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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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MICHAEL MINELLI and JILL MINELLI,

Plaintiff(s),

-against-

WATKINS AIRCRAFT SUPPORT PRODUCTS, INC. a/k/a WASP, INC.,

Defendant(s).

---x

Index No. 21491/08

Motion Submitted: 9/30/11
Motion Sequence: 003

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X

Motion by defendant Watkins Aircraft Support Products, Inc., a/k/a WASP, Inc. for an order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff while he was in the process of loading an airplane in the course of his employment. Plaintiff alleges that his foot became caught in the hole of a cargo dolly. The accident occurred on December 1, 2005.

Defendant moves for summary judgment on the grounds that plaintiff has failed to establish that the subject cargo dolly was defective and that the defect was a substantial factor in bringing about his injuries. (*See, e.g.*, ***Bolm v. Triumph Corp.***, 71 A.D.2d 429, 422 N.Y.S.2d 969 (4th Dept., 1979); *see also*, ***Micallef v. Miehle & Company***, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 [1976]). Defendant further asserts that plaintiff is unable to establish "that the cargo dolly was defective in any fashion which defect was the

proximate cause of the accident or that such defect existed at the time that it left the control of WASP." (*See, e.g.*, ***Blair v. Martin's***, 78 A.D.2d 895, 433 N.Y.S.2d 221 (2d Dept., 1980); ***Barry v. Manglass***, 55 A.D.2d 1, 389 N.Y.S.2d 870 [2d Dept., 1976]; (¶ 23 of Michael Congdon's Affirmation).

Overall, defendant maintains that plaintiff is unable to establish any of the requirements for making out a *prima facie* case with respect to either design or manufacturing defect. "Plaintiff is unable to specifically identify any defect either in manufacturing or design and is unable to say that any defect in manufacturing or design which may have been the proximate cause of his accident existed when the dolly in question left the control of WASP." (***Id.*** at ¶ 26)

As to plaintiff's claim that the defendant "failed to warn," defendant notes that the product in question is a cargo dolly which is not an inherently dangerous product. It has been held that, where the product causing the injury is not inherently dangerous when used according to directions for the purpose for which it was intended, a manufacturer or vendor is under no duty to warn. (*See, for example,* ***Mesick v. Polk***, 296 N.Y. 673, 70 N.E.2d 169 (1946); ***Gielskie v. State***, 10 A.D.2d 471, 200 N.Y.S.2d 691 (3d Dept., 1960); ***Soto v. E.C. Brown Company***, 283 A.D. 896, 130 N.Y.S.2d 21 [2d Dept., 1954]). (*Id.* at¶ 27).

As to any claim that defendant breached any warranties that the cargo dolly was fit for a particular use, plaintiff must establish that he had been injured by the product, that the injury occurred because the product was defective and that it was unfit for the purpose intended and that the defect existed when the product left the hands of the manufacturer. (*See, for example,* ***Codling v. Paglia***, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 [1973]).

"Plaintiff must also establish reliance on the warranty. (*See,* ***Wright v. Carter Products, Inc.***, 244 F.2d 53, [1957]). Here, plaintiff was not using the cargo dolly for any purpose for which it was designed or manufactured but, rather, as a step stool. The device was a cargo dolly, specifically the tow bar assembly, not a step stool. As such, plaintiff cannot claim the benefit of any warranty as he was using the device for a purpose other than its intended purpose." (Congdon's Affirmation, ¶ 30).

Based upon the foregoing, defendant concludes that "the accident and injuries in this case were due to plaintiff's own misuse of the cargo dolly in question. By placing his right foot in such a position that it spanned the opening between the tubular tow bar and the re-enforcing gusset and using it as a foothold, he was using those portions of the cargo dolly for a purpose for which they were neither designed nor intended." (***Id.*** at ¶ 32).

In support thereof, defendant submits plaintiff's deposition testimony, the deposition testimony of John Hoeper as well as Mr. Hoeper's affidavit. Mr. Hoeper has been employed

by WASP for a total of 24 years. Mr. Hoeper is currently Vice President/GSE (Ground Service Equipment/Military Division) and has held such position for seven years. As such, he is familiar with all ground service equipment manufactured by WASP including cargo dollies of the type involved in this action.

