

Tolin v City of New York
2017 NY Slip Op 31626(U)
June 14, 2017
Supreme Court, Queens County
Docket Number: 12154/14
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10

-----X

Richard Tolin,

Index
Number: 12154/14

Plaintiff,

- against -

Motion
Date: 5/24/17

City of New York, New York City Department
of Sanitation and Ingersoll-Rand
Company,

Motion
Cal. Number: 195

Motion Seq. No.: 3

Defendants.

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The following papers numbered 1 to 14 read on this motion by defendant, Ingersoll-Rand Company, for summary judgment or, in the alternative, for dismissal for failure to comply with discovery.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition(Plaintiff).....	5-6
Affirmation in Opposition(City).....	7-8
Reply to Plaintiff-Exhibits.....	9-11
Reply to City-Exhibits.....	12-

14

Upon the foregoing papers it is ordered that the motion is decided as follows:

That branch of the motion by Ingersoll-Rand for summary judgment dismissing the complaint and all cross-claims against it is granted solely to the extent that the causes of action alleging negligence on the part of Ingersoll-Rand in the maintenance of the premises and the gun, including routine inspections of it, are dismissed. In all other respects, the motion for summary judgment is denied.

FILED
JUN 22 2017
COUNTY CLERK
QUEENS COUNTY

Plaintiff, employed by the New York City Department of Sanitation, allegedly sustained injuries when a part of an air impact wrench he was using to change a tire on a Sanitation vehicle at the Sanitation Department garage located at 153-67 146th Avenue in Queens County on May 15, 2013 broke off and spun into his left hand, causing lacerations to his left hand. It is undisputed that the impact gun was manufactured by Ingersoll-Rand and that it was owned, and provided to plaintiff, by the Sanitation Department.

The complaint alleges two causes of action. The first cause of action alleges that all defendants were negligent in the ownership, operation, maintenance, management and control of the premises to the extent that they failed to properly inspect and maintain the air impact gun and caused or allowed it to be in a dangerous condition, failed to warn plaintiff that the product was dangerous and that they were negligent in the manufacture and sale of the impact gun. The second cause of action alleges causes of action against Ingersoll-Rand for products liability in the manufacture and sale of the gun, breach of the implied warranty of merchantability and fitness for its intended use and an express warranty that the product was manufactured safely and was safe to use, as well as failure to inspect and maintain the gun and failure to warn of its dangerousness.

Since it is undisputed that the impact gun, although manufactured by Ingersoll-Rand, was owned by the Sanitation Department on the date of the accident, and that Ingersoll-Rand did not own or operate the Sanitation garage premises where the accident occurred, the causes of action alleging negligence on the part of Ingersoll-Rand in the maintenance of the premises and the gun, including routine inspections of it, must be dismissed.

However, movant has failed to proffer evidence eliminating all questions of fact so as to establish an entitlement to summary judgment dismissing the balance of plaintiff's causes of action against it sounding in products liability and breach of warranty.

In support of the motion, movant submits a copy of the Unusual Occurrence Report prepared by a Sanitation Department employee who notes in the description area of the form that while plaintiff was removing tires "the socket pin on the air gun broke, inserting the pin through his glove and into the palm of his left hand". Also annexed is a copy of the NYS Labor

Department incident report signed by plaintiff in which he states "***[illegible] pin slipped out of socket and spun into hand."

On the basis of this description of the accident, movant submits an affidavit of a former Ingersoll-Rand employee, one Stephen Synoracki, former Product Technical and Reliability Support Leader for movant. He avers that he holds a B.S. degree in Mechanical Engineering and is familiar with air impact wrenches manufactured by movant, including the model of the impact wrench in question, the 2145QMAX. In this regard, movant annexes to the moving papers photographs of the subject impact wrench, or gun, which were supplied by plaintiff depicting the subject impact wrench and its model number, to wit, Model #2145QMAX. Synoracki refers to these pictures in his affidavit, stating that his opinion is based upon his review of these photographs, the Illustrated Parts Breakdown for the 2145QMAX, the Maintenance Manual for the 2145QMAX and the Product Safety Brochure for the 2145QMAX. Based purely upon a review of this material, Synoracki states that no part of the "Model 2145QMAX requires, contains, or uses any type of internal or external 'pins' - indeed, according to the photographs provided, the air impact wrench did not have a pin as a socket retainer but rather a ring retainer for socket retention". He further states, "Furthermore, the photographs show that a 'Proto' socket adapter is attached to the wrench. Proto is a manufacturer of, among other things, socket adapters for air impact wrenches and is not owned or operated by IRC. The photographs also show a pin and retaining ring. IRC did not make or manufacture the adapter, retaining ring, or the pin shown in the photographs." He concludes that since the 2145QMAX did not have any pins and that movant did not manufacture the socket, socket adapter, pin or retaining ring shown in the photographs, plaintiff's injuries were not caused by the impact wrench or equipment manufactured by movant.

Synoracki's conclusion that the Model 2145QMAX impact wrench does not contain or use any type of internal or external pin is not based upon any objective evidence. The photographs show that a socket attaches to a post on the end of the gun, which Synorecki terms an "anvil", which post, or anvil, has a hole through it. The socket also has a hole in its side near its base and appears to be secured to the gun with a pin in the shape of a ring that is inserted through the holes and wraps around the socket and sits in a groove or trough running around the diameter of the socket. This ring appears to be the "pin" that

plaintiff alleges became loose and lacerated his hand.

Thus, the photographic evidence examined by Synorecki shows that sockets are attached to the impact gun by means of a pin, or ring, as Synorecki himself avers. Consequently, his statement that no part of the "Model 2145QMAX requires, contains, or uses any type of internal or external 'pins'" is not accurate but, in fact, directly contradicts his own description of the device and the demonstrative evidence upon which he relied and which is annexed to the moving papers that establishes that the subject impact gun does require and use a pin for its operation.

Furthermore, the only other material that Synorecki stated he relied upon in forming his opinion, other than the photographs, are the "Illustrated Parts Breakdown for the 2145QMAX, the Maintenance Manual for the 2145QMAX and the Product Safety Brochure for the 2145QMAX". No maintenance manual or product safety brochure is annexed to the moving papers and he does not aver what, if anything, contained in these referenced documents informs his opinion that the 2145QMAX does not require or utilize any type of pin. With respect to the Illustrated Parts Breakdown for the 2145QMAX which is the only other reference material that he relied upon to form his opinion, movant annexes to its moving papers an exploded diagram with parts list of an air impact wrench bearing the Ingersoll-Rand logo which movant's counsel states is the Illustrated Parts Breakdown for the 2145QMAX that was relied upon by Synorecki. This illustrated parts breakdown, however, is not for the Model 2145QMAX, but for a different impact wrench, the model 2141 and 2141S.

Moreover, although the socket does appear in at least one of the photographs to bear the name "Proto", and even crediting Synorecki's averment that movant did not manufacture the socket but that Proto is a distinct and unrelated company that manufactures sockets, there is no objective basis for his statement that movant did not manufacture the ring or pin that secures the socket to the gun. As noted, the parts list and diagram annexed to the moving papers, which Synorecki references, is of a different model impact gun and, therefore, may not support Synorecki's opinion that the impact gun in question, the subject Model 2145QMAX, did not contain, require or use a pin. Indeed, the diagram annexed to the moving papers of the model 2141 impact wrench shows that it is of a different design than the subject impact wrench. The diagram does not show a post, or "anvil" with a hole through it for attachment of a

pin or ring. In contrast, the subject impact wrench does have a post, or anvil, that has a hole for attachment of a socket via a pin or ring inserted through it. Moreover, he references no other material in support of his conclusory assertion that movant did not manufacture the pin or ring. Furthermore, even if, arguendo, it were established that the pin or ring by which the various sockets that are attached to the gun was not manufactured by movant, which movant has failed to do, Synorecki does not aver, and no evidence is proffered to demonstrate, that the pin or ring that retains the sockets was supplied by the socket manufacturer and came with the socket and was not supplied by Ingersoll-Rand with the impact wrench. Also, even if it were shown that the pin or ring by means of which sockets were attached to the impact gun was manufactured and supplied by the "Proto" company and not movant, no evidence is proffered, and no opinion is offered by Synorecki, that plaintiff's injuries resulted from a structural failure or manufacturing defect of the pin or ring, as opposed to a manufacturing defect of the impact gun itself by which the pin or ring became loose, backed out of the hole or otherwise failed to be retained by the impact wrench. Thus, Synorecki's affidavit is of no probative value and does not support the granting of summary judgment.

The only other ground for summary judgment advanced by movant is that "since the plaintiff and co-defendant have failed to provide documentation establishing when the air impact wrench was purchased (notwithstanding several orders), a breach of warranty cause of action cannot be maintained, nor can it be established that the air impact wrench, as purchased, was in a dangerous or defective condition. Finally, the plaintiff was ordered several times to provide a Supplemental Bill of Particulars on his product liability claims, but to date this has not been done." Thus, movant argues that summary judgment should be granted because plaintiff has failed to comply with discovery and furnish proof to establish his prima facie case. In this regard, it was the burden of Ingersoll-Rand, as the proponent of summary judgment, to submit affirmative evidence to support an entitlement to summary judgment. "A movant cannot satisfy its initial burden merely by pointing to gaps in the plaintiff's case" (see Campbell v New York City Transit Authority, 109 ASD 3d 455, 456 [2nd Dept 2013]).

Thus, Ingersoll-Rand has failed to meet its initial burden on summary judgment of submitting probative evidence to eliminate all questions of fact. Therefore, this Court, with respect to that branch of the motion for summary judgment, need

not consider, and has not considered, the sufficiency of the opposition and, consequently, has not considered Ingersoll-Rand's reply to the opposition with respect to its motion for summary judgment.

That branch of the motion, in the alternative, to dismiss the action and all cross-claims against Ingersoll-Rand, pursuant to CPLR 3124 and 3126, for failure of plaintiff and the City to comply with discovery is granted solely to the extent that it is ordered that plaintiff and the City shall, within 30 days after entry of this order, fully comply with the stipulation of the parties so-ordered by the referee of the Centralized Motion Part on February 16, 2016 and the compliance conference order issued by Justice Martin E. Ritholtz (now retired) on February 22, 2016 with respect to document discovery, as well as, with respect to plaintiff, serving a supplemental bill of particulars amplifying his pleadings as to his product liability claims against Ingersoll-Rand, and it is further ordered that plaintiff shall submit to a deposition on September 6, 2017 at 10:00 a.m., the City shall submit to a deposition on September 8, 2017 at 10:00 a.m. and Ingersoll-Rand shall submit to a deposition on September 12, 2017 at 10:00 a.m. The depositions shall continue from day-to-day until completed. Neither the time nor the date of the depositions may be changed without the express authorization of this Court.

Dated: June 14, 2017



KEVIN J. KERRIGAN, J.S.C.

