Simmons v Elrac, LLC
2019 NY Slip Op 33926(U)
June 13, 2019
Supreme Court, Westchester County
Docket Number: 58486/2016
Judge: Terry Jane Ruderman

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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DOROTHEA SIMMONS,

Plaintiff,

-against-

ELRAC, LLC, EAN HOLDINGS, LLC, and GENERAL MOTORS, LLC,

Defendants.

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DECISION and ORDER

Motion Sequence Nos. 1 and 2
Index No. 58486/2016

RUDERMAN, J.

The following papers were considered in connection with the motion of defendants ELRAC, LLC and EAN Holdings, LLC, pursuant to CPLR 3212 for summary judgment dismissing the third cause of action of the complaint as against them, and for a conditional grant of summary judgment in their favor on their cross-claims for indemnification against defendant General Motors, LLC on plaintiff's strict products liability claim (sequence 1); and the motion of defendant General Motors, LLC ("GM"), for summary judgment dismissing the complaint as against it (sequence 2):

Papers - Sequence 1	Numbered
Notice of Motion, Affirmation, Exhibits A - O	1
GM's Affirmation in Opposition, Exhibit A	2
Plaintiff's Affirmation in Opposition	3
Reply Affirmation, Exhibit Q	4
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Plaintiff alleges that on October 31, 2015, while she was a rear-seat passenger in a 2015 Chevrolet Tahoe on I-95 near Newark, Delaware, the vehicle caught fire, and she sustained injuries while trying to remove her young son from the burning vehicle. The Tahoe had been manufactured by GM, and was owned by EAN Holdings, LLC, and used as a rental vehicle by ELRAC, LLC. At the time of the incident, the vehicle was in the possession of a rental customer who was transporting a number of passengers, including plaintiff and her son.

The causes of action pleaded in the amended complaint sound in strict liability, breach of implied warranty, and negligence. The claim for strict liability relates to the design of the vehicle's transmission oil cooler (TOC) connection to the thermal bypass valve; plaintiff claims that due to a design defect, transmission fluid leaked onto a hot surface in the vehicle's undercarriage, such as an exhaust pipe, causing the fire.

ELRAC and EAN Holdings move for summary judgment dismissing the negligence claim against them, contending that they have established the absence of negligence as a matter of law with their vehicle maintenance records, and that plaintiff has no evidence of any negligence on their part. They also argue that there is no evidence that they had knowledge of a transmission fluid leakage problem. Further, they seek an order conditionally granting them summary judgment on their indemnification cross-claim against GM on the strict liability claim.

In its motion for summary judgment, GM argues that plaintiff cannot establish her claim for strict liability or breach of the implied warranty of merchantability because the vehicle was not defectively designed. As to the negligence claim against it, GM contends that it must be dismissed because the claim that GM negligently failed to recall the subject Tahoe, which was built in February 2015, relies on a March 2014 recall notice concerning a design defect no longer included in GM's vehicles after that time.

Contentions

GM's Motion

In arguing that plaintiff cannot establish her claim for strict liability, GM relies on the affidavit of Jeffrey Santrock, a Senior Technical Expert for GM, who explains the design of the TOC connections used in the subject Tahoe. In particular, he describes the slotted "keeper plate" design securing the TOC lines into sockets in the valve, using compressible O-rings to seal the TOC, and explains how this system prevents fluid leaks. Santrock asserts that this design is "state of the art." He also lists the quality control and inspection procedures in place at Bend-All Automotive, the company that manufactures the keeper plates, to ensure that the connections of the TOC lines to the TOC valves are free of leaks. He adds that GM is not aware of any non-collision fires caused by transmission fluid leaking from the TOC connection of any of its vehicles employing the same system. GM also maintains that there is no evidence that the Tahoe at issue experienced any fluid leak prior to the incident.

GM challenges the cause of action for breach of the implied warranty of merchantability on the round that it relies on the element of defective design. As to the cause of action sounding in negligence, GM argues that it relies on the March 2014 recall, which is inapplicable to the subject Tahoe.

In opposition to GM's motion on this point, plaintiff submits the affidavit of her expert, Peter Chen, who opines that the Tahoe caught fire on October 31, 2015 as the result of a leak of transmission fluid from a defective TOC valve, due to a design defect. Chen reviews the history of the 2015 production run for Tahoes and other GM vehicles, asserting that from the outset there were issues with transmission fluid leaks from the TOC connection to the thermal bypass valve, and that during the course of the 2015 model year these vehicles underwent two design

changes for the TOC. He explains that the original design led to a safety recall after GM identified it as responsible for leaks – including leaks of transmission fluid – some of which led to undercarriage fires. Because those leaks became apparent early on, as soon as the TOC valve was first pressurized, it was quickly determined that the problems occurred because the lines were not securely attached to the bypass valve, and a recall was issued in March 2014.

According to Chen, although the first change GM adopted in the TOC design for the 2015 models successfully resolved the leak problem with the use of "assurance caps" placed on the transmission fluid lines into and out of the bypass valve, GM then adopted the "keeper plate" design, apparently at the request of their supplier, Bend-All Automotive. It is Chen's opinion that this design is not successful at resolving the problem with TOC leaks. He refers to evidence obtained from GM in discovery, regarding warranty work it has performed on seven 2015 vehicles with the keeper plate design, to repair leaks of transmission fluid from the TOC. These records reflect that the TOC leaks in those vehicles have appeared later in the life of the vehicles, several of which had accrued total mileage of approximately 20,000 miles by the time the leak became apparent. Chen suggests that the keeper plate design effectively conceals defects that were revealed almost immediately by the initial, recalled design.

As to Santrock's assertion that the keeper plate design is "state of the art," Chen notes that Santrock has not provided evidence to back up that claim. In particular, he observes that the keeper plate is manufactured not by GM but by Bend-All Automotive, and GM has not provided evidence regarding the manufacturer's testing of the part.

ELRAC/EAN Holdings

In the ELRAC/EAN Holdings motion for summary judgment, the moving defendants respond to plaintiff's claim in her bill of particulars that

> "The defendants ELRAC, LLC, and EAN HOLDINGS, LLC, were negligent by failing to properly maintain the 2015 Chevrolet Tahoe, VIN 1GNSKBKC9FR595903, . . . by failing to take notice of GM recall 14121, NHTSA Campaign ID 14V152000, issued March 31, 2014; by failing to repair the vehicle following the recall; by renting a defective and dangerous vehicle."

Since it is undisputed that the vehicle in question was manufactured in 2015, the moving defendants observe that as a matter of law they cannot be negligent for failing to take notice of a 2014 recall that, in any event, did not apply to the subject Tahoe. They also argue that since plaintiff claims that the fire was caused by a design defect in the transmission oil line, over which they have no responsibility, they cannot be liable for that defect. Further, they observe that plaintiff has not claimed that they failed to perform or negligently performed any repairs, servicing or maintenance to the subject vehicle, submitting their service records in order to establish that the subject vehicle received all the recommended maintenance services. Additionally, they assert that there were no reported problems with the subject vehicle from the 29 prior rental customers. They also claim that the vehicle was subject to a pre-rental inspection prior to each rental, and that they had no indication of a transmission fluid leak.

In opposition to the ELRAC/EAN Holdings motion, GM points out that only one hour elapsed between the time the prior renter returned the Tahoe on October 30, 2015 at 4:10 p.m. and the time it was then rented to the customer who had possession the Tahoe when it caught fire on October 31, 2015, at 5:12 p.m. Moreover, in that one hour the Tahoe was transported from West Hempstead to Floral Park. Therefore, GM argues, the assertion by ELRAC/EAN Holdings that a pre-rental inspection was performed on the vehicle is suspect. Plaintiff filed a document concurring with GM's argument.

Discussion

GM's Motion

A defendant moving to dismiss a products liability claim has the initial burden of establishing as a matter of law that there was no defect in the design or manufacture of the product (*see Maciarello v Empire Comfort Sys.*, 16 AD3d 1009, 1010 [3d Dept 2005]; *Lauber v Sears, Roebuck & Co.*, 273 AD2d 922 [4th Dept 2000]; *Terry v Erie Foundry Co.*, 235 AD2d 414, 415, 652 NYS2d 308 [2d Dept 1997]). GM contends that plaintiff failed to make the necessary showing for a claim of design defect, that "there was a feasible design alternative that would have made the product safer" (*Joline v City of New York*, 2 Misc 3d 1006(A), 1006A [Sup Ct Queens County 2004], *affd* 32 AD3d 492 [2d Dept 2006]).

However, the Chen affidavit and the related evidence are sufficient to establish an issue of fact as to the existence of a design defect in the TOC system that GM used for the 2015 Tahoe in question, as well as the existence of a feasible alternative design that would have been safer, namely, the use of assurance caps to prevent leaks of transmission fluid. While Santrock asserted that there was no defect in the Tahoe's TOC design, and that the design was "state of the art," his assertions fell short of establishing that the vehicles with the keeper plate design were "designed and manufactured under state of the art conditions" or that the "manufacturing process [for that part] complied with applicable industry standards" (*Ramos v Howard Indus., Inc.*, 10 NY3d 218, 223 [2008]).

Similarly, the Chen affidavit, and the submitted evidence of warranty work prompted by transmission fluid leaks in 2015 GM vehicles with the keeper plate design, was sufficient to create an issue of fact as to whether the vehicle experienced a fluid leak. The acknowledgment by Jerome Hendler, a GM engineer, that transmission fluid leaks had caused undercarriage fires

in the initial 2015 TOC design, when the transmission fluid came into contact with hot exhaust surfaces, suffices to create an issue as to whether, if there was such fluid leak in this instance, such a leak caused a fire which caused injury to plaintiff.

Finally, GM's argument regarding the negligence claim against it is rejected. That negligence claim is not based on the March 2014 recall of the vehicles with the earlier TOC system design. Rather, plaintiff's negligence claim against GM alleges that GM was negligent in "fail[ing] to recall the above 2015 Chevrolet Tahoe in a timely manner." Its moving papers do not conclusively disprove the allegations of this claim as a matter of law.

ELRAC/EAN Holding's Motion

Defendants correctly observe that as a matter of law they cannot be found negligent for failing to take notice of a 2014 recall that, in any event, did not apply to the subject Tahoe, and that plaintiff has not claimed that they failed to perform or negligently performed the scheduled servicing or maintenance on the subject vehicle. However, defendants' assertion that a pre-rental inspection was conducted on the subject vehicle before it was rented on the present occasion, is belied by the circumstances of this rental, so as to preclude a determination of the moving defendants' non-negligence as a matter of law.

Their request for a conditional grant of summary judgment on their cross-claim against GM for indemnification is premature.

"In strict products liability, a manufacturer, wholesaler, distributor, or retailer 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'" (*Godoy v Abamaster of Miami, Inc.*, 302 AD2d 57, 58 [2d Dept 2003], quoting *Gebo v Black Clawson Co.*, 92 NY2d 387, 392 [1998]). "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" (*Godoy v Abamaster*, 302 AD2d at 58). "Distributors and retailers may be held strictly liable to injured parties, even though they may be innocent conduits in the sale of the product, because liability rests not upon traditional considerations of fault and active negligence, but rather upon policy considerations which dictate that those in the best position to exert pressure for the improved safety of products bear the risk of loss resulting from the use of the products" (*id.*, citing *Sukljian v Charles Ross & Son Co.*, 69 NY2d 89, 95 [1986]).

Although "the distributor of the defective product is entitled to indemnification from the [manufacturer] of the product at the top of the commercial chain of distribution" (*Godoy v Abamaster*, *supra*), "since [ELRAC and EAN Holdings] did not establish entitlement to summary judgment dismissing the negligence cause of action, [they] also failed to establish [their] entitlement to conditional summary judgment on [their] claim for indemnification against [GM]" (*Brunjes v Lasar Mfg. Co., Inc.*, 40 AD3d 567, 568 [2d Dept 2007]).

Accordingly, it is hereby,

ORDERED that defendants' motions for summary judgment dismissing the causes of action of the complaint as against them are denied; and it is further

ORDERED that the parties are directed to appear in the Settlement Conference Part on Tuesday, August 6, 2019 at 9:15 a.m., at room 1600 of the Westchester County Courthouse located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York, 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
June 13, 2019

HON. TERRY JANE RUDERMAN, J.S.C.