified that Westbury Paper Stock bought both new and used balers from Nanoia and sometimes had Nanoia refurbish balers and ship them directly to their customers. He also testified that Westbury Paper Stock stored used balers at its plant and had agreements with some of its customers to provide balers, which was done in a number of ways, i.e., via sale, in exchange for recyclable paper, or via lease. In addition, upon request, Westbury Paper Stock would lend its used balers out to its customers after they were refurbished by Nanoia.

As for the cause of the fire, Marie Sandoval, an employee of Richner who was working in the pressroom on the day in question, testified at her examination-before-trial that she smelled smoke, observed a fire on top of the baler machine and that she immediately left. She testified that she did not know whether the baler had been used on the day of the fire; she hadn't seen anyone using it.

Mario Rogue, a pressman at Richner's, testified at his deposition that he was working on the printing press when he heard someone say "fire." He testified that he went to see what was going on and he, too, saw a fire only "in the top of the baling machine," however, he could not definitively say whether the flames were coming from the baling machine. Although he tried to extinguish the fire with a fire extinguisher, he was unable to do so.

Lou La Fauci, an employee of Richner, testified that on the morning of the fire, after disconnecting the power, reinstalling a bolt and nut in the ejector area and turning the power back on, he did a test on the baler and it operated as it should. He testified that when he observed the fire, he saw it in two areas, on the ground and high towards the ceiling in the Press Room. He could not recall whether the baler was on fire. He remembered seeing flames and smoke. La Fauci, however, could not testify where the fire started as it had been in progress for a while when he arrived.

The defendants Herald and Richner submit proof derived from eyewitness and experts. For example Fire Origin and Cause Investigator Salvatore Salvato (a former New York City Fire Marshall) stated that he eliminated careless smoking as a source of the fire and concluded that the source was electrical heat energy caused by a defect in the electrical components on the top of the replacement baler. Salvato was able to rule out all potential causes of the fire other than a malfunction of the electrical components at the top of the replacement baler including arson, the fluorescent lighting system, the clamp truck, the ink tote and pump, the waste paper blower system, the electrical system for the building and careless use of smoking materials.

David Toler, a Professional Engineer, eliminated the fluorescent lighting system, the clamp truck, the ink tote and pump, the waste paper blower system and the electrical system for the building as causes of the fire because they were not within the area of fire origin observed by the eyewitnesses to the fire in its incipient stages and because none of these items displayed any physical characteristics indicative of causing the fire. He explains that the baler's wiring was exposed to the elements, specifically sunlight, heat, ozone, moisture and cold for approximately ten years which can damage wire insulation and cause breakdown. He notes that the condition of the wiring was never tested and it is his opinion that the most probable cause of the fire was that the wire insulation failed and the electrical current generated heat which commonly causes fires in the very high temperatures of a baler's arc and metal surfaces. He concluded that the replacement baler was not properly inspected, tested, refurbished and/or installed.

Electrical Engineer Robert Simpson agrees with Toler that the outdoor elements would have compromised the baler's electrical components and even notes that the American National Standard governing enclosures of electrical components when exposed to the elements were not followed. He, too, opines that the replacement baler was not properly inspected and tested and that the failure of the insulation of the supply conductors resulted in high resistance fault which caused the fire. He states that under the circumstances, a comprehensive overhaul of the replacement baler's entire electrical system should have been performed.

In opposition to Richner's motion for summary judgment, Nanoia has submitted the affidavit of Peter Davis, a professional fire investigator, who inspected Richner's plant approximately two weeks after the accident. Westbury Paper Stock adopts Davis' affidavit also. The defendant Richner objects to consideration of this expert proof because Peter Davis was not identified by Nanoia until service of this affidavit, which was several months after the Note of Issue and Certificate of Readiness were filed attesting to the completion of discovery. Nanoia has not offered a valid excuse for their delay in identifying him as an expert.

