Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Emily Mangano,

Plaintiff,

-against-

The Town of Babylon,
J. & T. Metal Products Co., Inc.,
Cooper Tank & Welding Corp.
and Kleen-Tainer Corp.,

Defendants.

Clerk of the Court

Index No.: 07082/2007

Attorneys [See Rider Annexed]

Motion Sequence No.: 004; MG
Motion Date: 8/15/11
Submitted: 11/3/11

Motion Sequence No.: 005; XMD
Motion Date: 8/15/11
Submitted: 11/3/11

Motion Sequence No.: 006; XMD
Motion Date: 8/15/11
Submitted: 11/3/11

Upon the following papers numbered 1 to 73 read upon these motions for summary judgment: Notice of Motion and supporting papers, 1 - 23; Notice of Cross Motion and supporting papers, 24 - 41; 42 - 47; Answering Affidavits and supporting papers, 48 - 65; Replying Affidavits and supporting papers, 66 - 68; 69 - 73.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Emily Mangano, as a result of an incident that occurred on August 8, 2006 at the Cedar Beach Marina in Babylon, New York, which is owned by defendant the Town of Babylon ("Town"). It is undisputed that, while plaintiff was dumping her private garbage into a dumpster located in the marina the dumpster tipped over and landed on her right foot. The dumpster was manufactured by

complaint alleges causes of action sounding in negligence, strict products liability, breach of warranty and failure to warn.

Defendant Cooper Tank now moves (# 004) for summary judgment dismissing the complaints and all cross claims insofar as asserted against it. In support, Cooper Tank submits, *inter alia*, the pleadings, a bill of particulars, two transcripts of the deposition testimony of the plaintiff, dated April 29, 2008 and February 8, 2010, the transcript of the deposition testimony of Michael Taylor, a representative of Cooper Tank, and the affidavit of George Pfreundschuh, an expert engineer of Cooper Tank.

At her deposition dated April 29, 2008, plaintiff testified to the effect that, on the day of the accident, she and her two roommates did yard work including pulling out bushes and bagging soil at their rented house. After the yard work, they collected several bags of yard waste and put them into their vehicles. They each drove separate vehicles to the Cedar Beach Marina where plaintiff was employed as a dock master for the Town of Babylon. They backed in each car one-by-one to the front of a dumpster located on the left side of the marina and dumped the bags of yard waste into the dumpster. Plaintiff described the front side of the dumpster, which was about at "eye to neck level", as "sticking out and slanted." Plaintiff stated that she was able to see the bottom of the dumpster from where she was standing. The plaintiff's vehicle was the last one backed to the dumpster. After she finished unloading her vehicle, she closed the hatch of her vehicle. As she was turning around towards the dumpster, it tipped over and landed on her right foot. Prior to the accident, when she was dumping bags into the dumpster, she observed that it was on "grass, sand and concrete" but appeared to be "level" and "stable".

At her deposition dated February 8, 2010, plaintiff testified to the effect that, immediately before the dumpster came into contact with her foot and as she was turning around, she saw the dumpster coming down towards her. Prior to the accident, she observed labels on the dumpster, although she had no recollection as to the content of the labels.

At his deposition, Michael Taylor testified to the effect that he is the director of manufacturing of Cooper Tank, and that Cooper Tank is a company manufacturing and selling only garbage containers, which are referred to as dumpsters. He identified the subject dumpster as an eight-yard container manufactured by Cooper Tank. He stated that the design of the container has not changed since he started working at Cooper Tank 14 or 15 years ago. He also stated that, when Cooper Tank sells its containers, warning labels regarding the tipping hazard are attached on both sides of the products. About 14 years ago, he performed a weight test on an eight-yard container. He observed that the container was able to withstand the weight of 200 pounds in the front of the container without tipping, which was greater than the American National Standards Institute ("ANSI") standard. He stated that eight-yard containers have never been recalled, and that Cooper Tank has never received complaints that the eight-yard containers have tipped over.

In his affidavit, George Pfreundschuh stated that he is a professional engineer licensed in the State of New York. On November 20, 2009, he inspected several dumpsters at the Cedar Beach Marina. During the inspection, he tested an exemplar eight-yard dumpster manufactured by Cooper Tank. First, he observed that his "measurements of the exemplar Cooper 8 yard dumpster and the specification drawing that Cooper provided to the Town of Babylon indicates a dimensional design consistent with the ANSI Z245.60 standard". Next, he performed two tests – vertical and horizontal weight bearing tests – on the exemplar dumpster. He observed that the dumpster's "tip resistance and stability far exceeded the stability performance required by Section 7.2.3. of ANSI Z245.30", which contains the design requirements and specifies the test conditions to verify compliance with the performance requirements.

