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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

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ROBERT ZIEGLER and HELAINE ZIEGLER,

Plaintiffs,

-against-

AMKEN ORTHOPEDICS, INC.,

Defendant.

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TRIAL TERM PART: 45

INDEX NO.: 6876/08

MOTION DATE:12-18-09
SUBMIT DATE:2-11-10
SEQ. NUMBER - 001

The following papers have been read on this motion:

Notice of Motion, dated 11-18-09.....1
Memorandum of Law in Support, dated 11-18-09.....2
Affirmation in Opposition, dated 1-27-10.....3
Reply Affirmation, dated 2-9-10.....4

The defendant, Amken Orthopedics, Inc., moves pursuant to CPLR §3212 for an order dismissing the within complaint (Sequence #001). The motion is denied for the reasons set forth herein.

In or about 2005 or 2006, as a result of circulatory problems, the plaintiff underwent surgery, which involved the amputation of the toes on his left foot [1] (*see* Di Bernardino Affirmation in Support at Exh. E at pp. 24-26). As a consequence thereof, the plaintiff

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[1] The plaintiff testified that he does not remember when this surgery occurred, although it appears from a review of the entire record that it took place at some point in 2005 (*see* Plaintiff's Deposition Transcript at p. 26)

partook in rehabilitation at Parker Jewish Institute for a period of six weeks (*id.* at pp. 34, 39). Subsequent to being discharged, the plaintiff contacted defendant, Amken Orthopedics, Inc. [hereinafter Amken], which is in the business of providing prosthetic and orthodic services (*id.* at Exh. G at pp..7,8). On January 24, 2006, the plaintiff initially presented to Amken 's office at which time a cast was made of his left leg encompassing the area "above the fibula head distal to the amputated site" (*id.* at pp. 16, 17).

On February 23, 2006, the defendant delivered to the plaintiff a partial foot prosthesis to aid him in ambulating in the face of his toes having been amputated (*id.* at pp.14,17; *see also* Exhs. C,J). The prosthesis was comprised of polypropylene, with a rigid or semi rigid sole and toe filler (*id.* at Exhs. G,H,I,O; *see also* Milo Affidavit at ¶4). The prosthesis attached to the plaintiff's left leg by way of two adjustable velcro straps, one at that upper calf and one at the ankle, each of which was fastened to the device by rivets (*id.*). On the delivery date, the plaintiff was allegedly provided with both oral and written instructions with respect to the appropriate manner in which to wear the device (*id.* at Exh. G at pp.46,47; *see also* Exh. L). Thereafter, on 4/21/06, 5/22/06 and 6/26/06 respectively, the plaintiff returned to Amken for purposes of making modifications to the prosthesis and to provide additional padding therefor (*id.* at Exh. G at pp. 21-22).

With particular respect to the subject accident, the plaintiff testified that on September 14, 2006, between 5:00 and 5:30 a.m, he strapped on the prosthesis over the sock he was wearing, without any other foot wear on his left foot, and as he was walking into the living

room he "spun like a top and . . . landed on [his] left side." (*id.* at Exh E at pp. 110 - 112). As a result, the plaintiff sustained a fracture to his left hip (*id.* at p.124).

The underlying action was thereafter commenced by the plaintiff to recover for the injuries sustained and included causes of action sounding in negligent manufacture and design, failure to warn, breach of express and implied warranties, strict liability, and a claim for loss of services alleged on behalf of Helaine Ziegler, the wife of Robert Ziegler (*id.* at Exhs. A, C).

In support of the within application counsel for Amken initially contends that the evidence as adduced herein demonstrates that the defendant was not negligent in either its manufacture or design of the prosthetic device, and rather the it was the plaintiff' s intentional, yet unforeseeable, misuse of the device which proximately caused his injuries thus warranting dismissal of the within action (*see* Defendant's Memorandum of Law at pp. 7,11,12,13,14).

With respect to those causes of action sounding in strict products liability and breach of warranty, counsel again posits that the evidence herein demonstrates that the subject device was not defectively designed or manufactured, was safe for it's intended purpose and reiterates that it was the plaintiff's own misuse of the device that caused the subject accident (*id.* at pp. 16,20,21).

Counsel further argues that Amken was under no duty to provide written warnings that the plaintiff should not wear the device without a shoe or sneaker inasmuch as the plaintiff was aware that the device had to be worn with appropriate footwear and that the danger

posed by wearing the device without the presence thereof was an open and obvious danger (*id.* at pp. 17-19).

In support of said contentions, counsel for Amken makes reference to the annexed deposition testimony of the plaintiff wherein when asked if there was any way of attaching the prosthesis to his footwear, he responded by stating that the device "had to be put into a sneaker or shoe" (*id.* at pp.8-10). Counsel urges that such testimony clearly demonstrates that the plaintiff was cognizant that the device was intended to be used only with an appropriate shoe or sneaker (*id.* at 10).