The first issue that must be addressed is were the motions timely made. The note of issue appears to have been file on August 6, 2008. At that time, contrary to the statement of readiness discovery was not complete. Nonetheless, the certification order provided that motions for summary judgment were to be filed 60 days after the filing of the note of issue. To the extent either the motion or cross-motion might be viewed as untimely, the defendant Richner requests that good cause has been shown why the time limits applicable herein should be extended by

virtues of the fact that discovery was essential and, in fact, occurred well after the filing of the note of issue. Moreover, it appears that Richner waited until it was assured that the plaintiff was going to discontinue its action against it and then made its motion for summary judgment directed against the cross claims of Westbury and Nanoia. The need for the completion of outstanding discovery which has been demonstrated constitutes good cause for the delay. Gonzalez ex rel. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124 (2000); Alvarez v. Eviles, 56 A.D.3d 500 (2nd Dept. 2008).

Turning to the merits of the respective applications for summary judgment, the thresholds of proof needed to succeed are well established. "On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v. King, 10 A.D.3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 N.Y.3d 627 (2005), *citing* Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v. King, supra, at p.74; Alvarez v. Prospect Hosp., supra; Winegrad v. New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v. Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See*, Demishick v. Community Housing Management Corp., 34 A.D.3d 518, 521 (2d Dept. 2006), *citing*, Secof v. Greens Condominium, 158 A.D.2d 591 (2d Dept.1990).

Applying these principles to the instant facts as set forth above, to the motion of Westbury, the court must first determine if Westbury has met is *prima facie* burden to wit; to negate any possibility that it is liable to the plaintiff or any of the cross claimants on any of the numerous theories pled. In this regard central to Westbury's motion is its contention that it merely provided servicing and maintenance of the baler and was not a seller or distributor of the baler. In that capacity Westbury alleges that it has no obligation to the plaintiff in the nature of strict liability for the breach of warranty of fitness for use of the baler in question. Moreover, even if it were deemed a distributor, Westbury maintains that none of the other party's was able to identify a specific defect in the baler that caused the fire. These positions are disputed by Richner.

In addition to manufacturers of defective products, strict products liability applies to sellers and distributors as well provided that the seller is engaged in the business of selling such product. Sukijian v. Charles Ross & Co., 69 N.Y.2d 89, 95 (1986); *see also*, Restatement (Second) of Torts §402A; *see generally*, Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102, 106-107 [1983]; Robinson v. Reed-Prentice Division of Package Machinery Co., supra, at p. 478.

However, strict liability is only imposed on sellers who engage in product sales in the ordinary course of their business. Sprung v. MTR Ravensburg, Inc., 99 N.Y.2d 468 (2003).

Strict products liability does not apply to "a party who is not engaged in the sale of the product in issue as a regular part of its business." (Sukijian v. Charles Ross & Co., supra, at p. 95, citing Restatement [Second] of Torts §402A comment f; *see also*, Stiles v. Batavia Atomic Horseshoe, 174 A.D.2d 287 [4th Dept. 1992], reversed on other grounds, 81 N.Y.2d 950 [1993], rearg den., 81 N.Y.2d 1068 [1993]; *see also*, Nutting v. Ford Motor Company, 180 A.D.2d 122, 129 [3rd Dept. 1992]; Gonzalez v. Rutherford Corp., 881 F.Supp. 829, 841-842 [EDNY 1995]). Casual sellers of products only have a duty to warn a purchaser of known defects that are not obvious or readily discernible. Sukljian v. Charles Ross & Co. Inc., supra. Nevertheless" ...'when service predominates, and transfer of personal property is but an incidental nature of the transaction,' the exacting warranty standards for imposing liability without proof of fault will not be imparted from the law of sales to cast purveyors . . . in damages." Milau Associates, Inc. v. North Ave. Development Corp., 42 N.Y.2d 482 (1977), quoting Perlmutter v. Beth David Hosp., 308 N.Y. 100, 104 (1954), rearg den. 308 N.Y. 812 (1955). "While determination, as to whether the essence of a particular contract is for the rendition of services or for the sale of property, may at times be troublesome and vexations . . . it is the transaction, regarded in its entirety, which must determine its nature and character." Perlmutter v. Beth David Hosp., supra, at p. 106.

