Luftman v Fashion 21, Inc.
2009 NY Slip Op 31501(U)
June 15, 2009
Supreme Court, New York County
Docket Number: 107761/06
Judge: Doris Ling-Cohan
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SCANNED ON 6/30/2009

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 107761/2006
LUFTMAN, MELISSA
VS
FASHION 21
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. 107761/06

MOTION DATE

MOTION SEQ. NO. 003 + (004)

MOTION CAL. NO.

this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits #4 - found in motion seq. #003	3,4,5
Replying Affidavits	6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memorandum decision.

FILED
JUN 30 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

HON. DORIS LING-COHAN

Dated: 6/15/09

J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

MELISSA LUFTMAN,

Plaintiff,

-against-

FASHION 21, INC., and FOREVER 21 RETAIL, INC., and THE ORIGINAL, INC.,

Defendants.

DECISION AND ORDER

Index No. 107761/06

Motion Seq. No. 003 & 004

FASHION 21, INC., and FOREVER 21 RETAIL, INC.,

Third-Party Plaintiffs,

-against-

THE ORIGINAL, INC.,

Third-Party Defendant.

Third-party Index No. 590257/07

FILED
JUN 30 2009
COUNTY CLERK'S OFFICE
NEW YORK

DORIS LING-COHAN, J.S.C.:

In this products liability injury action, plaintiff Melissa Luftman (Luftman) seeks damages for personal injuries resulting from an incident on July 26, 2005, when the skirt she was wearing allegedly caught fire as a result of coming in contact with a lit cigarette. Defendants Fashion 21, Inc. and Forever 21 Retail, Inc. (collectively, Fashion 21) are related entities that operate retail stores, one of which allegedly sold the skirt in question to plaintiff. The Original, Inc. (The Original) is a wholesale supplier to Fashion 21.

The amended verified complaint contains 15 causes of action, including strict products liability, breach of warranty of fitness and merchantability, and negligence, against Fashion 21 and The Original. Plaintiff alleges that the skirt was not fit for its intended purpose and that it did not comply with the Federal Flammable Fabrics Act (15 USCA § 1191, et seq.). Fashion

21 asserted four cross claims against The Original in its verified amended answer: (1) contribution; (2) common law indemnification; (3) contractual indemnification; and (4) failure to procure insurance.

Luftman testified at her deposition that on July 26, 2005 she sat down on a concrete bench during her lunch break to make a phone call (ex. G to Fashion 21 mov. aff. at 16). She reached into her pocketbook for her phone and then felt heat on her legs (*id.* at 30). She saw flames behind her and pulled off the burning skirt and threw it (*id.* at 52). She saw a cigarette on the ground, but did not know where it came from (*id.* at 50). As a result, Luftman alleges to have received second- and third-degree burns to her legs, buttocks and hand (*id.* at 79-80, 84). Luftman testified that the skirt in question was yellow in color, ankle-length, and had an outside layer, a lining, and a ruffled edge at the bottom (*id.* at 34-35).

In motion sequence 003, defendant/third-party defendant The Original moves for summary judgment dismissing plaintiff's complaint as against it and striking the answer and third-party complaint of Fashion 21[1]. As detailed below, The Original's motion for summary judgment is denied.

In motion sequence 004, Fashion 21 moves for summary judgment dismissing the complaint, or, alternatively, granting Fashion 21 summary judgment on its cross claim against The Original for breach of contract for failing to procure insurance,

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[1] Fashion 21 filed a third-party complaint against The Original before The Original was named a defendant by plaintiff.

as well as conditional summary judgment against The Original based on common law and contractual indemnity. Fashion 21 also seeks an award of attorneys' fees based on the terms of its purchase order with The Original. As detailed below, Fashion 21's motion is granted to the extent of awarding Fashion 21 a conditional order of contractual and common law indemnity against The Original, including attorneys' fees, and judgment of liability on its cross claim for breach of The Original's contractual duty to procure insurance, and otherwise denied.

Motion Seq. No. 003

Defendant The Original moves for summary judgment, arguing that the skirt in question did not violate any law in the United States and that it could not have been set on fire by a cigarette when plaintiff was allegedly injured. In support of its motion, The Original relies upon an examination and testing done by an expert of an alleged replica of the skirt[2].

Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, it should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). "Moreover, the motion court

[2] A purported replica of the skirt was provided by The Original since plaintiff alleges that there was nothing left of the skirt after it caught fire and, therefore, no remaining sample of the actual skirt to test.

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should draw all reasonable inferences in favor of the nonmoving party in determining whether to grant summary judgment" (*F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 [1st Dept 2002]). In deciding such a motion, the court's role is "issue-finding, rather than issue-determination" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal quotations omitted]).

Tom Kim (Kim), the President of The Original, testified at his deposition that he remembers the particular skirt because Fashion 21 requested that an additional tier, or layer of material, be added to the sample (ex. M to Fashion 21 mov. aff.). Kim does not specifically identify what material was used for this additional tier, but he testified that this skirt was 100% cotton. Kim identified it from a photograph (ex. K to Fashion 21 mov. aff.). The Original produced a shipment of these skirts through its agent in China and sold them to Fashion 21 pursuant to a purchase order from Fashion 21.

Kim testified at his deposition that the skirts he sold to Fashion 21 were manufactured in China, but he never knew the identity of the manufacturer. Kim dealt with agents in China who arranged for garments to be manufactured based on samples and specifications. He no longer does business with the particular agent who placed the order for the manufacture of the skirts involved here.

Kim attempted to replicate the garment that he allegedly produced for Fashion 21 by making the identical order through his new agent in China. Kim testified at his deposition that he

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could not be 100% certain that the fabric used to make the exemplar was the same as the fabric used to make the skirts in 2005. Kim also testified that he did not check whether both of the skirts were 100% cotton (ex. C The Original's mov. aff. at 106-107).

The Original had this replica tested by an expert, Dr. Carl J. Abraham, as to it's flammability. Dr. Abraham's affidavit was submitted herein in support of The Original's motion for summary judgment. Dr. Abraham found that the subject garment could not be ignited with a cigarette and that the subject garment should have been acceptable with regards to meeting the required testing for textiles placed in the stream of commerce in the United States.

Dr. Abraham states: "[t]he opinions that I provide in this affidavit are based on ... the tests that I performed on the actual garment and the exemplar" (ex. C to The Original mov. aff. ¶ 5). However, the record is clear that the actual garment that allegedly ignited was not preserved. Thus, Dr. Abraham could only have tested the purported replica.

Dr. Abraham also states: "[i]t was understood that the garment tested by the undersigned was identical to the one worn by Ms. Luftman" (*id.* ¶ 6). Dr. Abraham states further: "[t]he undersigned obtained exemplar garments from the manufacturer in this case ..." (*id.* ¶ 7), but he acknowledges that the skirt he tested "was not manufactured by the same people who manufactured the skirt in the accident" (*id.*).

The examination and testing done by Dr. Abraham - of which

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The Original heavily relies upon in support of its motion - is insufficient to grant summary judgment for The Original as it is based on inaccurate assumptions. While Kim testified that he believed the skirt in question was cotton, he also stated that he could not be 100% certain of such fact. He also testified that, at some point, the sample given to him by the manufacturer used to produce the item was shorter and an additional layer was subsequently added to the skirt. This fact, in addition to Kim not knowing who the manufacturer was and having this replica produced by a different manufacturer without complete knowledge of the fabric and any other specifications used on the specific skirt that was ultimately sold to Luftman, requires that a trial be had on such issues. Moreover, the expert's affidavit is not definitive given that Dr. Abraham stated he tested the actual garment, while it is undisputed that the actual garment no longer exists.

Furthermore, "[w]here the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, ... the opinion should be given no probative force and is insufficient [on] summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *see also Caruso v John St. Fitness Club*, LLC, 34 AD3d 296, 296 [1st Dept 2006]). Based on the above, Dr. Abraham's speculative expert affidavit is insufficient on this summary judgment motion since it is based on the assumption that the exemplar is identical to the skirt that The Original sold to Fashion 21, which is an issue of fact in this case.[3] As such,

[3] Contrary to The Original's reply affirmation, this is not an issue of admissibility of the expert's affidavit, but whether

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since there remain issues of fact as to the fabric and whether it could ignite, summary judgment is inappropriate and The Original's motion is denied.

Based on the above arguments, The Original also moves to dismiss Fashion 21's complaint/cross claims as against it. Since issues of fact remain as to the fabric and flammability of the skirt in question, questions still exist as to whether The Original's product was one that should not have been in the marketplace. The Original's contention that Fashion 21 could be at fault for tampering with the skirt or that they sold a different skirt to plaintiff under The Original's purchase order number is entirely speculative. Thus, The Original's motion for summary judgment as to Fashion 21 is likewise denied.

Motion Seq. No. 004

Fashion 21 moves for summary judgment dismissing the complaint or, in the alternative, granting it summary judgment on its cross claim against The Original for breach of contract for failing to procure insurance, a conditional order against The Original based on common law and contractual indemnity, and attorneys' fees based on the terms of its purchase order with The Original.

Fashion 21 argues that summary judgment should be granted in its favor as against plaintiff because plaintiff failed to provide any evidence to show that the garment in question was

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the affidavit is sufficient evidence that there are no material issues of fact and summary judgment should be granted as a matter of law. The issue of admissibility is best left to the trial judge.

purchased from Forever 21, that Fashion 21 manufactured the item, that the skirt was defective or that Fashion 21 was negligent.

Luftman testified during her deposition that she purchased the skirt that caught fire from the Forever 21 store on 34th Street between Fifth and Sixth Avenues in Manhattan. Additionally, Luftman produced a Visa credit card receipt showing a $56.96 purchase on June 28, 2005, at the Forever 21 store in New York City (ex. H to Fashion 21 mov. aff.).

Irving Gustilo (Gustilo), the Comptroller of Fashion 21, testified at his deposition that he was able to trace that credit card purchase, through the use of bar code and store records, to a purchase of three items, including a yellow skirt (ex. I to Fashion 21 mov. aff.). Gustilo further testified that the yellow skirt was purchased by Fashion 21 from The Original. Thus, contrary to Fashion 21's contention, plaintiff has submitted adequate evidence that raises a factual issue as to whether the garment in question was purchased from its store, sufficient to withstand summary judgment. At trial, Luftman will bear the burden of proving that the skirt that allegedly caused her injuries was the one she purchased at Forever 21 (*Carrao v Heitler*, 117 AD2d 308, 312 [1st Dept 1986]; *D'Amico v Mfrs. Hanover Trust Co.*, 173 AD2d 263, 265 [1st Dept 1991]).

Fashion 21's motion for a conditional order as to contractual indemnification is granted, subject to determinations of liability at trial. The indemnification clause in the purchase order requires the Original to

> indemnify and hold Buyer harmless against any and all liability, ... including court costs,

> settlement awards, and attorneys' fees, arising from or relating to any claim or cause of action alleged against Buyer (including without limitation claims or causes of action relating to or alleging ... liability for the merchandise not being of merchantable quality or fit for the purpose intended ... or sold in a manner contrary to any federal ... law) in any litigation ... arising from the sale by Seller or purchase by Buyer of the merchandise described herein and payment therefor

(ex. L to Fashion 21 mov. aff.). Fashion 21 alleges that the Original has not provided the defense pursuant to the indemnification clause quoted above, despite Fashion 21's demand. As indicated by the clear language above, such indemnification includes attorneys' fees and other court costs.

Likewise, Fashion 21 has established its entitlement to judgment as a matter of law on its common law indemnification cross claim.

> [A]s among the parties to an action, a party/distributor lower in the chain of distribution is entitled to common-law indemnification from the one highest in the chain of distribution, due to the latter's closer, continuing relationship with the manufacturer and superior position to exert pressure to improve the safety of the product

(*Lowe v Dollar Tree Stores, Inc.*, 40 AD3d 264, 265 [1st Dept 2007]; *see also Godoy v Abamaster of Miami, Inc.*, 302 AD2d 57, 62 [2d Dept 2003]).

Summary judgment is also granted to Fashion 21 on its cross claim for failure to procure insurance. With respect to insurance, the purchase order provides: "[u]pon written request, Seller shall furnish to Buyer a Certificate of Products Liability Insurance containing an endorsement extended to cover Buyer's liability" (ex. L to Fashion 21 mov. aff.). At his deposition,

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Kim acknowledged that the purchase order required The Original to have insurance covering Fashion 21, but did not remember whether The Original had obtained the required insurance. No evidence has been supplied showing that insurance had been obtained by The Original.

Accordingly, it is

ORDERED that the motion for summary judgment by The Original is denied in its entirety; and it is further

ORDERED that the motion for summary judgment by Fashion 21 is granted solely to the extent of awarding Fashion 21 a conditional order of contractual and common law indemnification against The Original, including attorneys' fees, subject to determinations of liability at trial, and summary judgment is granted in favor of Fashion 21 on its cross-claim for failure to procure insurance, and otherwise denied; and it is further

ORDERED that the June 25, 2009 conference/oral argument date is hereby cancelled; and it is further

ORDERED that within 30 days of entry of this order, defendant Fashion 21 shall serve upon all parties a copy of this order and notice of entry.

HON. DORIS LING-COHAN

DATED: 6/15/09

Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Luftman.Fashion21 - sj, [illegible]

FILED
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