Granados v Balemaster
2017 NY Slip Op 32426(U)
October 10, 2017
Supreme Court, Suffolk County
Docket Number: 12-14982
Judge: Joseph Farneti
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SHORT FORM ORDER

COPY

INDEX No. 12-14982
CAL No. 13-01367OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 10-20-16 (004)
MOTION DATE 12-1-16 (005)
ADJ. DATE 4-13-17
Mot. Seq. # 004 - MG
Mot. Seq. # 005 - MD

---X

JULIO C. GRANADOS,

Plaintiff,

- against -

BALEMASTER, a division of EAST CHICAGO MACHINE TOOL CORPORATION, "JOHN DOE" MAINTENANCE COMPANY, and CLARE ROSE, INC.

Defendants.

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BALEMASTER, a division of EAST CHICAGO MACHINE TOOL CORPORATION,

Third-Party Plaintiffs,

- against -

ENVIRONMENTAL RESOURCE RECYCLING, INC. and CLARE ROSE DISTRIBUTORS, INC.,

Third-Party Defendants.

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Upon the following papers numbered 1 to 93 read on these motions for summary judgment ; Notice of Motion and supporting papers 1 - 47, 61 - 86 ; Answering Affidavits and supporting papers 48 - 55, 87 - 89 ; Replying Affidavits and supporting papers 56 - 60, 90 - 91 ; Other 92 - 93 ; it is,

ORDERED that the motion (seq. #004) by defendant Balemaster, and the motion (seq. #005) by defendant/third-party defendant Clare Rose, Inc., are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Balemaster for summary judgment dismissing the complaint, the counterclaim, and any cross-claims against it is granted; and it is further

ORDERED that the motion by defendant/third-party defendant Clare Rose, Inc. for summary judgment dismissing the complaint against it is denied.

Plaintiff Julio C. Granados commenced this action to recover damages for injuries he allegedly sustained on September 27, 2011, when the hydraulic cardboard compactor/baler he was servicing activated and severed his legs. The baler in question, model number 4275G-10, was manufactured by defendant Balemaster, a division of East Chicago Machine Tool Corporation ("Balemaster"). Plaintiff asserts claims against Balemaster for negligence in its product's design, manufacture, sale, inspection, delivery, packaging, warning, strict products liability, and breach of warranty. Balemaster filed a third-party complaint against Environmental Resource Recycling, Inc., and Clare Rose, Inc., for indemnification or contribution. Environmental Resource Recycling, Inc. ("ERRI"), in turn, filed a counterclaim against Balemaster for indemnification or contribution. Clare Rose, Inc. ("Clare Rose") asserted three cross-claims against third-party defendant ERRI, as well as a counterclaim against Balemaster.

Balemaster now moves for summary judgment in its favor on the grounds that it played no role in the baler's maintenance, that no manufacturing or design defect was present, that plaintiff caused his own accident by disregarding the warning labels on its product, and that the product was substantially modified by plaintiff's employer after it left Balemaster's possession. In support, it submits, among other things, copies of the pleadings; transcripts of the parties' deposition testimony; transcripts of the deposition testimony of nonparties Samuel Casoria, Juan Rodriguez, John O'Sullivan, Daniel Acer, Patrick Costanzo, Susan Cataldo, and Cesar Rivera; two diagrams; and a copy of a certified police "field report."

Clare Rose also moves for summary judgment in its favor as to the complaints against it, arguing that Clare Rose owed no duty to plaintiff. In support of its motion, Clare Rose submits, among other things, copies of the pleadings and transcripts of multiple witnesses' deposition testimony.

Plaintiff testified that on the date in question, he was employed by ERRI, which is owned by Mark Rose and Ricky Rose, who also own Clare Rose. Plaintiff stated that he began working for ERRI in 1991, that he first encountered the hydraulic cardboard baler in question at ERRI's Patchogue facility, and that the baler was moved to ERRI's new location in East Yaphank shortly before his 2011 accident. Plaintiff indicated that his work duties at both ERRI locations included operating three large machines: one that handled aluminum, one that handled plastic, and one that handled cardboard. Upon questioning, plaintiff testified that Frank Perez and Juan Rodriguez, both employees of ERRI, were responsible for maintaining those machines.