Counsel additionally relies upon an expert witness disclosure report, which is unsworn but incorporated by reference into an affidavit by David Schweitzman, a Board Certified Prosthetist, who avers that he prepared and executed said report (*id.* at Exh. O). In preparation of this report, Mr. Schweitzman states that he reviewed the relevant pleadings, depositions, color photographs of the device, care instructions given to the plaintiff, Amken's file on the plaintiff, the fabrication tracking form, plaintiff's expert witness disclosure report, and a copy of the plaintiff's check and signed receipt indicating he was provided with the device and the relevant wearing instructions (*id.*).

Mr. Schweitzman states that the prosthesis was made with polypropylene, which is commonly used in the manufacturing of such devices, and that the velcro straps and rivets utilized were also standard in the industry (*id.*). Based upon his review of the aforementioned documentation, Mr. Schweitzman concluded to a "reasonable degree of medical prosthesis certainty, that AMKEN'S conduct in providing Mr. Ziegler with the custom-fitted Prosthesis was in compliance with the duties expected from reasonably prudent prosthesis manufacturers/providers and that the particular prosthesis provided . . . was not defective in

any reasonably conceivable manner" (*id.*). Mr. Schweitzman further opined that the plaintiff's intentional failure to wear the prosthesis without a proper shoe or sneaker was the cause of his accident and resulting injuries (*id.*).

In opposition to the within application, counsel for the plaintiff proffers the affidavit of Ted Milo, an engineering consultant who has specialized in medical products for a period of over twenty years (*see* Milo Affidavit at ¶1). Mr. Milo avers that in June of 2007 he examined the plaintiff's prosthesis and based upon said examination concluded that the "device was defectively designed for not choosing the proper rivet" to hold the ankle strap in place (*id.* at ¶5). More specifically, Mr. Milo stated "the subject rivet did not function for the purpose created, i.e. to hold the strap in place as forces of the walker/user were placing the expected stress on the upper - and in this case- the lower strap" (*id.*). He opines that the "subject rivet that gave way and caused to be broken from the molded boot was either too small for the hole created for it, or the hole created for it was too large for the rivet" (*id.*). Mr. Milo additionally stated that irrespective of whether the plaintiff used the device with or without a shoe is "of no consequence regarding the failure of the subject rivet" (*id.*).

In addition to the foregoing, counsel contends that the defendant has failed to establish that it provided the plaintiff with clear instructions to wear a shoe with the device at all times and that the plaintiff's use of the device without a shoe or sneaker was not unforeseeable (*see* Santo Affirmation in Support at ¶13,14,15,16,18).

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *Sillman v Twentieth Century Fox*, 3 NY2d 395 (1957); *Alvarez v Prospect Hospital,* 68 NY2d 320 (1986); *Zuckerman v*

City of New York, 49 NY2d 557 (1980); *Bhatti v Roche*, 140 AD2d 660 (2d Dept 1998). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the Court, as a matter of law, to direct judgment in the movant' s favor. *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation (CPLR 3212 [b]; *Olan v Farrell Lines,* 64 NY2d 1092 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *Zuckerman v City of New York*, 49 NY2d 557 (1980), *supra.* A motion for summary judgment is the procedural equivalent of a trial, and when entertaining such an application, the Court is not to determine matters of credibility, but rather is to confine its inquiry to determining whether material issues of fact exist. *S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338 (1974);*Sillman v Twentieth Century Fox*, 3 NY2d 395 (1957), *supra*).

A product which is defectively designed " 'is one 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; that is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce' ". *Scarangella v Thomas Built Buses, Inc.*, 93 NY2d 655 (1999) quoting *Voss v Black & Decker Mfg. Co., 59* NY2d 102 (1983).

In asserting a case of a design defect, the Court of Appeals has recognized that with respect to theories of negligence, as well as strict products liability, the plaintiff's burden is similar and is within the purview of negligence principles. *Adamo v Brown & Williamson Tobacco, Corp.*, 11 NY3d 545 (2008) quoting *Voss v Black & Decker Manufacturing Corp.*, 59 NY2d 102 (1983). Thus, when proceeding under both theories of liability, the plaintiff is required to demonstrate that "it was feasible to design the product in a safer manner" and that the potential for doing so, renders the product or device safer, while at the same time permitting it to remain functional (*id.*).

In a design defect case, a cause of action sounding in negligence can be sustained against a manufacturer where it can be shown that the manufacturer was responsible for a defect that caused the plaintiff's injury and that the manufacturer could have foreseen the injury. *Robinson v Reed-Prentice Division of Package Machinery Co.*, 49 NY2d 471 (1980).

As contrasted with cases alleging defective design, in cases which assert that a product has been defectively manufactured, the resultant harm arises from a flaw in the actual process by which the item was produced and for which the defendant can be held strictly liable. *Opera v Hyva*, 86 AD2d 373 (4th Dept 1982). Under the theory of strict liability for a manufacturing defect, if the plaintiff demonstrates that the particular product is defective, then he or she has established a predicate for liability and does not have to prove fault. *Id; see also Lancaster Silo & Block Co. v Northern Propane Gas Co.*, 75 AD2d 55 (4th Dept 1980).

In order to establish a strict liability claim as to a manufacturing defect, the plaintiff is required to prove that the particular product did not perform as intended as a result of a flaw in the manufacturing process and that the product was defective when it left the manufacture's control. *Denny v Ford Motor Company*, 87 NY2d 248 (1995), *supra*; *Repka v Arctic Cat, Inc.*, 20 AD3d 916 (4th Dept 2005).

Failure to Warn

"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" as well as "a duty to warn of the danger of unintended uses of a product provided these uses are reasonably foreseeable". *Liriano v Hobart Corp.*, 92 NY2d 232 (1998). An action sounding in failure to warn also invokes a negligence paradigm and accordingly, when asserting an action predicated thereon, the plaintiff must demonstrate that the failure to warn of was a substantial factor which caused the events bringing about his or her injury. *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308(1980); 44 NY Prac Commercial Litigation in New York State Courts, §71:20 (2d ed).

Finally, with respect to an action sounding in breach of implied warranty, the plaintiff is only required to demonstrate that the particular product was not "fit for the ordinary purposes" for which it was intended and does not have to present evidence with respect to feasibility of alternative designs or the reasonableness of the manufacturer in injecting into the market a product in an unsafe condition. *Denny v Ford Motor Co.*, 87 NY2d 248 (1995), *supra*.

In the instant matter, the court having reviewed the record in a light most favorable to the non-moving party, finds that the defendant has not demonstrated the absence of material issues of fact entitling them to judgment as a matter of law. *Alvarez v Prospect Hospital,* 68 NY2d 320 (1986), *supra*; *Zuckerman v City of New York,* 49 NY2d 557 (1980), *supra*). Here, the central contention throughout the entirety of the defendant's supporting arguments is that the cause of the subject accident was that plaintiff's intentional, yet unforeseeable, misuse of the prosthesis by wearing it without appropriate footwear. However, the plaintiff's deposition and proffered documentation upon which the defendant relies, do not demonstrate the absence of material issues of fact and do not unequivocally indicate that the plaintiff misused the device (*id.*).

While the plaintiff testified that the prosthesis "had to be put into a sneaker or shoe", he did not testify that he knew that it could not be worn without foot wear. Additionally, and perhaps more relevant, the written information, identified by the defendant as having been provided to the plaintiff, is devoid of any language that the prosthesis was to be worn only with a shoe or sneaker. Rather, the language contained thereon indicates that when worn with a shoe, the heel must have a specific height.

Moreover, the expert witness report is not probative as to the issues of whether the subject prosthesis was defectively designed and/or manufactured as it was not based upon evidence which elucidated the conditions under which the prosthesis was in fact designed and manufactured. *Ramos v Howard Industries, Inc.*, 10 NY2d 218, 223 (2008). Here, the documents purportedly reviewed by the defendant's expert and which formed the basis of his opinion, were the plaintiff's file maintained by Amken, the "fabrication

tracking report" and the instructions provided to the plaintiff. With respect the plaintiff's file generated and maintained by Amken, it is unclear from the record exactly what in the file was reviewed in terms of design plans and manufacturing specifications. Additionally, the specific documents to which defendant's expert makes reference, do not provide such information. Particularly, the "fabrication tracking report" recites the stages of the devices fabrication and notes which technician performed the task. However, such report does not provide the design or manufacturing specifications by which it was constructed (*id.*). Similarly, the "case instructions" given to plaintiff are also devoid of any such information (*id.*).

Further, defendant has failed to demonstrate that the danger of using the device without a shoe was an obvious one or that the device or the user materials relevant thereto contained any warnings cautioning the users to wear it only with appropriate footwear. *Cf. Donuk v Sears, Roebuck & Co.*, 52 AD3d 456 (2d Dept 2008).

Even assuming the Court had determined that the defendant had made a *prima facie* showing, the within application would still have the subject of a denial as, in this Court's view, the Milo Affidavit provided by the plaintiff is sufficient to raise a triable issue of fact. *Ramos v Howard Industries, Inc.*, 10 NY2d 218, 223 (2008), supra. Said affidavit and the conclusions therein contained were specifically based upon an examination of the subject prosthesis and expressly refuted the opinions espoused by the defendant's expert that the subject accident was caused by the plaintiff's purported misuse of the prosthesis (*id.*).

Based upon the foregoing, the motion by defendant Amken, made pursuant to CPLR §3212 seeking an order granting summary judgment dismissing the plaintiff's complaint is hereby denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: March 15, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: **Duffy & Duffy**
Attorneys for Plaintiffs
1370 RexCorp. Plaza
West Tower
Uniondale, NY 11556

Bivona & Cohen, P.C.
By: Elio M. Di Berardino, Esq.
Attorney for Defendant
88 Pine Street
One Wall Street Plaza, 20th Floor
New York, NY 10005