

Wong v Electrolux N. Am., Inc.

2014 NY Slip Op 33152(U)

August 14, 2014

Supreme Court, Queens County

Docket Number: 26903/11

Judge: Darrell L. Gavrin

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

 JENNY WONG,

Index No. 26903/11

Plaintiff,

Motion

Date February 28, 2014

- against-

 ELECTROLUX NORTH AMERICA, INC., and
P.C. RICHARD & SON,

Motion

Cal. No. 164

Defendants.

Motion

Seq. No. 3

The following papers numbered 1 to 9 read on this motion by defendants for summary judgment dismissing the complaint.

	Papers <u>Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	1-4
Affirmation in Opposition - Exhibits.....	5-7
Reply Affirmation.....	8-9

Upon the foregoing papers, it is ordered that the motion is determined as follows:

On December 15, 2010, plaintiff was allegedly injured when her shirt sleeve caught fire while cleaning the gas range in her apartment. Plaintiff purchased the gas range, a Frigidaire model FGF36EQD, from defendant, P.C. Richard & Son (P.C. Richard). Defendant, Electrolux North America, Inc. (Electrolux), manufactured and distributed the subject Frigidaire gas range on March 25, 2007. On November 30, 2011, plaintiff commenced the within action against defendants alleging causes of action for negligence, breach of express warranty and implied warranties of merchantability and fitness, and strict products liability based on design defect, manufacturing defect, and failure to warn. In the bill of particulars, plaintiff claimed, among other things, that the subject gas range was defective because it leaked gas.

Initially, the Court notes that plaintiff's argument that defendants' instant summary judgment motion is untimely is without merit. The note of issue in this case was vacated by an Order of this Court, dated June 4, 2014, rendering such argument moot.

Further, plaintiff asserts that defendants' expert report of Randall E. Bills should not be considered because defendants did not identify him as an expert witness, pursuant to CPLR 3101 (d) (1) (i), prior to making their instant motion. However, there is no proof presented that defendants intentionally or willfully failed to disclose the identity of their expert witness and prejudice to plaintiff has not been shown (*see Howard v Kennedy*, 60 AD3d 905 [2d Dept 2009]; *Simpson v Tenore & Guglielmo*, 287 AD2d 613 [2d Dept 2001]; *Blade v Town of N. Hempstead*, 277 AD2d 268 [2d Dept 2000]). Moreover, as previously mentioned, the note of issue in this matter has been vacated. Under these circumstances, the Court will consider the expert affidavit.

Plaintiff's additional contention, that defendants' summary judgment motion is premature because discovery is incomplete, is also rejected. Plaintiff has failed to show that facts essential to justify opposition to the motion may exist upon further discovery. A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence (*see Woodard v Thomas*, 77 AD3d 738 [2d Dept 2010]; *Shectman v Wilson*, 68 AD3d 848 [2d Dept 2009]; *Trombetta v Cathone*, 59 AD3d 526 [2d Dept 2009]; *Gasis v City of New York*, 35 AD3d 533 [2d Dept 2006]; *Ruttura & Sons Constr. Co. v J. Petrocelli Constr.*, 257 AD2d 614 [2d Dept 1999]). The mere hope or speculation that such evidence may be discovered is an insufficient basis for denying a motion for summary judgment (*id.*).

Turning to the merits, that branch of defendants' motion for summary judgment dismissing the cause of action alleging breach of express warranty and implied warranties of merchantability and fitness for a particular purpose is granted. With respect to the breach of express warranty cause of action, plaintiff failed to set forth the specific terms of the warranty upon which plaintiff's claim allegedly relies (*see Cecere v Zep Mfg. Co.*, 116 AD3d 901 [2d Dept 2014]; *Parker v Raymond Corp.*, 87 AD3d 1115 [2d Dept 2011]). Defendants also made a *prima facie* showing of entitlement to judgment as a matter of law as to the breach of implied warranties of merchantability and fitness claim by demonstrating that the subject gas range was fit for the ordinary purposes for which it was intended (*see generally Denny v Ford Motor Co.*, 87 NY2d 248 [1995]). In his expert affidavit, Mr. Bills, an engineer, stated that he inspected the subject gas range and that the range "did not have any manufacturing or design defects, malfunctions or abnormalities as of the date of the incident." Mr. Bills further opined that the accident could not have happened in the manner plaintiff described and that the accident "was not caused by any manufacturing defects or design defects attributable to the gas range." Plaintiff's opposition papers are silent on the cause of action for breach of express warranty and implied warranties of merchantability and fitness and, therefore, those claims are dismissed.

Defendants also move for summary judgment dismissing the cause of action for strict products liability based on design defect, manufacturing defect, and failure to warn, asserted against them. A product may be defective when it contains a manufacturing flaw, is defectively designed, or is not accompanied by adequate warnings for its use (*see Liriano v Hobart Corp.*,

92 NY2d 232 [1998]; *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102 [1983]). To establish a *prima facie* case in a strict products liability action predicated on a design defect, a plaintiff must show that the manufacturer marketed a product which was not reasonably safe in its design, that it was feasible to design the product in a safer manner, and that the defective design was a substantial factor in causing the plaintiff's injury (*see Magadan v Interlake Packaging Corp.*, 45 AD3d 650, 652 [2d Dept 2007]). In strict products liability cases involving manufacturing defects, however, the harm arises from the product's failure to perform in the intended manner due to some flaw in the fabrication process, regardless of whether the intended design of the manufacturer was safe (*see Pierre-Louis v DeLonghi Am., Inc.*, 66 AD3d 859 [2d Dept 2009]). Such defects result from some mishap in the manufacturing process itself, improper workmanship, or because defective materials were used in construction (*see Caprara v Chrysler Corp.*, 52 NY2d 114 [1981]). On a motion for summary judgment, 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 [2d Dept 2011]).

Defendants herein met their initial burden of demonstrating their entitlement to judgment as a matter of law as to the design defect and manufacturing defect claims by demonstrating that the gas range in question, as designed and manufactured, was reasonably safe and was not defective when it left the manufacturing facility. In support of their motion, defendants submitted the affidavit of Randall Fuller, a product safety manager employed by Electrolux, who averred that the subject gas range was designed and manufactured in accordance with American National Standards Institute guidelines for the design and manufacture of residential gas ranges, and that all gas ranges designed and manufactured by Electrolux, including the particular model of plaintiff's gas range, meet or exceed those guidelines. Mr. Fuller further stated that every gas range undergoes a test and inspection for safety and compliance before leaving the possession of the manufacturer, and that there have been no recalls or prior similar complaints of leaking gas for the model gas range in issue, or any similar models manufactured and distributed by Electrolux, at the time that the subject gas range was sold. Moreover, as previously discussed, Mr. Bills inspected the subject gas range and opined that there were no malfunctions, defects, or abnormalities in the range which could have caused plaintiff's accident.

In opposition, the affidavit of plaintiff's expert, Robert Malanga, an engineer specializing in fire and explosion investigations, was insufficient to raise a triable issue of fact as to whether the subject gas range was defectively designed and/or manufactured. Following two inspections of the gas range in question, Mr. Malanga merely set forth in his affidavit two "potentially defective conditions" in the range that could result in a "minor flareup." Plaintiff's expert rendered no opinion as to whether those defective conditions were caused by a flaw in the design or manufacture of the subject gas range which caused plaintiff's accident (*see e.g. Guzzi*, 84 AD3d at 873; *Finazzo v American Honda Motor Co.*, 1 AD3d 315 [2d Dept 2003]). Mr. Malanga also failed to proffer an opinion as to a safer, feasible alternative design of the gas

range, which would have prevented plaintiff's injuries (*see e.g. Masiello v Efficiency Devices*, 6 AD3d 672 [2d Dept 2004]).

As to plaintiff's strict products liability cause of action based on failure to warn, defendants made a *prima facie* entitlement to judgment as a matter of law. In opposition, plaintiff failed to raise a triable issue of fact. To establish a claim based on failure to warn, plaintiff must prove that defendant had a duty to warn plaintiff, that there was a breach of that duty, and that such failure was a substantial factor or proximate cause of plaintiff's injury (*see Howard v Poseidon Pools*, 72 NY2d 972 [1988]). Defendants discharged their duty to warn plaintiff by providing customers with a Use and Care Manual, which contained detailed safety instructions and warnings regarding the risks associated with operating the subject gas range, including what to do if the customer smells gas leaking from the range. Mr. Fuller stated in his expert affidavit that every gas range sold by Electrolux is packaged with the Use and Care Manual. Significantly, plaintiff testified at her deposition that she did not read the manual delivered with the gas range (*see Mussara v Mega Funworks, Inc.*, 100 AD3d 185, 191 [2d Dept 2012]; *Boyle v City of New York*, 79 AD3d 664, 665 [1st Dept 2010]). In addition, plaintiff did not come forward with any evidence showing that the instructions and warnings contained in the Use and Care Manual were inadequate (*see Banks v Makita, U.S.A.*, 226 AD2d 659 [2d Dept 1996]; *Sugrim v Ryobi Tech., Inc.*, 2009 NY Slip Op 30634[U] [Sup Ct, Queens County 2009], *affd* 73 AD3d 904 [2010]).

That branch of defendants' motion for summary judgment dismissing the negligence cause of action asserted against them is granted. Specifically, the complaint alleges that defendants were negligent in the design, manufacture, and sale of the subject gas range in a defective condition, namely, that it leaked gas. Manufacturers and sellers in the normal course of business are liable for injuries caused by ordinary negligence and are, therefore, under a duty to exercise reasonable care so as to avoid the occurrence of injuries by any product which can reasonably be expected to be dangerous if negligently manufactured or designed (*see Gebo v Black Clawson Co.*, 92 NY2d 387, 394 [1998]). Proof that will establish strict liability will, in most instances, establish negligence (*see Lancaster Silo & Block Co. v Northern Propane Gas Co.*, 75 AD2d 55, 62 [4th Dept 1980]). To establish a *prima facie* case in negligence or strict products liability, plaintiff must show that defendant's negligence or defective product was a substantial factor in causing his or her injury (*see Adams v Genie Indus., Inc.*, 14 NY3d 535 [2010]). In view of the foregoing discussion regarding the cause of action for strict products liability based on design and manufacturing defect, the Court similarly finds that defendants made a *prima facie* showing of entitlement to judgment as a matter of law dismissing the claim for negligent design, manufacture, and sale of the subject gas range (*see Preston v Peter Luger Enters., Inc.*, 51 AD3d 1322, 1325-1326 [3d Dept 2008]). In opposition, plaintiff failed to submit evidence sufficient to raise a triable issue of fact. Plaintiff's new theory of negligence - that P.C. Richard negligently maintained the subject gas range because it had actual knowledge of a gas leak prior to plaintiff's accident - will not be considered by the Court as it was not pleaded or alleged in the complaint or bill of particulars, and was raised for the first time in

opposition to defendants' summary judgment motion (*see Horn v Hires*, 84 AD3d 1025 [2d Dept 2011]; *Mainline Elec. Corp. v Pav-Lak Indus., Inc.*, 40 AD3d 939 [2d Dept 2007]; *Golubov v Wolfson*, 22 AD3d 635 [2d Dept 2005]).

Accordingly, defendants' motion for summary judgment dismissing the complaint is granted.

Dated: August 14, 2014

DARRELL L. GAVRIN, J.S.C.