With regard to the cardboard baler in question, plaintiff testified he had more than seven years of experience operating it, and that it would automatically turn itself off when its transparent "feed chute" door was opened. Plaintiff testified that on the date of the instant accident, the baler's door was ajar when he arrived at the scene. Upon questioning, plaintiff admitted he was aware the baler "sometimes" remained operational with its feed chute door open. He indicated that he was not permitted to turn that machine off, that he has never turned that machine off, and that only Mr. Perez and Mr. Rodriguez were authorized to do so.

Plaintiff testified that in the moments preceding his accident, he switched off the overhead conveyor belt that routinely dropped cardboard into the baler, placed a black plastic milk crate on the floor beneath the baler's open feed chute door, used the milk crate to gain the height necessary for him to climb into the feed chute door, and entered the baler's main chamber. Plaintiff stated that he took no action to disable the baler itself, erroneously believing that Mr. Perez had shut the baler off prior to him entering the feed chute door. Subsequent to being shown photographs of the baler, plaintiff testified that he "didn't pay attention [to the warning labels]" and "just want[ed] to go straight and do the job." Plaintiff stated that he intended to enter the baler to remove some baling wire that had become jammed inside. He stated that this was a common maintenance procedure, one that his supervisor, Mr. Perez, would do in tandem with a second worker. Plaintiff indicated, however, that on this particular occasion, he took it upon himself to perform the maintenance on his own. He testified he told Mr. Perez that he "was going to get inside [the baler]," to which Mr. Perez replied "yes." Plaintiff stated that he saw the baler's feed chute door was already open and, to him, that signaled that the baler was deactivated. He indicated that he would not have entered the baler if he had known it was still powered up, but that Mr. Perez was "three to four meters from [him]," and "too far away" to summon him to deactivate the baler.

Plaintiff testified that he had entered the baler on approximately four prior occasions without incident, but that on those occasions he watched Mr. Perez shut off the power to the baler first. He stated he decided to enter the baler alone on this occasion and once inside, the baler became active and severed his legs.

Fred Perez testified that he is an employee of ERRI, and that he was plaintiff's direct supervisor at the time of the subject incident. Mr. Perez testified that the baler in question had been in service at ERRI since February of 2004, and that the "limit switch" for the feed chute door had been disabled by him at or near the time of its initial acquisition. Mr. Perez indicated that, unaltered, the feed chute door limit switch would disable the baler when the feed chute door was opened. He explained that the limit switch's effect was to force an ERRI employee to walk around the baler and re-start it following each occasion the door was opened, which severely slowed the processing of cardboard. Mr. Perez testified that, at some point, his supervisor, Samuel Casoria, asked him what could be done to increase production. Mr. Perez stated he explained to Mr. Casoria that the feed chute door's limit switch could be disabled, obviating the need to re-start the machine each time the door was opened. He indicated that Mr. Casoria then directed him to disable the limit switch.

Mr. Perez testified that ERRI's employees, including plaintiff, were fully aware that the feed chute door's limit switch had been disabled and that the baler would remain activated despite the feed chute door being open. Mr. Perez indicated that approximately ten times each year it was necessary for

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employees to enter the baler, through its feed chute door, to remove jammed baling wire. He explained that on those occasions, protocol required two employees to be present, and for the baler to be "locked out" and "tagged out," meaning that all power to the machine was cut. Mr. Perez testified that the two employees tasked with such baler maintenance were himself, and either Juan Hernandez or plaintiff.

Hilary Raab, Jr. testified he is vice-president of Eastern Chicago Machine Tool Corporation ("Eastern"), a manufacturer of industrial balers and shredders, and that he has worked for Eastern since 1969. Mr. Raab indicated that Eastern makes approximately 150 different models of balers, varying in size and capacity. He stated that Balemaster is a division of Eastern and that it does not install the balers it manufactures but, instead, conducts an inspection and setup of such a machine subsequent to its installation by a purchaser.

Regarding the subject baler, Mr. Raab testified that it had a limit switch on its feed chute door, and that such a switch was a standard component on all balers Eastern sold "[f]rom basically day one." He explained that the baler in question was designed in the early 1980s, but is an evolution of a design going back to the 1950s. Mr. Raab indicated that the limit switch installed on Eastern's balers has been the same model, supplied by the same manufacturer, since the 1980s; that the limit switch costs between $50 and $100; and that he is unaware of any complaints of limit switch malfunctions from customers. Upon questioning, Mr. Raab testified that the only reason the limit switch would not function would be if it was physically damaged, or if someone purposely disabled it. Mr. Raab further testified that Balemaster was unaware of any modifications its customers were making to its balers, and that he has never heard of anyone disabling their baler's limit switch. He opined that had the limit switch been operational, plaintiff's accident could not have occurred.

A party moving 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 any material issues of fact (***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, 26 NY3d 40, 19 NYS3d 488 [2015]; ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Nomura***, *supra*; *see also* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (***Daliendo v Johnson***, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Nomura***, *supra*; *see also* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

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 Corp.***, 92 NY2d 232, 235, 677 NYS2d 764 [1998]; ***Amatulli v Delhi Constr. Corp.***, 77 NY2d 525, 532, 569 NYS2d 337 [1991]). Depending upon the factual circumstances, a person injured by a defective product may maintain causes of action under the theories of strict products liability, negligence or breach of warranty (*see* ***Voss v Black & Decker Mfg. Co.***, 59 NY2d 102, 463 NYS2d 398 [1983]). Whether an action is pleaded in strict products liability, negligence, or breach of warranty, plaintiff has the burden of establishing that a defect in the product was a substantial

factor in causing the injury, and that the defect existed at the time the product left the manufacturer or other entity in the chain of distribution being sued (*see* ***Clarke v Helene Curtis, Inc.***, 293 AD2d 701, 742 NYS2d 325 [2d Dept 2002]; ***Tardella v RJR Nabisco***, 178 AD2d 737, 576 NYS2d 965 [3d Dept 1991]; *see also* ***Robinson v Reed-Prentice Div. of Package Mach. Co.***, 49 NY2d 471, 426 NYS2d 717 [1980]; ***Dickinson v Dowbrands, Inc.***, 261 AD2d 703, 689 NYS2d 548 [3d Dept], *lv denied* 93 NY2d 815, 697 NYS2d 563 [1999]).

Under the doctrine of strict products liability, a manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in causing the 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 [or herself] the user of the product he [or she] 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 or her] injury or damages

(***Codling v Paglia***, 32 NY2d 330, 342, 345 NYS2d 461 [1973]; *see* ***Amatulli v Delhi Constr. Corp.***, *supra*). "A product has a defect that renders the manufacturer liable for the resulting injuries if it: (1) contains a manufacturing flaw; (2) is defectively designed; or (3) is not accompanied by adequate warnings for the use of the product" (***Matter of NY City Asbestos Litig.***, 27 NY3d 765, 37 NYS3d 723 [2016]); ***Sprung v MTR Ravensburg***, 99 NY2d 468, 472, 758 NYS2d 271 [2003]; ***Gebo v Black Clawson Co.***, *supra* at 392, 681 NYS2d 221; ***Liriano v Hobart Corp.***, *supra* at 237, 677 NYS2d 764; ***Voss v Black & Decker Mfg. Co.***, *supra* at 106-107, 463 NYS2d 398).

A defectively designed product is one in 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 (***Robinson v Reed-Prentice Div.***, *supra* at 479; *see* ***Voss v Black & Decker Mfg. Co.***, *supra*; ***Bombara v Rogers Bros. Corp.***, 289 AD2d 356, 734 NYS2d 617 [2d Dept 2001]). Stated differently, a defective product is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce (***Robinson v Reed-Prentice Div.***, *supra* at 479; *see* ***Denny v Ford Motor Co.***, 87 NY2d 248, 639 NYS2d 250 [1995]; ***Voss v Black & Decker Mfg. Co.***, *supra*). In determining whether a plaintiff has made this showing, "certain risk-utility factors must be considered" (***Fasolas v Bobcat of New York, Inc.***, 150 AD3d 147, 153, 53 NYS3d 61 [2d Dept 2017]). The risk-utility factors that must be considered are:

> (1) the product's utility to the public as a whole; (2) its utility to the individual user; (3) the likelihood that the product will cause injury; (4) the availability of a safer design; (5) the possibility of designing and manufacturing the product so that it is safer; (6) the degree of awareness of the potential danger that can be attributed to the injured user; and (7) the manufacturer's ability to spread the cost of safety-related design changes

(*id.*).

A manufacturer may also 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.***, *supra*; ***Rastelli v Goodyear Tire & Rubber Co.***, 79 NY2d 289, 582 NYS2d 373 [1992]). 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* ***DiMura v City of Albany***, 239 AD2d 828, 657 NYS2d 844 [3d Dept 1997]; ***Johnson v Johnson Chem. Co.***, 183 AD2d 64, 588 NYS2d 607 [2d Dept 1992]). However, a manufacturer has no duty to warn product users of dangers that are obvious, readily discernable or apparent (*see* ***Martino v Sullivan's of Liberty***, 282 AD2d 505, 722 NYS2d 884 [2d Dept 2001]; ***Pigliavento v Tyler Equip. Corp.***, 248 AD2d 840, 669 NYS2d 747 [3d Dept], *lv dismissed in part, denied in part* 92 NY2d 868, 677 NYS2d 773 [1998]; ***Lonigro v TDC Elecs.***, 215 AD2d 534, 627 NYS2d 695 [2d Dept 1995]). 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* ***Warlikowski v Burger King***, 9 AD3d 360, 780 NYS2d 608 [2d Dept 2004]; ***Payne v Quality Nozzle Co.***, 227 AD2d 603, 643 NYS2d 623 [2d Dept 1996], *lv denied* 89 NY2d 802, 653 NYS2d 279 [1996]; ***Banks v Makita, U.S.A.***, 226 AD2d 659, 641 NYS2d 875 [2d Dept 1996]).

Failure to warn liability is intensely fact-specific, involving issues such as the obviousness of the risk, the knowledge of the product user, and proximate cause (***Liriano v Hobart Corp.***, *supra* at 243; *see* ***Brady v Dunlop Tire Corp.***, 275 AD2d 503, 711 NYS2d 633 [3d Dept 2000]; ***Rogers v Sears, Roebuck & Co.***, 268 AD2d 245, 701 NYS2d 359 [1st Dept 2000]). Nevertheless, a court can decide as a matter of law that there was no duty to warn or that the duty was discharged (*see* ***Passante v Agway Consumer Prods.***, 294 AD2d 831, 741 NYS2d 624 [4th Dept 2002], *appeal dismissed* 98 NY2d 728, 749 NYS2d 478 [2002]; ***Dias v Marriott Intl.***, 251 AD2d 367, 674 NYS2d 78 [2d Dept 1998]; ***Schiller v National Presto Indus.***, *supra*; ***Jackson v Bomag GmbH***, 225 AD2d 879, 638 NYS2d 819 [3d Dept 1996], *lv denied* 88 NY2d 805, 646 NYS2d 985 [1996]; ***Oza v Sinatra***, 176 AD2d 926, 575 NYS2d 540 [2d Dept 1991]). As with a claim of design defect, a plaintiff alleging liability based on a failure to warn must establish that the manufacturer had a duty to warn and that the failure to warn was a substantial cause of the event which produced the injuries (*see* ***Banks v Makita, U.S.A.***, *supra*; ***Billsborrow v Dow Chem.***, 177 AD2d 7, 579 NYS2d 728 [2d Dept 1992]).

The primary issue in relation to defendant Balemaster is whether the limit switch on the baler's feed chute door was defectively designed because it allegedly was susceptible to being disabled by users. It is axiomatic that a manufacturer who has designed and produced a safe product, "will not be liable for injuries resulting from substantial alterations or modifications of the product by a third party which render the product defective or otherwise unsafe" (***Hoover v New Holland, Inc.***, 23 NY3d 41, 54, 988 NYS2d 543 [2014], quoting ***Amatulli v Delhi Constr. Corp.***, *supra* at 532). Material alterations by a third party "which work a substantial change in the condition in which the product was sold by destroying the functional utility of a key safety feature, however foreseeable that modification may have been, are not within the ambit of a manufacturer's responsibility" (***Mackney v Ford Motor Co.***, 251 AD2d 298, 299, 673 NYS2d 718 [2d Dept 1998]). A manufacturer's duty "does not extend to designing a product that is impossible to abuse or one whose safety features may not be circumvented [or to incorporating] safety features into its product so as to guarantee that no harm will come to every user no matter how careless or even reckless" (***Robinson v Reed-Prentice Div. of Package Mach. Co.***, *supra* at 480-481).

Here, Balemaster established a *prima facie* case of entitlement to summary judgment (*see* ***Gorbatov v Matfer Group***, 136 AD3d 745, 26 NYS3d 92 [2d Dept 2016]; ***Hoover v New Holland, Inc.***, *supra*; ***Verost v Mitsubishi Caterpillar Forklift Am., Inc.***, 124 AD3d 1219, 1 NYS3d 589 [4th Dept 2015]; ***Magadan v Interlake Packaging Corp.***, 45 AD3d 650, 845 NYS2d 443 [2d Dept 2007]; ***Brodbeck v Albany Int'l Corp.***, 297 AD2d 693, 747 NYS2d 533 [2d Dept 2002]; ***Mackney v Ford Motor Co.***, *supra*; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). Balemaster met its initial burden by presenting evidence that the baler was not defective at the time it left the factory, that the baler's safety features were not designed to be disabled, that the baler's safety device was subsequently disabled by the purchaser, that it warned users of potential dangers through the use of prominent warning stickers on the subject baler, and that it included an instruction manual which specifically warned against disabling the baler's limit switch (*see* ***Liriano v Hobart Corp.***, *supra*). Mr. Raab, as Eastern's vice-president, testified that he is unaware of any prior injuries related to the limit switch (*see* ***Guzzi v City of New York***, 84 AD3d 871, 923 NYS2d 170 [2d Dept 2011]). Balemaster having established a *prima facie* case, the burden shifted to opposing parties to raise a triable issue (*see generally* ***Vega v Restani Constr. Corp.***, *supra*).

In opposition to Balemaster's motion, plaintiff submits his own affidavit, an affidavit of Eric Heiberg, P.E., a copy of OSHA "informal conference notes," and unsworn statements by Frank Perez, Samuel Casoria, and Juan Rodriguez. In his affidavit, plaintiff states he "believed the machine was off and that it could not turn on because the feed chute door was open" and that "[a]lthough the limit switch was sometimes bypassed to allow employees to load cardboard through the chute door, no one was doing that at this time accordingly [sic] [he] had no reason to suspect that said switch was bypassed when [he] entered the machine."

Eric Heiberg supplies an affidavit on behalf of plaintiff, stating that he is a registered professional engineer in the State of New York and that he has over thirty (30) years of experience. He avers he conducted an inspection of the subject baler, reviewed various photographs, read the applicable deposition testimony related to the instant matter, and drafted a report. Mr. Heiberg opines "[t]he manufacturer failed to design the subject bailer [sic] with a safer and still cost effective limit switch which could not be easily defeated," and that such failure "is a direct violation of the standards set forth by the National Institution for Occupational Safety and Health Standard with respect to product guarding." He further opines that if there "had been a functioning limit switch on the feed chute door this accident would never have occurred."

Plaintiff fails to raise a triable issue as to Balemaster's liability under a theory of design defect (*see* ***Robinson v Reed-Prentice Div.***, *supra*; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). Plaintiff's reliance on the Court of Appeals' decision in ***Hoover v New Holland, Inc.***, *supra*, is misplaced. The Court of Appeals distinguished the facts of that matter from those in ***Robinson v Reed-Prentice Div.***, *supra*, stating the defendant in ***Hoover*** "did not modify the [machine] in order to circumvent the utility of the shield or to adapt the [machine] to suit his own needs. Rather, [the machine owner] removed the shield because its functional utility had already been destroyed" (***Hoover v New Holland, Inc.***, *supra* at 57 [internal quotations and citations omitted]). Here, plaintiff's employer purposefully disabled the baler's feed chute door limit switch. Plaintiff did not submit evidence that the baler's limit switch would fail after repeated use, as the safety device in ***Hoover*** did. Nor did plaintiff adduce evidence raising an issue of whether the baler's limit switch was designed to be easily disabled (*see* ***Masiello v Efficiency Devices, Inc.***, 6 AD3d 672, 776 NYS2d 578 [2d Dept 2004]; ***Wyda v Makita Elec. Works***, 232 AD2d

407, 648 NYS2d 154 [2d Dept 1996]). Unlike the table saw in ***Forssell v Lerner***, 101 AD3d 807, 956 NYS2d 117 (2d Dept 2012), there is no evidence that the baler was designed to function in the absence of its safety device. Further, unlike the machine in ***Valentin v C.G. Bretting, Mfg., Co.***, 278 AD2d 230, 717 NYS2d 281 (2d Dept 2000), the baler did not require a safety device be removed to service it (*see also* ***Rios v Rockwell Intl. Corp.***, 268 AD2d 279, 701 NYS2d 386 [1st Dept 2000]). While Mr. Heiberg directs the Court's attention to other, allegedly safer, "interlock switches," he does not reference any other baler that uses such a switch. Nor does Mr. Heiberg state, with any specificity, that such "safer" switches are the industry standard. Plaintiff attempts to assign manufacturers of industrial machines the duty to design their machines with safety devices that cannot be easily defeated. However, plaintiff fails to cite any legal authority supporting the existence of such a duty. While "it may be foreseeable that an employer will abuse a product to meet its own self-imposed production needs, responsibility for that willful choice may not fall on the manufacturer" (***Robinson v Reed-Prentice Div. of Package Mach. Co.***, *supra* at 480).

As to his failure to warn claims, plaintiff also fails to raise a triable issue. In his affidavit, Mr. Heiberg states that Balemaster's warning labels were in violation of ANSI standards, because they failed to specify the type of injury that could occur if the warnings are not heeded. However, at his deposition, plaintiff stated that he had used the baler in question for approximately seven years. It is clear, therefore, that further warnings would not have given plaintiff any greater knowledge of the obvious dangers involved in working with the baler than he already had acquired through his own observations and experience (*see* ***Guzzi v City of New York***, *supra*; ***Neri v John Deere Co.***, 211 AD2d 915, 621 NYS2d 227 [3d Dept 1995]). Plaintiff was fully aware, based upon his experience and training, that the baler could inflict the type of injury he experienced. Therefore, any warning "would have been superfluous" (***Wesp v Carl Zeiss, Inc.***, 11 AD3d 965, 968, 783 NYS2d 439 [4th Dept 2004]; *see* ***Terwilliger v Max Co., Ltd.***, 137 AD3d 1699, 28 NYS3d 507 [4th Dept 2016]; ***Heimbuch v Grumman Corp.***, 51 AD3d 865, 858 NYS2d 378 [2d Dept 2008]). Plaintiff's expert also failed to assert those ANSI standards "represented the general custom or usage in the industry" (***Fernandes v Lawrence***, 10 AD3d 382, 384, 780 NYS2d 774 [2d Dept 2004]). The standards cited by plaintiff's expert use the term "should" when describing the manner of a machines design and, as such, are aspirational rather than the industry standards.

Finally, plaintiff does not offer opposition to Balemaster's applications for dismissal of the causes of action against it alleging negligent maintenance, care, and repair of the baler; negligent manufacturing; and strict products liability. Accordingly, the motion by defendant Balemaster for summary judgment dismissing the complaint, the counterclaim, and any cross-claims against it is granted.

Conversely, Clare Rose has failed to establish a *prima facie* case of entitlement to summary judgment (*see* ***Barretta v Glen Cove Prop., LLC***, 148 AD3d 1100, 50 NYS3d 520 [2d Dept 2017]; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). Pat Costanzo testified that he was the retired Director of Safety and Risk Management for Clare Rose and that his position required him to "develop and implement and enforce a health and safety program." At a point in time prior to plaintiff's accident, Mr. Costanzo requested permission from ERRI's employee, Samuel Casoria, to provide safety training to ERRI's employees, but did not seek such permission from Clare Rose. Mr. Costanzo stated such permission was granted by Mr. Casoria, and that he subsequently provided one-on-one safety training to one of ERRI's supervisors, Frank Perez. Mr. Costanzo indicated that he then observed Mr. Perez train

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ERRI's employees in a group setting, and occasionally conducted his own group safety training sessions with those ERRI employees. Mr. Costanzo testified that in the ten years he was employed by Clare Rose, he never operated a cardboard baler. He stated he "know[s] the lockout procedure for a specific piece of equipment, but [he does not] know how the machine works and how it's repaired or maintained." Upon questioning, Mr. Costanzo testified that he was not aware, prior to plaintiff's accident, that ERRI employees were bypassing the limit switch on the baler's feed chute door. Asked what he would have done had he known, Mr. Costanzo indicated that he would have instructed ERRI to return the switch to its proper functioning and not alter it again. Mr. Costanzo stated, however, that "he can't instruct them, but can [only] advise them."

Before a defendant may be held liable for negligence, it must be shown that the defendant owes a duty to the plaintiff (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]). The owner or possessor of real property must act "as a reasonable person in maintaining his or her property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (***Rigatti v Geba***, 140 AD3d 723, 723, 30 NYS3d 898 [2d Dept 2016], quoting ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]). This duty may be breached if a dangerous and defective condition is permitted to exist on the property and such condition causes injuries (*see* ***Bluth v Bias Yaakov Academy for Girls***, 123 AD3d 866, 999 NYS2d 840 [2d Dept 2014]; ***Conneally v Diocese of Rockville Ctr.***, 116 AD3d 905, 984 NYS2d 127 [2d Dept 2014]; ***Ortega v Liberty Holdings, LLC***, 111 AD3d 904, 976 NYS2d 147 [2d Dept 2013]). For an owner or possessor of real property to be liable to a plaintiff who is injured as a result of an allegedly defective condition upon property, "it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence" (***Monastiriotis v Monastiriotis***, 141 AD3d 510, 511, 35 NYS3d 265 [2d Dept 2016]).

An "out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct" (***Casson v McConnell***, 148 AD3d 863, 864, 49 NYS3d 711 [2d Dept 2017]). However, even an out-of-possession landlord who assumed the responsibility to make repairs to its property cannot be held liable for injuries caused by a defective condition on the property unless it created or had actual or constructive notice of it (*see* ***Davidson v Steel Equities***, 138 AD3d 911, 912, 30 NYS3d 275 [2d Dept 2016]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Toma v Rizkalla***, 138 AD3d 1103, 30 NYS3d 321 [2d Dept 2016]; ***Willis v Galileo Cortlandt, LLC***, 106 AD3d 730, 964 NYS2d 576 [2d Dept 2013]).

It is generally held that "control is the test which measures generally the responsibility in tort of the owner of real property" (***Ritto v Goldberg***, 27 NY2d 887, 889, 317 NYS2d 361 [1970]). Though, as "common law has evolved, the meaning of 'control' has changed, and in many common situations it may no longer be accurate to say that control, as that term is currently used, is a reliable measure of an out-of-possession landlord's duty" (***Alnashmi v Certified Analytical Group, Inc.***, 89 AD3d 10, 16, 929 NYS2d 620 [2d Dept 2011]). In ***Ritto***, the Court of Appeals held that a landlord, "by a long course of conduct of his employees in reporting malfunctions of the machines to the repair service and the owner, so intervened in the operation of the business as to give rise to a reliance by . . . tenants in the building

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on reports of malfunction being made by the landlord." Then, 41 years later, the Court of Appeals commented on the ***Ritto*** case, stating "despite a lease that transferred possession and control to commercial tenants, the issue of whether the landlord actually exercised control over the premises was one for the jury" (***Gronski v County of Monroe*** 18 NY3d 374, 379-380, 940 NYS2d 518 [2011]). In ***Gronski***, the Court of Appeals found a triable issue "remain[ed] to be resolved by a trier of fact [of] whether [the property owner], through its course of conduct, exercised sufficient control over the [subject property] such that it owed plaintiff a duty to prevent and remedy the kind of condition that resulted in [plaintiff's] injury" (*id.* at 382).

Given that Clare Rose has not submitted the lease or rental agreement between it and ERRI, extant at the time of plaintiff's alleged injury, the Court is unable to rule on the scope of the duties Clare Rose owed to ERRI (*see* ***Gronski v County of Monroe***, *supra*; ***Casson v McConnell***, *supra*; *cf.* ***Alnashmi v Certified Analytical Group, Inc.***, *supra*). Further, Mr. Costanzo's testimony, read in conjunction with the deposition testimony of Frank Perez, Juan Rodriguez, and Samuel Casoria, raises triable issues as to whether Clare Rose, as the premises owner, is an out-of-possession landlord; what degree of control Clare Rose maintained over ERRI; whether Clare Rose had the authority to direct the actions of ERRI's employees; and whether the disabled feed chute door limit switch represented a dangerous condition, of which it had notice (*see* ***Gronski v County of Monroe***, *supra*; *see also* ***Bouima v Dacomi, Inc.***, 36 AD3d 739, 829 NYS2d 572 [2d Dept 2007]; ***Thompson v Port Auth.***, 305 AD2d 581, 761 NYS2d 75 [2d Dept 2003]; ***Helena v 300 Park Ave., LLC***, 306 AD2d 170, 763 NYS2d 542 [1st Dept 2003]). Accordingly, the motion by Clare Rose for summary judgment dismissing the complaint against it is denied.

Dated: October 10, 2017

Hon. Joseph Farneti
Acting Justice Supreme Court

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