Leone v BJ's Wholesale Club, Inc.
2010 NY Slip Op 33895(U)
October 8, 2010
Sup Ct, Bronx County
Docket Number: 7737/2006
Judge: Norma Ruiz

NEW YORK SUPREME COURT ----- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 7737/2006

NINA MARIE LEONE

Plaintiff,

-against-

Decision and Order
Present: HON. NORMA RUIZ

BJ'S WHOLESALE CLUB, INC.,
AAA REFRIGERATION SERVICE, INC., and
KILLION INDUSTRIES, INC.

Defendants.

The following papers numbered 1 to 11 Read on this motion SUMMARY JUDGMENT
Noticed on 8/7/09 and duly submitted as No. 9&10 on the Motion Calendar of 3/8/10

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to:

Papers	Numbered
Notice of Motions and Affidavits Annexed.....	1-4
Answering Affidavits.....	5-9
Replying Affidavits	10-11
Memorandum of Law	
Other:	

Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as follows:

Defendants AAA Refrigeration Service, Inc. ("AAA") and Killion Industires, Inc. ("Killion") move for summary judgment dismissing the plaintiff's complaint and all cross claims. Defendant BJ's Wholesale Club, Inc. ("BJ's") cross moves for summary judgment on its cross claims for indemnification against co-defendants AAA and Killion.

This is a negligence action which arises from a slip and fall on August 5, 2005 in the BJ's located in Freeport, NY. The plaintiff slipped and fell due to water that leaked from a refrigerated flower display case. According to the plaintiff, on the day of the accident she was shopping at BJ's

with her mother where there were yellow caution signs near the floral display case. As a result, they walked around the cones and began to walk down the aisle when the plaintiff slipped and fell on what appeared to be water. The plaintiff alleges that the water which caused her to slip and fall was the same water leaking from the display case. Her testimony is that the water apparently leaked out from behind the case and continued down into the aisle.

The flower display case was manufactured by defendant Killion and serviced by defendant AAA . This display case had ongoing problems with leaking water for several weeks prior to the date of the accident. BJ's was aware of this problem and hired AAA to repair same on July 18, 2005. AAA service mechanic, Michael Duffy, testified there was water in the collecting pan at the bottom of the base and in the condensate pans on the top of the display case, the pans were all emptied. Thereafter, he called Killion and a representative suggested it might need an additional heater. After speaking with the Killion representative, Duffy advised BJ's to avoid spilling water from the flower buckets into the case because the heaters could only handle the condensation generated by the display case. Duffy further advised that the display case should be monitored to determine whether that resolved the problem. It is alleged that BJ's did not contact AAA again regarding the subject display case.

AAA's Motion

AAA now moves to dismiss the plaintiff's action as against it and all cross claims on the grounds that it owed no duty to the plaintiff. It persuasively argues that as an independent contractor it can not be held liable for the injuries of the plaintiff, a non-contracting party. The Court agrees. Here, none of the exceptions are applicable to the general rule that a contractor does not owe a duty of care to a non-contracting third party. *See Church v. Callanan Industries, Inc.*, 99 NY2d 104 (2002); *Timmins v. Tishman Construction Corp.*, 9 AD3d 62 (1st Dept 2004). AAA did not create an unreasonable risk of harm to others or increase any risk. There is no evidence the plaintiff reasonably relied upon the defendant's continuing performance of the contractual obligation. Nor did AAA entirely displace BJ's duty to maintain the premises safely. It is undisputed that AAA provided refrigeration services to BJ's only on an as-needed basis.

The Court finds the plaintiff failed to raise an issue of fact with respect to AAA's liability. The allegation that she relied upon the proper working function of the flower display case is not an exception to the general rule that a contractor does not owe a duty of care to a non-contracting third party. *See Church, supra.*

Similarly, BJ's also failed to raise an issue of fact with regard to AAA's liability towards the plaintiff. In his affidavit, Robert Jennette ("Jennette"), baldly asserts that AAA "entirely displaced" BJ's duty to maintain the premises safely. *See Timmins* supra. Jennette further asserts that there was an exclusive and comprehensive service oral agreement between BJ's and AAA to service, maintain and repair all of its refrigerated equipment. Yet, BJ's has not submitted proof to substantiate this claim. If such agreement existed, there would be numerous work tickets generated in connection with routine maintenance visits and necessary repairs. Discovery produced only one work ticket for repairs performed by AAA on the subject floral case. Moreover, Jennette conceded in his affidavit that AAA was available to BJ's on an as-needed basis, as opposed to AAA making regular visits to BJ's to perform routine maintenance work. In addition, Jennette averred that in furtherance of the alleged service agreement, AAA obtained insurance which named BJ's as an additional insured. A review of the annexed Certificate of Insurance reveals that BJ's was solely a certificate holder and not an additional insured. The Court finds BJ's failed to raise an issue of fact with respect to whether or not the third exception to the general rule regarding independent contractors is applicable in the case at bar.