A manufacturer who places a defective product into the stream of commerce may be liable for injuries or damages caused by such product (see, Gebo v. Black Clawson, 92 NY2d 387, 392 [1998]; Liriano v. Hobart Corp., 92 NY2d 232, 235 [1998]; Amatulli v. Delhi Constr. Corp., 77 NY2d 525, 532 [1991]). A product may be defective due to a mistake in the manufacturing process, an improper design or a failure to provide adequate warnings regarding the use of the product (see, Gebo v. Black Clawson, 92 NY2d 387 [1998]; Voss v. Black & Decker Mfg., 59 NY2d 102 [1983]). Depending upon the factual circumstances, a person injured by a defective product may maintain causes of action under the theories of strict products liability, negligence or breach of warranty (see, Voss v. Black & Decker Mfg., 59 NY2d 102 [1983]). Whether an action is pleaded in strict products liability, negligence or breach of warranty, the plaintiff has the burden of establishing that a defect in the product was a substantial factor in causing the injury (see, Rizzo v. Sherwin-Williams Co., 49 AD3d 847 [2nd Dept., 2008]) and that the defect existed at the time the product left the manufacturer or other entity in the chain of distribution being sued (see, Clarke v. Helene Curtis, Inc., 293 AD2d 701 [2nd Dept., 2002]; Tardella v. RJR Nabisco, 178 AD2d 737 [3rd Dept., 1991]).

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 issue of fact (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once such proof has been produced, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]; Melendez v. Parkchester Med. Serv., 76 AD3d 927 [1st Dept., 2010]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (see, Castro v. Liberty Bus Co., 79 AD2d 1014 [2nd Dept., 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the Court to direct a judgment in favor of the movant as a matter of law (see, Friends of Animals v. Associated Fur Mfrs., 46 NY2d 1065 [1979]).

Here, Cooper Tank has established its *prima facie* entitlement to summary judgment by demonstrating that there is nothing in the record from which it can reasonably be inferred that the

subject dumpster was defective when it left the possession and control of Cooper Tank (see, Wallace v. Sitma U.S.A., 77 AD3d 918 [2nd Dept., 2010]; Sabessar v. Presto Sales & Serv., 45 AD3d 829 [2nd Dept., 2007]; Lobello v. BFI Waste Sys. of N. Am., 35 AD3d 1177 [4th Dept., 2006]).

In opposition, neither the plaintiff nor the other defendants offered direct evidence that the dumpster was defective at the time it was manufactured or sold. Nor did they offer evidence that Cooper Tank negligently installed and/or repaired the dumpster (see, Steinberg v. D. Waldner Co., 305 AD2d 492 [2nd Dept., 2003]; Sullivan v. Main Line Elec. Co., 295 AD2d 497 [2nd Dept., 2002]). In opposition, plaintiff submits, *inter alia*, the affidavit of Anthony Storace, a professional engineer.

In his affidavit, Anthony Storace opined that "it was reasonable to foresee that the dumpster, because of its slanted front design, could be tipped forward under reasonably foreseeable conditions of use" and that "the dumpster design" caused the subject accident. He contended that Cooper Tank failed to provide "reasonable means of preventing" the accident, such as outriggers, braces or legs, and such failure rendered the dumpster "defective in design for safety".

Here, plaintiff's expert affidavit is insufficient to raise a triable question of fact, as it contains conclusory findings unsupported by fact or relevant data. Where the expert states his conclusion unencumbered by any trace of facts or date, the testimony should be given no probative force whatsoever (see, Romano v. Stanley, 90 NY2d 444 [1997]; Moore v. J.A. Bradley & Sons, 68 AD3d 1419 [2nd Dept., 2009]). It is also well established that a manufacturer need not incorporate safety features into its product so as to guarantee that no harm will come to every user no matter how careless or even reckless (see, Robinson v. Reed-Prentice Div. of Package Mach. Co., 49 NY2d 471 [1980]; Bombara v. Rogers Bros. Corp., 289 AD2d 356 [2nd Dept., 2001]). Thus, plaintiff failed to raise a triable issue of fact.

In view of the foregoing, the motion (# 004) by defendant Cooper Tank for summary judgment dismissing the complaint and all cross claims against it is granted. The action is severed and shall continue against the remaining defendants.

Defendant Town cross-moves (# 005) for an order granting summary judgment on the complaints and all cross claims against it. The Town incorporates by reference the pleadings and exhibits submitted by Cooper Tank in support of its original motion.

