Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

MARVIN BETHEA

- against -

MEDTEC AMBULANCE CORPORATION, et al.

Index Number 22864 2004

Motion Date January 13, 2010

Motion Cal. Number 8

Motion Seq. No. 3

The following papers numbered 1 to 16 read on this motion by defendants for summary judgment dismissing plaintiff's complaint, and all counterclaims and cross claims.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-5
Answering Affidavits - Exhibits.....	6-14
Reply Affidavits.....	15-16

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff, in this products liability action, seeks damages for personal injuries allegedly sustained on December 22, 2003 while employed as a paramedic for St. John's Hospital. Plaintiff testified: that he had just finished loading a patient into an ambulance; that he was carrying a drug bag in his right hand; that he intended to board the ambulance from the curbside door entrance; that his foot slipped on the first step leading to the ambulance's interior; that, as he felt himself falling, he reached for an A-bar to his left; and that the top portion of the A-bar came loose, causing plaintiff to fall backwards with the detached portion

of the A-bar still in his hand. Thereafter, plaintiff brought the instant action against defendant Medtec Ambulance Corporation (Medtec), as the manufacturer of the ambulance and installer of the subject A-bar, and defendant Specialty Ambulance Sales Corp. (Specialty), Medtec's customer and seller of the ambulance to plaintiff's employer.

In support of their motion for summary judgment, defendants submit, inter alia, the deposition testimony of Alan McFerren (McFerren), technical service manager for Medtec, as well as plaintiff's deposition testimony. McFerren testified: that the A-bar is a stainless steel framework used to house Sharps containers; that a Sharps container is a manufactured device used to contain hypodermic needles and syringes; that the A-bar is not designed or intended to be used as a grab bar but rather as a "buffer" to protect people from inadvertently striking their hand on the Sharps containers; that, in order to disassemble the A-bar framework, one would need to grip the vertical portion of the bar and lift upwards; that the vertical portion of the bar is designed to be easily removed; that the subject ambulance had a "Star of Lift Label," a registered mark of the General Services Administration of the federal government; that such a label indicates that the ambulance meets all the requirements of the Federal Ambulance Specification; and that the A-bar at issue falls outside the scope of these specifications.

Plaintiff testified: that the A-bar had come off several times prior to his accident; that he was aware that the A-bar was removable to allow for access to the Sharps containers; that, at times, plaintiff would use the A-bar as a grab bar to assist him in entering the vehicle; that plaintiff believed that the A-bar could be used as a grab bar; and that plaintiff's coworkers had also used the A-bar as a grab bar and had encountered similar problems in the past.

A manufacturer, wholesaler, distributor, or retailer may be held strictly liable for injuries caused by placing a defective product into the stream of commerce (*see Sprung v MTR Ravensburg Inc.*, 99 NY2d 468, 472 [2003]; *Pierre-Louis v DeLonghi Am., Inc.*, 66 AD3d 859 [2009]; *Young v Daglian*, 63 AD3d 1050 [2009]). When asserting a manufacturing defect claim, it must be shown that the product is flawed "because it is misconstructed without regard to whether the intended design of the manufacturer was safe or not. Such defects result from some mishap in the manufacturing process itself, improper workmanship, or because defective materials were used in construction" (*Caprara v Chrysler Corp.*, 52 NY2d 114, 128-129 [1981]; *see Pierre-Louis*, 66 AD3d at 861).

Here, defendants established their prima facie entitlement to judgment as a matter of law dismissing that portion of the complaint as alleged negligence and strict products liability based upon a manufacturing defect. Defendants demonstrated that the A-bar framework was installed properly and was not defective (*see Mincieli v Pequa Indus., Inc.*, 56 AD3d 627 [2008]; *Halliday v Stevens*, 55 AD3d 790 [2008]; *Heimbuch v Grumman Corp.*,

51 AD3d 865 [2008]). While McFerren testified that, after the accident, it appeared that the right portion of the framework was a different length than the plans and specifications of the manufacturer, McFerren testified that such a discrepancy did not exist when it left the custody and control of the manufacturer.

