Levine v Gugliotti
2015 NY Slip Op 30459(U)
March 27, 2015
Supreme Court, Suffolk County
Docket Number: 11-32573
Judge: Daniel Martin

[* 1]

SHORT FORM ORDER

INDEX No. 11-32573
CAL No. 14-00470OT

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

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 8-12-14
ADJ. DATE 10-7-14
Mot. Seq. # 005 - MD

SUSAN ANN JONES LEVINE, as Administratrix of the Estate of JOSHUA LEVINE, and Individually,

Plaintiff,

- against -

MICHAEL GUGLIOTTI, RICHARD SCHWAG and CNH AMERICA LLC,

Defendants.

FINZ & FINZ, P.C.
Attorney for Plaintiff
410 East Jericho Turnpike
Mineola, New York 11501

KRAL, CLERKIN, REDMOND, RYAN, PERRY & VAN ETTEN, LLP
Attorney for Defendant/Third-Party Plaintiff
Michael Gugliotti
538 Broadhollow Road, Suite 200
Melville, New York 11747

MICHAEL GUGLIOTTI,

Third-Party Plaintiff,

- against -

PECONIC LAND TRUST, INC. and QUAIL HILL COMMUNITY FARM,

Third-Party Defendants.

D'AMATO & LYNCH, LLP
Attorney for Defendant Richard Schwag
Two World Financial Center
New York, New York 10281

GOLDBERG & SEGALLA LLP
Attorney for Defendant/Second-Third-Party Plaintiff CNH America LLC
200 Garden City Plaza
Garden City, New York 11530

CNH AMERICA LLC,

Second Third-Party Plaintiff,

- against -

PECONIC LAND TRUST, INCORPORATED,

Second Third-Party Defendant.

MARONEY O'CONNOR LLP
Attorney for Third-Party Defendants Peconic Land Trust & Quail Hill Community & Second Third-Party Defendant Peconic Land Trust
11 Broadway, Suite 831
New York, New York 10004

Upon the following papers numbered 1 to 46 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 27 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 28 - 39 ; Replying Affidavits and supporting papers 40 - 46 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant/second third-party plaintiff CNH America LLC for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied.

The plaintiff commenced this action to recover damages for wrongful death and personal injuries allegedly sustained by the decedent due to a design defect in a tractor designed and manufactured by the defendant/second third-party plaintiff CNH America LLC (CNH). It is undisputed that the decedent was employed by the third-party defendant/second third-party defendant Peconic Land Trust, Inc. at its farm operated by the the third-party defendant Quail Hill Community Farm (the farm) (collectively Peconic). On November 30, 2010, the decedent was fatally injured when he was caught under the right rear wheel of a 1990 Case IH tractor, Model 495 (the tractor) at the farm.

In her complaint, the plaintiff alleges that the defendant/third-party plaintiff Michael Gugliotti (Gugliotti) negligently maintained and repaired the tractor, disengaged or bypassed the tractor's "safety start switch," and failed to warn of the unsafe condition of the tractor, and that the defendant Richard Schwag (Schwag) negligently operated the tractor, striking the decedent and causing the injuries resulting in his death. Regarding CNH, the plaintiff sets forth four causes of action sounding in breach of warranty, strict products liability, negligence and failure to warn. The plaintiff alleges, among other things, that CNH designed and manufactured the tractor to permit its use with the safety start switch disengaged or bypassed, that CNH breached the warranty of merchantability and fitness for intended use of the tractor, and that CNH failed to warn that the tractor's safety start switch should not be disengaged or bypassed. It is undisputed that the tractor's safety start switch was bypassed before this accident.

CNH now moves for summary judgment dismissing the complaint as well as all cross claims against it on the ground, among other things, that the tractor was modified to bypass the safety system installed therein. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of its motion, CNH submits, among other things, the pleadings, the affirmation of its attorney, the depositions of the parties, the tractor's operator manual, and the depositions of two nonparty witnesses. A number of the deposition transcripts of the parties' testimony are unsigned. Nonetheless, said transcripts may be considered herein as they have been adopted by the party deponents (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Ashif v Won Ok Lee***,

57 AD3d 700, 868 NYS2d 906 [2d Dept 2008], and/or the parties have not raised any challenges to their accuracy (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d at 936, 937 NYS2d at 602; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]). However, as to the depositions of the nonparty witnesses, likewise unsigned, CNH has failed to submit proof that the transcripts were forwarded to the witnesses for their review (*see* CPLR 3116 [a]). Under the circumstances, the deposition testimony of the nonparty witnesses is not in admissible form (*see* ***Marmer v IF USA Express, Inc.***, 73 AD3d 868, 899 NYS2d 884 [2d Dept 2010]; ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Mauss***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]).[1]

At his deposition, Scott Chamskey (Chamskey) testified that he is the director of the farm, that he is responsible for the maintenance of the agricultural equipment at the farm, and that he gave a safety orientation to the decedent when the decedent became an apprentice at the farm. He stated that he instructed the decedent how to mount the tractor, how to start and operate the tractor, and how to hook up implements to the tractor. He indicated that the farm used a manual from a CNH Model 385 tractor to train apprentices because the farm had purchased the (Model 495) tractor second-hand. Chamskey further testified that apprentices were instructed to leave the tractor in gear when it was shut down to prevent it from rolling, and to depress the clutch and place the tractor in neutral before starting it. He stated that he did not give any caution to the decedent about starting the tractor from the ground "because you can't start it from the ground ... you have to have your foot on the clutch." He indicated that he knew at the time that the tractor was equipped with a safety start switch, but did not give the apprentices any details as to why they had to depress the clutch to start the tractor. Chamskey further testified that the decedent became an apprentice at the farm in 2008, and that the decedent was permitted to operate the tractor with a bucket when he became a full-time employee in 2010. He indicated that he did not recall anyone at the farm adjusting the safety start switch, and that he did not instruct any Peconic employee or volunteer to do so.

Schwag was deposed on December 18, 2012 and testified that he was working at the farm with the decedent and nonparty Elizabeth Moran (Moran) on the day of this accident, that he was in the chicken coop when the wall began to collapse, and that he saw the tractor "pounding on the thing." He stated that he ran out of the coop, that he went to the left side of the tractor, and that he saw the decedent lying on the ground in front of the right rear tire of the tractor. He indicated that left rear tire of the tractor was stopping and turning, that the tractor was not moving forward, and that he reached in to turn the key to shut off the tractor. Schwag further testified that nothing happened when he turned the key, and that he jumped onto the tractor, stepped on the clutch and turned off the tractor.

At his deposition, Stephen Burdette (Burdette) testified that the tractor was equipped with a "neutral start switch" which requires an individual to depress the clutch to allow the engine to crank, and

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[1] Because CNH has elected to submit excerpts of the testimony of all the deponents, the Court is unable to determine if a third person, Joseph O'Grady, is an employee of a party to this action or a nonparty witness. Thus, along with the testimony of the two nonparty witnesses, Myron Levine and Elizabeth Devlin Moran, his testimony has not been considered herein.

that failure to depress the clutch means that the tractor will not start.[2] He stated that, when the clutch is depressed, the switch closes an electrical circuit permitting current to flow to the starter and crank the engine. He indicated that "bypassing" is defined as using a metallic object to allow the current to flow without the neutral start system.

At his deposition. Gugliotti testified that, on October 27, 2010, Chamskey asked him if he had a "clutch pedal switch" in his repair truck, that Chamskey said that the clutch pedal on the tractor was working intermittently, and that he told Chamskey that he did not have a switch in stock. He stated that Chamskey told him that he needed to move the tractor because it was blocking part of the driveway, and that he told Chamskey that he had a "jumper or a bypass wire" that could be placed to allow the tractor to move but that Chamsey would have to move the tractor himself and remove the wire "immediately." He indicated that he knew the function of the safety start switch, that he gave the jumper wire to Chamskey, and that he was reluctant to do so because it was dangerous as others would not know that the wire is "taking the place of the [safety start switch]." Gugliotti further testified that, if there is a bypass of the safety start switch, the tractor can start in gear "if all of the controls are in the proper position."

In his affirmation in support of the motion, counsel for CNH contends, among other things, that the plaintiff cannot establish that the alleged defect in the tractor was a proximate cause of the decedent's injuries, that CNH cannot be found liable as there was a substantial modification of the tractor, that a bypass of the safety start switch involves a complex process, and that the warnings on the tractor are clear and unambiguous. It is well settled that the affidavit of an attorney who has no personal knowledge of the facts is insufficient on a motion for summary judgment (***Sanbria v Paduch***, 61 AD3d 839, 876 NYS2d 874 [2d Dept 2009]; ***Warrington v Ryder Truck Rental, Inc.***, 35 AD3d 455, 826 NYS2d 152 [2d Dept 2006]).

A manufacturer who places a defective product into the stream of commerce may be liable for injuries or damages caused by such product (***Gebo v Black Clawson***, 92 NY2d 387, 392, 681 NYS2d 221 [1998]; ***Liriano v Hobart Co.***, 92 NY2d 232, 235, 677 NYS2d 764 [1998]). It is well settled that such a manufacturer may not be held liable for strict products liability or negligence where, after the product leaves the possession and control of the manufacturer, there is a subsequent modification which substantially alters the product and where it is shown that the accident would not have occurred but for the subsequent modification (***Amatulli v Delhi Constr. Corp.***, 77 NY2d 525, 569 NYS2d 337 [1991]; ***Robinson v Reed-Prentice Div. of Package Mach. Co.***, 49 NY2d 471, 426 NYS2d 717 [1980]). No matter how foreseeable the modification may have been, the general rule applies where material alterations by a third-party work a substantial change in the condition in which the product was sold by destroying the functional utility of a key safety feature (*see* ***Mackney v Ford Motor Co.***, 251 AD2d 298, 673 NYS2d 718 [2d Dept 1998]). However, the general rule does not apply when the safety feature is

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[2] The excerpts of Burdette's testimony do not reveal his qualifications or his relationship to CNH. In its reply, CNH submits an affidavit from Burdette wherein he swears that he retired from CNH in 2004 as a product safety engineer and product safety manager. In addition, the excerpts of Burdette's testimony submitted by the plaintiff in opposition to the motion include a face page which indicates that Burdette was produced as a witness for CNH, not as an expert.

easily accessible and the product was manufactured to permit its use without said feature (***Lopez v Precision Papers***, 107 AD2d 667, 484 NYS2d 585 [2d Dept 1985] *affd* 67 NY2d 871, 501 NYS2d 798 [1986]. In such a case, an action for design defect and failure to warn can be maintained (*see* ***Liriano v Hobart Co.***, 92 NY2d at 238, 677 NYS2d at 765; ***LaPaglia v Sears Roebuck & Co.***, 143 AD2d 173, 531 NYS2d 623 [2d Dept 1988]).

A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known (***Liriano v Hobart Co.***, *supra*; ***Rastelli v Goodyear Tire & Rubber Co.***, 79 NY2d 289, 582 NYS2d 373 [1992]). Liability based upon a claim that a manufacturer failed in its duty to warn may be premised upon the complete absence of warnings or upon the inclusion of insufficient warnings regardless of whether plaintiff has read them (*see* ***German v Morales***, 24 AD3d 246, 806 NYS2d 493 [1st Dept 2005]; ***Johnson v Johnson Chemical Co.***, 183 AD2d 64, 588 NYS2d 607 [2d Dept 1997]). Whether warnings are sufficient to alert the product user to potential hazards is generally a question of fact to be determined at trial and is not susceptible to the drastic remedy of summary judgment (*see* ***Magadan v Interlake Packaging Corp.,*** 45 AD3d 650, 845 NYS2d 443 [2d Dept 2007]; ***Torres v Indus. Container***, 305 AD2d 136, 760 NYS2d 128 [1st Dept 2003]).

Here, CNH has failed to establish its prima facie entitlement to summary judgment as a matter of law as to any of the causes of action against it. A defendant moving for summary judgment cannot satisfy its initial burden of establishing his or her entitlement thereto merely by pointing to gaps in the plaintiff's case (***Coastal Sheet Metal Corp. v Martin Assoc., Inc.***, 63 AD3d 617, 881 NYS2d 424 [1st Dept 2009]; *see also* ***Tsekhanovskaya v Starrett City, Inc.***, 90 AD3d 909, 935 NYS2d 128 [2d Dept 2011]; ***Blackwell v Mikevin Mgt. III, LLC***, 88 AD3d 836, 931 NYS2d 116 [2d Dept 2011]). To meet its burden on the motion, CNH is required to "tender ... evidentiary proof in admissible form" establishing as a matter of law that the allegedly defective tractor was not a proximate cause of the decedent's injuries (*see* ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d at 597; ***Speller v Sears, Roebuck & Co.***, 100 NY2d 38, 760 NYS2d 79 [2003]; ***L.M.B. v Sevylor USA, Inc.***, 43 AD3d 1355, 842 NYS2d 802 [4th Dept 2007]).

In addition, CNH has not submitted sufficient evidence that the tractor was free of design defects, that the safety start switch was not easily accessible, that the tractor was not manufactured to permit its use without said feature, or that the warnings issued were sufficient to warn users not to bypass the safety start switch. CNH's failure to submit expert testimony or affidavits regarding the issues raised in the plaintiff's causes of action for products liability precludes the grant of summary judgment herein (*cf.* ***Buchanan v Mack Trucks, Inc.***, 113 AD3d 716, 979 NYS2d 342 [2d Dept 2014] [deposition testimony and expert affidavits sufficient to prima facie establish product "state of the art" and reasonably safe]; ***Melendez v Abel Womack, Inc.***, 103 AD3d 609, 959 NYS2d 252 [2d Dept 2013] [expert affidavit sufficient to prima facie establish product reasonably safe]; ***Fitzpatrick v Currie***, 52 AD3d 1089, 861 NYS2d 431 [3d Dept 2008] [movant's expert sufficient to prima facie establish product free of design defects]).

CNH's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***,

supra; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). In any event, a review of the expert affidavits submitted by the plaintiff in opposition to the motion indicate that they are sufficient to defeat the motion as CNH has failed to introduce any expert evidence (***Arslanian v Volkswagen of America, Inc.***, 113 AD2d 858, 493 NYS2d 588 [2d Dept 1985]). Accordingly, CNH's motion for summary judgment is denied.

Dated: MARCH 27, 2015

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**