

**Corsino v United Rest. Serv. LLC**

2015 NY Slip Op 30211(U)

January 5, 2015

Supreme Court, Bronx County

Docket Number: 310372/10

Judge: Howard H. Sherman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX

-----x  
Eduardo Corsino ,

Decision and Order

Index No. 310372/10

*Plaintiff,*

-against-

**United Restaurant Services LLC, The Webb Corporation ; Lloyd H. Knost, Individually , and as Reed Engineering Company ; Ted Reed Individually, and as Reed Engineering Company,**  
*Defendants*

-----x  
United Restaurant Services, LLC,

T.P.

Index No. 83705/12

*Third-Party Plaintiff*

-against-

**Master Fire Prevention Services, Inc.,**  
*Third-Party Defendant*

-----x  
Facts and Procedural Background

Plaintiff Eduardo Corsino ("Corsino" ) seeks damages for injuries allegedly sustained on July 28, 2009, when in the course of his employment for third-party defendant Master Fire Prevention Systems, Inc. ("MFP"), his left hand was pulled into the rollers of a triple roller bending machine owned by defendant United Restaurant Services, LLC . ("U.R.S.").

That machine, which was used to fabricate metal objects, has been identified by its affixed identification plate as having been designed and built by "Reed Engineering Co., Carthage, Missouri." The identification plate also records a model and a serial number, and the estimate by The Webb Corporation's principal that the machine was designed and manufactured by Reed circa 1949-1951 is not here disputed.

It is undisputed that in 1954, Reed Engineering ("Reed"), by defendant Lloyd H. Knost,<sup>1</sup> entered into an exclusive license contract with The Webb Corporation ("Webb")<sup>2</sup> whereby the latter secured the right to manufacture and to sell certain identified Reed-manufactured products, including bending roll machines.<sup>3</sup> Webb was to discontinue its present designs for these machines in favor of Reed's. To distinguish between manufacturers, the agreement required Webb-manufactured machines to include on the name plate language stating either "Reed Engineering Division of Webb", or "A Product of Reed Engineering, Built by the Webb Corporation." The agreement specified that Reed was required to "assume any and all product liability resulting from machines manufactured prior to the date of this agreement in excess of \$100.00" and to convey to Webb all qualifying "good and marketable inventory" on its premises or on order.

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<sup>1</sup> Initially, Reed was formed as a partnership between Ted Reed and Knost, and in 1950, Knost purchased Reed's share and continued Reed as a sole proprietorship.

<sup>3</sup> Exhibit F to Webb's motion.

Five years later, the parties entered into a Contract of Sale whereby Webb purchased certain of Reed's product lines, including roll bending machines , or as denominated and described therein slip roll forming machines " including those commonly known as plate bending rolls, or slip roll formers having in their construction multiple rolls for the primary purpose of curving flat sheets or material in to a circular or curved form." Knost was to continue the manufacture of specifically exempted products under the "Reed" or "Reed Engineering Company" trade name.

U.R.S.<sup>4</sup> shared Bronx County manufacturing space with M.F.P. as co-tenants, both small businesses being engaged there in fabricating exhaust systems for later installation in restaurants. M.F.P. would subcontract work to U.R.S. [LABOY EBT: 29]. Before he started U.R.S. , Luis Laboy ("Laboy") was employed by M.F.P, and during that period he worked with a person whom he knew as "Ming." Ming owned several of the machines used by M.F.P. , including the subject triple roller bending machine. Laboy was trained on its use by Ming, who maintained , and was the only M.F.P. employee to use the triple roller. Laboy and Ming made plans to start a business together, however, the plans were not realized. Laboy did purchase equipment and a customer list from Ming before he started U.R.S.<sup>5</sup> Among the

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<sup>4</sup> As of 2012, the company was no longer in business [LABOY EBT: 9-10].

<sup>5</sup> At the time of the accident, Laboy was still paying off the \$70,000. purchase price to Ming [EBT: 27-28].

equipment was the triple roller bending machine.

A protocol was in place by which M.F.P. could use the triple roller machine for its work only by securing Laboy's permission, and the use was restricted to certain M.F.P. employees, two foremen, and Ismael Silervio ("Silverio").

Plaintiff testified that he used similar equipment when working in the Dominican Republic, however, he had never before used the U.R.S. triple roller. For the most part his work with M.F.P. involved welding.

On the day of the accident, Silverio asked him to assist in fabricating a round piece of metal Master Fire needed to place on a blower in a system that was being completed for installation.

Silverio instructed plaintiff to go to the front of the machine while he stood at the back adjusting the rollers. After plaintiff placed the metal, Silverio turned on the machine by pressing the button on the control box located three or four feet from the machine on the left, and the rollers started to run. Plaintiff told Silverio that the metal piece went in "crooked", and Silverio told him to "forget about it", however, plaintiff tried to straighten it. Silverio knew that plaintiff's hand had become caught in the machine because he observed his "glove on the other side." [SILVERIO EBT: 65-71]. At that point he jumped and pushed the stop button.

Plaintiff testified that he had turned on the machine , and after his left hand, which he had placed under the metal and was moving closer to the rollers became caught, he stopped the machine by moving his right hand over his head and hitting the stop button located on the control panel two feet away [CORSINO EBT: 74-75 ;90-96].

This action was commenced in December 2010, alleging that Webb Corporation, Knost, and Reed, both individually, and as Reed Engineering , and United Restaurant were negligent in the design, manufacture, testing, inspection, production, assembly, distribution, showing, installing, servicing and repairing of the machine . Plaintiff also asserts claims in strict products liability and breach of express and implied warranties as against Webb [Verified Complaint ¶¶ 13-22], and for negligence against United in failing to warn of the dangerous and unsafe condition of the equipment, and /or failing to provide reasonable protection for its use [ Id. ¶¶ 24-25].

Issue was joined with the service of the answer of United in January 2011 in which are asserted contribution and indemnification cross-claims against Webb and the Reed Defendants. In May, 2012, United also commenced a third-party action against plaintiff's employer seeking the same relief.

To date, neither Reed nor the individual defendants have answered or appeared.

Webb served its answer in February 2011 asserting cross-claims for contribution

and indemnification as against all co-defendants.

The Note of Issue was filed in March 21, 2013 .

Motions

1) Webb moves for an award of summary judgment dismissing the complaint and all cross-claims on the grounds that as a matter of law it was not negligent as it neither designed, nor manufactured , nor serviced or repaired the subject machine, nor , for purposes of any breach of warranty claim, is there a material issue of fact that Webb shipped or sold the machine to U.R.S., or issued any warranties with respect to it. Nor is there a triable issue of fact that Webb received any inquiries or complaints about the machine from U.R.S. or M.F.P. or any other individual or corporation.

Webb contends that as a matter of law it cannot be held liable as a successor to the manufacturer because on this record there is no issue of fact that : 1) it expressly or impliedly assumed Reed's tort liability , or 2) that there was a consolidation or merger of the two entities, or 3) that Webb was a "mere continuation " of Reed , or 4) that the agreements were entered into fraudulently to escape such obligations (see, Schumacher v. Richard Shear Company, 59 NY2d 239, 245, 451 N.E.2d 195 [1983]).

Finally, Webb argues that it had no special duty to warn of any possible dangers of the subject machine as the evidence demonstrates as a matter of law no special relationship between it and the end user (see, Sullivan v. Joy Mfg. Co., 70 NY2d 806,517

N.E.2d 1313 [1987]). Indeed, Webb maintains that it has established that it had no notice of the location or ownership of the machine, or even of its existence, and assumed no service contracts as part of the agreements with Reed, nor otherwise repaired or replaced any parts of the subject machine, nor received any complaint from any source concerning its performance.

In opposition, plaintiff argues that Webb had a continuing duty to warn end-users of dangers associated with using the subject machine without emergency stop devices and accessible controls based upon its knowledge of advancements in the state of the art and the promulgation of safety standards concerning roll bending machines.

Plaintiff argues that is not maintaining that the criteria for successor liability enunciated in Schumacher, supra., exist here, but argues that Webb had knowledge of safety standards applicable to roll bending machines, that "put it on notice that the use of its triple roll bending machines without emergency stop devices and accessible controls was egregiously dangerous", and in light of the agreements with Reed, "may be liable for failing to warn about Reed machines." Plaintiff also asserts that Webb breached its duty to warn by failing to include Reed's former customers in its mailing about design changes affecting its own older triple roll bending machines.

Tendered in opposition is the affidavit of Thomas J. Cocciola, a professional engineer, and board-certified safety professional who opines within a reasonable degree

of engineering certainty that Web "should have instituted and enforced procedures to formally notify and warn dealers , distributors and owners through Certified Mail and advertisements in various media about the hazards associated with using the three roll bending machines without the necessary emergency stop devices and providing information about how to retro-fit these machines."

In reply, Webb contends that because there is no evidence to raise a triable issue of fact that it had any relationship with U.R.S. , much less a "special" one (see, Schumacher, supra, at 246 ), or provided replacement parts for it, or solicited business with respect to it, or had knowledge of its owner and /or location , as a matter of law , it had no duty to warn unknown end users of state of the art advancements and safety standards . The authority on which plaintiff relies for its assertion that Webb had a such a duty is not here controlling as, unlike here, the cases concern the duties of manufacturers, and retailers, and exclusive distributors with respect to defects in their products.

Nor , it is maintained is there any evidence to raise an issue of fact that Webb derived substantial economic benefits from Reed's customers, nor does the 1959 agreement by which Webb acquired Reed's right to manufacture triple roll bending machines reference either sales records or customer lists for such machines having been provided to the purchaser. Without such documents it is argued that Webb could not

send alert notifications to Reed's former customers of safety upgrades mandated by the American Safety Standards Act of 1968.

The court is urged not to consider the affidavit of Thomas J. Cocchiola, as untimely, and as it is in conflict with an earlier opinion he rendered in this action, and on the further grounds that it is conclusory and speculative in that it is not supported by any evidentiary foundation for the industry standards referenced .

2) U.R.S. moves for summary judgment on the grounds that there is no evidence to raise a question of fact that the the triple roller was defective in anyway, or that its owner had actual or constructive notice that the machine was dangerous.

With respect to the first contention, defendant relies on the findings of its expert , Peter J. Schwalje, ("Schwalje") a licensed professional engineer who bases his opinion upon a review of the record here, as well as his inspection of the triple roller on November 15, 2010.

In pertinent part, Schwalje observed that the machine was equipped with a roll release mechanism located to the right and that the rollers were released by rotation of a handle operating a lead screw " to free the right hand end to create a path for the workpiece positioned between the bottom and top rollers to exit." [Affidavit of Peter J. Schwalje ¶ 8, Exhibit N to Moving Papers]. When inspected, the control /electrical box containing a "fast", "slow", "stop" and "start " pushbutton switch was attached to the

left side of the machine.<sup>6</sup> He opines that the machine remains the same as it was when manufactured , and that it was not improperly altered by defendant, noting that since purchasing the equipment in 2008, U.R.S. has only repositioned the control box.

Schwalje opines to a reasonable degree of engineering certainty that the machine “as it was designed and configured at the subject facility was reasonably safe to operate . “ He finds that when “fabricating pieces of the type being worked on by Mr. Corsino , no safety guard or device can be affixed to the machine as same would not permit the metal to pass through the rollers to produce the shape [ ] “ , and a “guard would block the metal’s ability to roll through the machine to complete the bending, and practically speaking , the machine simply would not function.” He opines as follows with respect to any claim that the control box was improperly positioned.

The fact that the control/electrical box was not physically positioned on the machine at the time of the accident does not constitute any type of deficiency as the [box] under applicable standards was required to be readily accessible to the operator , which the discovery material confirms to be the case.

The expert concludes that there “is nothing deficient or improper with the machine or its operational configuration and it is not in any way defective [ ] , and as configured at the time of the accident “did not violate any statutes , regulations , ordinances or

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<sup>6</sup> The expert notes that at the time of the accident, the control box was located on a rack one foot from the machine.

industry standards. "

Concerning the duty of care to be afforded plaintiff, defendant argues that the machine was the subject of a gratuitous bailment, and as such U.R.S. is charged only with a duty to warn the bailee of any known defects that are not obvious or readily discernible.

U.R.S. contends that upon review of the testimony of its principal, and of plaintiff and his co-workers there is no evidence to raise an issue of fact that U.R.S. had notice of any defect to trigger such a duty as there is no evidence of any prior accident or complaint in connection with the use of the machine.

3) Plaintiff cross-moves for an award of summary judgment as against U.R.S. on the grounds that the evidence demonstrates as a matter of law that the machine was not reasonably safe to use insofar as the control box was not readily accessible , or easily reached by plaintiff while operating it. In support of this contention plaintiff relies on the testimony of plaintiff who explained that he had to move approximately two feet and reach above his head to reach the controls when his hand became trapped [CORSINO EBT: 74; 97], and the expert's findings that electrical standards for industrial machines are violated when the operator controls are merely "in the vicinity" of the operator , and not readily accessible, and that the machine could and should have been retro-fitted with an emergency stop device to conform with applicable standards.

While not alleging that U.R.S. was negligent " in improperly alter[ing ] the machine, plaintiff contends that United was negligent in "failing to evaluate and remediate the hazards of using the subject machine after making its acquisition and before placing it into service."

Concerning U.R.S.'s arguments addressed to M.F.P.'s use of its machinery, plaintiff contends that the parties were engaged in a mutual benefit bailment because in return for allowing its co-tenant to use the machine, U.R.S. was permitted to use M.F.P.'s bending machine and hydraulic brake [LABOY EBT: 114-117]. As such, plaintiff contends that U.R.S. a higher degree of care to M.F.P.'s employees, such as plaintiff.

#### Discussion and Conclusions

It is by now well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law , tendering sufficient evidence to demonstrate the absence of a material issues of fact ( Zuckerman v. City of New York, 49 N.Y.2d 557, 404 N.E.2d 718 [1980] ). To support the granting of such a motion , it must clearly appear that no material and triable issue of fact is presented , as the "drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App.Div. 1019) or where the issue is 'arguable' (*Barrett v. Jacobs*, 255 N.Y. 520, 522); 'issue-finding, rather than issue-determination, is the key to the procedure' (*Esteve v. Avad*, 271 App. Div. 725, 727).

" Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404, 144 N.E.2d 387 [1957].

Moreover, "[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in opponent's proof , but must affirmatively demonstrate the merit of its claim or defense" (Pace v. International Bus. Mach., 248 AD2d 690,691, 670 N.Y.S.2d 543 [2d Dept 1998], quoting Larkin Trucking Co. v. Lisbon Tire Mart, 185 AD2d 614, 615,585 N.Y.S.2d 894, [4th Dept. 1992]; see also, Torres v. Merrill Lynch Purch., 95 A.D.3d 741, 945 N.Y.S.2d 78 [1st Dept. 2012]).

Failure to make such a showing requires the denial of the motion , regardless of the sufficiency of the papers in opposition ( Alvarez v. Prospect Hospital, 68 NY2d 320,324,501 N.E.2d 572 [1986]; see also, Smalls v. AJI Industires, Inc., 10 NY3d 733, 735, 883 N.E.2d 350 [2008] , rearg.den. 10 N.Y.3d 885 ).

Once such a showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. ( Romano v. St. Vincent's Medical Center of Richmond, 178 AD2d 467 , 577 N.Y.S.2d 311 [2d Dept. 1991];Meridian Mgt. Corp. v. Cristi Cleaning Serv. Corp., 70 A.D.3d 508, 894 N.Y.S.2d 422 [1st Dept. 2010]).

Webb Corporation

Upon review of the moving papers and upon consideration of the applicable law it is the finding of this court that defendant has sustained its prima facie burden.

There is here no material issue of fact that as alleged Webb Corporation either designed or manufactured the subject machine, or tested , or inspected, or produced, assembled or distributed, or serviced or repaired the subject machine, or that U.R.S. or M.F.P. ,or Ming was known to Webb .

Nor for purposes of any successor liability is there any issue of fact that by virtue of the purchase agreements, incorporating Reed's express assumption of tort liability for machines it manufactured before the 1954 contract , Webb expressly or impliedly assumed Reed Engineer's tort liability for the machine. Nor in light of unrebutted testimony that each entity carried on with independent design and manufacture, or any other indicia of a de facto merger of the seller and purchaser (see, Fitzgerald v. Fahnestock & Co., 286 A.D.2d 573, 574, 730 NYS2d 70 [1<sup>st</sup> Dept. 2001]; Matter of Asbestos Litigation v. A.W. Chesterton Co., 15 A.D.3d 254 [1<sup>st</sup> Dept. 2005]). Nor is there any allegation , much less evidence to suggest that the agreements were entered into fraudulently to evade obligations of liability.

With respect to any claim of negligence arising out of the breach of a duty for Webb to take steps to warn unknown end- users of state of the art advancements and

later enacted safety standards for those machines designed and manufactured by Reed , it is the further finding of this court that there is no material issue of fact of a special relationship, economic or otherwise, to Ming or to U.R.S. to impose such a duty upon the moving defendant (see, Sullivan v. Joy Manufacturing Company, supra at 808 ; Schumacher, supra. at 247 ). There is no issue of fact that Webb succeeded to Reed's service contracts for the triple roller machines , or that Webb did service the specific machine, or was contacted by any user for purposes of such a service , or in connection with the replacement of the machine's parts, or that either Ming or U.R.S. brought to Webb's attention risks revealed in their use of the machine . Indeed, on this record is there an issue of fact that Webb was provided with any customer lists or sales records in connection with the 1959 transaction .

It is the further finding of this court that the conclusory and speculative assertions of plaintiff's expert is insufficient to withstand Webb's prima facie showing particularly in light of the absence of such opinions with respect to Webb's conduct in the exchanged report .

U.R.S.Motion /Plaintiff's Cross-Motion

Based upon their education and professional experience, as well as a physical inspection of the triple roller more than a year post-accident, and a review of the record here, the experts have rendered starkly different assessments of the nearly sixty -year

old machine involved in this accident. As such, material issues of triable fact remain unresolved on this record precluding dispositive relief.

Schwalje opines to a reasonable degree of engineering certainty that there was nothing improper with the machine or its configuration, and with respect to the latter, he concluded that the positioning of the control box was "readily accessible" to the operator as required by applicable standards.

Cocchiola also opines to a reasonable degree of engineering certainty that the machine violated these applicable safety standards because it lacked either an accessible emergency stop cable, or a foot treadle that would have permitted plaintiff to rapidly stop roll rotation at the moment his glove became caught.

Also unresolved here is the duty of care owed by U.R.S. to M.F.P. employees using the subject machine, as there are questions of fact whether the bailment was gratuitous, or whether under the custom established by the manufacturers, it was one for the mutual benefit of both. U.R.S.'s machine was being used to fabricate an item needed to complete M.F.P.'s contracted work, however, the record also reveals that M.F.P. equipment, including a hydraulic brake, was used by Laboy when U.R.S. "had something heavy to bend." [LABOY EBT: 114-115], and on occasions a M.F.P. employee would assist Laboy in using the subject machine [SILVERIO EBT: 26].

Also unresolved here for purposes of any claim of negligent supervision, is the extent of the expertise and training of those workers Laboy had authorized to operate the machine. Silverio explained that training with Laboy did not consist of "sit[ting] in front of the [machine] and teach[ing] [him] everything about the rollers", but learning about "what the machine did" on the two or three occasions he helped Laboy [Id. 24-25; 83 ]. As afforded all favorable inferences there are material issues of fact as to whether U.R.S. had adequately supervised the operation of its triple roller.

Accordingly, it is

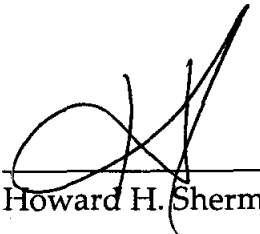
ORDERED that the motion of the defendant The Webb Corporation be and hereby is granted and it is

ORDERED that summary judgment be entered in favor the of the defendant Webb dismissing as asserted against it the complaint and any and all cross-claims asserted against it and it is further

ORDERED that the motion of defendant United Restaurant Services, LLC and the cross-motion of plaintiff be and hereby are denied.

This constitutes the decision and order of this court.

Dated: January 5, 2015

  
Howard H. Sherman