SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

THOMAS HOWARD,

Calendar No.: 3536-004
3580-005
3593-006

Index No.: 103294/05

Plaintiff,

against

DECISION
HON. JOSEPH J. MALTESE

GODWIN PUMPS OF AMERICA, INC
and TEREX CORPORATION,

Defendants.

GODWIN PUMPS OF AMERICA, INC

Third-Party Plaintiff, **Index No.: A103294/05**

against

MILLER ENVIRONMENTAL GROUP

Third-Party Defendant.

GODWIN PUMPS OF AMERICA, INC

Second Third-Party Plaintiff, **Index No.: B103294/05**

against

AMIDA INDUSTRIES, INC.

Second Third-Party Defendant.

The following papers numbered 1 to 11 were fully submitted on the 31st day of January, 2011:

Upon the foregoing papers, the respective motions (Nos. 3536-004 and 3580-005) for summary judgment by (1) defendant Terex Corporation (hereinafter "Terex") and Second Third-Party Defendant Amida Industries, Inc. (hereinafter "Amida") and (2) third-party defendant Miller Environmental Group (hereinafter "Miller Environmental") are granted. The motion (No. 3593-006) for summary judgement by defendant/third-party plaintiff/second third-party plaintiff Godwin Pumps of America, Inc.(hereinafter "Godwin") is denied.

To the extent relevant, this is an action for personal injuries allegedly sustained by plaintiff on December 27, 2004 while operating a portable light tower at an environmental cleanup site in Paulsboro, New Jersey. At the time of the accident, plaintiff was employed as an oil spill worker by nonparty Miller's Launch, Inc. who was hired as a subcontractor by third-party defendant Miller Environmental for the project involving plaintiff's accident (*see* EBT of Gary Humphreys, p 15). The light tower at issue was rented by Miller Environmental from Godwin (*see* Rental Contract Annexed as Godwin's Exhibit "M"). Godwin originally purchased the light tower from Coleman Engineering, Inc., now a wholly owned subsidiary of Terex/Amida.[1]

According to the complaint, at the time of the accident, plaintiff had "started to crank the light tower" from a horizontal to a vertical position and "cranked it to about maybe forty degrees" until he was instructed to stop so that it could be re-positioned (EBT of Thomas Howard, p 69-70). Plaintiff had "heard the [tower] clicking so [he] thought... it was working pretty well but when he [was] told... to stop, [he] let it go and the light [tower] fell back down" (id. at 70). When plaintiff let go, he "expected [the tower] to stay in [its prior] position" (id. at 72). When the light tower fell, plaintiff was "struck on the hand' by the "hand crank" and injured (id. at 72-75). It is uncontroverted that plaintiff had never cranked up a light tower prior to the subject incident (id. at 79).

[1] The light tower in question was purchased by Godwin on August 16, 1994 (*see* Affidavit of James M. Celentano, Legal Counsel for Terex). In October of 2000, Coleman Engineering became a wholly-owned subsidiary of Terex and was subsequently merged with Amida in January of 2004 (id.). Thus, Coleman Engineering no longer exists as a separate entity. It is undisputed that Terex did not design, manufacture, distribute or sell the light tower in question (id.). Pursuant to a Stipulation of Discontinuance dated May 20, 2010, the complaint against Terex was dismissed without prejudice.

Plaintiff maintains, inter alia, that both the hand crank and the braking mechanism on the Coleman LT-440 light tower were defective; that it "spun free" and "broke away 'striking plaintiff' with extreme force in the [left] hand" (*see* Plaintiff's Bill of Particulars). Severe injuries, including fractures requiring surgery, were the result (id.). In the complaint, plaintiff maintains that defendants were negligent, inter alia, in failing to properly maintain and repair the hand crank and braking mechanism of the portable light tower. He also asserts causes of action in strict products liability and breach of warranty. More particularly, plaintiff alleges that the light tower was improperly designed and manufactured "with a brake winch instead of a worm gear drive" (*see also* Plaintiff's Bill of Particulars).

Plaintiff has also lodged a claim of spoliation against Godwin, which subsequently discarded the winch in question and installed new parts in the subject light tower (*see* EBT of Samuel Susnick III, p 30, 83).

In support of their respective motions for summary judgment, Terex/Amida submit the affidavit of an engineering expert, Luke Webber, one of their product safety engineers. Mr. Webber states that the subject light tower includes "one self-activating automatic brake winch" which was "and continue[s] to be the standard in the industry among light tower manufacturers, as well as other industries that required automatic braking capabilities" (*see* Affidavit of Luke Webber, para 4). According to the witness, the winch used on the light tower in question was manufactured by either Fulton Performance or Dutton Lainson, and based upon a review of both, he (1) found no design deficiencies, and (2) opined that both were well suited for use on the light tower in question (id. at 3, 5). However, because he did not examine the subject light tower until January of 2009, he was unable to evaluate the cause of the alleged failure due to the replacement of the mechanism which purportedly failed. Moreover, said mechanism was no longer available for inspection (id. at 5). Lastly, Mr. Webber averred that he was unaware of any data which would suggest any difficulties with the products of either winch manufacturer during the time periods involved (id.).

In support of its motion for summary judgment, Miller Environmental relies upon an affidavit by their expert engineer, Peter K. Schutz, P.E. Based on his inspection of the subject light tower and a similar winch, as well as his review of all the relevant pleadings and documents, it was his opinion, within a reasonable degree of engineering certainty, that Godwin had not properly maintained the subject equipment, particularly in the year prior to Miller Environmental's rental of same (*see* Affidavit of Peter K. Schutz, P.E.). According to Mr. Schutz, his review of Godwin's records

revealed that, based on its usage meter, "there is no indication that Godwin ever inspected or serviced the subject tower before leasing it to Miller" in February of 2004 (id. at 4). Rather, Mr. Schutz reported that the last recorded inspection of the winch which allegedly failed occurred on August 9, 2002, almost two years prior to the rental date (id. at 8).

Gary Humphreys, the regional manager of Miller Environmental, also testified on its behalf. According to this witness, Miller Environmental did not perform any maintenance or repairs to the subject light tower. Rather, it was asserted that Godwin would have been called to repair any of the leased light towers if they were not functioning properly (*see* Affidavit of Gary Humphreys). He also denied that Miller Environmental made any alterations or repairs to the rented light towers, and denied the receipt of any complaints regarding them from any of its employees (id).

In support of its motion for summary judgment, Godwin has submitted the affidavit of Sam Susnick, the supervisor of its electrical department. Mr. Susnick attests that every light tower is inspected and maintained both before it is rented and when it is returned (*see* Affidavit of Sam Susnick, para 3). Moreover, "[i]f any problem[s are] found with the braking or clutching system of the winch while the tower [is] being lowered [it] would be recognizable by the operator and... would be replaced" (id. at 4). According to this witness, "plaintiff's expert's discussion of the clutching system on the winch is not applicable to the accident as described by the plaintiff. As [plaintiff] described [it,] the accident happened as he was raising the tower. The clutching system is only engaged when the tower is being lowered. Therefore, the clutch system by plaintiff's own description of the accident could not be a cause of this alleged incident" (id.). Mr. Susnick also claims that the "interpretation of the maintenance records [by plaintiff's expert] is incorrect" (id. at 8-9). In fact, he attests that the records reveal that "the light tower [in question] went through... routine maintenance on September 15, 2004 at 900 hours" (id.). He further attests that all maintenance and repairs to the subject light tower were performed by Godwin (*see* EBT of Samuel Susnick III, pp 20, 74), and that if parts had been needed, Godwin would have purchased them from the manufacturer, whether Coleman or Terex (actually, Amida) (id. at 21, 35). According to the witness, the light tower in question was purchased in 1994 and was always serviced at the 200 to 250 hour mark (id. at 71). Finally, he noted that the "pick-up slip" pertaining to Miller Environmental's rental failed to indicate any problem with the subject light tower (id. at 79).

In opposition to Godwin's motion, plaintiff submits the expert affidavit of Eric Heiberg, P.E.[2] Based upon his review of the photographs and inspection notes of the subject light tower taken by the plaintiff's original engineer expert, as well as his review of the relevant pleadings and discovery material, such as Godwin's maintenance records and purchase orders, Mr. Heiberg affirms within the bounds of reasonable engineering certainty that Godwin both failed to properly maintain the subject light tower, and failed to comply with well established industry guidelines (Affidavit of Eric Heiberg). In his expert opinion it was these failures which caused plaintiff's accident (id.). Plaintiff has adopted the exhibits and affidavit of the engineering expert of third-party defendant Miller Environmental.

In strict products liability, a manufacturer, wholesaler, distributor, or retailer who sells or leases a product in a defective condition is liable for any injury which results from the use of the product regardless of privity, foreseeability or the exercise of due care (*see Godoy v. Abamaster of Miami,* 302 AD2d 57, 60 [2nd Dept 2003]).[3] In order to recover, a plaintiff need only prove (1) that the product was defective as the result of either a manufacturing flaw, improper design, or a failure to provide adequate warnings regarding the use of the product, and (2) that the defect was a substantial factor in bringing about the injury (id.). As a result, distributors, retailers and lessors may be held strictly liable even though they may be innocent conduits in the sale or lease of the product, as liability is premised upon policy considerations rather than on traditional considerations of fault and active negligence (id.). Those policy considerations, not dissimilar to those underlying, e.g., section 240(1) of the Labor Law, dictate that those in the best position to exert pressure for safety improvements bear the risk of loss resulting from the use of such products. Thus, like the concept of vicarious liability, strict products liability represents an exception to the rule which limits liability to one's own wrongdoing (id.). The overall result is that a party injured as the result of a product defect may seek relief against its manufacturer or others in the chain of distribution if the defect was a substantial factor in causing the injury, whether by way of a flaw in the manufacturing process, improper or defective design, or simply because the manufacturer failed to provide adequate warnings regarding the use of the product (*see Rabon-Willimack v. Mondavi Corp*, 73 AD3d 1007, 1008 [2nd

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[2] Plaintiff also submits the unsworn affidavit of his original expert engineer, Cliff Anderson, who has passed away since his examination of the light tower. Thus, plaintiff retained the above engineer for purposes (1) of reviewing the materials pertinent to this case; (2) to render an expert's report and affidavit in response to these motions; and (3) for trial purposes.

[3] Courts have recognized that lessors/renters of products may be subject to strict products liability (*see Wengenroth v. Formula Equip Leasing, Inc*, 11 AD3d 677, 680 [2nd Dept 2004]; *Buley v. Beacon Tex-Print, Ltd*, 118 AD2d 630 [2nd Dept 1986]).

Dept 2010]).

Consonant with the foregoing, a prima facie case in strict products liability predicated, as here, on a design defect, requires a showing that (1) the manufacturer marketed a product which was not reasonably safe in its design, (2) it was feasible to design the product in a safer manner, and (3) the defective design was a substantial factor in causing plaintiff's injury (*see Pierre-Louis v. DeLonghi Am, Inc*, 66 AD3d 859, 861 [2nd Dept 2009]). It is not required that the injured party adduce evidence of a particular design defect, so long as he or she can prove both that the product did not perform as intended, and that all other causes of product failure can be eliminated. Proof of such circumstances has been held to give rise to an inference that the accident could only have been caused by a defect in the product in question (*see Riglioni v. Chambers Ford Tractor Sales, Inc*., 36 AD3d 785, 786 [2nd Dept 2007]). However, additional evidence will be required if defendant can rebut this inference by coming forward with evidence that the accident was not necessarily attributable to a defect. In these types of cases, the plaintiff must then produce direct evidence of a particular defect (id. at 786). Moreover, even where a qualified expert is able to (1) opine that a particular product is defective or dangerous, (2) explain why this is so, (3) describe the means by which the product could be made safer, and (4) conclude that it is reasonably feasible to do so, whether or not plaintiff has carried his or her burden of proof is generally within the province of a jury based on a so-called "risk-utility" analysis (*see Pierre-Louis v. DeLonghi Am, Inc*, 66 AD3d at 861-862). Thus, conflicting expert opinions which are neither speculative nor conclusory and based upon accepted industry standards will almost inevitably give rise to a triable issue of fact (id.).

Here, it is the opinion of this Court that Terex/Amida have met their respective burdens of demonstrating prima facie their entitlement to judgment dismissing Godwin's claims against them through the submission of deposition testimony and an expert's affidavit explaining that the subject light tower was not defectively designed or manufactured, nor was there any indication that the winches employed were unsuitable for their intended use (*see Pierre-Louis v. DeLonghi America, Inc*, 66 AD3d at 861). In response, no evidence has been adduced sufficient to demonstrate the existence of triable issues of fact as to the claims against either of a design or manufacturing defect.