In his affidavit, Mr. Hoeper states, in pertinent part, as follows:

> "It is my understanding that plaintiff, Michael Minelli, has testified that the accident and his injury occurred while he was assisting in the loading of a cargo container from a cargo dolly into the body of an aircraft, and that, while doing so, he placed his right foot on a portion of the tow bar such that it spanned the opening between the tow bar itself, and one of the reinforcing gussets described above.
>
> Based upon my experience at WASP and my involvement with cargo dollies, I can state with certainty that the tow bar assembly including the main central tow bar and the two reinforcing metal gussets on either side were not designed, manufactured or intended to be used as a foothold for the purposes of mounting the bed of the dolly itself. Using the tow bar assembly in such a fashion was not anticipated to occur during the normal and expected use of the cargo dolly.
>
> As I testified at my deposition of October 1, 2010, I have no knowledge of any accidents similar to the one involving Mr. Minelli having occurred at any time before or subsequent to his accident or of any complaints regarding the tow bar assembly itself. In my position as V.P., GSE/Military Division, I would anticipate that any such accidents or any complaints about the tow bar assembly would be brought to my attention.
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> Each such cargo dolly manufactured by WASP is inspected and tested prior to being released into the stream of commerce for purposes of identifying any defects in the manufacturing process and ascertaining its ability to perform its intended function. Any such dollies found to be defective in any way, including defects in the tow bar assembly, are corrected, if possible, at the factory prior to shipment. Defects which are not easily repaired would typically result in the affected unit being stripped of its usable parts and reconstructed.
>
> Based on my understanding of that incident and my knowledge of WASP's products and the manner in which they are manufactured, it does not appear that any defect in design or manufacture of the cargo dolly in question was a cause of Mr. Minelli's accident or injuries."

On a motion for summary judgment, it is incumbent upon the movant to 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 (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986); ***Zuckerman v. City of New York***, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). The failure to make that showing requires the denial of the motion regardless of the sufficiency of the opposing papers (***Mastrangelo v. Manning***, 17 A.D.3d 326, 793 N.Y.S.2d 94 (2d Dept., 2005); ***Roberts v. Carl Fenichel Community Servs., Inc.***, 13 A.D.3d 511, 786 N.Y.S.2d 823 [2d Dept., 2004]). Issue finding, as opposed to issue determination is the key to summary judgment (*see* ***Kriz v. Schum***, 75 N.Y.2d 25, 549 N.E.2d 1155, 550 N.Y.S.2d 584 [1989]). Indeed, "[e]ven the color of a triable issue forecloses the remedy" (***Rudnitsky v. Robbins***, 191 A.D.2d 488, 489, 594 N.Y.S.2d 354 [2d Dept., 1993]).

On this record, defendant has established its *prima facie* entitlement to judgment as a matter of law dismissing the complaint. *(See,* ***Parker v. Raymond Corp.***, 87 A.D.3d 1115, 930 N.Y.S.2d 27, 2011 N.Y. Slip Op. 06827, (2d Dept., 2011]).

Where the moving party "has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do." *(**W.W.W. Associates, Inc. v. Giancontieri***, 77 N.Y.2d 157, 566 N.E.2d 639, 565 N.Y.S.2d 440 (1990), *quoting* ***Zuckerman v. City of New York***, 49 N.Y.2d 557, 560, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). Even viewing the burden of a summary judgment opponent more generously than that of the summary judgment proponent, plaintiff fails to raise a triable issue of fact (*see* ***Friends of Animals v. Associated Fur Mfrs.***, 46 N.Y.2d 1065, 1068, 390 N.E.2d 298, 416 N.Y.S.2d 790 [1979]).

At bar, plaintiff has not come forward with any proof in evidentiary form that the accident was attributable to any defect in the product. Plaintiff simply points to gaps in the movant's proof as opposed to affirmatively demonstrating the merits of his claim. (*See generally,* ***Amendola v. City of New York***, __ A.D.3d __, 2011 WL 5433797 (2d Dept., 2011); ***Cummins v. New York Methodist Hosp.***, 85 A.D.3d 1082, 1083, 926 N.Y.S.2d 313 (2d Dept., 2011); ***Post v. County of Suffolk***, 80 A.D.3d 682, 685, 915 N.Y.S.2d 124 [2d Dept., 2011]).

In view of the foregoing, the motion is granted and the complaint is dismissed.

The foregoing constitutes the Order of this Court.

Dated: December 1, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.

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ENTERED
DEC 09 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE