

Silver v Sportsstuff, Inc.
2013 NY Slip Op 34115(U)
June 12, 2013
Supreme Court, Nassau County
Docket Number: 019086/06
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
Justice

TRIAL/IAS PART 14

MAX SILVER and JESSICA SILVER, X

Plaintiffs,

-against-

Index No.: 019086/06
Motion Sequence...04, 05, 06
Motion Date...04/01/13

SPORTSSTUFF, INC., CARGO GIFTS, INC.,
COAST DISTRIBUTION SYSTEM, INC.
and LAND 'N' SEA MIDWEST, INC.,

Defendants.

COAST DISTRIBUTION SYSTEM, INC., X

Third-Party Plaintiff,

-against-

MICHAEL SAPIR and ARYE SAPIR,

Third-Party Defendants.

CARGO GIFTS, X

Second Third-Party Plaintiff,

-against-

MICHAEL SAPIR and ARYE SAPIR,

Second Third-Party Defendants.

X

LAND 'N' SEA MIDWEST, INC.,

Third Third-Party Plaintiff,

-against-

MICHAEL SAPIR and ARYE SAPIR,

Third Third-Party Defendants.

_____ Papers Submitted:	
Notice of Motion (Mot. Seq. 04).....	X
Affirmation in Opposition (Mot. Seq. 04 & 05).....	X
Reply Affirmation.....	X
Notice of Motion (Mot. Seq. 05).....	X
Reply Affirmation.....	X
Notice of Cross-Motion (Mot. Seq. 06).....	X
Opposition and Reply Affirmation.....	X
Affirmation in Opposition.....	X
Reply Affirmation.....	X

Upon the foregoing papers, the motion (Mot. Seq. 04) by the Defendant, Coast Distribution System, Inc. ("Coast") pursuant to CPLR § 3212 seeking summary judgment dismissing the complaint and all cross claims interposed as against it; the motion (Mot. Seq. 05) by the Defendant, Land 'N' Sea Midwest, Inc., ("Land 'N' Sea") pursuant to CPLR § 3212 seeking summary judgment dismissing the Plaintiffs' negligence, strict products liability and breach of warranty claims, and all cross claims interposed as against it; and the Cross-motion by the Defendant, Cargo Gifts, Inc. ("Cargo") seeking, *inter alia*, a conditional order of indemnity as against Co-Defendants, Land 'N' Sea and Coast with respect to their cross claims, are determined as herein provided.

In June of 2006, the Plaintiff, Max Silver, was injured while using a water product known as the "Wego Kite Tube," manufactured by the Defendant, Sportsstuff, Inc. ("Sportsstuff"), a now-defunct company involved in Chapter 7 bankruptcy proceedings (Cmplt., ¶¶ 24-25). In essence, the Kite Tube is a circular, 10-foot wide, inflatable device on which the user lies while it is towed by a motor boat. As the towing boat reaches a stated speed, the Kite Tube is designed to become airborne, requiring the rider to hold onto the tube as it elevates in a fluttering flight style away from the water surface.

Notably, the Plaintiff purchased the Kite Tube on the internet from the Defendant, Cargo, in May of 2006. Cargo in turn, obtained the Kite Tubes from either of two separate distributors, the Defendant, Coast or the Defendant, Land 'N' Sea.

The Plaintiff alleges that while using the device in Hewlett Harbor, New York, he was thrown violently into the water, causing him to sustain severe and permanent injuries (Cmplt., ¶¶ 27-29; Interrogatory Response, Item 9). In 2006, Sportsstuff, in cooperation with the Consumer Product Safety Commission, voluntarily recalled all (some 19,000) Kite Tube products after 39 injuries were associated with its use (Rubin Aff., Exh., "B").

On November 16, 2006, the Plaintiff commenced the within action as against, Sportsstuff and Cargo by filing a summons and complaint in the Office of the Nassau County Clerk. In December 2006, the Plaintiff filed a Supplemental Summons and Amended Complaint adding the Defendants, Coast and Land 'N' Sea (Grechi Aff., Exh., "A"). The complaint contains causes of action sounding in breach of warranty, negligence and strict

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products liability. According to the Plaintiff, the Kite Tube is unreasonably dangerous and defectively designed because, among other things, the rider lacks the ability to control the height and/or sudden and unpredictable movements caused by air gusts, which result in tipping, nose-diving and the tendency of the flip over during flight (Rubin Aff., Exh., "A").

The Defendants have answered, denied the materials allegations of the complaint and commenced various third-party actions and/or and interposed cross-claims against each other.

Discovery has been conducted, but it has been established that none of the Defendants, including Cargo, maintained or now possesses any records which would identify whether it was Land 'N' Sea or Coast which supplied Cargo with the specific Kite Tube which was later sold to the Plaintiff.

The Defendants, Coast and Land 'N' Sea now move for summary judgment dismissing the complaint and all cross claims interposed as against them.

The Defendant, Cargo, and the Plaintiffs have opposed the motion. Additionally, Cargo has cross-moved seeking an order granting it conditional indemnity as against the Defendants, Land 'N' Sea and Coast.

In support of their applications, the Defendants, Land 'N' Sea and Coast argue in substance that there is no evidence upon which a finder of fact could conclude, absent speculation, which Defendant/distributor actually supplied the offending Kite Tube to Cargo.

“In strict products liability, a manufacturer, wholesaler, distributor, or retailer who sells a product in a defective condition is liable for injury which results from the use of the product ‘regardless of privity, foreseeability or the exercise of due care’” (*Godoy v. Abamaster of Miami*, 302 A.D.2d 57, 60, quoting from, *Gebo v. Black Clawson Co.*, 92 N.Y.2d 387, 392 [1968]). It is well settled that “one of the necessary elements plaintiff in a strict products liability cause of action must establish by competent proof is that it was the defendant who manufactured and placed in the stream of commerce the injury-causing defective product” (*Healey v. Firestone Tire & Rubber Co.*, 87 N.Y.2d 596, 601 [1996]; *Hymowitz v. Lilly & Co.*, *supra*, 73 N.Y.2d 487, 504; *Aetna Casualty & Surety Co.*, 239 A.D.2d 449 see also, *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 243 [2001] cf., *Canavan v. Galuski*, 2 A.D.3d 1039, 1040; *Franov v. Exxon Co., USA*, 178 A.D.2d 327, 328; *Gifaldi v. Dumont Co., Inc.*, 172 A.D.2d 1025, 1026).

Notably, “[p]roduct identification may be established by circumstantial evidence, even where the allegedly defective product is missing or no longer in existence” although that evidence “must establish that it is reasonably probable, not merely possible, that a defendant was the source of the offending product” (*Healey v. Firestone Tire & Rubber Co.*, *supra*, 87 N.Y.2d at 601-602; *D’Amico v. Manufacturers Hanover Trust Co.*, 173 A.D.2d 263 see, *Katz v. PRO Form Fitness*, 3 A.D.3d 474, 475; *Brown v. Elm Plumbing Supply, Ltd.*, 271 A.D.2d 469; *Escarria v. American Gage & Mfg. Co.*, 261 A.D.2d 434).

Nevertheless, on a motion for summary judgment, however, it is the defendant who “has the initial burden of establishing as a matter of law that it did not manufacture or supply the product” in question (*Ebenezer Baptist Church v. Little Giant Mfg. Co., Inc.*, 28 A.D.3d 1173, 1174; *Abulhasan v. Uniroyal-Goodrich Tire Co.*, 14 A.D.3d 900, 901; *Baum v. Eco-Tec, Inc.*, 5 A.D.3d 842, 843-844; *Kivat v. Kershis*, ___ Misc.3d. ___, 2011 WL 6936581 [Supreme Court Suffolk County 2011] *see generally*, *Healey v. Firestone Tire & Rubber Co.*, *supra*, 87 N.Y.2d at 601; *Lamitie v. Emerson Elec. Co. White Rodgers Div.*, 241 A.D.2d 827, 828 *see also*, *Surdo v. Albany Collision Supply, Inc.*, 8 A.D.3d 655).

Upon the evidence submitted, the moving distributor/Defendants have failed to establish their entitlement to summary judgment by eliminating all questions of fact as to their potential liability (*see*, *Lamitie v. Emerson Elec. Co.-White Rodgers Div.*, *supra*, 241 A.D.2d 827 *see also*, *Katz v. PRO Form Fitness*, *supra*, 3 A.D.3d 474, 475; *Raymond v. DiStefano*, 222 A.D.2d 810, 811). More specifically, and, apart from pointing to alleged gaps in the Plaintiff's proof (*Picart v. Brookhaven Country Day School*, 37 A.D.3d 798, 799; *Surdo v. Albany Collision Supply, Inc.*, *supra*, 8 A.D.3d 655, 656), the movants have failed to establish that it was *not* the manufacturer or supplier of the allegedly defective product * * * (*Ebenezer Baptist Church v. Little Giant Mfg. Co., Inc.*, *supra*, 28 A.D.3d 1173, 814; *Lamitie v. Emerson Elec. Co.-White Rodgers Div.*, *supra*, 241 A.D.2d 827, 929 *see also*, *Katz v. PRO Form Fitness*, *supra*, 3 A.D.3d 474, 475; *George Larkin Trucking Co. v. Lisbon Tire*

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Mart, Inc., 185 A.D.2d 614, 615 *cf.*, *D'Amico v. Manufacturers Hanover Trust Co.*, *supra*, 173 A.D.2d 263, 266-267).

