

Kruger v Packaging Mach. Tech.

2009 NY Slip Op 33175(U)

December 1, 2009

Supreme Court, Suffolk County

Docket Number: 05-21064

Judge: Joseph C. Pastoressa

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INDEX No. 05-21064
CAL. No. 09-00279-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

P R E S E N T :

Hon. JOSEPH C. PASTORESSA
Supreme Court

MOTION DATE 4-7-09
ADJ. DATE 6-17-09
Mot. Seq. # 005 - MD

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- against -	:	PACKAGING MACHINERY TECHNOLOGY
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Upon the following papers numbered 1 to 20 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 18 - 20; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant FMV Machine Works, Inc. for an order pursuant to CPLR 3212 for summary judgment dismissing the complaint as against it is denied.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by the then 59 year old plaintiff Anne Kruger on October 7, 2002 when her left arm was pulled into and a portion of the index finger of her left hand was severed by an indexer machine (indexing conveyor) attached to a "Garber #6" boxing machine in the Packing Department of Entenmann's Bakery (Entenmann's) located at 1724 Fifth Avenue in Bayshore, New York. At the time of said accident, the plaintiff was a Garber Operator on the finishing line where cakes were boxed for delivery. Prior to the accident, the plaintiff was attempting to wrap a wire that was dangling out from the area of a shaft on the side of an indexing conveyor that had been manufactured by the now defunct defendant FMV Machine Works, Inc. (FMV) and installed at the Entenmann's premises around 1991. FMV had manufactured said

indexing conveyor at the request of Entenmann's by copying the design and measurements of an existing indexing conveyor at the Entenmann's premises that allegedly had been manufactured by the defendant Packaging Machinery Technology, Inc.¹

By their complaint and bill of particulars, the plaintiffs allege that the defendants were negligent in, among other things, their design, manufacture, assembly, inspection, testing, distribution and sale of the subject indexing conveyor; failing to provide proper instructions and warnings; designing, manufacturing and placing into the stream of commerce an inherently and unreasonably dangerous product when used in an ordinary and usual manner; designing, manufacturing, assembling and distributing a machine that was unfit for its intended purpose and was dangerous and unsafe; warranting, representing and advertising that the machine was safe when used in an ordinary and usual manner; and failing to properly test and inspect the product during the manufacturing and assembly process.²

FMV now moves for summary judgment dismissing the negligent design claims as against it on the grounds that the indexing conveyor was built according to the design and specifications of a sample provided by Entenmann's, with no obvious defects, so as to be a component of the existing boxing machine. In addition, FMV seeks dismissal of the negligent design claims based on the substantial modification defense that the indexing conveyor had no electrical parts or wires or motor of its own when it was delivered and that Entenmann's substantially modified the indexing conveyor after its installation by replacing the hard clear plastic shield covering the area where the plaintiff's accident occurred with a soft clear plastic that could be raised and removed. FMV also seeks dismissal of the negligent manufacturing claims against it on the grounds that there is no evidence that FMV failed to follow Entenmann's design, used defective materials or used improper workmanship. FMV further seeks dismissal of the failure to warn claims on the grounds that any alleged failure to warn was not the proximate cause of the subject accident inasmuch as three days prior to said accident the plaintiff had attended a hand safety class and the danger of sticking her hands into the machine near the normally moving shaft and sprockets and chains was open and obvious.

A manufacturer is liable in negligence for failing to act with due care in designing, testing, producing, or marketing a product that proximately causes harm to those who use the product for a purpose for which the manufacturer should expect it to be used and to those whom the manufacturer should expect to be endangered by its use (see generally, Restatement [Second] of Torts § 395; **Caprara v Chrysler Corp.**, 52 NY2d 114, 124; **Farrell v Stafford Mach. Corp.**, 205 AD2d 951, appeal dismissed by, in part, appeal denied by, in part 84 NY2d 947; **Velez v Craine & Clarke Lumber Corp.**, 33 NY2d 117, 122). A product may be defective when it contains a manufacturing flaw, is defectively designed or is not accompanied by adequate warnings for the use of the product (see, **Liriano v Hobart**

¹ By order of this Court dated April 11, 2006 (Molia, J.), the plaintiffs were granted a default judgment as against the defendant Packaging Machinery Technology, Inc. and the action was severed and continued as against the remaining defendant, FMV Machine Works, Inc.

