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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. Justice PART 2

Sean Reeps, an infant by His Mother & Natural Guardian Debra Reeps

-v-

BMW of North America, LLC Et Al

INDEX NO. 100725-2008

MOTION DATE

MOTION SEQ. NO. 6

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision.

FILED

JUL 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 18, 2011

LOUIS B. YORK J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2
----------X

SEAN REEPS, an Infant by His Mother and Natural Guardian, DEBRA REEPS,

Plaintiff,

INDEX NO. 100725/08

-against-

BMW OF NORTH AMERICA, LLC., BMW OF NORTH AMERICA, INC., BMW (US) HOLDING CORP., MARTIN MOTOR SALES, INC., and HASSEL MOTORS, INC.,

Mot. seq. nos. 006 and 007

Defendants.

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LOUIS B. YORK, J.:

Motions seq. nos. 006 and 007 are consolidated for disposition.

In motion seq. no. 006, defendants BMW of North America, LLC, BMW of North America, Inc. (collectively, "BMW") and BMW (US) Holding Corp. move for summary judgment pursuant to CPLR 3212 dismissing all claims and cross-claims asserted against them.

In motion seq. no. 007, defendant Hassel Motors, Inc. ("Hassel") moves for summary judgment pursuant to CPLR 3212 dismissing plaintiff's complaint. Alternatively, if plaintiff's product liability claims against Hassel are not dismissed, Hassel seeks a conditional order of indemnification against BMW.

Defendant Martin Motor Sales, Inc. ("Martin"), the car dealer which sold the car to the Reeps, cross-moves for summary judgment dismissing all claims against it.

Plaintiff, who is now more than 18 years old, cross-moves without opposition to have his father, Guy Reeps, appointed guardian ad litem for him.

At the outset, the court notes that that the parties will not be allowed to drown the issues in verbiage. The local rules of this court limit affidavits and affirmations to 25 pages and memoranda of law to 30 pages (Local Rule 14[b]), and do not allow sur-replies to be submitted (Local Rule 14[c]). Since the court has not granted permission to deviate from either of these rules, only the first 25 pages of the affidavits will be considered, and the sur-replies will not be read.

This is an action to recover damages for the personal injuries allegedly sustained in utero by plaintiff as a result of his mother's exposure to gasoline fumes emanating from a defective 1989 BMW 525i sedan plaintiff's parents (the "Reeps") purchased in 1989.

In 1994, BMW, the car's manufacturer, recalled it due to a safety defect which caused seepage from the car's feed fuel hose/fitting connection and a noticeable fuel odor. It is unclear whether the Reeps still owned the car when it was recalled by BMW. At some indeterminate point after plaintiff's birth, Mrs. Reeps gave the car to her father, who gave it to another relative who then sold the car.

Plaintiff's complaint alleges four causes of action: (i) negligence; (ii) strict products liability; (iii) breach of express warranty; and, (iv) breach of implied warranty (merchantability).

BMW argues that plaintiff's claims are barred by the doctrine of spoliation, since he cannot establish a prima facie case without the car or at least the fuel hose to show the actual defect. According to BMW, if plaintiff cannot establish the existence of a defect, he cannot sustain his claims against BMW. It is BMW's position that only a relatively small percentage of

its cars developed the recall defect, and from the available evidence, it appears that the Reeps car was not among them but rather had a different problem. This argument is supported by the affidavit of BMW's expert witness, who examined the car and found it to be "in very poor condition and far from operational" (Noble Affidavit, ¶ 8). According to Noble, the fuel leakage experienced by the Reeds was caused by a split in the fuel hose, not by the recall defect (id., ¶ 39).

Hassel was the licensed BMW dealer and service provider to which the Reeps brought the car in March 1991 and again in November 1991 to check and remedy an exhaust odor detected inside the car. In March, Hassel performed the car's 15,000 miles service but could not detect any exhaust odors. In November, Hassel identified the source of the odor as a split fuel hose to the fuel rail and repaired it under BMW's new car warranty. Plaintiff was born in May 1992 with various birth defects including cerebral palsy. The Reeps attribute his injuries to Mrs. Reeps' inhalation of gas fumes in the first couple of months of her pregnancy, from August 1991 until Hassel fixed the problem in November 1991.

The gravamen of plaintiff's claims against Hassel is that it was negligent in failing to find the split fuel hose when the Reeps first complained of the fuel odor in March 1991. Plaintiff contends that if Hassel had repaired the problem at that time, Mrs. Reeps would not have inhaled any fumes during her subsequent pregnancy.

As the court noted in its prior summary judgment decision (mot. seq. no. 001), "a cause of action on behalf of a later-born child for injuries sustained in utero resulting from a tort committed during pregnancy" is actionable provided plaintiff proves, usually by expert testimony, that he was injured, and his injuries were proximately caused by the tort (see

Sheppard-Mobley v King, 10 AD3d 70, 75 [2d Dept 2004], affd as mod 4 NY3d 627 [2005]). An expert "opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)" (Parker v Mobil Oil Corp., 7 NY3d 434, 448 [2006], rearg den 8 NY3d 828 [2007]). Plaintiff has submitted such expert affidavits in opposition to the motions at bar. Hassel, relying primarily on Parker v Mobil Oil, supra, contends that the testimony of plaintiff's experts must be discounted because they did not conduct any testing or examination of the car or substantiate their findings with reliable scientific testing or methodology.

Hassel also argues that it has been unfairly damaged by plaintiff's almost 20-year delay in commencing this action, since in the interim the Reeps disposed of the car and Hassel, which had no notice of a possible claim, no longer has its own records. This argument is undercut by Hassel's own expert, who avers that he has personally examined, inter alia, the Reeps' car and its service records (Gambardella affidavit, ¶ 3).

Since there is no evidence of "willful or contumacious conduct" by the Reeps in disposing of the car, the spoliation alleged by defendants is not fatal to plaintiff's case (see Scordo v Costco Wholesale Corp., 77 AD3d 725, 727-728 [2d Dept 2010]). However, given that the car, which amazingly has been found after all this time, is clearly not in the same condition it was in 1991, and the original fuel hose no longer exists, plaintiff is not, as defendants would have it, barred from pursuing his claim, but rather he will have the onerous trial burden of proving his case solely by circumstantial evidence (see Speller ex rel Miller v Sears, Roebuck and Co., 100 NY2d 38, 41 [2003]). "[I]t is not necessary to prove a specific defect to succeed in a product

defect case, [but] it must at least be shown that the product did not perform as intended" (Miniero v City of New York, 65 AD3d 861, 863 [1st Dept 2009], lv den 13 NY3d 918 [2010], citations omitted). "To establish a prima facie case in strict products liability for design defects, a plaintiff must show that the manufacturer marketed a product that 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.... Where the product at issue is no longer available, and the plaintiff seeks to prove a manufacturing defect by circumstantial evidence, the plaintiff must establish that the product did not perform as intended, and exclude all other causes of failure not attributable to the manufacturers" (Guzzi v City of New York, 84 AD3d 871, 872-873 [2d Dept 2011]).

On the instant motions for summary judgment, however, the burden of proof is squarely on defendants. "A defendant's motion for summary judgment opposed by the plaintiff must be decided on the version of the facts most favorable to the plaintiff" (Mullin v 100 Church LLC, 12 AD3d 263, 264 [1st Dept 2004]).

In order to prevail on its motion, BMW must "establish that the subject [car] performed as intended or that there existed a likely cause of the [gas fumes] not attributable to any defect in the design or manufacturing of the product" (Koslow v Zenith Electronics Corp., 45 AD3d 810, 810-811 [2d Dept 2007], citations omitted). BMW has not established that there was a likely cause of the fumes unrelated to any defect in the design or manufacturing of the car (see D'Auguste v Shanty Hollow Corp., 26 AD3d 403, 405 [2d Dept 2006]). All plaintiff has to do to survive BMW's summary judgment motion is submit sufficient proof to allow a jury to find that his injuries were caused by the defective car (cf. Colt v Great Atlantic & Pacific Tea Company

Inc., 209 AD2d 294, 295 [1st Dept 1994]). The Reeps' testimony about the presence of the gas fumes is sufficient to raise a triable issue of fact (see Rodriguez v Ford Motor Co., 62 AD3d 573, 574 [1st Dept 2009]).

Hassel, which is being sued for negligence, has a different burden of proof on its summary judgment motion. In a negligence case, summary judgment may not be appropriate even where the facts are uncontested. 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 eliminate any material issues of fact from the case (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The plaintiffs have no duty to lay bare their proof until defendants have made a showing of entitlement to judgment as a matter of law (Narciso v Ford Motor Co., 137 AD2d 508, 509 [2d Dept. 1988]). Simply put, Hassel must prove that it was not negligent when it failed to find the source of the gas fumes complained of by the Reeps in March 1991. It has not done so.

Summary judgment should not be granted if there is any doubt as to the existence of a triable issue (Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 231 [1978]). The function of summary judgment is issue finding, not issue determination (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957], rearg den 3 NY2d 941 [1957]).

Neither has Hassel shown entitlement to its alternative request for relief, a conditional order of indemnification against BMW. "Indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for that loss because it was the actual wrongdoer. The right to indemnification may be created by express contract, or may be implied by law to

prevent an unjust enrichment or an unfair result" (Trustees of Columbia University in the City of New York v Mitchell/Giurgola Associates, 109 AD2d 449, 451-452 [1st Dept 1985]). Since Hassel has yet to show that it is free of fault, it cannot at this juncture seek indemnification from BMW.

Accordingly, it is

ORDERED that:

1. the motions for summary judgment by BMW (seq. no. 006) and Hassel (seq. no. 007) are denied in their entirety;

2. Martin's cross-motion is denied as moot, since the court has already dismissed all claims against Martin (mot. seq. no. 005);

3. Plaintiff's cross-motion to have his father appointed as his guardian ad litem is granted without opposition.

DATED: July 18, 2011

Enter:

J.S.C.