Rather, the evidence submitted indicates that one of the two moving distributor/Defendants definitely supplied the Kite Tube to Cargo. More particularly, the evidence shows, *inter alia*, that both distributors placed the allegedly defective product into the stream of commerce, and that one of the two without question, conveyed the offending product to Cargo, which then sold it to the Plaintiff. Although the movants contend, *inter alia*, that the Plaintiffs can never establish, absent speculation, which of them actually sold that the subject Kite Tube to Cargo (*cf.*, *D'Amico v. Manufacturers Hanover Trust Co.*, *supra*, 173 A.D.2d 263), this theory “fails to consider the evidence that the only source of” supply for the offending Kite Tube, was * * * either [Land ‘N’ Sea or Coast] * * *” and that “where there is such uncertainty, the burden is upon each defendant to prove that it has not caused the harm” (*Lamitie v. Emerson Elec. Co.-White Rodgers Div.*, *supra*, 241 A.D.2d 827, 929 *cf.*, *Bichler v. Eli Lilly & Co.*, *supra*, 55 N.Y.2d at 580, fn 5; *Hawkes v. Goll*, 256 A.D. 940, *aff'd*, 281 N.Y. 808 [1939]; *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 [Supreme Court, California 1948]).

Moreover, the Court agrees that the so-called alternative liability doctrine is applicable within the factual context presented (*e.g.*, *Hymowitz v. Lilly & Co.*, 73 N.Y.2d 487, 504 [1989]; *New York Tel. Co. v. AAER Sprayed Insulations*, 250 A.D.2d 49, 52). “Alternative liability, ‘like concerted action liability, is joint and several. It applies ‘[w]here

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the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it' (Restatement, Torts 2d, § 433B, subd. [3], comment [f]). In such a case, "the burden is upon each such actor to prove that he has not caused the harm" (*Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 580, fn 5 [1982]; *Lamitie v. Emerson Elec. Co.-White Rodgers Div.*, *supra*, 241 A.D.2d 827, 929; *Raymond v. DiStefano*, *supra*, 222 A.D.2d 810, 811 *see also*, *Hawkes v. Goll*, 256 A.D. 940, *aff'd*, 281 N.Y. 808 [1939] *cf.*, *Summers v. Tice*, *supra*). "The reason for the exception is the injustice of permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm" (*New York Tel. Co. v. AAER Sprayed Insulations*, *supra*, 250 A.D.2d at 54 [citations and internal quotations omitted] *see*, *Bichler v. Eli Lilly & Co.*, *supra*; *Raymond v. DiStefano*, *supra*, 222 A.D.2d 810, 811).

To succeed on this theory "a plaintiff must demonstrate that all possible tortfeasors are before the court; that all have breached a duty toward the plaintiff; that the conduct of one of the defendants has caused his injuries; and that the defendants, as a group, have better access to information concerning the incident than does the plaintiff" (*New York Tel. Co. v. AAER Sprayed Insulations*, 250 A.D.2d 49, 52 *see also*, *Hymowitz v. Lilly & Co.*, *supra*, 73 N.Y.2d 487, 505; *Bichler v. Eli Lilly & Co.*, *supra*; *Canavan v. Galuski*, 2 A.D.3d 1039, 1040; *Burns v. Haines Equipment, Inc.*, 284 A.D.2d 922, 924)

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Here, the relevant group of tortfeasors is highly discrete and is before the Court; one of the two, upstream distributors indisputably placed the item in the stream of commerce and sold the offending item to Cargo; and that those distributors would arguably possess better access to any relevant information than would the Plaintiff (*Raymond v. DiStefano, supra*, 222 A.D.2d 810, 811 *cf.*, *Baum v. Eco-Tec, Inc., supra*, 5 A.D.3d 842, 843-844; *Godoy v. Abamaster of Miami*, 302 A.D.2d 57, 62).

The cases relied on by the moving Defendants are not determinative. The Court of Appeals' holding in *Healy (supra)*, is distinguishable since there, as many as six potential manufacturers made the offending tire rim and, as detailed by the Court, there was also independent and additional evidence adduced suggesting that Firestone (the main defendant in the action), did not, in fact, manufacture the offending product (87 N.Y.2d at 601, 602-603). Nor does the holding in *D'Amico v. Manufacturers Hanover Trust Co., supra*, (173 A.D.2d 263), also relied on by the Defendants, require dismissal.

In *D'Amico v. Manufacturers Hanover Trust Co., supra*, in which the First Department detailed the specific claims raised by the parties does not indicate that the alterative liability doctrine was actually raised or argued on the appeal. In any event, the Court disagrees that the alternative liability doctrine is inapplicable merely because two defendants, one of whom definitely supplied the offending product, both similarly claim that they cannot produce evidence relating to the products they themselves distributed, *i.e.*, the

argument that upon these facts, both defendants must therefore be free from all and any liability to an injured plaintiff.

Rather, in such a case, and in conformity with the underlying purpose of the doctrine, both defendants would be potentially liable to the plaintiff as joint and several tortfeasors (*Hymowitz v. Lilly & Co.*, *supra*, 73 N.Y.2d at 505-506; *Bichler v. Eli Lilly & Co.*, *supra*). As relevantly observed by the Court of Appeals in *Hymowitz v. Lilly & Co.*, *supra*, the alternative liability exception applies, *inter alia*, “where the precise identification of a wrongdoer *is impossible*” (73 N.Y.2d at 505-506) [emphasis added]. More specifically, it addresses and mitigates the “injustice of permitting wrongdoers to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or *impossible to prove* which of them has caused the harm” (*New York Tel. Co. v. AAER Sprayed Insulations*, *supra*, 250 A.D.2d at 54 [emphasis added] [internal citations and quotations omitted] *see also*, *Bichler v. Eli Lilly & Co.*, *supra*, 55 N.Y.2d 571, 580, fn 5).

Lastly, the motion by the Defendant, Cargo, seeking an order of conditional indemnity, should be granted as to the strict products and breach of warranty/failure to warn causes of action.

Contrary to the Defendants, Coast and Land ‘N’ Sea’s opposition, Cargo’s indemnity application is not premature merely because it has been made pre-trial or pre-judgment. Moreover, while the Second Department’s indemnity holding in *Godoy v. Abamaster of Miami*, *supra*, (302 A.D.2d 57, 62), was rendered after trial, *Godoy* does not

hold that conditional indemnity can only be awarded after a trial (*Lowe v. Dollar Tree Stores, Inc.*, 40 A.D.3d 264, 265; *Schwalm v. County of Monroe*, 158 A.D.2d 994, 994).

Rather, conditional indemnity has been often granted by the Courts “notwithstanding the fact that a judgment has yet to be rendered * * * in the main action, since it serves the interest of justice and judicial economy in affording the indemnitee ‘the earliest possible determination as to the extent to which he may expect to be reimbursed’” (*Lowe v. Dollar Tree Stores, Inc.*, *supra*, 40 A.D.3d 264, 265, quoting from, *McCabe v. Queensboro Farm Prods.*, 22 N.Y.2d 204, 208 [1968] see also, *Martins v. Little 40 Worth Assoc., Inc.*, 72 A.D.3d 483; *Roddy v. Nederlander Producing Co. of Am., Inc.*, 44 A.D.3d 556, 557; *Brunjes v. Lasar Mfg. Co., Inc.*, 40 A.D.3d 567, 568; *German v. Morales*, 24 A.D.3d 246, 247). In any event, the Court’s order here is conditional at this point, *i.e.*, it is dependent upon whether the Plaintiffs can later prevail on the relevant claims as against Cargo (*cf.*, *Jian-Guo Yu v. Greenway Mews Realty LLC*, 99 A.D.3d 619, 620).

The Court has considered the remaining contentions by the Defendants, Land ‘N’ Sea and Coast and concludes, *inter alia*, that they do not support the granting of summary judgment on their respective motions or the denial of the Defendant, Cargo’s cross-motion for contractual indemnification.

Accordingly, it is hereby

ORDERED, that the motions (Mot. Seq. 04 & Mot. Seq. 05) by the Defendants, Coast and Land ‘N’ Sea, seeking, *inter alia*, summary judgment dismissing the

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Plaintiffs' negligence, strict products liability and breach of warranty claims, and all cross-claims interposed as against them, are **DENIED** and it is further,

ORDERED that the cross-motion (Mot. Seq. 06) by the Defendant, Cargo, seeking, *inter alia*, a conditional order of indemnity, is **GRANTED**.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
June 12, 2013



Hon. Randy Sue Marber, J.S.C.

ENTERED

JUN 14 2013

NASSAU COUNTY
COUNTY CLERK'S OFFICE