Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Mark Forssell,

Plaintiff,

-against-

Randy Lerner and Makita U.S.A., Inc.,

Defendants.

Clerk of the Court

Index No.: 37077/2009

Motion Sequence No.: 001; MD
Motion Date: 9/29/10
Submitted: 10/27/10

Motion Sequence No.: 002; MD
Motion Date: 9/29/10
Submitted: 10/27/10

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Upon the following papers numbered 1 to 37 read on these motions for summary judgment: Notice of Motion and supporting papers, 1 - 11; 19 - 31; Answering Affidavits and supporting papers, 12 - 15; 32 - 35; Replying Affidavits and supporting papers, 16 - 18; 36 - 37.

The plaintiff commenced this action to recover damages for personal injuries he purportedly sustained while performing work at premises owned by defendant Randy Lerner. The plaintiff claims that he was injured while operating a table saw manufactured and sold by defendant Makita U.S.A., Inc. At the time of the incident, the table saw was plugged into an outlet which was also being used by electricians and that the outlet had five electrical devices being used simultaneously. According to the plaintiff, the overload of devices on the individual outlet caused a power surge which caused the table saw to "skip," the piece of wood he was cutting to "bind," and his left hand to come into contact with the blade of the table saw. It is undisputed that the plaintiff purchased the table saw from an unknown co-worker several months prior to the incident and that the tool was not equipped with a blade guard at that time.

The plaintiff alleges that Makita is liable for his injuries based on theories of negligence, strict products liability and breach of the warranty of merchantability. Specifically, he alleges that Makita is liable based on its negligence, *inter alia*, in permitting the saw to be marketed and distributed so it could be assembled and used without safety guards in place, in failing to cause a guard or safety device to be installed and in improperly designing and manufacturing the table saw. He further alleges that Makita is strictly liable for his injuries based on the defective, unsafe and improper design of the table saw without the appropriate guards, warnings or other safety devices. The plaintiff alleges that Lerner is liable for his injuries based on Labor Law § 200 and common-law negligence. Specifically, he alleges that Lerner was negligent, *inter alia*, in failing to provide a safe work environment, in allowing the table saw to be used in a dangerous environment and in allowing the electrical devices to exceed the limit that the individual outlet could maintain. The defendants assert cross claims against each other for contribution and indemnification.

Defendant Makita now moves for summary judgment dismissing the complaint and all cross claims asserted against it on the ground that it is not liable for the plaintiff's injuries. It argues that it cannot be held liable for the plaintiff's injuries where the table saw was manufactured and equipped with a blade guard and the blade guard was removed by a third-party after the product was distributed. Defendant Lerner cross-moves for summary judgment dismissing the complaint and all cross claims asserted against him on the grounds that he is not liable for the plaintiff's injury. He argues that he cannot be held liable for the plaintiff's injuries because he did not control or supervise the manner or methods of the plaintiff's work and did not create or have notice of the overloaded outlet.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Failure to make a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

The gravamen of the plaintiff's action against Makita is an alleged design defect. To prevail on a cause of action sounding in negligent design, a plaintiff must prove that the manufacturer failed to exercise reasonable care in designing the product (see, Giunta v. Delta Intl. Mach., 300 AD2d 350 [2nd Dept., 2002]). In a similar vein, 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 and that it was feasible to design the product in a safer manner (see, Gonzalez v. Delta Intl. Mach. Corp., 307 AD2d 1020 [2nd Dept., 2003]; Giunta v. Delta Intl. Mach., 300 AD2d 350 [2nd Dept., 2002]). New York courts have deemed these concepts "functionally synonymous" with respect to the manufacturer of the product (id.; see also, Denny v. Ford Motor Co., 87 NY2d 248, 258 [1995]). Ultimately, it is for the jury to decide whether a product was reasonably safe in light of all the evidence presented (see, Voss v. Black & Decker Mfg. Co., 59 NY2d 102 [1983]). The question for the jury is whether after weighing the evidence and balancing the product's risks against its utility and cost, it can be concluded that the product as designed is not reasonably safe (see, id.). In balancing the risks inherent in the product, as designed, against its utility and cost, the jury may consider several factors (see, id.). "Those factors may include the following: (1) the utility of the product to the public as a whole and to the individual user; (2) the nature of the product -- that is, the likelihood that it will cause injury; (3) the availability of a safer design; (4) the potential for designing and manufacturing the product so that it is safer but remains functional and reasonably priced; (5) the ability of the plaintiff to have avoided injury by careful use of the product; (6) the degree of awareness of the potential danger of the product which reasonably can be attributed to the plaintiff; and (7) the manufacturer's ability to spread any cost related to improving the safety of the design" (id. at 109).

In support of its motion for summary judgment, Makita submits, *inter alia*, the plaintiff's response to its first set of interrogatories, a notice to admit, the affidavit of David Anthony Haefner, and the instruction manual for the subject table saw. This evidence fails to demonstrate Makita's *prima facie* entitlement to summary judgment dismissing the complaint and cross claims asserted

against it. Contrary to Makita's contention, the evidence was insufficient to establish that the subject table saw did not contain a design defect. In his affidavit, Haefner avers that "at all relevant times, each and every [unit of the subject table saw] offered for sale was equipped with a blade guard, which was included as a standard component part." Notably, however, the instruction manual for the subject table saw expressly states that the "tool is shipped from the factory with the saw blade and blade guard not in the installed condition" (compare, Rodriguez v. Sears, Roebuck & Co., 22 AD3d 823 [2nd Dept., 2005]; Barnes v. Pine Tree Mach, 261 AD2d 295 [1st Dept., 1999]; Alvarado v. Otto Martin Maschinebau GmbH & Co., 236 AD2d 345 [2nd Dept., 1997]). In any event, Haefner's conclusory affidavit is insufficient to establish Makita's freedom from liability for a design defect (see, JMD Holding Corp. v. Congress Fin. Corp., 4 NY3d 373 [2005]; County of Nassau v. Velasquez, 44 AD3d 987 [2nd Dept., 2007]; Feldmus v. Ryan Food Corp., 29 AD3d 940 [2nd Dept., 2006]). Indeed, Makita fails to present any evidence showing that the subject table saw met all applicable industry standards for safety and was reasonably safe for its intended use when it was manufactured (see, Johnson v. Delta Intl. Mach. Corp., 60 AD3d 1307 [4th Dept., 2009]; cf., Fahey v. A.O. Smith Corp., 77 AD3d 612 [2nd Dept., 2010]; Sugrim v. Ryobi Tech., 73 AD3d 904 [2nd Dept., 2010]; Giunta v. Delta Intl. Mach., 300 AD2d 350 [2nd Dept., 2002]; Ganter v. Makita U.S.A., 291 AD2d 847 [4th Dept., 2002]; David v. Makita U.S.A., 233 AD2d 145 [1st Dept., 1996]; but see Banks v. Makita, U.S.A., 226 AD2d 659 [2nd Dept., 1996]

Defendant Makita's failure to make a *prima facie* showing of entitlement to judgment as a matter of law requires denial of its motion, regardless of the sufficiency of the opposition papers (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]). Accordingly, the motion by defendant Makita for summary judgment dismissing the complaint and all cross claims against it is denied.

The motion by defendant Lerner for summary judgment dismissing the complaint and all cross claims asserted against him is also denied. Labor Law §200 codifies the common-law duty imposed upon an owner or general contractor to provide construction and demolition workers with a safe place to work (see, La Veglia v. St. Francis Hosp., 78 AD3d 1123 [2nd Dept., 2010]; Nankervis v. Long Is. Univ., 78 AD3d 799 [2nd Dept., 2010]). A cause of action sounding in violation of Labor Law §200 or common-law negligence may arise from either dangerous or defective premises conditions at a work site or the manner in which the work is performed (see, Pilato v. 866 U.N. Plaza Assoc., 77 AD3d 644 [2nd Dept., 2010]). Where an accident is related to a dangerous or defective premises condition, a property owner can be held liable for either creating the condition or having actual or constructive notice and not remedying the condition within a reasonable time (see, Slikas v. Cyclone Realty, 78 AD3d 144 [2nd Dept., 2010]). By contrast, where an accident arises from the manner in which work is performed, no liability attaches to the property owner absent evidence that the owner had the authority to supervise or control the performance of the work (see, id., *supra*; Pilato v. 866 U.N. Plaza Assoc., 77 AD3d 644 [2nd Dept., 2010]; cf., Fried v. Always Green, 77 AD3d 788 [2nd Dept., 2010]). An owner has the authority to supervise or control the work for

purposes of the statute when it is responsible for the manner in which the work is performed (La Veglia v. St. Francis Hosp., 78 AD3d 1123 [2nd Dept., 2010]; Pilato v. 866 U.N. Plaza Assoc., LLC, 77 AD3d 644 [2nd Dept., 2010]). "However, no liability will attach to the owner solely because it may have had notice of the allegedly unsafe manner in which work was performed" (Dennis v. City of New York, 304 AD2d 611, 612 [2nd Dept., 2003]; see, Ortega v. Puccia, 57 AD3d 54 [2nd Dept., 2008]). Moreover, although property owners often have a general authority to oversee the progress of the work, mere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200 (see, La Veglia v. St. Francis Hosp., 78 AD3d 1123 [2nd Dept., 2010]; Ortega v. Puccia, 57 AD3d 54 [2nd Dept., 2008]).

In support of his motion for summary judgment, Lerner relies on his own affidavit, plaintiff's response to Makita's first set of interrogatories, and a copy of a building permit listing Ben Krupinski as the general contractor for the construction at the premises. This evidence fails to demonstrate Lerner's *prima facie* entitlement to summary judgment dismissing the complaint and cross claims asserted against him. At the outset, the Court notes that the evidence presented fails to conclusively establish whether the purported cause of the plaintiff's accident was a defective or dangerous premises condition or the manner in which the work is performed (compare, Pilato v. 866 U.N. Plaza Assoc., LLC, 77 AD3d 644 [2nd Dept., 2010]). In any event, Lerner's conclusory and self-serving affidavit was insufficient to establish his freedom from liability on either basis (see, Berkowitz v. Long Is. Water Corp., 70 AD3d 991 [2nd Dept., 2010]; Santiago v. Filstein, 35 AD3d 184 [1st Dept., 2006]; Garrett v. Ohlsen, 282 AD2d 807 [3rd Dept., 2001]). With respect to the manner in which the work was performed, Lerner avers in an entirely conclusory fashion that he visited the property from time to time to inspect the progress of the work and to ensure it was consistent with the overall plan and design, but that he did not supervise or control the "performance of the construction work" or the "manner or methods of the work performed" (see, JMD Holding Corp. v. Congress Fin. Corp., 4 NY3d 373 [2005]; County of Nassau v. Velasquez, 44 AD3d 987 [2nd Dept., 2007]; Feldmus v. Ryan Food Corp., 29 AD3d 940 [2nd Dept., 2006]). With respect to the defective condition of the outlet, he states that at "no time while he was at the property was an overloaded outlet visible or apparent to him." He does not provide any evidence to establish that he did not have constructive notice of an overloaded outlet (see, Slikas v. Cyclone Realty, 78 AD3d 144 [2nd Dept., 2010]; Nankervis v. Long Is. Univ., 78 AD3d 799 [2nd Dept., 2010]).

Moreover, the Court finds that summary judgment is inappropriate under the circumstances of this case because at the time of this motion, the parties had not been deposed and discovery had not been completed (see, Evangelista v. Kambanis, 74 AD3d 1278 [2nd Dept., 2010]; Matter of Fasciglione, 73 AD3d 769 [2nd Dept., 2010]; Harvey v. Nealis, 61 AD3d 935 [2nd Dept., 2009]; Juseinoski v. New York Hosp. Med. Ctr. of Queens, 29 AD3d 636 [2nd Dept., 2006]; Groves v. Land's End Hous. Co., 80 NY2d 978 [1992]).

Based on the foregoing, it is

ORDERED that these motions are consolidated for the purpose of this determination; and it is further

ORDERED that the motion by defendant Makita U.S.A., Inc. for summary judgment dismissing the complaint and all cross claims against it is denied; and it is further

ORDERED that the motion by defendant Randy Lerner for summary judgment dismissing the complaint and all cross claims against him is denied.

Dated: February 16, 2011

/s/ William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**