In opposition, plaintiff submits the deposition testimony of Dale Jacobs (Jacobs), manufacturing support specialist for Medtec. Jacobs testified that the A-bar has a top and bottom half. The bottom half has two vertical tubes that are bolted to the ambulance's squad bench, while the top half is comprised of a horizontal curved bar connected via two collars on the legs. Jacobs indicated that, after the accident, it appeared that the bottom tubes were different lengths, which signifies that the spot-weld (this allows the bottom tubes to adhere to the top tubes) had been broken. However, Jacobs noted that such a deficiency would have been noted before having left Medtec's custody and control.

However, plaintiff also submits the respective expert affidavits of Charlie Opalenik, engineer, and Richard Twomey, safety engineer and certified safety professional. These experts inspected the A-bar post-accident and opined that there was no evidence that the collars had ever been welded in the first instance, rendering the A-bar unsafe.

The above discrepancy demonstrates that there are questions of fact as to whether the A-bar was defective when it left defendants' control (*see Vereczkey v Sheik*, 57 AD3d 523 [2008]; *Hutchinson v Crown Equip. Corp.*, 48 AD3d 421 [2008]). Specifically, there are issues as to: (1) whether the manufacturer failed to weld the collars in place, thereby permitting the top bars to slip into the bottom ones; and (2) whether this failure caused the A-bar to be much looser than intended, thereby causing the A-bar to become detached in plaintiff's hand, contributing to his fall.

To the extent that defendants argue that plaintiff's alleged injuries were not caused by the A-bar since the A-bar was not intended to be used as a grab bar to support plaintiff, same is unavailing. Jacobs revealed in his testimony that, while the device was intended to be used to house Sharps containers, he admitted that, from the perspective of someone entering the ambulance, the A-bar appeared to be a grab bar (*see e.g. Pierre-Louis*, 66 AD3d at 861 [defendant's own expert admitted that it was reasonably foreseeable that someone would use the product in a way that was not intended, same precluding summary judgment dismissing plaintiff's manufacturing defect claim]).

To the extent that plaintiff claims a manufacturing defect with respect to the steps located on the curbside entrance of the ambulance (as per plaintiff's response to defendants' interrogatories), defendants are entitled to judgment as a matter of law dismissing said claim. Defendants have demonstrated that the ambulance was equipped with a "Star of Life Label,"

which indicates that all of the necessary components of the ambulance, including the steps, met the requirements of the "Federal Ambulance Specification," and plaintiff does not raise an issue of fact as to whether the steps failed to conform to those specifications.

Plaintiff next alleges that the A-bar was defectively designed. "To establish a prima facie case in a strict products liability action predicated on a design defect, a plaintiff must show that the manufacturer marketed a product which was not reasonably safe in its design, that it was feasible to design the product in a safer manner, and that the defective design was a substantial factor in causing the plaintiff's injury" *(Gonzalez v Delta Intl. Mach. Corp.*, 307 AD2d 1020 [2003]; *see Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 [1983]; *Pierre-Louis*, 66 AD3d at 861). The standard requires an assessment of whether, "if the design defect were known at the time of manufacture, a reasonable prudent person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner" (*Voss*, 59 NY2d at 108; *see Steuhl v Home Therapy Equip., Inc.*, 51 AD3d 1101 [2008]; *Warnke v Warner-Lambert Co.*, 21 AD3d 654 [2005]).

Here, the linchpin of defendants' contentions on their motion is that the A-bar was properly designed for its intended use; to wit: to hold Sharps containers and to prevent persons from inadvertently placing their hands into same. Moreover, defendants argue that plaintiff knew that the top portion of the A-bar was removable. However, manufacturers are under an obligation to use reasonable care in designing their product when used both "for its intended purpose or for an unintended but reasonably foreseeable purpose" (*Lugo v LJN Toys*, 75 NY2d 850, 852 [1990] *Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 480 [1980]; Kreindler, Rodriguez, and Cook, New York Law of Torts § 16:76 [15 West's NY Prac Series 2009] [explains that, in the context of design defects, a manufacturer is liable when a plaintiff is injured when using the product for a purpose or in a manner not intended by the manufacturer]).

