

Francesco v EFCO Corp.
2016 NY Slip Op 31461(U)
July 27, 2016
Supreme Court, New York County
Docket Number: 155763/12
Judge: Shlomo S. Hagler
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17**

-----X
JOSEPH FRANCESCO and ALLISON FRANCESCO,

Plaintiffs,

-against-

**Index No.: 155763/12
Motion Seq. No.: 005**

**EFCO CORPORATION, PELLA CORPORATION,
ROGER ADAMS d/b/a ADAMS TRUCKING,
PHILIP ADAMS d/b/a ADAMS TRUCKING and
DAVID ROY ADAMS d/b/a ADAMS TRUCKING,**

DECISION/ORDER

Defendants.

-----X
HON. SHLOMO S. HAGLER, J.S.C.:

In this personal injury action, defendants EFCO Corporation (“EFCO”) and Pella Corporation (“Pella”) move for summary judgment pursuant to CPLR 3212 to dismiss the complaint [Motion Sequence Number 005]. Plaintiffs oppose the motion.

PROCEDURAL HISTORY

By Stipulation of Discontinuance, dated March 5, 2014, plaintiffs discontinued action against defendants Roger Adams d/b/a Adams Trucking, with prejudice [Notice of Motion, Exhibit “D”], and by Stipulation, dated April 12, 2014, the claims of Allison Francesco in this matter were discontinued, with prejudice [Notice of Motion, Exhibit “E”]. At oral argument on the record on August 10, 2015, the Court granted defendants’ motion for summary judgment to the extent of dismissing the action as against Pella only¹ [Transcript of Oral Argument, dated August 10, 2015 at 8]. The remaining defendants, Phillip Adams d/b/a Adams Trucking and David Roy Adams d/b/a Adams Trucking have not appeared in this action (Affirmation of Dominic S. Curcio, Esq. in

¹EFCO is a subsidiary of Pella (Transcript of Oral Argument at 5; Notice of Motion, Exhibit “B” [Verified Complaint] at ¶ 7; Notice of Motion, Exhibit “H” [Deposition of Bryan David Cox, plant manager of EFCO] at 8, 36).

Support at ¶ 13].

BACKGROUND

On August 27, 2009, plaintiff Joseph Francesco (“plaintiff” or “Francesco”) was injured during the course of his employment as a glazier for non-party Forno Enterprises (Notice of Motion, Exhibit “B” [Verified Complaint] at ¶¶ 12-14). Specifically, Francesco alleges that he was unloading a window from a truck and “was injured when one portion of the double-hung window suddenly and without warning slammed down onto his hand and thumb causing an amputation of his right thumb” (*Id.* at ¶ 14). Francesco alleges that EFCO was responsible for manufacturing, packaging and shipping the window that caused his injury (*Id.* at ¶ 5). The double-hung windows were shipped to the Hawthorne School in Yonkers in connection with a school renovation project (*Id.* at ¶¶ 5, 8). Defendants Roger, Philip and David Roy Adams, d/b/a Adams Trucking were the parties Francesco alleges to have transported the window to the site where he was working (*Id.* at ¶¶ 9-11).

Plaintiff’s Deposition

At his deposition on March 4, 2014, Francesco stated that at the time of his accident, he and three co-workers were engaged in off loading a quantity of double-hung windows² from the truck that had delivered them (Notice of Motion, Exhibit “G” at 67). He and one of his co-workers, Gary D. Kinne (“Kinne”), were on the ground and the other two workers, Rich Kavleski (“Kavleski”) and Rich Sarrantonio (“Sarrantonio”), were located on the truck (Notice of Motion, Exhibit “G” at 54, 67, 72). The windows on the truck on the day of the accident arrived in the

² Plaintiff testified as to the general procedure regarding the windows that were unloaded on the day of the accident and stated that all the windows were “basically taken off the same way prior to [his] accident” (Notice of Motion, Exhibit “G” at 85).

trailer in an upright position (Notice of Motion, Exhibit "G" at 82, 108). Francesco testified that Kavleski and Sarrantonio remained inside the truck and slid the windows to the back of the truck in an upright position (*Id.* at 71-72, 112). Once at the tail of the truck, Kavleski and Sarrantonio would put the windows on their sides (Notice of Motion, Exhibit "G" at 71-72, 83-84, 111-112).³ The windows were too high and top heavy to unload them in a vertical position, and the truck was not high enough (*Id.* at 73, 82). As it pertains to the window involved in the subject accident, plaintiff testified that as he and Kinne approached the subject window on the truck, it was on its side (*Id.* at 91-92). Plaintiff also testified that as it pertains to the subject window, the two co-workers on the truck handed (rather than slid) plaintiff and Kinne the window and tilted it downward toward them (*Id.* at 84-86, 92). Windows were not off loaded from the truck in an upright position (*Id.* at 71). Plaintiff and Kinne unloaded the windows from the truck and carried the windows to a storage trailer (*Id.* at 69, 96).⁴

When off loading the subject window, plaintiff's left hand was at the top of the window and his right hand was at the bottom as the window was laid on its side (*Id.* at 94, 96, 104). The subject window tilted downwards as it came off the truck (*Id.* at 97). Plaintiff testified further as follows:

Q. How did the accident occur, to your knowledge?

A. As I tilted it down, because it is a construction site and we had stuff laying around, I turned around to see where I was going. I felt the weight shift and it got my finger.

Q. When you felt the weight shift, did a portion of the window slide?

A. Yes (*Id.*).

³Plaintiff testified that the windows were "slid out" because of the height of the truck, and then "brought down and brought out far enough for the other fellow to grab it, get behind it and carry it down to the ground" (*Id.* at 73).

⁴Once the windows came off the truck, the windows would be stood up again (*Id.* at 83).

Plaintiff's right thumb was at the bottom corner of the window as it was being off loaded (*Id.* at 105). A piece of that thumb was severed (*Id.* at 105).

All the windows being off loaded on the day of the Accident had stickers which indicated with an arrow and in red "THIS END UP" (*Id.* at 102-103; Notice of Motion, Exhibit "A"), although plaintiff testified that he did not recall what the stickers said (Notice of Motion, Exhibit "G" at 99). On the day of the accident, the sashes of the windows were in place and had cardboard corners but no other packaging including fiberglass straps or shrinkwrap (*Id.* at 81-82, 108-109). Francesco stated that he was wearing gloves at the time of his accident, and that although there were suction cups at the job site which are utilized for moving glass, plaintiff did not use them (*Id.* at 89-90).

DISCUSSION

Summary Judgment

The movant has the initial burden of proving entitlement to summary judgment. As the Court of Appeals in *Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 853 (1985) held:

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 issues of fact from the case (see *Zuckerman v City of New York*, 49 N.Y.2d 557, 562; *Sillman v Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Matter of Redemption Church of Christ v Williams*, 84 A.D.2d 648, 649; *Greenberg v Manlon Realty*, 43 A.D.2d 968, 969).

Negligence⁵

In order to prevail in an action premised upon negligence, plaintiff must show that EFCO owed him a duty, that EFCO breached such duty, that such breach was the proximate cause of plaintiff's injuries, and that plaintiff suffered damages (*Salvador v New York Botanical Garden*, 71 AD3d 422, 423 [1st Dept 2010]).

In support of its motion for summary judgment, EFCO proffers among other things, an affidavit of its expert, Barry S. Rope ("Rope"), a "Distribution Packaging/Handling Consultant", sworn to on February 11, 2015 (the "Rope Affidavit") (Affidavit in Support of Motion for Summary Judgment). In said Affidavit, Rope attests that

"It is my opinion within a reasonable degree of my knowledge and expertise in the field of product/package system design and material handling/distribution that the manner in which the subject windows were labeled, packaged, loaded, secured and shipped was completely appropriate when considering the packaging and shipping industry in the United States over the last 45 years, including but not limited to relevant standards of practice in the industry...[and that] none of the factors in the control of defendants EFCO and/or PELLA, including the windows labeling, loading, securing, shipping, distribution, packaging, packing and handling, were a proximate cause of the subject accident" (Notice of Motion, Rope Affidavit at ¶ 20, 21).

Rope further opines that "the sole proximate cause of plaintiff's accident was the handling of the

⁵In his Verified Complaint, Francesco pleads one cause of action asserting that the accident "was caused solely by the negligence of the defendants in the manufacture, packaging, shipping and transporting of the aforesaid window without any negligence on the part of this plaintiff contributing thereto" (Notice of Motion, Exhibit "B" [Verified Complaint] at ¶ 15). Plaintiff's Verified Bill of Particulars (the "Bill") amplifies the claim against EFCO that the accident was caused solely by EFCO's negligence in its manufacture, packaging, shipping and transporting of the subject window, by alleging products liability claims based on negligence, including allegations of design defect and failure to warn (Notice of Motion, Exhibit "B" [Verified Complaint] at ¶ 15; Notice of Motion, Exhibit "F" [Verified Bill of Particulars] at ¶ 15).

windows during the off loading of the windows at the Pearls Hawthorne School job site, particularly the fact that the plaintiff and his co-workers were careless and mishandled the window, thus placing plaintiff in harms way” (Notice of Motion, Rope Affidavit at ¶ 21). In addition, Rope opines that “had the gentlemen on the trailer bringing the windows to the tail checked that the locks were engaged before the subject window was off loaded, the accident could not have occurred...Had the window not been tipped or leaned beyond the horizontal position as the window was removed from the tail of the subject trailer, the accident could not have occurred” (*Id.* at ¶ 22).

Rope states in his affidavit that his opinion was based on his review of

“various material in this case, including the pleadings, Plaintiff’s Verified Bill of Particulars, all party and non-party deposition transcripts, discovery responses served by defendants EFCO/PELLA, all incident reports including the Worker’s Compensation Employer’s C-2 report, the subject Packing List, Bill of Lading, Window Installation Instructions and the sticker affixed by EFCO to each of its double hung windows at the end of the manufacturing process and before the window is shipped, indicating which end of the window is the top when the window is placed in the proper upright position” (Notice of Motion, Rope Affidavit at ¶ 5).

The Rope Affidavit is insufficient insofar as submitted to support EFCO’s motion for summary judgment dismissing Francesco’s cause of action for negligence. Rope fails to assert that he examined the subject window that he alleges was defective (*See Wing Wong Realty Corp. v Flinlock Constr. Servs., LLC*, 95 AD3d 709, 709 [1st Dept 2012] [defendant’s expert “failed to indicate [] that he had examined the excavation site”]; *see also Oboler v City of New York*, 31 AD3d 308, 309 [1st Dept 2006] [“plaintiff’s expert did not visit the scene until four years after the accident”]; *Zvinys v Richfield Inv. Co.*, 25 AD3d 358, 359-360 [1st Dept 2006] [plaintiff’s expert “never visited the premises or inspected the circuit breakers he alleged were deficient or defective”]). Moreover, although Rope opined that the “manner in which the subject windows were

labeled, packaged, loaded, secured and shipped was completely appropriate when considering...relevant standards of practice in the industry”, he fails to identify any specific industry standards, codes or statutes (*See Aur v Manhattan Greenpoint Ltd.*, 132 AD3d 595, 596 [1st Dept 2015]; *Scansarole v Madison Sq. Garden, L.P.*, 33 AD3d 517, 517 [1st Dept 2006]; *Zviryns v Richfield Inv. Co.*, 25 AD3d at 360). Accordingly, EFCO has failed make a *prima facie* showing of entitlement to summary judgment as a matter of law dismissing plaintiff’s negligence cause of action. “Failure to make such prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). As such, all claims sounding in negligence remain.

Products Liability

A strict products liability allegation is not pled in plaintiff’s Verified Complaint or Verified Bill of Particulars.⁶ However, in support of its motion, EFCO asserts that plaintiff cannot establish a strict products liability cause of action.⁷

Design Defect

“Where a plaintiff is injured as a result of a defectively designed product, the product

⁶In plaintiff’s Attorney Affirmation in Opposition, Matthew Tomkiel, Esq. states that this matter is “a product liability case based on negligence and failure to warn” (Attorney Affirmation in Opposition at ¶ 3).

⁷In actions sounding in strict products liability, “the manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages; provided: (1) that at the time of the occurrence the product is being used *** for the purpose and in the manner normally intended, (2) that if the person injured or damaged is himself the user of the product he would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages” *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 106 [1983] [internal quotations and citation omitted].

manufacturer or others in the chain of distribution may be held strictly liable for those injuries. '[A] defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use,' and whose utility does not outweigh the danger inherent in its introduction into the stream of commerce. To establish a prima facie case for design defect, the plaintiff must show that the defendant 'breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and the defective design was a substantial factor in causing plaintiffs' injury' " (*Hoover v New Holland N. Am., Inc.*, 23 NY3d 41, 53-54 [2014] [internal citations omitted]).

In the instant matter, plaintiff has as a matter of law failed to adequately allege that there was a defect in the design of the subject window. In fact, plaintiff's opposition fails to address claims based on design defect, and as such, those claims are deemed abandoned.

Duty to Warn

"While claims based on...a lack of adequate warnings, can be framed in terms of strict liability or negligence, failure-to-warn claims grounded in strict liability and negligence are functionally equivalent, as both forms of failure-to-warn claim depend on the principles of reasonableness and public policy at the heart of any traditional negligence action" (*Matter of New York City Asbestos Litigation (Dummitt v. A.W. Chesterton; Sutter v A.W. Chesterton Co.)*, 2026 WL 3495191 [2016]; see *Giunta v Delta Intern. Mach.*, 300 AD2d 350, 352 [2d Dept 2002]; *Frederick v Niagara Mach. & Tool Works*, 107 AD2d 1063, 1064 [4th Dept 1985]).

Plaintiff has failed to submit admissible evidence establishing whether or not the label on the window constituted an adequate warning of the risks. In any event, "in all but the most unusual

circumstances, the adequacy of a warning is a question of fact" (*Nagel v Brothers Intl. Food, Inc.*, 34 AD3d 545, 547 [2d Dept 2006][internal quotation and citation omitted]; *Feiner v Calvin Klein, Ltd.*, 157 AD2d 501 [1st Dept 1990]).

Finally, plaintiff's reliance on the doctrine of *res ipsa loquitur* is misplaced. For a case to fall within the doctrine, "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff" (*Ebanks v New York City Tr. Auth.*, 70 NY2d 621, 623 [1987] [internal quotation and citations omitted]). There is no proof in the record that the doctrine of *res ipsa loquitur* is applicable to the instant matter. Plaintiff "is unable to establish the necessary element of 'exclusive control'" *Medinas v. MILT Holdings LLC*, 131 AD3d 121, 128 [1st Dept. 2015].

CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion by defendant EFCO for summary judgment, pursuant to CPLR 3212 dismissing the complaint of plaintiff JOSEPH FRANCESCO as against EFCO is granted insofar as defendant seeks dismissal of plaintiff's claims sounding in products liability, and is denied insofar as defendant seeks dismissal of plaintiff's cause of action for negligence, including claims sounding in failure to warn; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Dated: July 27, 2016

ENTER:



J.S.C.

SHLOMO HAGLER
J.S.C.