

Padilla v Burger King Corp.

2013 NY Slip Op 32254(U)

September 18, 2013

Sup Ct, Suffolk County

Docket Number: 08-17152

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY



PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 4-25-13 (#005)
MOTION DATE 5-2-13 (#006)
ADJ. DATE 6-27-13
Mot. Seq. # 005 - MD
006 - MD

-----X
VALERIA PADILLA, a minor by her father and
legal guardian, JOSE ANIBAL PADILLA,

Plaintiff,

- against -

BURGER KING CORPORATION,

Defendant.

CANNON & ACOSTA, LLP
Attorney for Plaintiff
1923 New York Avenue
Huntington Station, New York 11746

BLANE MAGEE, ESQ.
Attorney for Defendant/Third-Party Plaintiff
77 North Centre Avenue, Suite 310
Rockville Centre, New York 11570

-----X
BURGER KING CORPORATION,

Third-Party Plaintiff,

- against -

PLAY SYSTEMS, INC.,

Third-Party Defendant.

MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN
Attorney for Third-Party Defendant
425 Eagle Rock Avenue
Roseland, New Jersey 07068

-----X
BURGER KING CORPORATION,

Third-Party Plaintiff,

- against -

PLAY SYSTEMS, INC., a DIVISION OF
SUPERIOR INTERNATIONAL,

Third-Party Defendant.
-----X

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Upon the following papers numbered 1 to 50 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; 14 - 28; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 29 - 40; 41 - 44; Replying Affidavits and supporting papers 45 - 46; 47 - 50. Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (seq. #005) by Superior International Industries, Inc. s/h/a Play Systems Inc. and this motion (seq. #006) by Burger King Corporation are consolidated for purposes of this determination; and it is further

ORDERED that the motion by Superior International Industries, Inc. s/h/a Play Systems Inc. for summary judgment dismissing the third-party complaint against it is denied; and it is further

ORDERED that the motion by Burger King Corporation for summary judgment dismissing the complaint in the main action against it is denied.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by infant plaintiff Valeria Padilla, then two years and ten months old, on August 5, 2007, when she fell from a playground apparatus on the playground of the Burger King restaurant located at 96 Broad Hollow Road in Farmingdale, New York, owned and operated by the Burger King Corporation (“Burger King”). The gravamen of the complaint is that Burger King was negligent in failing to properly maintain, manage and control the premises, creating a hazardous condition.

Burger King commenced a third-party action against Superior International Industries, Inc. s/h/a Play Systems Inc. (“Superior International”), alleging causes of action in negligence, strict products liability, breach of warranty, and contractual indemnification.

Superior International now moves for summary judgment dismissing the third-party complaint against it. In support, Superior International submits, *inter alia*, the pleadings and the incomplete portion of the deposition testimony given by plaintiff Jose Padilla, Robert Daniel Foster, a representative of Burger King, James O. Dunn, Jr., a representative of Superior International, and non-party witness Shann McGuire.

At his examination before trial, plaintiff Jose Padilla testified to the effect that his daughter, infant plaintiff Valeria Padilla, started to climb upon the playground apparatus. When she reached the second step of the apparatus, she slipped and fell to the ground. At that time, he was sitting in front of her, approximately 10 to 15 feet away from her.

At his deposition, Robert Daniel Foster testified on behalf of Burger King to the effect that the manufacturer designs a structure based on approved components and presents it to Burger King in drawings, and that Burger King determines what components can be used and installed for a Burger King playground, including color and style. He testified that Burger King will present specifications to a manufacturer, but in many cases, has adopted the manufacturer’s specifications. Superior International is one of three approved manufacturers.

At his deposition, James O. Dunn, Jr. testified on behalf of Superior International to the effect that the Burger King specifications basically incorporated the CSPS and the ASTM standards, and that Superior International would lay out components of the playground based on the area Burger King gave. The layout of the playground would be presented in drawings.

At his deposition, Shann McGuire testified to the effect that he was a former employee of Superior International, and that the New Image playground was manufactured according to specifications provided by Burger King.

Whether the action is pleaded in strict products liability, breach of warranty or negligence, it is a plaintiff's burden to show that a defect in the product was a substantial factor in causing the injury (*see Beckford v Pantresse, Inc.*, 51 AD3d 958, 858 NYS2d 794 [2d Dept 2008]; *Rizzo v Sherwin-Williams Co.*, 49 AD3d 847, 854 NYS2d 216 [2d Dept 2008]). The plaintiff must demonstrate, at a minimum, that injuries are the direct result of a defect in the product and that the defective product is the sole possible cause of those injuries (*see Beckford v Pantresse, Inc., supra*; *Clarke v Helene Curtis, Inc.*, 293 AD2d 701, 742 NYS2d 325 [2d Dept 2002]). A claim of strict products liability can assert either a (1) manufacturing defect; (2) a design defect; or (3) a failure to provide adequate warning regarding the use of a product (*see Doomes v Best Tr. Corp., No. 170*, 17 NY3d 594, 935 NYS2d 268 [2011]; *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398 [1983]). Where plaintiffs allege a design defect, the relevant inquiry is whether the product, as designed, was not reasonably safe (*see Doomes v Best Tr. Corp., No. 170, supra*; *Voss v Black & Decker Mfg. Co., supra*). When a product is made in accordance with plans and specifications provided by the purchaser, the manufacturer is not liable for design defects, unless the specifications are so patently defective that a manufacturer of ordinary prudence would be placed on notice that the product is dangerous and likely to cause injury (*see Houlihan v Morrison Knudsen Corp.*, 2 AD3d 493, 768 NYS2d 495 [2d Dept 2003]). This exemption from liability for adherence to specifications does not apply where the manufacturer is involved in the design and installation of the allegedly defective product (*see Bailey v Disney Worldwide Shared Servs.*, 35 Misc 3d 1201[A], 950 NYS2d 607 [Sup Ct, New York County 2012]; *see e.g. Sprung v MTR Ravensburg, Inc.*, 99 NY2d 468, 758 NYS2d 271 [2003]).