To establish its entitlement to summary judgment, Westbury Paper Stock must establish that the paper baler performed as intended ,or that the accident can not have resulted from any defect in the design or manufacturing of the paper baler. Kaslow v. Zenith Electronics Corp., 45 A.D.3d 810, 810-811 (2nd Dept 2007), *citing*, Speller ex rel. Miller v. Sears, Roebuck & Co., supra, at p. 41; D'Auguste v. Shanty Hollow Corp., 26 A.D.3d 403, 404-405 (2nd Dept. 2006); Milazzo v. Premium Technological Services. Corp., 7 A.D.3d 586 (2nd Dept. 2004); Taft v. Sports Page Shop, Inc., 226 A.D.2d 974 (3rd Dept. 1996). A defendant cannot meet this burden by merely pointing to gaps or what it deems to be potential fatal defects in the plaintiff's proof. Russell v. Kraft, 284 A.D.2d 386 (2nd Dept. 2001), *citing*, Pace v. International Business Machines Corp., 248 A.D.2d 690 (2nd Dept. 1998).

The proof submitted by Westbury does not prove as a matter of law that Westbury was at beast a service provider for Richner. An issue of fact also exists as to whether Westbury Paper Stock leased the replacement baler to Richner as part of the cost borne by Westbury Paper Stock in exchange for Richner's baled paper and in so doing, breached the implied warranty of fitness for a particular purpose. Indeed, as in Adeyinka v. Yankee Fiber Control, Inc., (564 F.Supp2d 265, 276 [S.D.N.Y. 2008], *citing*, Sprung v. MTR Ravensburg, Inc., supra; Gebo v. Black Clawson Co., supra; *see also*, Walusimbi v. Epco Leesona Corp., 1988 WL 14466 [E.D.N.Y. 1988]). There are also issues of fact as to whether Westbury is liable for a breach of the common law implied warranty or if Westbury was relieved of such duty through its delegation of obtaining the replacement baler to Nanoia 93 N.Y.Jur2d Sales §32. Moreover, the proof does not negate an issue of fact as to Westbury's potential responsibility for contributing to the cause of the fire, despite the fact that Richner's poof did not conclusively identify a specific cause of the fire attributable to Westbury.

In an endeavor to fill in these gaps in its proof Westbury offers the expert affidavit of its

expert electrical engineer, Peter Davis to establish that the fire was not caused by the baler or any part thereof. However, Mr Davis was not disclosed as an expert prior to the filing of the note of issue and the intent to employ his expertise was only revealed by the submission of his affidavit in reply to the Richner motion for summary judgement. An affidavit of an expert not revealed during the discovery process may be excluded from consideration on a motion for summary judgment submitted after the filing of the note of issue, See, King v. Gregruss Management Corp., 57 A.D.3d 851, 870 N.Y.S.2d 103; Construction by Singletree Inc. v. Love, 55 A.D.3d 861, 866 N.Y.S.2d 702, Gerry v. Commack Union Free School Dist., 52 A.D.3d 467, 860 N.Y.S.2d 133. Nor even if disclosure had been had may such an affidavit be submitted in reply to satisfy Westbury's *prima facie* burden for summary judgment Jackson-Cutler v. Long, 2 A.D.3d 590 (2nd Dept. 2003); Adler v. Suffolk County Water Auth., 306 A.D.2d 229 (2nd Dept. 2003).

As to all of the allegations of the complaint, other than the cause of action sounding in negligence, the defendant Westbury has failed to establish its entitlement to such relief. The adequacy of the opposing proof is, therefore, irrelevant. Winegard v. New York University Medical Center, 64 N.Y.2d 851,487 N.Y.S.2d 642; Smalls v. mercy Medical Center, 50 A.D.3d 670, 854 N.Y.S.2d 535.

On the other hand, the proof submitted by Westbury shows that neither Westbury Paper Stock or Nanoia had actual or constructive knowledge of any defects in the replacement baler, therefore all of the claims sounding in negligence are dismissed. Lasser v. Northrup Grumman Corp, 55 A.D.3d 561, 865 N.Y.S.2d 301; Perez v. Cassone Leasing Inc., 40 A.D.3d 946, 837 N.Y.S.2d 215. No adequate proof to the contrary was submitted. Accordingly, that branch of the motion seeking summary judgment dismissing the negligence cause of action is granted.

With respect to that branch of motion which seeks an order of preclusion, the court has examined the plaintiff's supplemental bill of particulars. That response indicates that electrical activity in the motor connection box cause excessive heating. The plaintiff's theory has been adequately revealed in that the improper installation, maintenance, and inspection of the baler is alleged to have caused the ignition of the fire in question. Thus, the supplemental bill of particulars is deemed sufficient.

Westbury Paper Stock's attack on plaintiff's disclosure regarding damages also fails. Not only has ample documentation been supplied, plaintiff's measure of damages as the cost of restoration is permitted. *See*, Jenkins v. Etlinger, 55 N.Y.2d 35, 39 (1982). Plaintiff need only establish its damages under one formula and the burden then shifts to the defendant(s) to prove a lesser amount. Jenkins v. Etlinger, supra, at p. 39; Barron v. Dube, 48 A.D.3d 1059 (4th Dept. 2008). Accordingly, the plaintiff's response is sufficient.

Turning to the cross-motion and applying the same principles, it is clear that Richner and Herald have established their entitlement to summary judgment dismissing Westbury Paper Stock and Nanoia's cross-claims as well as Chubb Indemnity's complaint against them. They

have demonstrated through the submission of expert testimony that every possible cause of the accident that might be attributable to them has been addressed and eliminated as a potential cause of the fire.

Having met their burden of establishing their entitlement to summary judgment, Richner and Herald Community have shifted the burden to Westbury Paper Stock, Nanoia and Chubb to establish the existence of a material issue of fact. In opposition to Richner's motion for summary judgment, Nanoia has submitted the affidavit of Peter Davis, a professional fire investigator, who inspected Richner's plant approximately two weeks after the accident. Westbury Paper Stock adopts Davis' affidavit also.

As indicated previous due to the fact that neither Westbury nor Nanoia disclosed Davis as an expert nor offered good cause for their failure to do so, Davis' affidavit may not be considered. *See,* King v. Gregruss Management Corp., supra, Construction by Singletree Inc. v. Love, supra, Gerry v. Commack Union Free School Dist., supra.

In opposition to Richner's summary judgment motion, Westbury Paper Stock also submits the testimony of Mr. LaFauci. Contrary to Westbury Paper Stock's summarization of LaFauci's testimony, he did not testify that the fire "stemmed" from areas other than where the baler was located. There is no proof that he witnessed the ignition of the fire. Rather, he testified that he observed the fire after it had been going on for some time. Standing alone, that hardly establishes the existence of an issue of fact regarding the initial location of the ignition of the fire or Richner's role in causing the fire. Thus, Westbury Paper Stock, Nanoia and Chubb have failed to establish the existence of a material issue of fact regarding Richner and Herald Community Newspapers' role in causing the fire. Richner and Herald Community Newspaper's motion for summary judgment dismissing Westbury Paper Stock and Nanoia's cross-claims and Chubb's complaint in Action No. 4 against it is , therefore, granted.

Accordingly, that branch of the motion which seeks summary judgement os granted to as to the negligence claims pled and is otherwise denied. The request for alternative relief in the nature of an application for a preclusion order is likewise denied. The cross-motion for summary judgment is granted to the extent indicated herein.

So Ordered.

A.J.S.C.

Dated: April 24, 2009