² The Court notes that the plaintiffs did not allege any claims sounding in strict products liability. The plaintiffs also allege violations of Occupational Safety and Health Administration Standards (OSHA) relating to bakery equipment (29 CFR § 1910.263 [a][1], [c][2], [c][3] and [i][7][iii]).

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Corp., 92 NY2d 232, 241; see also, **Robinson v Reed-Prentice Div. of Package Mach. Co.**, 49 NY2d 471, 478).

To prevail on a negligence claim based on a design defect, a plaintiff must prove that the product as designed was not reasonably safe for its intended use and the defective design was a substantial factor in causing the plaintiff's injuries (see, **Voss v Black & Decker Mfg. Co.**, 59 NY2d 102, 106). A cause of action for negligent design additionally requires proof that the manufacturer acted unreasonably in designing the product (see, *id.* at 107). A manufacturer of a product may not be held liable for negligence where, after the product leaves the possession and control of the manufacturer, there is a subsequent modification which substantially alters the product and where it is shown that the accident would not have occurred but for the subsequent modification (**Amatulli v Delhi Constr. Corp.**, 77 NY2d 525, 532; **Robinson v Reed-Prentice Div. of Package Mach. Co.**, 49 NY2d at 479). In addition, "where a component part manufacturer produces a product in accordance with the design, plans and specifications of the buyer and such design, plans and specifications do not reveal any inherent danger in either the component part or the assembled unit, the component part manufacturer will be held blameless for an injury to the buyer's employee" in a products liability action (see, **Leahy v Mid-West Conveyor Co., Inc.**, 120 AD2d 16, 18, appeal denied 69 NY2d 606; **Munger v Heider Mfg. Corp.**, 90 AD2d 645, 645-646; see also, **Masiello v Efficiency Devices, Inc.**, 6 AD3d 672, 673; **Lonigro v TDC Electronics, Inc.**, 215 AD2d 534).

With respect to a negligence claim based on a manufacturing defect, a plaintiff must prove that the product did not perform as intended and did not conform to the intended design due to a flaw in the manufacturing process, improper workmanship, or the use of defective materials (see, **Caprara v Chrysler Corp.**, 52 NY2d at 128-129; **Finazzo v American Honda Motor Co., Inc.**, 1 AD3d 315).

The deposition testimony of the plaintiff reveals that on the date of the subject accident, the plaintiff had been working at the subject premises since 1971, had been head foreman, had been a Garber operator for two years, and had attended a hand safety meeting three days prior to said accident. The plaintiff explained that her duties involved filling the in-feed of the Garber boxing machine with boxes. In addition, the plaintiff explained that the person before her made sure that the cakes came down on the conveyor belts properly positioned in slots to enter the boxes correctly and that the plaintiff made sure the cakes entered the boxes, and that the boxes would then continue down the belts to a "Pearson" and then the boxes were stacked in preparation for placement in the delivery trucks. The plaintiff testified that her duties also involved making sure that the Garber boxing machine did not jam, fixing a jam and restarting the machine and cleaning the line. The plaintiff's deposition further reveals that the accident occurred 45 minutes into her shift on an early Monday morning when the line had stopped moving and no cakes were coming out of the oven. The plaintiff had noticed an approximately four inch long wire hanging out from the shaft area of the indexing conveyor, which had not been there prior to the weekend, and notified the acting foreman and a mechanic. The plaintiff then attempted on her own to wrap the wire around the shaft when suddenly the line began to run again and the wire that was looped around her finger pulled her left arm into the machine. There was no button nearby to stop anything.

The deposition testimony of Bruce Benson, the Shop Manager for FMV at the time that the subject indexing conveyor was manufactured, and Christopher A. Pecoraro, the plaintiff's production

supervisor at Entenmann's, indicate that the location of the plaintiff's accident at the indexing conveyor was in an area four to five feet to the left of where the plaintiff was supposed to be stationed to feed the boxes into the boxing machine. Mr. Benson explained that FMV was essentially a machine shop; that his duties involved overseeing building at the shop, installations and design; and that Entenmann's showed FMV the sample indexing conveyor at Entenmann's premises that Entenmann's wanted FMV to manufacture. In addition, Mr. Benson explained that the purpose of the indexing conveyor was to put the cakes in a pattern that the boxing machine could handle. Mr. Benson also explained that an FMV shop worker went to the Entenmann's premises and made sketches of the machine, then FMV purchased the chains, bearings, sprockets, sheet metal sides and tank and that FMV made the shafts and assembled the approximately eight feet long indexing conveyor then installed it at the Entenmann's premises and tested it by running cakes through it. Mr. Benson pointed out that the indexing machine had no wires, no electrical controls and did not have its own drive; it was driven by the boxing machine to which it was attached upon installation. He also pointed out that Entenmann's had its own, large, mechanics shop/service department for its machines where they would make changes to the machines if the machines did not do exactly what they wanted and that FMV never performed any maintenance on the subject indexing conveyor or replaced any parts or made any repairs after it was installed at the Entenmann's premises. Mr. Pecoraro testified that the stop buttons were about ten feet away from the accident area and Mr. Benson stated that there was no provision for the installation of a stop button by FMV. Marie Vasicek, the former president and secretary of FMV, testified at her deposition that FMV went out of business in 2005.

Both the plaintiff and Mr. Benson testified at their depositions that the photographs taken in August 2006 during an inspection by the parties and their counsel of the subject location at the Entenmann's premises, submitted herein with the motion papers, did not accurately depict the indexing conveyor as it appeared either upon original installation or on the date of the accident. Mr. Benson explained that the subject shaft originally had a blue-painted nickel plated or cast iron housing bearing around it and the plastic shield was of a harder plastic, Lexan. According to the plaintiff, on the date of the accident the metal "covering" of the shaft on the indexing conveyor had been knocked off; the plastic shield of the indexing conveyor had been removed; and the hanging wire connected to an electric eye that had a bell that rang when the cakes went by but the electric eye had been disconnected for about two years. Both denied the existence of most if not all of the warning labels on the indexing conveyor.

The affidavit dated February 6, 2009 of FMV's professional engineer expert, Joseph R. Petrella, indicated that he inspected the subject indexing conveyor on August 15, 2006 at the Entenmann's premises and took 61 photographs and that his opinions were based on said inspection as well as a review of the pleadings, bill of particulars, deposition transcripts and other documentation. FMV's expert opined to a reasonable degree of professional certainty that the design of the subject indexing conveyor was not defective because it called for a plastic guard to be bolted to the conveyor covering the area where the accident occurred and that the plastic guard required a tool for its removal thereby alerting anyone removing it that they were performing a significant modification of the conveyor. The expert also opined that the design of the subject indexing conveyor was reasonable because it allowed the owner to remove the plastic guard in order to service the conveyor. FMV's expert added that it was reasonable for FMV to rely on and copy the sample conveyor provided by Entenmann's when FMV assembled the subject indexing conveyor inasmuch as FMV was exclusively a mechanical contractor and Entenmann's

was a sophisticated purchaser and user of conveyors.