Here, Superior International has failed to establish its entitlement to judgment as a matter of law. There are several questions of fact as to whether the subject playground apparatus was defective at the time it was manufactured or sold; whether the apparatus was properly inspected before it was shipped; whether the apparatus, as designed, was reasonably safe; and whether the apparatus was manufactured in conformity with the specifications provided by Burger King. Moreover, due to the incomplete transcripts of the deposition testimony, the Court is left to speculate as to the entirety of the testimony, raising factual issues which preclude summary judgment (*see Lopez v Knipfing*, 2013 NY Slip Op 30461[U], 2013 NY Misc Lexis 887 [Sup Ct, Suffolk County 2013]).

Burger King moves for summary judgment dismissing the complaint in the main action against it on the ground that the playground area where the infant plaintiff fell was not dangerous. In support, Burger King submits, *inter alia*, the pleadings, the affidavit of Steven Schneider, Burger King's expert, and the affidavit of Robert Schwartzberg, plaintiffs' expert.

In his affidavit, Burger King's expert, Steven Schneider, a New York licensed professional engineer, opined that the subject playground equipment as it existed on the day of the accident was reasonably safe.

In his affidavit, plaintiffs' expert, Robert Schwartzberg, a New York licensed professional engineer, opined that the subject apparatus was far too advanced for a person of the infant plaintiff's size. He noted that there were no handholds, rails or other devices along the route for children to hold onto, and the spacing of the steps was excessive. He also opined that the posted safety rules limiting use of the apparatus to children four feet and under was totally inappropriate based on the design and configuration of the apparatus, and that it appeared that the apparatus was more suited for children having a height of at least three feet and should be off limits to children under 36 inches tall.

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 Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (see *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (see *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).


While, to prove a *prima facie* case of negligence in a slip/trip and fall case, a plaintiff is required to show that defendant created the condition which caused the accident or that defendant had actual or constructive notice of the condition (see *Williams v SNS Realty of Long Is.*, 70 AD3d 1034, 895 NYS2d 528 [2d Dept 2010]), the defendant, as the movant in this case, is required to make a *prima facie* showing affirmatively establishing the absence of notice as a matter of law (see *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 758 NYS2d 133 [2d Dept 2003]; *Dwoskin v Burger King Corp.*, 249 AD2d 358, 671 NYS2d 494 [2d Dept 1998]). Liability can be predicated only upon failure of the defendant to remedy the danger after actual or constructive notice of the condition (see *Piacquadio v Recine Realty Corp.* 84 NY2d 967, 622 NYS2d 493 [1994]). Furthermore, 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 *Clark v AMF Bowling Ctrs., Inc.*, 83 AD3d 761, 921 NYS2d 273 [2d Dept 2011]; *Moons v Wade Lupe Constr. Co.*, 24 AD3d 1005, 805 NYS2d 204 [3d Dept 2005]; *Fasano v Green-Wood Cemetery*, 21 AD3d 446, 799 NYS2d 827 [2d Dept 2005]).

Here, Burger King has failed to establish its entitlement to judgment as a matter of law. The affidavits of Steven Schneider and Robert Schwartzberg conflict as to the safety of the subject playground apparatus. The conflict between the opinions of both sides' experts is one for a jury to resolve (see *Callistro v Bebbington, M.D.*, 94 AD3d 408, 941 NYS2d 137 [1st Dept 2012]). There are questions of fact as to whether the subject playground apparatus was reasonably safe; whether a dangerous condition existed on the second step of the apparatus so as to create liability on the part of Burger King; whether Burger King exercised reasonable care under the circumstances (see

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McCummings v New York City Tr. Auth., 81 NY2d 923, 597 NYS2d 653 [1993]; *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]); and whether infant plaintiff was comparatively negligent (*see Bruker v Fischbein*, 2 AD3d 254, 769 NYS2d 34 [1st Dept 2003]). Accordingly, Burger King's motion for summary judgment is denied.

Dated: September 18, 2013



Hon. Joseph Farneti
Acting Justice Supreme Court

___ FINAL DISPOSITION X NON-FINAL DISPOSITION