With respect to AAA's portion of the motion which seeks to dismiss all cross claims, the Court notes that there was no contractual indemnification agreement between AAA and BJ's, thus its counter claim is based on common law indemnification. It is undisputed that substantial modifications were made to the subject floral display case. However, there is no evidence as to when those modifications were made. In a response to a discovery demand, BJ's stated it no longer has any additional AAA work tickets. Hence, the ONLY evidence of any "repairs" made to the subject floral display case by AAA, prior to the plaintiff's date of accident, is the work ticket dated July 18, 2005. With regards to what may have been causing the leakage, Duffy testified that a possible cause was water being dumped into the case. *See* Duffy deposition at p. 47-48 . AAA claims it did not receive any additional service calls regarding leaks from the subject floral display case after the

July 18, 2005 service call. . It annexed to its papers a print-out of a computer log of repairs (notably not one visit was for routine maintenance) done at BJ's from July 18, 2005 up to August 19, 2005 and the log reflects only one work ticket for the floral display case.

In opposition, BJ's alleges it relied upon AAA's expertise and thus failed to rectify the leaking condition. Further, BJ's failed to raise an issue of fact as to any negligence on behalf of AAA in connection with the work it performed on July 18, 2005.

While not annexed to BJ's paper, its operations manager, Victor Chin Lo ("Lo") testified at his deposition that he recalled AAA made three service calls for the subject floral display case. During the first service visit, Lo recalled AAA repaired "some kind of pump from the bottom" that was not working.[1] The second repair Lo stated involved a line from one of the condensation pumps which apparently became clogged. The final repair Lo stated was due to the inability of the display to hold the "gallons of condensation" which was traveling to the top of the case. Lo contends that AAA replaced the existing pan with a bigger one and that resolved the leaking problem. However, Lo could not recall when these repairs where done, thus he did not give a time frame for the aforementioned repairs. As such, it is possible that the work Lo testified to occurred after the plaintiff's accident. Since there are no other AAA work tickets, it is impossible to determine with certainty what additional work AAA performed, if any, and when it was performed.

The expert affidavit annexed to BJ's papers was conclusory and not based upon facts in evidence. His opinions regarding AAA were based upon the flawed premise that AAA made all the modifications to the subject floral case and that same were made prior to the date of the accident. Since there is no such evidence, the expert affidavit fails to raise an issue of fact with regards to AAA's negligence.

Since there is no evidence that AAA did anything to the display case, other than remove water from the base and pans prior to the plaintiff's accident and direct BJ's: not to dump water into the case and to monitor the case for any new leaks; the Court grants that portion of AAA's motion to dismiss all counter claims against it.

Accordingly, AAA's motion for summary judgment dismissing the plaintiff's complaint and all cross claims is granted.

---

[1]See Lo's deposition transcript at p. 22.

Killion's Motion

Plaintiff commenced a products liability action against defendant Killion. A party injured as a result of a defective product may seek relief against the product manufacturer if the defect was a substantial factor in causing the injury. *See Rabon-Willimack v. Robert Mondavi Corp.*, 73 AD3d 1007 (2d Dept 2010). A manufacturer who sells a product in a defective condition is liable for injury when the product is used for its intended purpose or for an unintended but reasonably foreseeable purpose. *See Reis v. Volvo Cars of North America, Inc.*, 73 AD3d 420 (1st Dept 2010). A product may be defective because of a mistake in the manufacturing process resulting in a manufacturing flaw, because of an improper, defective design, or because *the manufacturer failed* to provide adequate warnings regarding the use of the product. *Liriano v. Hovart Corp.*, 92 NY2d 232, 237 (1998). "On the other hand, 'where the injured party was fully aware of the hazard through general knowledge, observation or common sense' . . . the duty to warn may be obviated." *Stewart v. Honeywell International, Inc.*, 65 AD3d 864, 865 (1st Dept 2009); *See also Reis*, supra. In addition, a plaintiff asserting a failure to warn claim must adduce proof that the user of the product would have read and heeded a warning had one been given. *Reis, supra* at 420. If there is no evidence that the failure to warn was the proximate cause of the injury, a claim for failure to warn can not lie. *Id.*; *Stewart, supra.*

According to Killion witnesses the subject floral display case had a recirculatory system. Water from the case's condensation would fall into a collecting pan in the base of the case. A floater in the collecting pan would trigger the pump to circulate the water from the collecting pan up to the condensate / evaporating pans located on the top of the display case. Once the water is pumped up to the condensate pans the water is heated by coils (cow rods) until it evaporates. The top of the unit had two condensate pans. The primary pan was intended for the ordinary amount of condensation produced by the unit. The secondary pan, the "hot" pan, was designed to deal with any excess water that might rise to the top of the unit. The electric coils are cycled on and off by a trigger inside the condensate pans. The trigger inside the condensate pans was designed to turn on the electric coils when a half inch of water accumulates in the condensate pan. This unit was designed to dispose of the condensation it produces, not any additional water that may be placed in the unit Paul Bramhall, ("Bramhall") the National Sales Manager of the Refrigeration Division testified on behalf

of Killion. He stated that the Industry standard for this type of unit was to have one condensate pan, Killion exceeded the industry standard by manufacturing the unit with a second condensate pan. He further testified that he verbally informed Sue Klein ("Klein")(the person who placed the flowers inside the floral display unit) that water from the floral buckets should not be dumped into the case.

Killion also seeks summary judgment dismissing the plaintiff's complaint and all cross claims on the grounds that there is no viable cause of action against it for strict products liability since, at the request of BJ's substantial modifications were made to the floral display case by an unknown party which then rendered it defective. Killion failed to annex any evidence in admissible form to establish what modifications were made to the case. The annexed photos were taken at least nine months after the date of the accident as evidenced by a marking on a heater that stated "installed 5/9/06". Additionally, there has been no testimony by anyone to establish that the condition of the floral display case, as set forth in the photographs, is an accurate depiction of the condition of the subject unit on the date of the accident.

The Court finds that Killion made its prima facie entitlement to judgment as a matter of law dismissing the strict products liability claim, based upon a manufacturing defect, by submitting the deposition testimony of Karl Fisher ("Fisher") and the subject floral display unit's Traveler [2] document. Fisher, who was employed by Killion as a Vice President of Manufacturing and Design, explained at his deposition that the manufacturing process for the floral display unit was completed on January 24, 2005 (almost six months prior to the date of the accident). He further explained that according to the Traveler, the unit in question passed all inspections and tests when it left Killion's factory.

The Court further finds that Killion made its prima facie entitlement to judgment, as a matter of law, dismissing the strict products liability claim based upon design flaw by submitting Bramhall's testimony that the floral display unit exceeded the industry's standard with the use of a second condensate pan. Moreover, Bramhill opined that leaking was due to water being dumped into the base of the unit.

Lastly, the Court finds that Killion made its prima facie entitlement to judgment, as a

---

[2]A traveler is a factory document which travels with a unit and documents the outcome of all tests performed on the individual components and establishes whether or not a unit is in conformity with the design specs.

matter of law, dismissing the strict products liability claim based upon a failure to warn. Bramhall testified that he verbally informed Klein not to dump water from the floral buckets into the case. Lo also conceded receipt of the July 18, 2005, AAA work ticket which stated that water should not be dumped into the floral display unit. Under these facts, BJ's should have known that dumping water into a floral display case would cause it to leak water through general knowledge, observation or common knowledge. The Court notes that Lo (BJ's former operations manager) conceded at his deposition that water from the flower buckets was being dumped into the display unit every morning, before the store opened, as the flowers were being refilled into the buckets.[3] Hence, a lack of warning is not a legal cause of the plaintiff's accident. *See Stewart, supra, Reis, supra, Rabon-Willimack, supra.*

The affidavits of both the plaintiff's and BJ's expert failed to raise an issue of fact.

Accordingly, Killion's motion is granted.

In light of the fact that AAA's motion and Killion's motion are both granted, the BJ's cross motion for summary judgment on its counterclaims is denied.

This constitutes the decision and order of the Court.

Dated: 10/08/10
Bronx, New York

NORMA RUIZ, J.S.C.

[3] See Duffy's deposition transcript at p. 44.