Defendants do not argue that the way in which plaintiff used the A-bar was unforeseeable. In fact, Jacobs admitted: (1) that the A-bar appears to be a grab bar; and (2) that the grab bar located on the curbside door, to the right of plaintiff (which was purportedly there to support him), could not have practically been used by someone in plaintiff's position because it is situated too far behind that person. Since the above certainly raises issues of fact regarding foreseeability of intended use, and since foreseeability is ordinarily a question of fact for the jury, defendants are not entitled to judgment as a matter of law dismissing plaintiff's design defect claim (*see Heller v Encore of Hicksville*, 53 NY2d 716, 717-718 [1981]). Furthermore, whether or not a detent pin (small device which is inserted into the steel tubes to secure them into place) could have been used to make the product safer – as suggested by plaintiff's experts – is also a question of fact better left

to a jury (*see Pierre-Louis*, 66 AD3d at 862; *Steuhl*, 51 AD3d at 1104; *Wengenroth v Formula Equip. Leasing, Inc.*, 11 AD3d 677 [2004]).

To the extent that defendants argue that it was the wet sole of plaintiff's boot that caused the accident and not the A-bar, plaintiff need not prove that there was no other cause attributable to his accident but the alleged defect; rather, plaintiff must show that defective design could have been a *substantial factor* in causing plaintiff's fall (*see Voss*, 59 NY2d at 107; *Pierre-Louis*, 66 AD3d at 861; *see also Vereczkey*, 57 AD3d at 526 [concurrent causes do not necessarily absolve defendants of liability]).

Plaintiff next claims that the A-bar did not contain proper or adequate warnings. Specifically, plaintiff asserts that, absent the installation of detent pins, there should have been a warning to the effect of "THIS HANDRAIL/GRAB BAR IS NOT A HANDRAIL."

On their motion, defendants have met their prima facie burden of establishing their entitlement to judgment as a matter of law dismissing the portion of the complaint as alleged negligence and strict products liability based upon a failure to warn. Plaintiff testified that the A-bar had come loose (and also had come off) numerous times prior to the subject accident, that he knew it was removable, and that he did not need a sign to warn him of same. Consequently, "any warning which the defendants could have issued would have been 'superfluous' given the injured plaintiff's 'actual knowledge of the specific hazard that caused the injury' " *(Heimbuch*, 51 AD3d at 868, quoting *Liriano v Hobart Corp.*, 92 NY2d 232, 241 [1998]; *see also Bruno v Thermo King Corp.*, 66 AD3d 727 [2009]; *Rodriguez v Sears, Roebuck & Co.*, 22 AD3d 823 [2005]; *Warlikowski v Burger King Corp.*, 9 AD3d 360 [2004]). While it may be true that plaintiff's use of the A-bar as a grab bar was foreseeable, this argument speaks to defendants' alleged defective design of the A-bar (since, based on its design, location, and appearance, a reasonable person could have mistaken the A-bar for a grab bar). In any event, the court notes that plaintiff's opposition fails to specifically address defendants' prima facie showing, thereby entitling defendants judgment as a matter of law with respect to this particular issue.

Finally, plaintiff also asserts a cause of action for breach of implied warranties. UCC 2-314 (1) states, in relevant part: "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." The Court of Appeals in *Denny v Ford Motor Co.* (87 NY2d 248 [1995]) explained that an alleged breach of implied warranty claim requires "an inquiry . . . into whether the product in question was 'fit for the ordinary purposes for which such goods are used,' " focusing on "the expectations for the performance of the product when used in the customary, usual and reasonably foreseeable manners" (*id.* at 259 [internal citation omitted]). Here, the record certainly establishes that there are issues of fact as to whether: (1) it was

reasonably foreseeable that the A-bar would be used as a grab bar; and (2) the A-bar was unfit for the manner in which plaintiff used it.

Accordingly, the portion of defendants' motion seeking summary judgment dismissing plaintiff's manufacturing defect claim as it relates to the ambulance steps, and the portion of defendants' motion seeking summary judgment dismissing plaintiff's failure to warn claim, are granted. The remaining portions of defendants' motion are denied.

Dated: March 9, 2010

J.S.C.