Here, FMV failed to meet its initial burden of demonstrating that there was no defect in the design or manufacture of the subject indexing conveyor inasmuch as FMV failed to demonstrate that said indexing conveyor conformed to industry safety standards and was reasonably safe for its intended use when it was manufactured approximately eleven years prior to the subject accident (see, **Johnson v Delta Intern. Machinery Corp.**, 60 AD3d 1307; **Sapp v Niagara Mach. & Tool Works**, 45 AD3d 1261, 1263; **Magadan v Interlake Packaging Corp.**, 45 AD3d 650, 652; **Gian v Cincinnati Inc.**, 17 AD3d 1014, 1016). Notably, FMV's expert rendered no opinion in his cursory affidavit as to whether the subject indexing conveyor was a component part of the boxing machine or a separate machine and failed to address the lack of a shut-off mechanism on or near to the approximately eight foot long indexing conveyor or the lack of an interlock switch that would render the indexing conveyor inoperable when the plastic shield was removed. Even if the subject indexing conveyor was a component part of the boxing machine, FMV employees knew from their observation of the sample machine and their installation and testing of the subject indexing conveyor at the Entenmann's premises how the indexing conveyor would be functioning when integrated into the packing line so that FMV should have been able to anticipate appropriate safety features when the conveyor became a part of the line (compare, **Leahy v Mid-West Conveyor Co., Inc.**, supra). Thus, the proof proffered by FMV raises issues of fact including, whether the subject indexing conveyor was a component part of the boxing machine or was itself a separate machine; whether the design, plan and specifications of the sample machine copied by FMV revealed any inherent dangers, particularly, whether the absence of a shut-off mechanism in proximity to the indexing conveyor constituted a design defect and whether that alleged defect, in addition to the plaintiff's own conduct, was a substantial factor in causing the plaintiff's injury (see, **Ploof v Stone Const. Equip., Inc.**, 221 AD2d 1008). With said outstanding issues of fact, a decision cannot be rendered as to the existence of any implied warranties of fitness for a particular purpose or merchantability (see, **Leahy v Mid-West Conveyor Co., Inc.**, supra). Among other issues raised is whether the alleged removal of the original hard plastic shield and original metal or iron shaft housing bearing that had been placed by FMV on the subject indexing conveyor constituted substantial modifications that rendered an otherwise safe machine defective (see, **Wade v Landegger Container Machinery, Inc.**, 193 AD2d 1056; see also, **Scardefield v Telsmith Inc., a Div. of Astec Industries Inc.**, 267 AD2d 560, lv denied 94 NY2d 761).

A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known (see, **Liriano v Hobart Corp.**, supra; **Rastelli v Goodyear Tire & Rubber Co.**, 79 NY2d 289, 297) and a duty to warn of the danger of unintended uses of a product provided these uses are reasonably foreseeable (see, **Liriano v Hobart Corp.**, supra; **Lugo v L.J.N. Toys**, 75 NY2d 850; **McLaughlin v Mine Safety Appliances Co.**, 11 NY2d 62). However, the duty to warn of a product's danger does not arise when the injured party is already aware of the specific hazard or the product-connected danger is obvious (see, **Lonigro v TDC Electronics, Inc.**, 215 AD2d 534, 535-536). It is well settled that the "adequacy of the warning in a products liability case based on a failure to warn is, in all but the most unusual circumstances, a question of fact to be determined at trial" (**Cooley v Carter-Wallace Inc.**, 102 AD2d 642, 642; see also, **Liriano v Hobart Corp.**, 92 NY2d at 242).

Here, FMV also failed to establish that the danger that a worker's hand could become entangled

in the wire of an electric eye, while wrapping the wire around an exposed shaft, and then be drawn into the gears of the indexing conveyor when the line suddenly started up again was obvious as a matter of law (see, **Dunn v Black Clawson Co., Inc.**, 38 AD3d 1212; **Frederick v Niagara Mach. & Tool Works**, 107 AD2d 1063). In addition, FMV's expert did not address the plaintiffs' failure to warn claims as well as the proffered deposition testimony that appropriate warning labels were not on the indexing conveyor at the time of the subject accident. Therefore, FMV failed to demonstrate as a matter of law that it did not breach a duty to warn (see, **Cereo v Takigawa Kogyo Co., Ltd.**, 252 AD2d 963, 964).

Inasmuch as FMV failed to establish its prima facie entitlement to judgment as a matter of law, it was unnecessary to consider the sufficiency of the opposition papers (see generally, **Calandra v Crane Plumbing**, 54 AD3d 655, 656).

Accordingly, the instant motion is denied.

Dated: December 1, 2009



HON. JOSEPH C. PASTORESSA

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION