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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

ALLEN STEVENSON and ELSIE STEVENSON,

Plaintiffs,

- against -

FORD MOTOR COMPANY and DEJANA TRUCK & UTILITY EQUIPMENT CO. INC.,

Defendants.

Index No.: 5923/08
Motion Seq. Nos.: 04, 05
Motion Dates: 05/04/10
05/04/10

DEJANA TRUCK & UTILITY EQUIPMENT CO. INC.,

Third-Party Plaintiff,

- against -

RUGBY MANUFACTURING COMPANY,

Third-Party Defendant.

The following papers have been read on these motions:

	Papers Numbered
Third-Party Defendant's Notice of Motion for Summary Judgment (Seq. No. 04), Affidavit and Exhibits and Memorandum of Law	1
Plaintiff's Affirmation in Opposition and Exhibits	2
Reply Affidavit to Plaintiff's Opposition and Exhibits	3
Defendant/Third-Party Plaintiff's Affirmation	4
Reply Affidavit to Defendant/Third-Party Plaintiff's Opposition and Exhibits	5
Defendant/Third-Party Plaintiff's Notice of Motion for Summary Judgment (Seq. No. 05), Affirmation and Exhibits	6
Plaintiff's Affirmation in Opposition	7
Third-Party Defendant's Affirmation in Partial Opposition	8

Upon the foregoing papers, it is ordered that the motions are decided as follows:

This is a personal injury action stemming from an accident occurring on April 5, 2005, in which plaintiff Allen Stevenson ("A. Stevenson"), during his employ as a groundskeeper with the Great Neck Union Free School District, severed a portion of his left ring finger when the tailgate portion of a dump body installed on a 1996 Ford F-350 dump truck (known as truck 23) dropped on plaintiff A. Stevenson's finger.

Third-party defendant, Rugby Manufacturing Company ("Rugby"), moves (Seq. No. 04), pursuant to CPLR §3212, for an Order granting summary judgment dismissing the complaint of defendant/third-party plaintiff Dejana Truck & Utility Equipment Co., Inc. ("Dejana") and all cross-claims asserted against third-party defendant Rugby. The motion is opposed by plaintiffs Stevenson and defendant/third-party plaintiff Dejana.

Defendant/third-party plaintiff Dejana moves (Seq. No. 05), pursuant to CPLR §3212, for an Order granting summary judgment dismissing plaintiffs Stevenson's complaint and any and all cross-claims/cross-complaints asserted against defendant/third-party plaintiff Dejana.

Defendant/third-party plaintiff Dejana also moves, pursuant to CPLR §3212, for an Order granting defendant/third-party plaintiff Dejana conditional summary judgment against third-party defendant Rugby.

The Court notes that defendant Ford Motor Company has been voluntarily dismissed from the action by plaintiffs Stevenson and defendant/third-party plaintiff Dejana.

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. *See Sillman v. Twentieth*

Century- Fox Film Corp., 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). 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. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.,* 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (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. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra.* When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra.* Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. S*ee Gilbert Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v.*

Johnson, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept.1989).

Third-party defendant Rugby relies on the Examination Before Trial testimony of plaintiff A. Stevenson to set forth the factual history of this matter. In 1987, plaintiff A. Stevenson was hired as a custodian by the Great Neck School District. In 1993, he was promoted to groundskeeper and he maintained that position from 1993 through 2007. Plaintiff A. Stevenson testified that, beginning in May of 1995, he worked every day on a dump truck designated as truck number 23. He additionally testified that, in the spring of 2003, he noticed that the tailgate of truck 23 began to swing back and forth and he could hear it banging as he drove the truck. Plaintiff A. Stevenson testified that the tailgate was "popping off while (plaintiff) was driving, and the bottom part of the tailgate used to come out of the section that was clamped to hold it together..." He also testified that, from the spring of 2004 until the day of his accident on April 4, 2005, the tailgate fell off the truck on a daily basis and that he complained to school personnel about said situation, but nothing was done to remedy the alleged problem. On April 4, 2005, Plaintiff A. Stevenson drove truck 23 to a baseball field, parked the truck, got out and walked to the back of said truck where he intended to lower the tailgate and remove a blower to perform some work on the field. First, plaintiff A. Stevenson removed two pins at the top of the tailgate. Next, he positioned his left hand under the bottom of the tailgate and his right hand holding the top of the tailgate. The chains on the tailgate were at a setting where the gate could be lowered to be level with the bed of the dump truck. Plaintiff A. Stevenson started to pull the gate down using his right hand, intending to bring it down so it would be level with the bed of the dump truck. Plaintiff A. Stevenson claims that the minute he started lowering it, the right chain on the passenger side of the gate snapped and, after that

happened, the gate on the passenger side came out of the latch. He also said that the gate on the driver side did not come out as it remained locked in the latch. Plaintiff A. Stevenson testified that his finger was injured when the tailgate fell on it.

On or about March 26, 2008, plaintiffs Stevenson commenced an action against the two defendants in the main action. Issue was joined by defendant/third-party plaintiff Dejana on or about May 1, 2008. On or about June 1, 2009, defendant/third-party plaintiff Dejana filed a third-party summons and complaint against third-party defendant Rugby. Issue was joined by third-party Rugby on or about July 15, 2009.

Third-party defendant Rugby submits that the complaint of defendant/third-party plaintiff Dejana should be dismissed for a number of enumerated grounds. First, third-party defendant Rugby argues that defendant/third-party plaintiff Dejana's claims of strict products liability must be dismissed as a matter of law based upon the facts that a) the tailgate at issue was damaged prior to plaintiff A. Stevenson's accident and was subsequently altered as a result of that damage thereby resulting in plaintiff A. Stevenson's injuries; b) defendant/third-party plaintiff Dejana has failed to offer any evidence establishing a manufacturing defect; and c) defendant/third-party plaintiff Dejana has failed to offer any evidence establishing a design defect.

Third-party defendant Rugby argues that the facts establish that prior to plaintiff A. Stevenson's accident the tailgate at issue was damaged in an accident in which it was slammed into something, causing the tailgate's latch device to jam and causing the weld around the latch device to crack. Third-party defendant Rugby asserts that James Schwind, a mechanic with the Great Neck Union Free School District, testified at his Examination Before Trial ("EBT") that

he worked on truck 23 and that the welding around the latch device on the tailgate was cracked and pushed in. Mr. Schwind, a mechanic with no formal training or certification for welding, re-welded the cracked welding around the latch device that holds the tailgate in place. Mr. Schwind also testified that after he did this welding he did not perform any test to determine whether his weld was sufficient to fix the cracks. Third-party defendant Rugby also asserts that Randy Brauer, another mechanic with the Great Neck Union Free School District, testified at his EBT that the accident jammed the tailgate's latch device as well as cracked the weld around the latch device. In order to fix this damage, Mr. Brauer had to make adjustments to a rod that connects the tailgate to the handle that opens and closes the latch device on the tailgate.

Third-party defendant Rugby submits that, due to the accident involving the tailgate, the tailgate was modified and substantially altered the area- the latch device-that allegedly caused plaintiff A. Stevenson's injuries. It claims that it is clear that it cannot be liable for injuries allegedly stemming from the performance of a tailgate that, in the wake of the tailgate accident and subsequent repairs, was so profoundly modified and altered before plaintiff's accident as to simply cease being fairly characterized as a Rugby design/manufactured product.

Third-party defendant Rugby additionally submits that defendant/third-party plaintiff Dejana has failed to offer any evidence establishing a manufacturing defect. In support of this argument, third-party defendant Rugby states "there is simply no evidence that the tailgate and chains did not perform as intended due to some flaw, nor is there even a scintilla of proof that the tailgate and chains were defective when they left Rugby's control. Third-party defendant Rugby argues that the facts that plaintiff A. Stevenson worked on truck 23 on a daily basis from 1996 until his accident in 2005 and that he worked on the truck and with its tailgate for seven or

eight years before he first complained about the tailgate establish that the tailgate was functioning properly and safely for many years after it left Rugby's possession and control.

Third-party defendant Rugby further submits that defendant/third-party plaintiff Dejana has failed to offer any evidence establishing a design defect. In support of this argument, third-party defendant Rugby states "defendant/third-party plaintiff has utterly failed to offer any proof that the tailgate and chains were not reasonably safe and a design defect was the substantial cause of plaintiff's injuries. Again, Dejana's witness testified he could not recall any particular problem with any installation of a Rugby dump body....He certainly never identified any problem with the design of Rugby tailgates and/or Rugby chains. The plaintiff's testimony similarly fails to show that the tailgate and chains were not reasonably safe, and that his injuries were substantially caused by any design defect....Here, the record is simply devoid of any fact(s) to support a finding that the tailgate and chains left Rugby in a condition not reasonably contemplated by the ultimate consumer....Also there has been no showing that the utility of the tailgate and chains did not outweigh any danger their introduction may have posed into the stream of commerce. In fact, because plaintiff did not have his accident until after all of the modifications and alterations to the tailgate, it is axiomatic that the Rugby design-in a utility versus danger analysis-posed far more utility when introduced in the stream of commerce."

The second enumerated ground that third-party defendant Rugby argues is that defendant/third-party plaintiff Dejana's negligence claim should be dismissed as a matter of law. In support of this argument, third-party defendant Rugby states that product manufacturers have a duty to exercise reasonable care to avoid the occurrence of injuries by any product which can reasonably be expected to be dangerous if negligently manufactured and defendant/third-party

plaintiff Dejana has failed to demonstrate that third-party defendant Rugby was negligent in its design and manufacture of the tailgate and/or chains or that it failed to exercise reasonable care. Third-party defendant Rugby asserts that the facts show that Rugby met its duty to deliver to Dejana a safe dump body, including tailgate and chains, that was designed and manufactured in accordance with Rugby's standards and, as Rugby's witness testified, all products are subject to rigorous testing and inspection and tailgates are tested twenty times for safety and quality.

The third enumerated ground that third-party defendant Rugby argues is that defendant/third-party plaintiff Dejana's breach of warranty claims must be dismissed. In support of this argument, third-party defendant Rugby states that defendant/third-party plaintiff Dejana has failed to offer any documentary or testimonial evidence that Rugby expressly warranted anything, let alone made express warranties about the tailgate and chains. Moreover, defendant/third-party plaintiff Dejana has failed to offer any documentary or testimonial evidence setting forth the terms of any warranty upon which it relied.

The fourth enumerated ground that third-party defendant Rugby argues is that defendant/third-party plaintiff Dejana's contractual indemnification claims must be dismissed. In support of this argument, third-party defendant Rugby states that defendant/third-party plaintiff Dejana has failed to prove any contract ever existed between it and Rugby. Moreover, Rugby's witness testified there never was any contract between Rugby and Dejana. Accordingly, absent any contract there can be no contractual indemnification obligation. Third-party defendant Rugby further argues that defendant/third-party plaintiff's common law indemnification claims should fail as there is not proof that Rugby was negligent.

As a general rule, a party does not carry its burden in moving for summary judgment by

pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense. *See Pace v. International Business Machines Corp.*, 248 A.D.2d 690, 670 N.Y.S.2d 543 (2d Dept. 1998) *quoting George Larkin Trucking Company v. Lisbon Tire Mart, Inc.*, 185 A.D.2d 614, 585 N.Y.S.2d 894 (4th Dept. 1992); *Calderone v. Town of Cortland*, 15 A.D.3d 602, 790 N.Y.S.2d 687 (2d Dept. 2005); *Dalton v. Educational Testing Service,* 294 A.D.2d 462, 742 N.Y.S.2d 364 (2d Dept. 2002); *Porter v. Uniroyal Goodrich Tire Company*, 224 A.D.2d 674, 638 N.Y.S.2d 702 (2d Dept. 1996); *Narciso v. Ford Motor Company*, 137 A.D.2d 508, 524 N.Y.S.2d 251 (2d Dept. 1988). The Court finds in the instant matter that third-party defendant Rugby did not meet its burden as it based its arguments for summary judgment on alleged contradictions and gaps in defendant/third-party plaintiff Dejana's proof. As detailed above, third-party defendant Rugby's arguments in support of its summary judgment claims all start with the contentions that either "defendant/third-party plaintiff Dejana has failed to demonstrate" or "defendant/third-party plaintiff Dejana has failed to offer any evidence" or "defendant/third-party plaintiff Dejana has failed to prove."

A defendant seeking dismissal of a strict products liability claim under New York law on summary judgment must submit proof in admissible form establishing that plaintiff's injuries were not caused by a manufacturing defect in the product. Defendants can meet this burden by submitting evidence of tests, mechanical processes, and inspections, among other things. Third-party defendant Rugby failed to submit direct evidence of tests, mechanical processes and inspections, instead relying exclusively upon the testimony of Douglas Hauck with respect to same.

The Court would also note that it finds that there is a material issue of fact as to when the

other alleged accident involving truck 23 took place and when the repairs as a result of said accident were performed. There has been conflicting evidence presented to the Court in the form of the EBT depositions of various witnesses in this matter with respect to when this alleged additional accident occurred. No direct evidence has been presented as to whether or not this additional accident occurred before or after plaintiff A. Stevenson's accident. As third-party defendant Rugby relies heavily in its arguments for summary judgment that the additional accident occurred before plaintiff A. Stevenson's accident thereby materially altering the subject tailgate thereby causing plaintiff A. Stevenson's injuries; claiming that it is clear that it cannot be liable for injuries allegedly stemming from the performance of a tailgate that, in the wake of the tailgate accident and subsequent repairs, was so profoundly modified and altered before plaintiff's accident as to simply cease being fairly characterized as a Rugby design/manufactured product, it is clear that the question of when the additional accident occurred is a material issue of fact that the Court finds would preclude the granting of summary judgment.

The Court would also like to note that while third-party defendant claims that plaintiffs Stevenson have no standing to oppose Rugby's summary judgment motion as third-party defendant Rugby has not moved against plaintiffs' complaint and plaintiffs failed to assert any claim against Rugby, CPLR § 3212(b) specifically provides that "the motion shall be denied if *any party* shall show facts sufficient to require a trial of *any* issue of fact" (emphasis supplied). Therefore the Court finds that plaintiffs Stevenson did indeed have standing to oppose third-party defendant Rugby's motion.

Based upon the above, third-party defendant Rugby's motion (Seq. No. 04) is hereby denied. In as much as defendant/third-party plaintiff Dejana adopts the arguments made by third-

party defendant Rugby into its own summary judgment motion, defendant/third-party plaintiff Dejana's motion (Seq. No. 05) is also hereby denied.

All parties shall appear for Trial in Nassau County Supreme Court, Central Jury Part at 100 Supreme Court Drive, Mineola, New York, on November 30, 2010 at 9:30 a.m.

This constitutes the decision and order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
October 18, 2010