

Roseto v Ground Servs. Intl. Inc.

2019 NY Slip Op 32075(U)

July 3, 2019

Supreme Court, Suffolk County

Docket Number: 13-28776

Judge: David T. Reilly

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INDEX No. 13-28776

CAL. No. 18-005180T

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 8-23-18

ADJ. DATE 1-30-19

Mot. Seq. # 002 - MG

-----X
DOMENIC ROSETO,

Plaintiff,

- against -

GROUND SERVICES INTERNATIONAL
INCORPORATED, and ASN, INC.,

Defendants.
-----X

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ASN, INC.,

Third-Party Plaintiff,

- against -

TG INDUSTRIES, INC.,

Third-Party Defendant.
-----X

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Upon the following papers numbered 1 to 25 read on this motion for summary judgment: Notice of Motion and supporting papers 1 - 14; Answering Affidavits and supporting papers 15 - 16; 17 - 18; Replying Affidavits and supporting papers 19 - 25; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendant/third-party plaintiff ASN, Inc., for summary judgment dismissing the complaint and Ground Services International, Inc.'s cross-claim against it is granted.

This action was commenced by plaintiff Domenic Roseto to recover damages for injuries he allegedly sustained on October 27, 2010, when his left arm was pulled into an airplane-loading apparatus operated by defendant Ground Services International, Inc., while in the employ of nonparty UPS Cartage Service. By his bill of particulars, plaintiff contends that the reflective safety vest he was wearing at the time of the incident, allegedly distributed by defendant ASN, Inc., was defectively designed, in that its Velcro connecting points "failed to break away" after becoming caught in a spinning roller which, in turn, caused his arm to be pulled into that mechanism. The Court notes that the third-party action against TG Industries, Inc., was dismissed by an Order of the Hon. James Hudson dated September 28, 2015. Defendants ASN, Inc. and Ground Services International, Inc. assert cross-claims against one another for contribution.

ASN, Inc. (ASN) now moves for summary judgment, arguing that plaintiff cannot prove that it manufactured the reflective vest worn by him at the time of his alleged injury. ASN further asserts that if its vest was worn by plaintiff at the time of his incident, such vests "are fully fit for their intended use" and "meet all applicable standards." In support of its motion, ASN submits copies of the pleadings, transcripts of the parties' deposition testimony, a transcript of nonparty Savion Adams' deposition testimony, multiple photographs, and an affidavit of Ricky Mehta-Desai, Ph.D.

Plaintiff testified that on the date in question he was employed by United Parcel Service (UPS) as a truck driver. He stated that he arrived at work in Springfield Gardens, New York at approximately 4:45 a.m. and was given an assignment to "go to the plane," meaning that he would drive an empty tractor trailer truck to JFK Airport and meet one of UPS Airlines' jets. Plaintiff indicated that this was a relatively unusual assignment, one that he had only been given once before in the approximately nine years he had worked for UPS. He testified that prior to commencing his drive to JFK Airport, his supervisor, Bill Doyle, gave him a brand-new reflective safety vest to wear, as well as a rain slicker. Upon questioning, plaintiff described the rain slicker as "waist high," long-sleeved, and red in color. He indicated that he put the rain slicker on first, then put his reflective vest on over it. Plaintiff stated that the new reflective vest, which Mr. Doyle had stored in his desk drawer, was larger than the one he had been wearing previously, and was secured with Velcro.

Plaintiff further testified that he arrived at JFK Airport at approximately 5:30 a.m. and drove the tractor trailer to a designated area near the UPS aircraft, which had already arrived and was waiting on the tarmac. He stated that his designated loading area was next to a machine called a K-Loader, which retrieves cargo from the UPS aircraft and loads it onto the "slave system." Plaintiff explained that the slave system, or "roller system," is an apparatus dotted with rollers, which aids in the movement of shipping containers from the K-Loader into the tractor trailers. He indicated that after he had parked the tractor trailer in the designated area and it was loaded with two shipping containers, he exited his truck

and walked to its rear. Plaintiff stated that prior to departing the premises, he had to “take the air out of the roller system in [his] truck,” which entailed actuating two switches located on the driver’s side of the vehicle, underneath the trailer, just behind its rearmost wheels. He testified that after flipping the two toggle switches, he felt a tug at his lower back and realized that he was being “drawn into the roller” on the K-Loader, which was parked just behind him. He indicated that his reflective safety vest had become caught in a revolving five-inch-diameter roller on the K-Loader, which caused the vest to wrap around him and rapidly turn him to his left. Upon questioning, plaintiff denied that any portion of the rain slicker he was wearing was drawn into the roller. He also testified that neither the rain slicker, nor the reflective vest he wore, was preserved following the accident.

David Olivieri testified that he is the vice-president of ASN, which is a distributor of over 450,000 products. He stated that ASN does not design or manufacture items, but “brands” already-manufactured products with the purchaser’s logo or name. Upon questioning, Mr. Olivieri indicated that ASN sells a “5-Point Breakaway” safety vest, which is comprised of three fabric panels with five “release points.” The release points are located on each shoulder, with two more at the waist and “one in the front.” He testified that the design of the vest “is out in the marketplace” and “not specific to [ASN].” He stated that the vests are purchased from a Canadian company named TG Industries, and that ASN sells the vests directly to UPS.

Mr. Olivieri testified that the item sold by ASN is an “ANSI-certified class two safety vest” which conforms to the requirements relating to reflective stripes and “fluorescent background.” He indicated that prior to selling the vests to UPS, ASN sent representative samples of the vest to a company called TexTest, which examined the vest design and issued a certification that they conformed to ANSI standards. Mr. Olivieri stated that while he is unaware if any testing of the vest’s Velcro release points was done to determine how easily they “break away,” he denied receiving any complaints regarding that feature. Finally, Mr. Olivieri testified that ASN was not the only entity from which UPS obtained safety vests.

In his affidavit, Ricky Mehta-Desai, Ph.D, states that he is an engineering consultant for Connecticut Technology Associates in Stamford, Connecticut. He indicates that he possesses more than 10 years of education and experience in the field of engineering, having obtained a bachelor of science degree in biomechanical engineering and a doctorate in applied physiology. Mr. Mehta-Desai avers that he was hired by ASN to opine on the suitability of their 5-point breakaway vest at issue in this matter. In preparation for his evaluation, Mr. Mehta-Desai states that he reviewed, among other things, the transcripts of the witnesses’ depositions, copies of purchase orders, and multiple ANSI/ISEA standards. He further stated that he inspected two exemplar vests and conducted testing, using his hands, of the vests’ ability to separate at their Velcro breakaway points.

Referring first to industry guidelines, Mr. Mehta-Desai states that “[a]t the time of the subject accident, the only standard which applied to safety vests was the ANSI/ISEA 207-2006.” He indicates that while that standard “had requirements mostly pertaining to the reflectivity and the minimum material strength of the vest fabric, which are not relevant to the subject accident,” it does mention a “tear away” feature as a “suggested option.” He adds that the standard “does not include any testing, design or performance requirements for the optional tear away feature.”

Mr. Mehta-Desai states that during his testing of the exemplar vests' tear away features, he found that the vest "could easily be separated by hand at each of the tear away points." He opines that "[t]here is nothing special or unusual about the design of the subject vest or its tear away feature that would make it any more prone to experiencing a roller entrapment event than any other commonly available high visibility safety vest design." In conclusion, Mr. Mehta-Desai further opines that, within a reasonable degree of engineering certainty, "the high visibility public safety vest distributed by ASN, Inc. was and is a safe product, fully fit for its intended purpose."

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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). 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 (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

A manufacturer who places a defective product on the market that causes injury may be liable for the ensuing injuries (*Liriano v Hobart Corp.*, 92 NY2d 232, 235, 677 NYS2d 764 [1998]). A wholesaler, distributor, a retailer, or others in the chain of distribution may also be held liable in products liability by a party injured as a result of a defective product (*see 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]; *Godoy v Abamaster of Miami, Inc.*, 302 AD2d 57, 754 NYS2d 301 [2d Dept 2003]). 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]). "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 New York City Asbestos Litig.*, 27 NY3d 765, 37 NYS3d 723 [2016]).

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, is unreasonably dangerous for its intended use, and whose utility does not outweigh the danger inherent in its introduction into the stream of commerce (*Hoover v New Holland, Inc.*, 23 NY3d 41, 53-54, 988 NYS2d 543 [2014], quoting *Voss v Black & Decker Mfg. Co.*, *supra* at 107 [internal quotations omitted]). To determine whether a product's danger outweighs its utility, a factfinder must consider

- (1) the product's utility to the public as a whole and to the individual user;
- (2) the nature of the product — that is, the likelihood that it will cause injury;
- (3) the availability of a safer design;
- (4) the potential for designing

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and manufacturing the product so that it is safer but remains functional and reasonably priced; (5) the ability of the plaintiff to have avoided injury by careful use of the product; (6) the degree of awareness of the potential danger of the product which reasonably can be attributed to the plaintiff; and (7) the manufacturer's ability to spread any cost related to improving the safety of the design

(*Fasolas v Bobcat of New York, Inc.*, ___ NY3d ___, 2019 NY Slip Op 03657 [2019] [internal quotations and citations omitted]).

Here, ASN has established a prima facie case of entitlement to summary judgment in its favor (see *Conte v Orion Bus Indus., Inc.*, 162 AD3d 638, 78 NYS3d 236 [2d Dept 2018]; see generally *Alvarez v Prospect Hosp.*, *supra*). Initially, though not conclusively established through the testimony of the parties, the Court will assume for the purposes of the instant motion that the safety vest worn by plaintiff at the time of his alleged injury was distributed by ASN. The testimony of Mr. Olivieri, coupled with the expert affidavit of Mr. Mehta-Desai, demonstrated that the vest in question exceeded all applicable safety requirements, was not defective, and was fit for its intended purpose. The burden, thus, shifted to the opposing parties to raise a triable issue of material fact (see generally *Vega v Restani Constr. Corp.*, *supra*).

GSI opposes ASN's motion, arguing that Mr. Mehta-Desai's appearance in this matter as an expert witness was not properly noticed and, even if it had been, his expert affidavit is unsigned and speculative. It also argues that Mr. Mehta-Desai relied upon certain evidence in the drafting of his report that was not submitted to the Court with the motion. GSI further opposes ASN's motion on procedural grounds, arguing that the transcripts of the witnesses' depositions submitted by ASN in support of its motion are unsigned. Initially, the Court notes that each transcript submitted to it, save for plaintiff's own, is signed and certified by the relevant stenographer. Thus, the transcripts submitted by ASN in support of its motion, except for that of the plaintiff, are properly before the Court on that ground (see *Ortiz v Lynch*, 105 AD3d 584, 965 NYS2d 84 [1st Dept 2013]). As to the transcript of plaintiff's deposition testimony, GSI explicitly stated in its opposition that it "incorporates by reference the . . . exhibits . . . as set forth by counsel for ASN." Accordingly, plaintiff's deposition transcript may be considered (see *Baptiste v Ditmas Park, LLC*, 171 AD3d 1001, 98 NYS3d 280 [2d Dept 2019]). Significantly, the accuracy of the various deposition transcripts is not disputed by GSI.

Turning to GSI's arguments regarding ASN's expert, the Court notes that its copy of Mr. Mehta-Desai's affidavit is signed, sworn, and notarized. GSI's argument regarding disclosure of ASN's expert is similarly unavailing, as failure to disclose is not fatal to ASN's motion (see generally *Cobham v 330 W. 34th SPE, LLC*, 164 AD3d 644, 83 NYS3d 537 [2d Dept 2018]). Regarding certain materials that Mr. Mehta-Desai reviewed prior to the drafting of his report, but that ASN did not submit to the Court with its motion, namely a "Vartest Laboratories Third Party Certificate," an "ASN purchase order," and a "UPS purchase order," the Court finds that such failure does not preclude consideration of such report. In most cases, an expert's affidavit will be deemed insufficient when it relies upon uncertified, unauthenticated, inadmissible, or unsubmitted documents as the basis for the expert's opinions (see generally *Garrison v Quirk*, 120 AD3d 753, 991 NYS2d 334 [2d Dept 2014]; *LaVecchia v Bilello*, 76


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AD3d 548, 906 NYS2d 326 [2d Dept 2010]; *Farmer v City of New York*, 25 AD3d 649, 810 NYS2d 90 [2d Dept 2006]; *Vetti v Aubin Contr. & Renovation*, 306 AD2d 874, 761 NYS2d 903 [4th Dept 2003]). However, in this case, the aforementioned three documents, of approximately 12 items listed as having been reviewed by Mr. Mehta-Desai, are not mentioned elsewhere in his report, and there is no indication that they played any role in the formation of his ultimate conclusions. Instead, Mr. Mehta-Desai focuses upon the exemplar vests' general safety and their conformity to ANSI guidelines. Furthermore, there is no allegation that GSI was not provided copies of the documents during discovery, or that their authenticity is questionable.

Plaintiff also opposes ASN's motion, arguing that triable questions of fact remain as to whether the vest worn by plaintiff on the date of his injury was distributed by ASN, and whether such vest "adhere[d] to any safety standards." Plaintiff also adopts ASN's exhibits as his own. Plaintiff, like GSI, fails to include an expert affidavit or other evidence to demonstrate that the vest in question was defectively designed or manufactured, or that ASN was negligent. Plaintiff further fails to identify any feature of the subject vest that was unreasonably dangerous, did not testify that he relied upon the "breakaway" feature of the subject vest to protect him from harm, or that some other model of reflective vest would have been less dangerous (*see Fasolas v Bobcat of New York, Inc., supra*).

Thus, neither opponent to ASN's motion raises a triable issue of material fact. Accordingly, the motion by defendant ASN, Inc., for summary judgment dismissing the complaint and Ground Services International, Inc.'s cross-claim against it is granted.

Dated: July 3, 2019
Wisterhead, NY


J.S.C.
HON. DAVID T. REILLY

 FINAL DISPOSITION X NON-FINAL DISPOSITION