SHORT FORM ORDER

INDEX No. 12-7765
CAL. No. 14-01907OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 4-7-15 (003)
MOTION DATE 4-14-15 (004)
MOTION DATE 5-12-15 (005)
MOTION DATE 6-23-15 (006)
ADJ. DATE 9-11-15
Mot. Seq. #003-MotD
#004-MotD
#005-XMD
#006-XMG

GEORGE CUSTANCE and PATRICIA CUSTANCE,

Plaintiffs,

- against -

TEREX UTILITIES and UTILITY EQUIPMENT LEASING CORPORATION,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Utility Equipment Leasing Corporation, dated March 17, 2015, and supporting papers 1 - 14 (including Memorandum of Law dated March 17, 2015); (2) Notice of Motion/Order to Show Cause by the defendant Terex Utilities, dated March 12, 2015, and supporting papers 15 - 22; (3) Notice of Cross Motion by the defendant Terex Utilities, dated May 5, 2015, and supporting papers 23 - 33; (4) Notice of Cross Motion by the defendant Utility Equipment Leasing Corporation, dated May 26, 2015, and supporting papers 46 - 51; (5) Affirmation in Opposition by the defendant Terex Utilities, dated June 16, 2015, and supporting papers 52 -55; (6) Affirmation in Opposition by the plaintiffs, dated July 21, 2015, and supporting papers 56 -58; (7) Reply Affirmation by the defendant Utility Equipment Leasing Corporation, dated July 24, 2015, and supporting papers 34 - 43 (including Memorandum of Law dated July 24, 2015); (8) Reply Affirmation by the defendant Terex Utilities, dated September 10, 2015, and supporting papers 44 - 45; (9) Reply Affirmation by the

defendant Utility Equipment Leasing Corporation, dated September 2, 2015, and supporting papers 59 - 60; (10) Reply Affirmation by the defendant Utility Equipment Leasing Corporation, dated September 2, 2015, and supporting papers 61 - 62; (11) Reply Affirmation by the defendant Terex Utilities, dated September 10, 2015, and supporting papers 63 - 66; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion (#003) by the defendant Utility Equipment Leasing Corporation for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and for judgment on its claims for indemnification against the defendant Terex Utilities is granted to the extent that the plaintiffs' third and fourth causes of action are dismissed, and is otherwise denied, and it is further

ORDERED that the motion (#004) by the defendant Terex Utilities for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted to the extent that the plaintiffs' third and fourth causes of action are dismissed, and is otherwise denied, and it is further

ORDERED that the partially duplicative motion (#005) by the defendant Terex Utilities for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and for judgment regarding its right to contractual indemnification from the defendant Utility Equipment Leasing Corporation is denied, and it is further

ORDERED that the motion (#006) by the defendant Utility Equipment Leasing Corporation for an order extending its time to file its motion for summary judgment is granted.

The plaintiffs commenced the instant action sounding in products liability and negligence on or about March 9, 2012. The plaintiff George Custance (the plaintiff) was allegedly injured on September 1, 2009, when he slipped and fell as he attempted to enter the bucket of a model TL-38P Personnel Lift (aerial lift) manufactured by the defendant Terex Utilities (Terex). It is undisputed that nonparty Dueco Inc., a "sister company" of the defendant Utility Equipment Leasing Corporation (UELC), incorporated the aerial device into a truck manufactured by the Ford Motor Company. At the time of this incident, the plaintiff was working to maintain street lights in New York City pursuant to his employment with nonparty Welsbach Electric Corporation (Welsbach), which had leased the completed truck with aerial lift (the truck or bucket truck) from UELC. The aerial lift consists of a bucket at the end of a telescopic boom which can extend 38 feet in the air for various work purposes. The bucket, constructed from fiberglass, is approximately 42 inches deep, approximately 28 inches by 22 inches square, and is intended to be used by one person only. A fiberglass step on the exterior of the bucket, which is covered with a non-slip material, permits an individual to enter or exit the bucket. In their complaint, the plaintiffs set forth five causes of action. The first cause of action alleges breaches of the implied warranties of merchantability and fitness for a particular purpose. The second through fourth causes of

action respectively set forth claims for negligent design, failure to give adequate warnings regarding the use of the product, and negligent manufacture and production of the product. In addition, the plaintiffs set forth a derivative fifth cause of action on behalf of the plaintiff Patricia Custance.

The defendants now move for summary judgment dismissing the complaint. However, before addressing the merits of said motions, it is appropriate to consider the procedural issues which present themselves herein. The plaintiffs filed their note of issue on November 13, 2014. Pursuant to CPLR 3212(a), the 120-day period in which the parties were permitted to move for summary judgment ended on March 13, 2015. Terex's motion for summary judgment (#004) was timely made on March 12, 2015, and included a return date of April 14, 2015. UELC's motion for summary judgment (#003) was made on March 17, 2015, included a return date of April 7, 2015, and was technically untimely made. It appears that, because UELC's motion contained an earlier return date, its motion was assigned a lower motion sequence number than the earlier motion made by Terex. Because UELC's motion included a request for relief against Terex, Terex cross-moved (#005) for similar relief against UELC, and raised the issue that UELC's motion for summary judgment was untimely. UELC then moved (#006) for an order extending its time to move for summary judgment to March 17, 2015.

The Court will address UELC's motion to extend its time to move for summary judgment (#006) before it reviews the remaining applications as the subject motion directly affects the analysis required in determining those motions. CPLR 3212(a) provides that if no date for making a summary judgment motion has been set by the court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (*see* ***Miceli v State Farm Mut. Auto. Insurance. Co.***, 3 NY3d 725, 786 NYS2d 379 [2004]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]).

It is undisputed that a compliance conference order dated October 14, 2014 directed the plaintiffs to file a note of issue in this action on or before November 18, 2014, and that "all motions for summary judgment shall be made within one hundred twenty (120) days of the date that the note of issue is filed." Thus, pursuant to statute and said order, and absent different circumstances, all such motions were required to be made on or before March 18, 2015. It is also undisputed that the plaintiffs filed their note of issue on November 13, 2014, and that all motions for summary judgment were subsequently required to be made on or before March 13, 2015. UELC made its motion on March 17, 2015, the date that it was served upon all parties (CPLR 2211). Finally, it is undisputed that, because March 13, 2015 fell on a Friday, UELC's motion was delayed by two business days.

It is well settled that courts have broad discretion in determining whether the moving party has established good cause for such delay (***Gonzalez v 98 Magazine Leasing Corp.***, 95 NY2d 124, 711 NYS2d 131 [2000]; ***Fine v One Bryant Park, LLC***, 84 AD3d 436, 921 NYS2d 524 [2d Dept 2011]). It has been held to be an improvident exercise of discretion to deny a summary judgment motion solely on the ground that it was untimely pursuant to CPLR 3212(a) where there has been a de minimus delay of two days, there was a failure to object to the motion as untimely, and there was no prejudice to the nonmoving party (***Fernandez v Mark Andy, Inc.***, 7 AD3d 484, 776 NYS2d 305 [2d Dept 2004]).

Nonetheless, the good cause requirement applies no matter how late the motion (*see e.g.* ***Brill v City of New York***, *supra*; ***Milano v George***, 17 AD3d 644, 792 NYS2d 906 [2d Dept 2005]).

The New York Courts have accepted diverse excuses in finding good cause for the making of a late summary judgment motion (***Gonzalez v United Parcel Service***, 249 AD2d 210, 671 NYS2d 753 [1st Dept 1998][motion would have been timely had note of issue not been prematurely filed]; ***McFadden v 530 Fifth Ave.***, 28 AD3d 202, 812 NYS2d 88 [1st Dept 2006][movant relied on date of service of note of issue though statute refers only to the paper's filing]; ***Stimson v E.M. Cahill Co.***, 8 AD3d 1004, 778 NYS2d 585 [4th Dept 2004][family emergencies that occurred on the last day to serve the motion]). However, it has been held that a late filing may not be excused absent a showing of something more than mere law office failure (***Quinones v Joan & Sanford I. Weill Med. Coll. & Graduate Sch. of Med. Sciences of Cornell Univ.***, 114 AD3d 472, 980 NYS2d 88 [1st Dept 2014]).

In support of it's motion, UELC submits, among other things, the affirmation of its attorney, and an internal memorandum from the attorney who handled the file in this matter and attended the subject compliance conference. In his affirmation, counsel for UELC avers that the attorney who handled this file is no longer with the firm, that she prepared the subject memorandum on December 2, 2014 before she left the firm's employment, and that the memorandum stated that the note of issue was filed on November 18, 2014. He states that it was reasonable to believe the information as the compliance conference order directed the filing on or before that date, and that the motion would have been filed earlier had the firm "known the deadline was March 13, 2015." Counsel contends that the subject delay was de minimus, that the delay "does not prejudice the other parties to this action," and that UELC had good cause for its delay in moving for summary judgment herein.

The subject memorandum, designated an "Exit Memorandum," is submitted as an exhibit in both redacted and unredacted form. In the paragraph labeled "To do," the author states "Plaintiff filed the Note of Issue - the case has been remanded .... We have 120 days from the filing of the Note of Issue - which was November 18, 2014. So deadline for [summary judgment] is March 18, 2015."

It is determined that UELC's delay in moving for summary judgment was de minimus (***Matos v Schwartz***, 104 AD3d 650, 960 NYS2d 209 [2d Dept 2013][five day delay beyond deadline fixed by CPLR 3212(a) considered de minimus]; ***Castro v Homsun Corp.***, 34 AD3d 616, 826 NYS2d 89 [2d Dept 2006][good cause shown for three-day de minimus delay in making the motion]; ***Valenzano v Valenzano***, 98 AD3d 661, 950 NYS2d 150 [2d Dept 2012][affirming trial court's determination that two days delay was de minimus]). Moreover, counsel for UELC has provided an adequate explanation for the de minimus delay herein. The Appellate Division has stated that in the context of CPLR 3212(a), trial courts should "be afforded wide latitude with respect to determining whether 'good cause' exists for permitting late motions" (***Rossi v Arnot Ogden Med. Ctr.***, 252 AD2d 778, 779, 676 NYS2d 699 [3d Dept 1998]). Here, it is determined that said explanation constitutes more than mere law office failure. "What constitutes 'good cause' for failure to file a summary judgment motion ... refers less to the merits of the motion than to the reason for the untimeliness" (***Stimson v E.M. Cahill Co.***, 8 AD3d 1004, 778 NYS2d 585 [4th Dept 2004]). In one matter, the Appellate Division affirmed the trial court's grant of leave to file a motion more than 60 days after the filing of the note of issue where the movant established its good cause (***Brooks v Ross***, 24 AD3d 589, 808 NYS2d 358 [2d Dept 2005]).

Considering that the motion was made before the date which would have been the deadline to make the motion pursuant to the compliance conference order had the plaintiffs not filed their note of issue "prematurely" or earlier than contemplated, that the motion was made within the time-frame considered de minimus by the courts, and that the attorney handling this matter left her employment with the subject law firm during the relevant time period, UELC has established good cause for the delay in making its motion. Accordingly, UELC's motion to extend its time to file its motion for summary judgment is granted.

The undersigned will next address Terex's motion for summary judgment (#004), as it was made prior to UELC's motion (#003), and UELC's motion and Terex's cross motion in opposition (#005) are best analyzed together without any intervening discussion. Terex moves for summary judgment claiming that the aerial lift was not defective, that it cannot be found negligent as it was not responsible for the maintenance of the truck, and that the plaintiff is the sole proximate cause of his injuries as he was aware of the condition which caused his fall. In support of its motion, Terex submits, among other things, the parties' deposition testimony and a copy of the operator's manual for the aerial lift.

At his deposition, the plaintiff testified that he returned for his 20th year of work for Welsbach in the spring of 2009 after working for a similar company for one year, that he had used bucket trucks with buckets similar to the one involved herein to maintain street lights for approximately one year prior to his accident, and that he was never given any training or instruction on how to enter the bucket of the truck. He stated that he was assigned the subject truck by Welsbach, and that he would enter and exit the bucket of his truck 28 times a day, five days a week, to replace the "heads" of the 28 street lights he was assigned to repair daily. He indicated that, on the day of this incident, he began work at 6:00 a.m., and that he had replaced 11 to 14 heads before approximately 9:00 a.m., when his accident occurred. The plaintiff further testified that he went to enter the bucket and his left foot slipped off of the bucket step causing him to fall, and that he had never had a problem using the step before his accident. He stated that, "a few weeks" before his accident, he noticed that the non-slip material applied to the step "on the outside ... was starting to come off." He indicated that, as an employee of Welsbach, he was required to conduct a daily "walk-around" inspection of his truck, and "if you see something needs maintenance, you bring it to the foreman's attention." The plaintiff further testified that he was aware that a portion of the step was not covered by the non-slip material, that he did not report that the material was starting to peel, and that he would try to avoid the uncovered area by keeping his foot "to the inside of the step." He stated that he did so at the time of his accident, but he "slid on my heel, and it took up the [non-slip material]." He described the customary manner in which he would enter the bucket on his truck including, among other things, placing his left foot on the bucket step, his right hand on a wood bin placed on the truck bed, and his left hand on the rim of the bucket. He indicated that he would use a different method of entering a bucket on a truck where the wood bin was not present, and that Welsbach placed the wooden bins on his truck. The plaintiff further testified that he did not know if he read or saw the operator's manual for the aerial lift, and that he does not know who replaced the non-slip material after his accident.

Greg Adler (Adler) was deposed on August 27, 2013 and testified that he is employed by Dueco Inc. (Dueco), the sister company of UELC, as its eastern region service manager, and that Dueco is a

final stage manufacturer of aerial bucket trucks for UELC. He stated that Terex's aerial lift is equipped with an insulated bucket, that insulated buckets, including those manufactured by other companies, do not have doors which would allow entry to the bucket, and that the design of Terex's bucket has a single step measuring approximately four by twelve inches on the outside of the bucket to permit entry. He indicated that he had never seen any buckets with bars or handles on the outside of the bucket to aid in entry, that he was not aware whether Dueco or UELC conducted any safety studies pertaining to the aerial lift, and that there is a prescribed method for entering the bucket on the aerial lift. He described that method as "the three point stance," which involves having "both hands attached to something solid and your foot on the ground" while you step onto the bucket step and then swing your leg from the ground into the bucket. Adler further testified that there is no step located inside the bucket, that the outside step is approximately 20 inches from the bottom of the bucket, and that a person has to step down an additional 20 inches with the leg used to enter the bucket. He stated that alterations to the aerial lift cannot be made without authorization from Terex, and that Dueco inspects each bucket truck before delivery to UELC and produces a unit condition report regarding its inspection. He indicated that the report for the subject truck does not include a notation specific to the outside step, and that the report states that the truck is equipped with "one bucket free of damage and holes." Adler further testified that "it was [his] understanding" that if the truck was rented from UELC then Welsbach would be responsible for "upkeep" of the vehicle, and that UELC's maintenance records reveal that the bucket and the outside step were never repaired by Dueco or UELC. He later stated that, if anything was wrong with the truck, Welsbach would call UELC, which would call Dueco to make repairs, and that he was uncertain if UELC allowed Welsbach to make repairs. He indicated that he did not know if UELC ever evaluated the warnings placed on the bucket, that the warnings which relate to a door in the bucket are not applicable as an insulated bucket cannot have a door, and that he was not certain if any warning decals state how to enter or exit the bucket.

At his deposition, Jim Olson (Olson) testified that he is employed by Terex as a products safety engineer, that he is a licensed professional engineer, and that he had reviewed certain photographs and the operator's manual for the aerial lift before testifying. He stated that Terex Telelect manufactured the aerial lift doing business under the name Terex, that he did not believe that the bucket was manufactured by Terex but was purchased, and that he did not know who manufactured the bucket. He indicated that the aerial lift was purchased by Dueco and UELC which would have decided what type of bucket they needed, that the subject bucket required an insulating liner to make it dielectric to safely permit work with electricity, and that any door or opening in the bucket/liner would mean that the bucket would not be dielectric. Olson further testified that the outside step to the bucket was designed with a "piece of nonskid ... 3M material ... on the top surface where their foot would go," that he did not know and never tested the coefficient of friction of the nonskid material, and without the material the fiberglass step would be very slippery. He indicated that the top lip of the bucket provides a handhold to aid in entering the bucket, that any type of hand bar or handhold on the outside of the bucket would interfere with "the use and would not be suitable for alignment," and that there are no instructions in the operating manuals regarding entering or exiting the bucket because "the variability of accessing the [bucket] is so much dependent on the person who is doing it; his physique, his strength, what he's doing." He stated that photographs of the truck reveal that, when the aerial lift is in the "recessed position" the bucket is not in it normal position, and that half of the bucket "is hanging over the back of the truck .... When it left Terex, the [bucket] was entirely over the bed of the truck." Olson further testified that it appears that a

wooden box on the bed of the truck "prevents it from retracting fully," that nothing in Terex's documentation indicates where the bucket should be situated when the truck is not operating, and that there is a platform on the bed of the truck to support the bucket in its retracted position. He indicated that the support platform is intended to be "centered underneath the [bucket]," and that one of the photographs "shows that it is greatly compressed." He stated that requirements of the American National Standards Institute (ANSI), which provide in part for the protection of bucket users from electrocution, indicate that a bucket designed for use with an insulated liner cannot have any openings, but said standards do not have any bearing on a person's "ingress or egress" from a bucket. Olson further testified that there is noting in the operator's manual regarding the step's nonskid material other than general instructions to inspect the aerial lift, that he had not had, and was not aware of, any conversations regarding the use of something other than an adhesive nonskid material in the design of the bucket's exterior step, and that Terex had not conducted any ergonomic studies with regard to how users would enter and exit the bucket.

A plaintiff seeking to establish liability for breach of the warranty of merchantability (*see* UCC 2-314) or breach of the implied warranty of fitness for a particular purpose (*see* UCC 2-315) must establish that the product at issue was not reasonably fit for the purposes for which it was intended, and that such product was the proximate cause of his or her injury (*see* ***Denny v Ford Motor Co.***, 87 NY2d 248, 639 NYS2d 250 [1995]; ***J.C. Constr. Mgt. Corp. v Nassau-Suffolk Lbr. & Supply Corp.***, 15 AD3d 623, 789 NYS2d 903 [2d Dept 2005]). New York has eliminated the privity requirement for claims alleging a breach of implied warranty where personal injury allegedly results from a defective product (*see e.g.* ***Codling v Paglia***, 32 NY2d 330, 345 NYS2d 461 [1973]; ***New York Methodist Hospital. v Carrier Corp.***, 68 AD3d 830, 892 NYS2d 110 [2d Dept 2009]). Contractual privity between the parties is essential to a claim for breach of an implied warranty when only economic damages are claimed (*see* ***Archstone v Tocci Building. Corp. of N.J., Inc.***, 101 AD3d 1059, 956 NYS2d 496 [2d Dept 2012]; ***Jesmer v Retail Magic, Inc.***, 55 AD3d 171, 863 NYS2d 737 [2d Dept 2008]). To be merchantable, goods must be at least such as pass without objection in the trade under the contract description (UCC § 2-314[2][(a]), and the inquiry focuses on the expectations of the product's performance when used in the customary, usual, and reasonably foreseeable manner (***Denny v Ford Motor Co.***, *supra*; ***Fahey v A.O. Smith Corp.***, 77 AD3d 612, 908 NYS2d 719 [2d Dept 2010]).

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 (***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Here, Terex has failed to submit any evidence that the bucket and step were used in anything other than the customary, usual, and reasonably foreseeable manner, or that the plaintiff could not have reasonably expected the step to provide a relatively safe method of entry and exit from the bucket.

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 Hospital***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). ***Matinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]). Accordingly, that branch of Terex's motion which seeks to dismiss the plaintiffs' first cause of action for breach of warranty is denied.

In addition, Terex has failed to establish its prima facie of entitlement to summary judgment dismissing the plaintiffs' second cause of action. In strict products liability, a manufacturer who sells a product in a defective condition is liable for injury which results from the use of the product, regardless of privity, foreseeability or the exercise of due care (*see* ***Wheeler v Sears Roebuck & Co.***, 37 AD3d 710, 831 NYS2d 427 [2d Dept 2007]; ***Godoy v Abamaste of Miami***, 302 AD2d 57, 60, 754 NYS2d 301 [2d Dept 2003]). The plaintiff need only prove that the product was defective as a result of either a manufacturing flaw, improper design, or a failure to provide adequate warnings regarding the use of the product (*see* ***Wheeler v Sears Roebuck & Co.***, *supra*; ***Godoy v Abamaste of Miami***, *supra*), and that the defect was a substantial factor in bringing about the injury (*see* ***Codling v Paglia***, 32 NY2d at 342, 345 NYS2d at 469).

Initially, the Court notes that Terex failed to provide any evidence that the step was reasonably safe for workers using the bucket truck and that no safer alternative surface was feasible at the time the aerial lift system was installed on the van (*see* ***Watson v Scott McLaughlin Truck & Equip. Sales***, 23 AD3d 1051, 804 NYS2d 185 [4th Dept 2005]; ***Milazzo v Premium Tech. Servs. Corp.***, 7 AD3d 586, 777 NYS2d 167 [2d Dept 2004]). It is undisputed that Terex's witness, Olson, was produced as a fact witness and not as an expert. Regardless, Olson did not address the salient issues in his testimony, nor offer an opinion thereon. Terex's failure to submit expert testimony or affidavits regarding the issues raised in the plaintiffs' 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]).

While recognizing that a manufacturer is not expected to design products with components that do not wear out, and that purchasers are expected to use reasonable care to maintain products, the evidence that the nonskid material on the step was worn away does not establish that the bucket truck was not defectively designed. 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]). Accordingly, that branch of Terex's motion which seeks to dismiss the plaintiffs' second cause of action is denied.

As to the claim of strict liability based uponTerex's alleged failure to provide adequate warnings regarding the step contained in the plaintiffs' third cause of action, a manufacturer may be held liable for

the failure to warn of the latent dangers resulting from the foreseeable uses of its product which it knew or should have known (*see* ***Liriano v Hobart Corp.***, 92 NY2d 232, 235, 677 NYS2d 764 [1998]; ***Young v Daglian***, 63 AD3d 1050, 883 NYS2d 75 [2d Dept 2009]). Liability may be imposed based on either the complete failure to warn of a particular hazard or the inclusion of warnings that are inadequate (*see* ***Nagel v Brothers Intl. Food, Inc.***, 34 AD3d 545, 825 NYS2d 93 [2d Dept 2006]; ***DiMura v City of Albany***, 239 AD2d 828, 657 NYS2d 844 [3d Dept 1997]). However, a manufacturer has no duty to warn product users of dangers that are obvious, readily discernable or apparent (*see* ***Frisbee v Cathedral Corp.***, 283 AD2d 806, 725 NYS2d 129 [3d Dept 2001]; ***Martino v Sullivan's of Liberty***, 282 AD2d 505, 722 NYS2d 884 [2d Dept 2001]). The duty to warn of a specific hazard also does not arise if the injured person, through common knowledge or experience, already is aware of such hazard (*see* ***Fitzgerald v Federal Signal Corp.***, 63 AD3d 994, 883 NYS2d 67 [2d Dept 2009]; ***Warlikowski v Burger King***, 9 AD3d 360, 780 NYS2d 608 [2d Dept 2004]).

Terex has demonstrated prima facie that plaintiff's injuries were not proximately caused by its alleged failure to give warnings regarding the step on the bucket. The plaintiff's deposition testimony shows that he had worked on bucket trucks repairing overhead street lights for at least one year prior to the subject accident, and that he was aware of the worn surface of the nonskid material on the step. Thus, given plaintiff's actual knowledge of the alleged hazardous condition, any warning which Terex could have issued with respect to the step would have been superfluous (*see* ***Heimbuch v Grumman Corp.***, 51 AD3d 865, 858 NYS2d 378 [2d Dept 2008]; ***Rodriguez v Sears, Roebuck & Co.***, 22 AD3d 823, 803 NYS2d 184 [2d Dept 2005]). As the plaintiffs' submission in opposition fails to raise a triable issue with respect to the plaintiff's knowledge of the alleged defective condition, the plaintiff's third cause of action predicated on a failure to warn is dismissed (*see* ***Heimbuch v Grumman Corp.***, *supra*; ***Warlikowski v Burger King***, *supra*).

In addition, Terex has established its prima facie entitlement to summary judgment regarding the plaintiffs' fourth cause of action alleging that a manufacturing flaw caused the plaintiff's injuries. Olson testified that the step was designed with a piece of nonskid 3M material on the top surface where a worker's foot would go. There is no indication in the record that any party alleges a flaw in the production of the bucket, the step, or the nonskid material. In their opposition, the plaintiffs fail to address the issue of a manufacturing flaw. New York Courts have held that the failure to address arguments proffered by a movant or appellant is equivalent to a concession of the issue (*see* ***McNamee Constr. Corp. v City of New Rochelle***, 29 AD3d 544, 817 NYS2d 295 [2d Dept 2006]; ***Welden v Rivera***, 301 AD2d 934, 754 NYS2d 698 (3d Dept 2003]). Accordingly, that branch of Terex's motion which seeks to dismiss the plaintiffs' fourth cause of action is granted.

UELC now moves for summary judgment dismissing the complaint and granting judgment on its claims for common-law indemnification and contractual indemnification against Terex (#003). In support of its motion, UELC submits the pleadings, the previously summarized depositions of the parties, and an unauthenticated copies of Dueco's distribution agreement with Simon-Telelect and its amendment. Said agreements will be considered solely for the purposes of determining these motions as the record reveals that Terex has submitted copies of the same documents and no preliminary evidence

of authenticity is required under the circumstances (Richard Terex. Farrell, Prince, Richardson on Evidence §9-102 [11th Edition]; *see e.g.* ***Low v Payne***, 4 NY 247, 4 Comst. 247 [1850]).[1]

It is well settled that a wholesaler, distributor, a retailer, or others in the chain of distribution may be held liable in products liability by a party injured as a result of a defective product (***Gorbatov v Matfer Group***, 136 AD3d 745, 26 NYS3d 92 [2d Dept 2016]; ***Pierre-Louis v DeLonghi Arthur., Inc.***, 66 AD3d 859, 887 NYS2d 628 [2d Dept 2009]). It is undisputed that UELC leased the bucket truck to the plaintiff's employer, Welsbach, and can be considered a distributor of said truck and aerial lift. Here, UELC has failed to submit any evidence regarding the issues raised in the plaintiffs' causes of action for products liability. For the reason set forth above regarding Terex's motion, that branch of UELC's motion which seeks to dismiss the complaint is similarly granted to the extent that the third and fourth causes of action are dismissed, and is otherwise denied.

Notwithstanding its potential liability as a distributor of the bucket truck, UELC seeks judgment on its claims for indemnification against Terex. As to UELC's claim for common-law indemnification, it is well settled that a seller or distributor of a defective product has an implied right of indemnification as against the manufacturer of the product in a products liability action (***Martins v Little 40 Worth Assoc., Inc.***,72 AD3d 483, 899 NYS2d 30 [1st Dept 2010]; ***Godoy v Abamaster of Miami***, 302 AD2d 57, 754 NYS2d 301 [2d Dept 2003]). However, in the absence of fault on the part of the manufacturer, a party in the chain of distribution is not entitled to recover its costs in defending the action (***Bigelow v General Elec. Co.***, 120 AD3d 938, 991 NYS2d 497 [2d Dept 2014]). Thus, a finding that UELC is entitled to common-law indemnification would be premature prior to a determination that Terex's negligence contributed to this accident (***Brockman v Cipriani Wall St.***, 96 AD3d 576, 947 NYS2d 34 [1st Dept 2012]; ***Barraco v First Lenox Terrace Assoc.***, 25 AD3d 427, 810 NYS2d 8 [1st Dept 2006]).

Lastly, the Court turns to that branch of UELC's motion which seeks summary judgment on its claim for contractual indemnification. The right to contractual indemnification depends upon the specific language of the contract between the parties (*see* ***Kielty v AJS Constr. of L.I., Inc.***, 83 AD3d 1004, 922 NYS2d 467 [2d Dept 2011]; ***Bellefleur v Newark Beth Israel Med. Ctr.***, 66 AD3d 807, 888 NYS2d 81 [2d Dept 2009]). Thus, "[t]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (***LaRosa v Internap Network Servs. Corp.***, 83 AD3d 905, 921 NYS2d 294 [2d Dept 2011] quoting ***George v Marshalls of MA, Inc.***, 61 AD3d 925, 930, 878 NYS2d 143 [2d Dept 2009]; ***Torres v LPE Land Development. & Constr. Inc.***, 54 AD3d 668, 863 NYS2d 477 [2d Dept 2008]).

A review of the agreements between Simon-Telelect and Dueco reveals that they include contractual indemnification provisions. The original agreement, dated February 26, 1993 (the agreement), provides in paragraph 8:

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[1] In addition, its opposition to UELC's motion, Terex admits that Simon-Telelect is the "predecessor of Terex," which entered into said agreements with Dueco.

> b. Company agrees to indemnify and hold Distributor harmless from and against all claims, expenses or liabilities of any kind or nature whatsoever, including reasonable attorneys' fees, incurred by Distributor, directly or indirectly, with respect to the following:
>
> * * *
>
> (2) any and all claims for damage or injury to person or property alleged to have been caused by Company's negligence or a defect in a Product or Parts manufactured or sold by Company.

The amendment to the agreement, dated December 28, 2007 (the amendment), provides that it was made by and between "Simon-Telelect, Inc. [now known as] Terex Telelect, Inc," and Terex, and Dueco and UELC. The amendment provides that UELC signed the document "[s]olely with respect to Sections 3, 10 and 13." Said sections do not bear on the question whether Terex is obligated to indemnify UELC herein. Paragraph 14 of the Schedule 1, Exhibit D, attached to the amendment and entitled "Terms & Conditions of Sale" names Terex-Telelect, Inc. and Terex as "sellers," and provides:

> 14. Indemnification. Each of Seller and Buyer hereby agree to indemnify, release, defend and hold harmless each other ... against direct claims, demands, losses, judgments, damages, costs, expenses or liabilities, to any person whatsoever ... directly arising out of or directly connected with the performance or the furnishing of Products under this agreement; provided, however, that the indemnifying party shall not be responsible for indemnifying the indemnified party for damages directly or indirectly caused by the negligence or willful acts or omissions of such indemnified party.

"[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (***Cava Constr. Co., Inc. v Gealtec Remodeling Corp.***, 58 AD3d 660, 662, 871 NYS2d 654 [2d Dept 2009], citing General Obligations Law § 5-322.1; *see* ***McAllister v Constr. Consultants L.I., Inc.***, 83 AD3d 1013, 1014, 921 NYS2d 556 [2d Dept 2011]). Here, UELC request for summary judgment on its cross claim for contractual indemnification is denied as premature, as there are issues of fact as to whose negligence, if any, caused plaintiff's accident (*see* ***George v Marshalls of MA, Inc.***, 61 AD3d 925, 878 NYS2d 143 [2d Dept 2009]).

There are issues of fact requiring a trial in this matter including, but not limited to, whether UELC had a duty to repair the bucket truck and step, whether UELC negligently failed to meet said duty, what do the relevant provisions of the lease between UELC and Welsbach indicate, and whether UELC is a party to, or third-party beneficiary of, the contractual indemnification provisions in the subject agreements. Accordingly, UELC's motion for summary judgment is granted to the extent that the third cause of action in the complaint is dismissed, and is otherwise denied.

Terex now cross-moves for summary judgment dismissing the complaint and for judgment regarding its alleged right to contractual indemnification from UELC (#005). To the extent that the cross motion seeks summary judgment dismissing the complaint it is duplicative of Terex's motion for summary judgment (#004). Thus, the undersigned will not address the issues raised in that regard as they have already been determined herein. In addition, any allegation that the subject branch of the cross motion is untimely is without merit.

It is noted that Terex's answer does not include a cross claim for contractual indemnification against UELC. Regardless, for the reasons set forth above including, but not limited to, the fact that there has been no determination as to either defendant's negligence or culpability herein, and the open question as to the rights of the parties regarding contractual indemnification, Terex has failed to establish its prima facie entitlement to summary judgment herein. Accordingly, Terex's cross motion is denied.

Dated: August 1, 2016

Peter H. Mayer

PETER H. MAYER, J.S.C.