Capuano v Rae Corp.
2013 NY Slip Op 32353(U)
September 23, 2013
Sup Ct, Suffolk County
Docket Number: 08-19859
Judge: Daniel Martin

[* 1]

SHORT FORM ORDER

INDEX No. 08-19859
CAL. No. 12-01119OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 7-2-12 (004)
MOTION DATE 10-26-12 (005 & 006)
MOTION DATE 11-3-12 (007)
ADJ. DATE 4-2-13
Mot. Seq # 005 - MD
006 - XMG
007 - MG

LOUIS CAPUANO, Plaintiff, - against - RAE CORP., THERM-A-TROL, INC. and CHEVALLEY & WALLACE PLUMBING & HEATING, INC., CHEVALLEY, INC., and CHEVALLEY ENTERPRISES, LTD., Defendants.	CHURBUCK CALABRIA JONES, et al. Attorneys for Plaintiff 43A East Barclay Street Hicksville, New York 11801 HUENKE & RODRIGUEZ Attorneys for Defendant Rae Corp. 1 Huntington Quadrangle, Suite 2C18 Melville, New York 11747 BELLO & LARKIN Attorneys for Defendant Therma-A-Trol 150 Motor Parkway, Suite 405 Hauppauge, New York 11788-5108 EPSTEIN FRANKINI & GRAMMATICO Attorneys for Defendants Chevalley 45 Crossways Park, Suite 102 Woodbury, New York 11797

Upon the following papers numbered 1 to 40 read on these motions and this cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; 23 - 32 ; Notice of Cross Motion and supporting papers 13 - 22 ; Answering Affidavits and supporting papers 33 - 36 ; Replying Affidavits and supporting papers 37 - 40 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED the motion (#005) by defendant Therm-A-Trol, Inc., the cross motion (#006) by defendant Chevalley Enterprises, Ltd., and the motion (#007) by defendant Rae Corp. hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant Therm-A-Trol, Inc. seeking summary judgment dismissing the complaint is denied; and it is

ORDERED that the cross motion by defendant Chevalley Enterprises, Ltd. seeking summary judgment dismissing the complaint is granted: and it is further

ORDERED that the motion by defendant Rae Corp. seeking summary judgment dismissing the complaint is granted.

Plaintiff Louis Capuano commenced this action to recover damages for injuries he allegedly sustained as a result of a slip and fall that occurred at the Clare Rose, Inc. truck barn, located at 72 West Avenue in the Town of Brookhaven, on June 25, 2005. It is alleged that plaintiff's accident occurred as he was stepping up into the driver's seat of a Clare Rose truck when, after stepping on a slippery substance on the floor, his right foot slipped on a step leading into the truck's cab, causing him to fall backwards onto the ground. At the time of the accident, plaintiff was employed by Clare Rose, Inc. as a driver/salesman. By his bill of particulars, plaintiff alleges that Chevalley Enterprises, Ltd., s/h/a Chevalley & Wallace Plumbing & Heating, Inc., Chevalley, Inc. (hereinafter collectively referred to as "Chevalley") and Therm-A-Trol, Inc. negligently installed the pipes and "hook-up" to the cooling/refrigeration system in the truck barn at the Clare Rose facility, thereby creating a dangerous condition. Plaintiff also alleges that defendant Rae Corp. negligently manufactured, designed and installed the component parts used in the cooling system.

In early 2000, Clare Rose contracted with Therm-A-Trol to install a new refrigeration system for its delivery trucks that was designed by a company named Multiplex System. As designed, the new system consisted of pipes attached to the ceiling of the Clare Rose truck barn which allowed glycol, the coolant used in the delivery trucks' refrigeration system, to flow into the hoses connected to the delivery trucks overnight to refrigerate the inventory of beverages stored therein. A valve on the end of the hose and a valve on the delivery truck connected the two pieces together and allowed the glycol to be pumped into the delivery truck's refrigeration system. The coolant's flow through the hose was controlled by an electrical system. Prior to disconnecting the hose from the truck, the driver was required to shut the electrical system off. Therm-A-Trol subcontracted the installation of the pipe work that ran through the ceiling and into each truck bay for the refrigeration system to Chevalley. Therm-A-Trol installed the "hook-ups"to half of the trailers, performed the valve and small pipe connections, performed pressure testing, and tested the pipes after they were installed by Chevalley to ensure they were not leaking.

Therm-A-Trol now moves for summary judgment on the basis that it did not create or have actual or constructive notice of the alleged defective condition that resulted in plaintiff's accident and subsequent injury. Therm-A-Trol also contends that plaintiff is unable to establish the cause of his fall and, therefore, summary dismissal is warranted. In support of the motion, Therm-A-Trol submits copies of the pleadings, the parties' deposition transcripts, photographs of the situs of the accident, and a copy of plaintiff's accident report. Chevalley cross-moves for summary judgment on the same basis as Therm-A-Trol. In support of the motion, Chevalley submits copies of the pleadings, its own deposition transcript, and a copy of the contract between Chevalley and Therm-A-Trol for the pipe installation at the Clare Rose facility in Patchogue. Plaintiff does not oppose the motion by Chevalley, but he opposes the motion by Therm-A-Trol, arguing that there are triable issues of fact as to whether Therm-A-Trol had notice of glycol leaks from the connections. In opposition of the motion, plaintiff submits the affidavit of Rae Corp.'s expert, John McManus.

It is axiomatic that on a motion for summary judgment the proponent must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*see* ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]; ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). The court's task on a motion for summary judgment is issue finding rather than issue determination (*see* ***Sillman v Twentieth Century Fox Film Corp.***, *supra*), and it must view the evidence in the light most favorable to the party opposing the motion (*see* ***Boyce v Vazquez***, 249 AD2d 724, 671 NYS2d 815 [3d Dept 1998]). Thus, to obtain summary judgment, the moving party must establish his or her claim or defense by tendering sufficient evidentiary proof, in admissible form, to warrant the court to direct judgment in the movant's favor (*see* ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such showing has been made, the burden shifts to the nonmoving party to demonstrate the existence of material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923). Mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]).

To establish a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and that the breach of that duty was a proximate cause of the plaintiff's injury (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Kievman v Philip***, 84 AD3d 1031, 924 NYS2d 112 [2d Dept 2011]; ***Demshick v Community Hous. Mgt. Corp.***, 34 AD3d 518, 824 NYS2d 166 [2d Dept 2006]). A landowner has a duty to maintain his or her property in a reasonably safe condition in view of the existing circumstances (*see* ***Tagle v Jacob***, 97 NY2d 165, 737 NYS2d 331 [2001]; ***Demshick v Community Hous. Mgt. Corp.***, *supra*). The nature and scope of that duty and the persons to whom it is owed require consideration of the likelihood of injury to another from a dangerous condition on the property, the seriousness of the potential injury, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property (***Galindo v Town of Clarkstown***, 2 NY3d 633, 636, 781 NYS2d 249 [2004] *quoting* ***Kush v City of Buffalo***, 59 NY2d 26, 29-30, 462 NYS2d 831 [1983]; *see* ***Peralta v Henriquez***, 100 NY2d 139, 144, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]).

In addition, to impose liability upon a defendant in a trip and fall action, there must be evidence that the defendant either created the condition or had actual or constructive notice of it (*see* ***Semros v Gruppuso***, 95 AD3d 985, 944 NYS2d 245 [2d Dept 2012]; ***Hayden v Waldbaum, Inc.***, 63 AD3d 679, 880 NYS2d 351 [2d Dept 2009]; ***Denker v Century 21 Dept. Stores, LLC***, 55 AD3d 527, 866 NYS2d 681 [2d Dept 2008]). A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident so that it could have been discovered and remedied (*see* ***Gordon v American Museum of Natural History***, 67 NYS2d 836, 501 NYS2d 646 [1986]). A general awareness of that a dangerous condition might exist on one's premises is legally insufficient to charge a defendant with constructive notice of such condition (*see* ***Gordon v American Museum of Natural History***, *supra*; ***Joseph v New York City Tr. Auth.***, 66 AD3d 842, 888 NYS2d 533 [2d Dept 2009]; ***DeJesus v New York City Hous. Auth.***, 53 AD3d 410, 861 NYS2d 31 [2d Dept 2008]).

Based upon the adduced evidence, Therm-A-Trol failed to establish its prima facie entitlement to judgment as a matter of law that it did not create nor have actual or constructive notice of the defective

condition that allegedly resulted in plaintiff's accident (*see* ***Dones v New York City Hous. Auth.***, 81 AD3d 554, 917 NYS2d 186 [1st Dept 2011]; ***Talavera v New York City Tr. Auth.***, 41 AD3d 135, 836 NYS2d 610 [1st Dept 2007]; ***Dawson v Raimon Realty Corp.***, 303 AD2d 708, 758 NYS2d 100 [2d Dept 2003]). Robert Seitz, testifying on behalf of Therm-A-Trol at an examination before trial, stated that he is the owner and president of the company, and that the company performs heating, air condition, and refrigeration installation and repairs. Seitz testified that Therm-A-Trol's only performs refrigeration services and repairs for Clare Rose. He testified that in early 2002, Therm-A-Trol was contracted by Clare Rose to install the piping for its new refrigeration system at its Patchogue facility and that it subcontracted the installation of the larger piping work to Chevalley. Seitz testified that he saw the plans for the refrigeration system, although the project was supervised by his now-deceased son. He testified that Therm-A-Trol performed the "hook ups" to half of the Clare Rose trailers, and connected the smaller piping to the larger piping that was installed by Chevalley, and that it tested the pipes after the installation to ensure that they were not leaking fluids. Seitz testified that approximately six months after the initial installation of the refrigeration system all of the valves connecting the hoses and the trailers were replaced, because Therm-A-Trol was informed by Clare Rose that glycol was leaking due to improper connections. Seitz also testified that Therm-A-Trol received complaints from Clare Rose drivers about the new refrigeration system, stating that they were having a difficult time placing the valves in the sockets for the connections to the hoses from the trucks. Seitz further testified that the valves had to be replaced again in either late 2004 or early 2005, because the valves were being "ripped" out by the Clare Rose drivers when they drove the trucks away.

In addition, plaintiff testified that, as a driver/salesman, he was required to "unhook" his delivery truck from the refrigeration system, and that the trucks were "hooked up" to the refrigeration system in the evenings after they were loaded with the following morning's deliveries. Plaintiff testified that on the morning of his accident he arrived at the Clare Rose truck barn between 5:00 a.m. and 5:30 a.m., that he disconnected the hose connected to his truck and "bungee corded" it to the support beam, and that as he climbed up the steps of the trailer, his right foot slipped, causing him to fall backwards and strike his right shoulder on the ground. He testified that he slipped and fell on a slippery substance that he believed to be glycol, although he did not see the substance prior to his accident. However, he testified that after he disconnected the hose some of the fluid leaked onto his hands and onto the floor. He also testified that he did not recall if he turned off the electrical system prior to disconnecting the hose from his truck. Plaintiff further testified that prior to his accident he made numerous complaints to his supervisors about glycol leaking onto the floor of the truck barn from the connections attached to the hoses, but never complained directly to Therm-A-Trol.

Thus, the evidence submitted by Therm-A-Trol failed to eliminate all material triable issues fact as to whether it created or had notice of the fact that the hoses and connecting valves of the refrigeration system leaked gylcol and whether it had notice of such condition (*see* ***Persaud v S&K Green Groceries, Inc.***, 72 AD3d 778, 898 NYS2d 255 [2d Dept 2010]; ***O'Hurley-Pitts v Diocese of Rockville Ctr.***, 57 AD3d 633, 869 NYS2d 185 [2d Dept 2008]; ***Robinson v 211-11 Northern, LLC***, 46 AD3d 657, 847 NYS2d 599 [2d Dept 2007]; *see generally* ***Ayotte v Gervasio***, 81 NY2d 1062, 601 NYS2d 463 [1993]). "A defendant who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific recurrence of the condition" (***Brown v Linden Plaza Hous. Co., Inc.***, 36 AD3d 742, 742, 829 NYS2d 571 [2d Dept 2007], *quoting* ***Osorio v Wendell Terrace Owners Corp.***, 276 AD2d 540, 714 NYS2d 116 [2d Dept 2000]). Additionally, Therm-A-Trol's contention that plaintiff failed

to identify the defect that caused his fall is without merit, since plaintiff testified that he believed the slippery substance was glycol and, based upon the record, it can logically be inferred that plaintiff's fall was as a result of the glycol dripping from the connections from the hoses (*see e.g.* ***Mitchell v Mongoose, Inc.***, 19 AD3d 380, 796 NYS2d 421 [2d Dept 2005]; *see also* ***Schneider v Kings Highway Hosp. Ctr.***, 67 NY2d 743, 500 NYS2d 95 [1986]; ***Hartman v Mountain Val. Brew Pub.***, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]). Therm-A-Trol's motion for summary judgment in its favor, therefore, is denied.

However, Chevalley has established a prima facie case that it neither created nor had notice of the defective condition that allegedly caused plaintiff's injury (*see* ***Leary v Leisure Glen Home Owners Assn, Inc.***, 82 AD3d 1169, 920 NYS2d 193 [2d Dept 2011]; ***Rubin v Cryder House***, 39 AD3d 840, 834 NYS2d 316 [2d Dept 2007]; ***Panetta v Phoenix Beverages, Inc.***, 29 AD3d 659, 816 NYS2d 122 [2d Dept 2006]). Rene Chevalley, testifying on behalf of Chevalley at an examination before trial, stated that he is the owner of the company and that his company was involved in the installation of the refrigeration system at Clare Rose's Patchogue facility. He testified that Chevalley installed the feeders and returns from the chiller to each truck bay based upon the drawings and specifications provided to it by Therm-A-Trol. He testified that Chevalley did not install any of the pipes in the truck bays of the building and that it did not install any of the drop lines, i.e., hoses, that were connected to the trailers of the Clare Rose trucks. He further testified that once this particular job was complete, Chevalley was not involved in servicing the refrigeration system, that he was never informed about any leaks in the refrigeration system, and that he has not returned to Clare Rose's facility to perform any additional work since Chevalley installed the pipes for the refrigeration system. In opposition to Chevalley's prima facie showing, plaintiff failed to raise a triable issue of fact demonstrating that Chevalley either created or had actual or constructive notice of the alleged defective condition that resulted in plaintiff's injury (*see* ***Hartley v Waldbaum, Inc.***, 68 AD3d 902, 893 NYS2d 272 [2d Dept 2010]; ***Joseph v New York City Tr. Auth.***, 66 AD3d 842, 888 NYS2d 533 [2d Dept 2009]). Accordingly, Chevalley's motion for summary judgment dismissing the complaint against it is granted.

Rae Corp. moves for summary judgment on the basis that it did not manufacture, design or install the refrigeration system that allegedly caused plaintiff's accident. Rae Corp. also asserts that it merely provided certain component parts that were used in the refrigeration system, which was designed by Multiplex Systems, and that the component parts that it provided were not a part of the apparatus that allegedly caused plaintiff's injury. In support of the motion, Rae Corp. submits copies of the pleadings, the parties' deposition transcripts, and a copy of the affidavit of its expert, John McManus. Plaintiff does not oppose Rae Corp.'s motion for summary judgment and has not submitted any evidence in opposition to the motion.

A product may be defective when it contains a manufacturing flaw, is defectively designed, or is not accompanied by adequate warnings for its use (***Liriano v Hobart Corp.***, 92 NY2d 232, 237, 677 NYS2d [1998]; ***Voss v Black & Decker Mfg. Co.***, 59 NY2d 102, 106-07, 463 NYS2d 398 [1983]). A manufacturer who places a defective product on the market that causes injury may be liable for the ensuing injuries (*see* ***Sprung v MTR Ravensburg, Inc.***, 99 NY2d 468, 758 NYS2d 271 [2003]; ***Billsborrow v Dow Chem.***, 177 AD2d 7, 579 NYS2d 728 [2d Dept 1992]). 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. Co.***, *supra*). 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, 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, 742 NYS2d 325 [2d Dept 2002]; ***Tardella v RJR Nabisco***, 178 AD2d 737, 576 NYS2d 965 [3d Dept 1991]). "Proof of mere injury furnishes no rational basis for inferring that the product was defective for its intended use" (***Beckford v Pantresse, Inc.***, 51 AD3d 958, 959, 858 NYS2d 794 [2d Dept 2008], *quoting* ***Clarke v Helene Curtis, Inc.***, *supra* at 701-02). Where a defendant comes forward with evidence that the accident was not necessarily attributable to a defect, the plaintiff must then produce direct evidence of a defect in order to defeat the motion (*see* ***Guzzi v City of New York***, 84 AD3d 871, 923 NYS2d 170 [2d Dept 2011]; ***Schneidman v Whitaker Co.***, 304 AD2d 642, 758 NYS2d [2d Dept 2003]).

Here, Rae Corp. has established its prima facie entitlement to judgment as a matter of law by demonstrating that there was no causal relationship between the component parts that it supplied to Multiplex Systems that were incorporated into the design of the refrigeration system at the Clare Rose facility in Patchogue and plaintiff's accident (*see* ***Guzzi v City of New York***, *supra*; ***Levy v Kung Sit Huie***, 54 AD3d 731, 863 NYS2d 498 [2d Dept 2008]; ***Rizzo v Sherwin-Williams Co.***, 49 AD3d 847, 854 NYS2d 216 [2d Dept 2008]). Eric Swank, testifying on behalf of Rae Corp., stated that he is the president and chief executive officer of the company, and that the company is in the business of building commercial air-conditioning and refrigeration equipment. Swank testified that Multiplex Systems designed a refrigeration system to cool "Budweiser" trucks. He testified that, in approximately 1999, Multiplex Systems contracted with Rae Corp. to manufacture a processed chiller that operated using glycol and a unit cooler, which would be placed directly into a "Budweiser" truck, for its refrigeration system design. He testified that the process chiller and unit coolers were sold to Multiplex Systems in 2001. He testified that Rae Corp. also sold to Multiplex System a thermostat and an expansion tank for use in its refrigeration system, but those components were not manufactured by Rae Corp. Swank testified that he has never been to Clare Rose's facility, that Rae Corp. did not provide any instructions on how to assemble the refrigeration system and that he has never seen the facility's refrigeration system, although he believes that someone from Rae Corp. has seen the completely installed system. He testified that Rae Corp. did not supply Multiplex Systems with any hoses, hose connections or piping for use in its refrigeration system, and that he has never heard of Therm-A-Trol. Swank further testified that he is unaware of Rae Corp. having received any complaints about the component parts that it supplied to Multiplex System. In opposition to Rae Corp's prima facie showing, plaintiff failed to raise a triable issue of fact as to whether any of the component parts manufactured by Rae Corp. were defective or negligently installed, and were a substantial factor in causing his injury (*see* ***Rabon-Willimack v Robert Mondavi Corp.***, 73 AD3d 1007, 905 NYS2d 1007 [2d Dept 2010]; ***Finazzo v Am. Honda Motor Co.*** 1 AD3d 315, 766 NYS2d 575 [2d Dept 2003]).

Accordingly, the motion by Rae Corp. for summary judgment dismissing the complaint against it is granted. The action is severed and continued only as against Therm-A-Trol.

Dated: SEPTEMBER 23, 2013.

J.S.C.

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION