

Garrison v Dick's Sporting Goods, Inc.

2019 NY Slip Op 34133(U)

February 26, 2019

Supreme Court, Ulster County

Docket Number: 15-0744

Judge: Christopher E. Cahill

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**STATE OF NEW YORK
SUPREME COURT COUNTY OF ULSTER**

**JAMES GARRISON and
CHRISTOPHER GARRISON,**
Plaintiffs,

-against-

**Decision & Order
Index No. 15-0744**

**DICK'S SPORTING GOODS, INC., and
JOHN DOE and/or JANE DOE 1-10, said
names being fictitious in nature,**
Defendants.

Supreme Court, Ulster County
Motion Return Date: April 2, 2019
RJI No.: 55-15-01391

**FILED
2 H 25 M
MAY 24 2019
Nina Postupack
Ulster County Clerk**

Present: Christopher E. Cahill, JSC

Appearances: MAINETTI & MAINETTI, PC.
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By: Marc J. Kaim, Esq.

Cahill, J.:

The defendants move for summary judgment pursuant to CPLR § 3212 and seek the dismissal of the complaint. The plaintiffs oppose the motion.

On October 14, 2014, James Garrison ("James") purchased a Barnett Recruit Tactical crossbow from Dick's Sporting Goods, Inc. ("Dick's") in Kingston, New York.

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On October 28, 2014, James allowed his son, Christopher Garrison (“Christopher”), to use the crossbow. James cocked and loaded the crossbow for his son on two occasions. When the son fired the crossbow a second time, the cord broke and wrapped around Christopher’s hand causing him injury to his left thumb. The next day, James took the crossbow back to Dick’s. James alleges that a Dick’s employee, Douglas North, repaired and modified the crossbow using parts of another crossbow. James returned home with the alleged modified crossbow and fired three shots. On the third shot, James sustained an injury to his left index finger. On November 4, 2014, James returned the crossbow to Dick’s, claiming that the crossbow was defective. Dick’s accepted the returned crossbow which was eventually destroyed by the manufacturer. Thereafter, James purchased a Barnett Game Crusher crossbow. Employee, Douglas North denies that he repaired and/or modified plaintiff’s crossbow. Mr. North also claims that he had no knowledge of plaintiffs’ alleged injuries.

On March 9, 2015, the plaintiffs commenced this action against Dicks and an unknown John and Jane Doe alleging claims for negligence, strict liability, and breach of express and implied warranty based upon theories of design defect and failure to warn. The defendants served an Answer on June 9, 2015. Discovery continued for several years. On July 26, 2018, the plaintiffs filed a Note of Issue without the required expert disclosures. In November 2018, the plaintiffs informed the court that they were experiencing difficulty in retaining an expert witness. On November 26, 2018, the

defendants moved for summary judgment. In a Decision and Order dated February 26, 2019, this court granted the defendants partial summary judgment, finding that “because plaintiffs have no expert, that branch of defendants’ motion for summary judgment dismissing plaintiffs’ defective design cause of action must be granted”. This court also directed the plaintiffs to serve opposition papers to “defendants’ summary judgment motion which is addressed to plaintiffs’ remaining claims which apparently do not require expert testimony”. The plaintiff submitted an Affirmation in Opposition on March 19, 2019. The defendants submitted a Reply Affirmation on April 2, 2018.

“Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue” (see McDay v. State, 130 AD3d 1359 [3rd Dept. 2016]). In deciding whether summary judgment is warranted, the court’s main function is issue identification, not issue determination (see Barr v. County of Albany, 50 NY2d 247 [1980]). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law (see Winegard v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). The evidence must be construed in a light most favorable to the party opposing the motion (see Davis v. Klein, 88 NY2d 1008 [1996]). In order to defeat a motion for summary judgment, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action (see Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Failure to make such a showing

requires denial of the motion regardless of the sufficiency of the opposing papers (see Voss v. Netherlands Ins. Co., 22 NY3d 728 [2014]).

Initially, the defendants claim that the plaintiffs failed to replace the “Doe” defendants with named defendants in the second cause of action. The defendants allege that the plaintiffs have had over four years to ascertain the identity of the alleged Doe defendants. Since the plaintiffs have not opposed this portion of defendants’ motion, summary judgment is hereby granted dismissing plaintiffs’ claims against John and Jane Doe.

Turning to the remaining contentions, the core of plaintiffs’ case is that Dick’s failed to warn them of the dangers of the crossbow. The plaintiffs maintain that Dick’s is under a duty to exercise reasonable care to ensure proper warnings are provided on dangerous products sold to the public. The plaintiffs contend that warning labels were not displayed on the crossbow and that this failure to display warnings on the crossbow requires the denial of summary judgment.

In support of its motion, Dick’s maintains that the crossbow gave the consumer ample warnings in regard to the operation of the crossbow. James acknowledged at his EBT that he read and understood the Owner’s Manual which included assembly and use instructions, including detailed instructions on the safe operation of the bow. Christopher testified that he never reviewed the Owner’s Manual in order to learn of the dangers in operating a crossbow. The defendants point out that the Owner’s Manual gave numerous

warnings to the consumer regarding the operation of the crossbow, including warning consumers to use extreme caution, and if they failed to do so, such failure could result “in serious injury or death”. The Manual further warned owners to “keep your fingers below the flight track and out of the path of the cables and strings when firing the crossbow. The velocity of the string striking your fingers as the string travels forward could cause severe personal injury”. The Owner’s Manual also directed that the string and cables should be waxed, and it provided photographs of how to hold and not hold the crossbow and where to position one’s fingers, and the limb of the crossbow contained a black decal with a “WARNING” sign that stated - “Do not place thumb or fingers above the flight track, this may cause serious injury!” The crossbow also was sold with a hangtag which contained five “Safety Guidelines” and a “CAUTION” warning “DO NOT PLACE THUMB OR FINGERS ABOVE THE FLIGHT TRACK OR IN FRONT OF CABLES. CAN CAUSE SERIOUS INJURY”.

To succeed on a failure to warn claim, the plaintiffs are required to prove the product did not contain adequate warnings and that the inadequacy of those warnings was the proximate cause of their injuries (see Mulhall v. Hannafin, 45 AD3d 55 [1st Dept. 2007]). The failure to warn cannot be a proximate cause of a plaintiff’s injury if the plaintiffs had actual knowledge of the injury-producing hazard or chose to ignore all warnings (see Palmatier v. Mr. Heater Corporation, 159 AD3d 1084 [3rd Dept. 2018]). After a review of the record, this court concludes the plaintiffs have not met their burden

of proof by demonstrating the safety warnings contained in the Owner's Manual were inadequate and were the proximate cause of their injuries (see Banks v. Makita, U.S.A., Inc., 226 AD2d 659 [2nd Dept. 1996], ly denied 89 NY2d 805 [1996]). In this court's estimation, the safety warnings contained in the owner's manual, on the limb of the bow and on the hangtag adequately warn the user of the dangers of using the bow.

In addition, the plaintiffs have not submitted any evidence proving that Dick's gave any express or implied warranties that influenced their purchase of the crossbow. Neither plaintiff did any research prior to the purchase, and they have not shown that they relied upon representations of Dick's sales agent when they purchased the crossbow. Accordingly, the plaintiffs have not sustained their burden by proving a breach of either an implied warrant of merchantability or an express warranty (see Pronti v. DML of Elmira, Inc., 103 AD2d 916 [3rd Dept. 1984]).

The court has reviewed the plaintiffs' remaining contentions and concludes they either lack merit or are unpersuasive given the court's determination (see Hubbard v. County of Madison, 71 AD3d 1313 [3rd Dept. 2010]).

ORDERED that the defendants' motion for summary judgment is granted.

This shall constitute the Decision and Order of the court. The original Decision and Order and all other papers are being delivered to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the

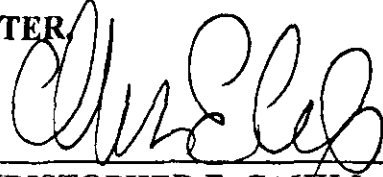
applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: Kingston, New York

May 22 2019

ENTER



CHRISTOPHER E. CAHILL, JSC

PAPERS CONSIDERED:

1. Notice of Motion dated November 19, 2018; Affirmation of Marc J. Kaim, Esq. dated November 19, 2018 with exhibits A-J; Memorandum of Law dated November 19, 2018;
2. Decision & Order dated February 26, 2019;
3. Affirmation of Alexander E. Mainetti, Esq. dated March 19, 2019 with exhibits A-I;
4. Reply Affirmation of Marc J. Kaim, Esq. dated April 1, 2019.

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Nina Postupack
Ulster County Clerk