Spencer v Lansing Cent. Sch.Dist.
2014 NY Slip Op 33834(U)
October 21, 2014
Supreme Court, Tompkins County
Docket Number: 2009-0066
Judge: Phillip R. Rumsey
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At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District at the Tompkins County Courthouse, in the City of Ithaca, New York on the 18th day of July, 2014.

PRESENT: HON. PHILLIP R. RUMSEY
JUSTICE PRESIDING.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF TOMPKINS

JAMIE SPENCER, Individually and as Father and Natural Guradian of **CALEB R. SPENCER**, an Infant Under the Age of Fourteen Years,

Plaintiff,

vs.

LANSING CENTRAL SCHOOL DISTRICT, LANDSCAPE STRUCTURES, INC., and PARKITECTS, INC.,

Defendants.

DECISION AND ORDER
Index No. 2009-0066
RJI No. 2010-0257-M

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PHILLIP R. RUMSEY, J. S. C.

This action arises from an injury that infant plaintiff, Caleb Spencer (herein plaintiff), sustained on October 21, 2007, while playing on a flexible climbing apparatus, known as a "Lattice Ladder," that had been erected on the playground at the Lansing Elementary School in 2000. The Lattice Ladder is comprised of 84 separate CableCore cables, each consisting of strands of wire woven into a wire rope, or cable, approximately 11.25 inches long that is encased in a flexible covering of either PVC or polyurethane (depending upon the date of manufacture). Prior to plaintiff's injury, numerous CableCore cables on the Lattice Ladder had broken, resulting in exposed wires. LCSD staff had a practice of replacing broken CableCores cables as they were discovered in the course of regular inspections. The injury was caused by a piece of rusty thin metal wire that became embedded in plaintiff's left eye, which allegedly came from a CableCore cable that had broken prior to plaintiff's use of the Lattice Ladder.[1]

This action was originally commenced against Lansing Central School District (LCSD), as owner of the premises where the injury occurred, on January 22, 2009. In a decision and order by Justice Mulvey dated August 26, 2010, this court denied LCSD's motion for summary judgment.[2] By amended complaint filed on September 30, 2010, plaintiff asserted causes of action against Landscape Structures, Inc. (LSI), which manufactured the Lattice Ladder, and Parkitects, Inc. (Parkitects), an authorized dealer for LSI that sold the Lattice Ladder to LCSD. In answering the amended complaint, LCSD asserted cross claims against LSI and Parkitects for indemnification and/or contribution, and LSI and Parkitects each asserted a cross claim against

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[1] The treating physician removed rusty metal material from plaintiff's left eye.

[2] This action was subsequently reassigned to the undersigned.

LCSD for indemnification and/or contribution. LSI and Parkitects each now move for summary judgment dismissing the complaint and LCSD's cross claims.

The amended complaint asserts causes of action against LSI for negligence, strict products liability, and breach of warranty. It also asserts a cause of action against Parkitects for breach of warranty. Although the amended complaint alleges that LSI was negligent for a number of reasons, plaintiff limits his argument on this motion to claims that the CableCore cables were defectively designed, and that LSI breached its duty to warn LCSD that the CableCores were not reasonably safe for their intended use (see Memorandum of Law of Plaintiff dated July 8, 2014, pp. 4 – 8).[3] In that regard, plaintiff notes that the Lattice Ladder on which he was injured was acquired by LCSD in 2000 and contained CableCores as they were originally designed and marketed, beginning in 1999. LSI received numerous complaints from customers, beginning in early 2000, that the CableCores were breaking, exposing the inner cables and, in some cases, causing injuries; LSI records show that it received a total of 33 such complaints during the period from February 2000 through the end of 2001. LSI redesigned the CableCores in late 2000 to eliminate metal sleeves that had been located at the end of each cable in the original design. Plaintiff argues that the number of product failures within a year or two of release of the original design was significant, and with the subsequent redesign show that the CableCores were defective when manufactured and sold.

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[3] The Court of Appeals has instructed that a strict liability defective design cause of action is functionally synonymous with a negligent design cause of action, and that both are governed by the same standards announced in Voss v Black & Decker Mfg. Co., 59 NY2d 102 [1983]), its leading case on what is required to prove a design defect (see Adams v Genie Indus., Inc., 14 NY3d 535, 542 – 543 [2010]; Reis v Volvo Cars of N. Am., 24 NY3d 35 [2014], citing Adams). Thus, both plaintiff's negligence and strict liability causes of action are limited to claims of defective design and failure to warn.

Upon a motion for summary judgment dismissing a defective design claim, a defendant has the burden of establishing prima facie entitlement to judgment as a matter of law by showing that the product was "not defective at the time it was manufactured and sold" (Hoover v New Holland North America, Inc., 23 NY3d 41, 56 [2014] [quotation and citation omitted]; accord Yun Tung Chow v Reckitt & Coleman, Inc., 17 NY3d 29, 33 – 34 [2011]; Hall v Husky Farm Equip., Ltd., 92 AD3d 1188 [2012]; Stalker v Goodyear Tire & Rubber Co., 60 AD3d 1173 [2009]; Preston v Peter Luger Enters., Inc. 51 AD3d 1322 [2008]; Garrison v Clark Mun. Equip., 241 AD2d 872 [1997]; Merritt v Raven Co., 271 AD2d 859 [2000]). LSI failed to meet that burden. Notably, its proof does not contain a single allegation that the original CableCores were not defective – i.e., that they were reasonably safe – when they were manufactured and sold in 2000. LSI submits an affidavit from Teresa B. Hendy, a playground design and safety consultant, in which she opines that: (1) comprehensive maintenance programs are required to ensure playground safety (see Affidavit of Teresa B. Handy, sworn to May 15, 2014, ¶¶ 9, 11); (2) the fact that the original "CableCores broke, even with some degree of frequency, does not mean that LSI did not conform to the ASTM or CPSC standards and guidelines," or otherwise indicate a design or manufacturing defect (id., ¶ 9); (3) redesign of products is a good manufacturing practice (id., ¶ 10); and (4) the fact that LSI chose to replace or upgrade worn components does not mean that the original product was unsafe or defective (id., ¶ 10). Significantly, Hendy does not provide any information demonstrating or opining that the original CableCores were reasonably safe when they were designed and manufactured; rather, she only attempted, in conclusory fashion, to rebut plaintiff's argument that the facts that the CableCores often broke and were redesigned as a result establishes that the original design was defective (see Boyle v

City of New York, 79 AD3d 664 [2010]).[4] Thus, her affidavit is insufficient to meet LSI's burden of establishing prima facie entitlement to summary judgment dismissing the defective design claims, thereby requiring denial of LSI's motion to the extent that it seeks summary judgment dismissing plaintiff's defective design claim, whether plead in negligence or strict products liability (id., see also Yun Tung Chow, 17 NY3d at 34; Armijo v George A. Mitchell Co., 53 AD3d 516 [2008]; Restrepo v Rockland Corp., 38 AD3d 742 [2007]; Potaczala v Fitzsimmons, 171 AD2d 1015 [1991]).[5]

It bears noting that LSI's argument that plaintiff's evidence fails to meet his ultimate burden of establishing a prima facie cause of action for defective design does not require a different result.[6] At trial, plaintiff will bear the burden of presenting evidence that the

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[4] The court also reviewed the transcript of the examination before trial of Randy Westmiller, LSI's Director of Product Development, and found that he likewise provided no opinion regarding whether the CableCores were reasonably safe when manufactured and sold.

[5] LSI argues that plaintiff cannot prove that the original design of the CableCores was a substantial factor in causing his injury in light of the fact that it had provided LCSD with a complete replacement set of 84 CableCores more than three years prior to his injury. As more completely explained below, there are issues of fact regarding whether LSI or its agent, Parkitects, ever advised LCSD that it should use the replacement set to replace all of the CableCores on the Lattice Ladder rather than continuing its practice of replacing them only as they broke. Further, there is an issue of fact regarding whether it was reasonable for LCSD to continue its past practice of replacing cables only as they broke in the absence of a specific contrary directive. Thus, summary judgment may not be granted to LSI on the basis of its argument that any design defect could not have been a substantial cause of plaintiff's injury because it had previously provided a complete set of cables as replacements for the originals.

[6] Plaintiff did not submit an expert opinion to the effect that the original CableCores were defectively designed (see the unsworn Architect's Report by Thomas Pienciak, A.I.A., dated June 1, 2010 [does not opine on the issue of whether initial design was defective; notes that CableCores were dangerous when broken (p. 5)] [a copy is attached as Exhibit B to the Affidavit of Dirk A. Galbraith, sworn to July 6, 2010, which is itself Exhibit A to the Affidavit of Dirk A. Galbraith, sworn to July 8, 2014]). Rather, he has relied on his argument that the original CableCores design was defective because the product had a high rate of failure within the

CableCores, "as designed, were not reasonably safe because there was a substantial likelihood of harm and it was feasible to design the product in a safer manner" (Yun Tung Chow, 17 NY3d at 35; see also Cervone v Tuzzolo, 291 AD2d 426 [2002]; Ramirez v Sears, Roebuck & Co., 286 AD2d 428 [2001]). In Yun Tung Chow, the Court of Appeals denied defendant's motion for summary judgment in a defective design case solely because defendant failed to show its prima facie entitlement to summary judgment. Judge Smith authored a concurring opinion to emphasize that the decision did not result from the merits of plaintiff's case, but from a feature of New York procedural law. He noted that if a record identical to the one made on the motion were developed at trial, plaintiff would fail to meet his burden of proof and the trial court would be required to direct a verdict for defendants. However, in the context of a summary judgment motion, the proponent bears the burden of making a prima facie showing of entitlement to summary judgment and the failure to make the required showing requires that the motion be denied, regardless of the sufficiency of the opposing papers (see Yun Tung Chow, 17 NY3d at 35 – 36, quoting Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). Judge Smith's observation that a proponent's failure to meet the burden is fatal – even though it may not have been difficult to have made the necessary evidentiary showing – and his warning that parties seeking summary judgment be alert to the burden that New York law places on a moving party are apt in this case.

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warranty period and was, as a result, redesigned by LSI. However, it has not yet been established that plaintiff may rely on customer complaints of breakage and subsequent redesign as evidence that the CableCores were defectively designed (see Fitzpatrick v Currie, 52 AD3d 1089, 1092 [2008] [customer complaints]; Perazone v Sears Roebuck & Co., 128 AD2d 15, 17 – 19 [1987] [explaining the general rule that evidence of post-manufacture design change is inadmissible on the issue of defective design]; see also Demirovski v Skil Corp., 203 AD2d 319 [1994], citing Perazone; cf. Bartlett v General Elec. Co., 90 AD2d 183, 185 – 186 [1982], appeal dismissed 60 NY2d 587 [1983] [evidence of redesign was permitted in light of defendant's awareness of alternatives at the time of original design and manufacture]).

Sellers have a post-sale duty to warn of any significant risks associated with use of product that were not known at the time of sale (see Adams, 14 NY3dat 544 – 545, citing Liriano v Hobart Corp., 92 NY2d 232, 240 [1998], Cover v Cohen, 61 NY2d 261, 274 – 275 [1976]; Young v Robertshaw Controls Co., Uni-Line Div., 104 AD2d 84, 87 [1984], appeal dismissed 64 NY2d 885 [1985]). LSI asserts that it fulfilled its duty to warn of the potential for injury caused by broken CableCores, to the extent that it had such duty, by providing LCSD – in May 2004, more than three years prior to plaintiff's injury – with a complete set of 84 redesigned CableCore cables which it intended be used to replace all of the CableCores in the Lattice Ladder. However, there are issues of fact about whether LSI, or its agent, Parkitects, communicated to LCSD that the original CableCores were subject to breakage and should be completely replaced with the redesigned CableCore cables that it provided. There is no allegation that LSI ever communicated directly with LCSD. Although LSI alleges that it instructed Parkitects to relay that information to LCSD (see Affirmation of Barbara A. Sheehan, Esq. dated May 21, 2014 [Sheehan Affirmation], Exhibit G [Transcript of Examination Before Trial of Randy Watermiller], pp. 128 – 132), Parkitects's customer service representative could not recall whether she told LCSD's custodian to replace all of the CableCores on the Lattice Ladder upon receipt of the new set (see Sheehan Affirmation, Exhibit L [Transcript of Examination Before Trial of Karen Armstrong], pp. 36 – 38, 44 – 47). LCSD's representative testified that he did not recall being informed that he use the set of 84 replacement cables that he received in May 2004 to immediately replace all of the CableCores, rather than continuing his practice of replacing them as they broke (see Sheehan Affirmation, Exhibit O [Transcript of Examination Before Trial of George Feiner on March 8, 2013], pp. 72 – 74, 81 – 82, 89 – 90). Thus, there are

issues of fact regarding whether LSI discharged any duty to warn that it may have had. There is likewise an issue of fact regarding whether it was reasonable, in the absence of a specific contrary directive, for LCSD to continue its past practice of replacing cables only as they broke. Such issues of fact require denial of LSI's motion seeking summary judgment dismissing plaintiff's claim that if failed to provide a proper post-sale warning.

Plaintiff asserts breach of warranty claims against LSI and Parkitects, which they contend are time-barred. The statute of limitations for breach of warranty claims is four years from the date that the product was delivered (see UCC § 2-725; Heller v U.S. Suzuki Motor Corp., 64 NY2d 407 [1985]). The Lattice Ladder was delivered in April 2000, and plaintiff was injured more than seven years later, in October 2007, well beyond expiration of the statute of limitations. Plaintiff's argument that the statute of limitations was tolled, pursuant to CPLR 208, as a consequence of plaintiff's infancy, is unavailing under the facts present in this case, namely, that plaintiff's cause of action had yet to accrue when the four-year statute of limitations expired (see Ridley v Hirsch Corp., 57 AD2d 234 [1977]; see also Donacik v Pool Mart, 270 AD2d 921 [2000], citing Ridley). Thus, LSI and Parkitects are entitled to summary judgment dismissing plaintiff's breach of warranty claims. However, as noted by LCSD without contradiction, dismissal of the only claim against Parkitects on statute of limitations grounds does not require dismissal of its cross-claim against Parkitects for indemnification or contribution, since that cross-claim does not accrue until payment is made on the underlying claim (see Fisher v Preston, 251 AD2d 843 [1998]).

Based on the foregoing: (1) LSI's motion is granted to the extent of dismissing plaintiff's breach of warranty claims against it, with prejudice, and is otherwise denied; and (2) Parkitects

motion is granted to the extent of dismissing the complaint against it, with prejudice, and is otherwise denied.

This decision constitutes the order of the court. The transmittal of copies of this decision and order by the court shall not constitute notice of entry.

Dated: October 21, 2014
Cortland, New York

Phillip R. Rumsey
Digitally signed by Phillip R. Rumsey
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HON. PHILLIP R. RUMSEY
Supreme Court Justice

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