Conversely, in response to Godwin's motion, plaintiff and third-party defendant Miller Environmental have demonstrated clear issues of fact through the opinions of their respective experts regarding the maintenance of the subject light tower, and whether plaintiff's injury was attributable to Godwin's purported lack of proper maintenance, i.e., negligence (*see Pierre-Louis v. DeLonghi America, Inc*, 66 AD3d at 862). Hence, Godwin's motion for summary judgment must be denied.

Miller Environmental has also moved for summary judgment dismissing the third-party indemnification claims asserted against it by Godwin. In opposition, Godwin submits a copy of the light tower rental agreement with Miller Environmental dated December 3, 2004 (*see* Godwin's Exhibits "M"), which provides in pertinent part:

"**Lessee agrees to indemnify and save lessor harmless against all loss, damage, expense and penalties, arising from any action on account of personal injuries, or damage to property, occasioned or caused by the property rented, or arising out of its operation, maintenance, or control, or handling or transportation, during the rental period, or while in transit**" (Godwin's Exhibit "M").

It is well settled that a party seeking contractual indemnification must prove itself to be free from any negligence, because to whatever extent its own negligence is found to have contributed to an accident, it is not entitled to be indemnified (*see* General Obligations Law §5-322.1; *Tarpey v. Kolanu Partners, LLC*, 68 AD3d 1099, 1100 [2nd Dept 2009]).

Relative to the foregoing, Miller Environmental maintains that Godwin's third-party indemnification claims under the rental agreement's choice of law provision are governed by the laws of the State of New Jersey (*see* Godwin's Exhibit "M"). The court agrees. Here, not only does New Jersey bear a reasonable relationship to the rental agreement as, e.g., the situs of the accident (*see Hageman v. Home Depot USA, Inc*, 45 AD3d 732 [2nd Dept 2007]), but Godwin has failed to sustain its heavy burden of proving that applicable New Jersey law is offensive to New York public policy (id.). In New York, the statutory prohibition of indemnification agreements which purport to indemnify a promisee for its own negligence, whether in whole or in part, is found in General Obligations Law 5- §322.1, which was only amended in 1981 to prohibit such provisions. Thus, it does not represent a policy consideration of long standing. In addition, rather that being at odds with the New York statute, the relevant New Jersey statute (NJSA 2A:40A-1) similarly bars indemnification agreements purporting to indemnify a promisee where the latter is solely negligent. Accordingly, while New Jersey law may be more or less generous (depending on your point of view) than the parallel New York provision, it is by no means "truly obnoxious" to the law of this State (id. at 734, quoting *Finucane v. Interior Constr Corp*, 264 AD2d 618, 621 [1st Dept 1999]).

Under either statute, it is the Court's opinion that Miller Environmental has met its burden of demonstrating prima facie its entitlement to judgment as a matter of law through the submission

of its expert's affidavit and the deposition testimony of (1) its regional manager, (2) plaintiff and (3) the witnesses presented on behalf of Terex/Amida, none of whom contradicted its claim that the light tower was improperly maintained by Godwin. Although Godwin's negligence, if any, and its role in plaintiff's injury can not be determined as a matter of law, the undisputed evidence before the Court to the effect that Miller Environmental did not alter, maintain or repair the subject light tower prior to plaintiff's accident is demonstrative of the absence of any triable issues as to the liability of this third-party defendant under Godwin's indemnification provision. As a result, Miller Environmental's motion for summary judgment dismissing Godwin's third-party action for indemnification must be granted.

Accordingly, it is hereby:

ORDERED that the motion for summary judgment by defendant Terex Corporation and second third-party defendant Amida Industries, Inc. is granted; and it is further

ORDERED that the complaint, third-party complaint, second third-party complaint and any cross claims against the above defendants are hereby severed and dismissed; and it is further

ORDERED that the motion for summary judgment by third-party defendant Miller Environmental Group is granted; and it is further

ORDERED that the third-party complaint against the above defendant are hereby severed and dismissed; and it is further

ORDERED that the motion for summary judgment by defendant/third-party plaintiff Godwin Pumps of America, Inc. is denied; and it is further

ORDERED that the action shall continue as to said remaining defendant; and it is further

ORDERED that the Clerk enter judgment and mark his records accordingly.

ENTER,

DATED: March 31, 2011

Joseph J. Maltese
Justice of the Supreme Court