At his deposition, Ronald Kestenbaum testified to the effect that he is a Deputy Commissioner of Department of Public Works and the Public Works Facility Coordinator of the Town. On the day of the accident, he was in charge of maintaining the Cedar Beach Marina, including "grass cutting and emptying the garbage". There were five or six dumpsters in the marina, and all of dumpsters were six or eight-yard dumpsters owned by the Town. The Town itself emptied the dumpsters when they were filled. According to a Town law, "Town employees cannot bring in their own personal garbage" to the marina. During June, July and August of 2006, the dumpsters

were emptied every day in the morning. He stated that there was no "procedure in place for the maintenance personnel to check regularly that the dumpsters were placed on the proper surface". Prior to the accident, he did not observe or receive any complaint that the dumpsters had tipped over.

At his deposition, non-party witness Joseph Argento testified to the effect that he is a Bay Constable for the Town and his duties include patrolling the beaches and keeping the peace at the Town parks. On the day of the accident he was dispatched to the area of the accident. When he arrived at the scene, he observed that the subject dumpster was "tipped over onto the opening" and the plaintiff was sitting on the ground. He heard that the plaintiff's foot had been "removed from underneath the dumpster." While he was at the scene, Suffolk County Police Emergency Service put the dumpster in an upright position. When he walked around the dumpster at the scene, he observed that the dumpster was on the pavement and that "[a]round the back [was] grass and dirt". He was able to step on the grass and dirt and felt the ground was stable and level. During the summer of 2006, there was no complaint about the "dumpster being unstable" prior to the accident.

A landowner must act as a reasonable person in maintaining its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk (see, Basso v Miller, 40 NY2d 233 [1976]; Witherspoon v Columbia Univ., 7 AD3d 702 [2nd Dept 2004]). The issue of negligence, whether of the plaintiff or defendant, is usually a question of fact (see, Bruni v City of New York, 2 NY3d 319 [2004]). Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (see, Moons v Wade Lupe Constr. Co., 24 AD3d 1005 [3rd Dept 2005]; Fasano v Green-Wood Cemetery, 21 AD3d 446 [2nd Dept 2005]).

Here, the Town failed to establish its entitlement to judgment as a matter of law. There are questions of fact as to how the accident occurred; whether a dangerous condition existed in the area of the accident so as to create liability on the part of the Town, and whether it exercised reasonable care under the circumstances (see, McCummings v New York City Tr. Auth., 81 NY2d 923 [1993]; Basso v Miller, 40 NY2d 233 [1976]; Karsdon v Barringer, 298 AD2d 501 [2nd Dept 1999]). There are also questions of fact as to whether the Town's alleged negligence was a proximate cause of the subject accident, and whether the plaintiff was comparatively negligent (see, Gogarty v Hay Kit Ho, 28 AD3d 607 [2nd Dept 2006]; Bruker v Fischbein, 2 AD3d 254 [1st Dept 2003]). Accordingly, the Town's motion for summary judgment is denied.

Defendant J. & T. Metal Products Co., Inc. ("J. & T. Metal") cross-moves (# 006) for an order granting summary judgment dismissing the complaints and all cross claims against it.

Here, J. & T. Metal's cross motion for summary judgment is untimely inasmuch as it was not served within 120 days of the filing of the note of issue on March 28, 2011 (see, CPLR §3212 [a]). Instead, the affirmation of service of the cross motion is dated July 27, 2011, one day after the

deadline for filing the cross motion for summary judgment. J. & T. Metal has provided no explanation or "good cause" for serving the cross motion 1 day late and, thus, the Court has no discretion to entertain it on the merits (see, Brill v. City of New York, 2 NY3d 648 [2004]; Thompson v. Leben Home for Adults, 17 AD3d 347 [2nd Dept., 2005]). Moreover, while a cross motion for summary judgment made after the expiration of the statutory 120-day period, as here, may be considered by the Court, where a timely motion for summary judgment was made seeking relief "nearly identical" to that sought by the cross motion, this Court finds that the relief sought by other defendants' motion and cross motion and J. & T. Metal's cross motion was not "nearly identical" (see, Teitelbaum v. Crown Hgts. Assn. for the Betterment, 84 AD3d 935 [2nd Dept., 2011]). J. & T. Metal's cross motion for summary judgment is also denied as procedurally defective for failure to submit a complete copy of the pleadings.

Accordingly, it is

ORDERED that the motion by defendant Cooper Tank & Welding Corp. (# 004) for an order granting summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the cross motion by defendant the Town of Babylon (# 005) for an order granting summary judgment dismissing the complaint and all cross claims against it is denied; and it is further

ORDERED that the motion by defendant J. & T. Metal Products Co., Inc. (# 006) for an order granting summary judgment dismissing the complaint and all cross claims against it is denied.

Dated: 3/26/2012

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

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION

RIDER

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