Tseluiko v Town Sports Intl., LLC
2020 NY Slip Op 31725(U)
June 1, 2020
Supreme Court, Kings County
Docket Number: 515134/16
Judge: Carolyn E. Wade

At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1st day of June, 2020.

P R E S E N T:

CAROLYN E. WADE,
Justice.

----------X

ALEKSEI TSELUIKO, AS FATHER AND NATURAL GUARDIAN OF LILIAN TSELUIKO

PLAINTIFF,

-AGAINST-

TOWN SPORTS INTERNATIONAL, LLC D/B/A NEW YORK SPORTS CLUB, ROOM & BOARD, INC., AND STONE CRAFTERS, INC.,

DEFENDANTS.

----------X

TOWN SPORTS INTERNATIONAL, LLC D/B/A NEW YORK SPORTS CLUB,

THIRD-PARTY PLAINTIFF,

-AGAINST-

ROOM & BOARD, INC., AND STONE CRAFTERS, INC.,

THIRD-PARTY DEFENDANT.

----------X

DECISION AND ORDER

INDEX NO. 515134/16

MOTION SEQUENCE NOS. 13-14

The following e-filed papers read herein: NYSCEF Doc. Nos.[1]

Notice of Motion, Affidavits (Affirmations) + Exhibits	266-267, 269-290; 291-292, 294-314
Opposing Affidavits (Affirmations) + Exhibits	319-320, 325-326, 328, 336; 333
Reply Affidavits (Affirmations)	332-333

[1] New York State Courts Electronic Filing Document Numbers

Upon the foregoing papers, defendant/third-party plaintiff, Town Sports International d/b/a New York Sports Club (TSI), moves, in motion (mot.) sequence (seq.) 13, for an order, pursuant to CPLR 3212, awarding it summary judgment dismissing the complaint of plaintiff, Aleksei Tseluiko, as father and natural guardian of Liliana Tseluiko (plaintiff), as well as any cross claims or counterclaims against it.[2] Defendant/third-party defendant, Room & Board, Inc. (R&B), moves, in mot. seq. 14, for an order, pursuant to CPLR 3212, awarding it summary judgment dismissing plaintiff's complaint and TSI's cross claims against it.

Background and Procedural History

On August 15, 2016, plaintiff's three year-old daughter (LT) was situated in TSI's waiting room after plaintiff had picked her up from TSI's child care facility, where she had been placed while her mother exercised at the facility. Plaintiff was speaking to a person at the front desk about a possible membership and told LT to await him in the waiting room. While there, she placed her torso on a round table located between two chairs and kicked her legs into the air. The table upended, and its top landed on her hand causing serious injury.

TSI had purchased the table from R&B between 9 and 10 years before the accident. It consists of an approximately 38-pound quartz top that sits directly on a cross-shaped, stainless steel base and is not attached, but held in place by its own weight on four silicone pads.

[2]However, the operative pleadings contain no counterclaim against TSI.

Plaintiff commenced this negligence action against TSI, who answered and subsequently commenced a third-party action against R&B and defendant/third-party defendant Stone Crafters Inc.[3] for negligence, design defect and failure to warn. Plaintiff amended his complaint adding R&B and Stone Crafters Inc. as defendants in the primary action. R&B answered, discovery ensued and a note of issue was eventually filed on August 1, 2018. TSI and R&B now move for summary judgment dismissing the claims against them

Discussion

Summary judgment relief requires the movant "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, 49 [2015], *rearg denied* 27 NY3d 957 [2016], quoting *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see also Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). A failure to make that showing requires a denial of the motion, regardless of the adequacy of the opposing papers (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]).

Once a movant makes that showing, the burden then shifts to the opposing party to produce sufficient evidentiary proof to establish the existence of material factual issues (*see Nomura Asset Capital Corp.*, 21 NY3d at 49, *Giuffrida*, 100 NY2d at 81, *Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562-563 [1980]).

[3] Stone Crafters Inc. did not answer and has not appeared in this action.

Averments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004] [internal quotations omitted]). All evidence "must be viewed in the light most favorable to the non-moving party" (*see Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted]) and accord that party the benefit of every favorable inference *(see I.A. v Mejia*, 174 AD3d 770, 772 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]).

The law is well settled that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact'" (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005] citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). Accordingly, issue-finding, rather than issue-determination, is the key in deciding a summary judgment motion (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957][internal citations omitted]; *Vega*, 18 NY3d at 505; *Matter of Joseph Z. (Yola Z.*), 173 AD3d1052, 1052 [2d Dept 2019]). "The court's function on a motion for summary judgment is to determine whether material factual issues exist, not resolve such issues" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] [internal quotation marks and citations omitted]).

Denial of the motion is necessary "where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Benetatos v Comerford*, 78 AD3d 750, 752 [2d Dept 2010] [internal

quotation marks and citations omitted]; *see also Peerless Ins. Co. v Allied Bldg. Prods. Corp.*, 15 AD3d 373, 374 [2d Dept 2005] [denial of summary judgment required where "any doubt as to the existence of a triable issue, or where the material issue of fact is arguable"] [internal quotation marks and citations omitted]).

TSI's Summary Judgment Motion

> "It is well settled that a landowner has a duty to exercise reasonable care in maintaining [its] own property in a reasonably safe condition under the circumstances. The nature and scope of that duty and the persons to whom it is owed require consideration of the likelihood of injury to another from a dangerous condition on the property, the seriousness of the potential injury, the burden of avoiding the risk and the foreseeability of a potential plaintiff's presence on the property" (*Galindo v Town of Clarkstown*, 2 NY3d 633, 636 [2004]), *see also Powers v 31 E 31 LLC*, 24 NY3d 84, 94 [2014])

Here, it is undisputed that: TSI ordered the table from R&B over nine years earlier, the table top was not affixed to its base and plaintiff's daughter was injured when she placed her torso on the table and kicked her legs upward causing the table to overturn. TSI argues that it neither created nor had actual or constructive knowledge of the alleged defect or dangerous condition citing *Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]. However, TSI ordered the table and had R&B place it in its waiting area which was open to the public including young children. These actions arguably constitute affirmative acts on TSI's part creating a hazardous condition (*see Cook v Rezende*, 32 NY2d 596, 599 [1973]; *Santana v Western Beef Retail, Inc.*, 132 AD3d837, 838 [2d Dept 2015]) and "questions of notice of the condition are irrelevant since [TSI allegedly] created the condition" (*Cook*, 32 NY2d at 599). Further, "[w]hether

a dangerous or defective condition exists on the property so as to give rise to liability depends on the particular circumstances of each case and is generally a question of fact for the jury" (*Pellegrino v Trapasso*, 114 AD3d 917, 918 [2014]). Therefore, questions of whether a table not attached to its base, susceptible to falling over when a three-year-old leans on it and kicks her legs in the air is a dangerous condition, and whether TSI was aware or should have been aware of the dangerous condition are triable, factual issues.

Additionally, plaintiff's expert, C. Bruce Gambardella, noted that three of the four silicone bumpers were missing from the table when he inspected it. R&B's witness testified that R&B would normally have recommended to TSI that the table be inspected twice a year and that missing parts such as bumpers should be replaced. TSI, by its own admission, did not regularly inspect the table, maintaining that it never separated the table from its base during cleaning. "Where, as here, an object capable of deteriorating is concealed from view, a property owner's duty of reasonable care entails periodic inspection of the area of potential defect" (*Hoffman v United Methodist Church*, 76 AD3d 541, 542 [2d Dept 2010] [internal quotation marks and citations omitted]). "If no such program of inspection is in place, constructive notice of the defect is imputed" (*Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500, 501 [1st Dept 2007], *lv denied* 9 NY3d 809 [2007] [internal quotation marks and citation omitted]). Therefore, it is also a factual issue whether TSI had a duty to inspect the table and failed to fulfill that duty, thereby contributing to this accident.

R&B's Summary Judgment Motion

"A cause of action in strict products liability lies where a manufacturer places on the market a product which has a defect that causes injury" (*Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 478 [1980].

> "In order to establish a prima facie case in strict products liability for design defects, the plaintiff must show that the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury" (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 [1983]).

"[T]he New York standard for determining the existence of a design defect has required an assessment of whether 'if the design defect were known at the time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner'" (*Denny v Ford Motor Co.*, 87 NY2d 248, 257 [1995], *rearg denied* 87 NY2d 969 [1996], quoting *Voss*, 59 NY2d at 108).

> "This standard demands an inquiry into such factors as (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 but remains functional and reasonably priced, (6) the degree of awareness of the product's potential danger that can reasonably be attributed to the injured user, and (7) the manufacturer's ability to spread the cost of any safety-related design changes" (*Denny,* 87 NY2d at 257).

Plaintiff's expert,[4] after examining the table, concluded that the table, as designed, is a danger for tipping over when sufficient force is placed on it. He also opined that either utilizing a larger rectangular base or substituting a circular base for the rectangular base would provide more stability and would have prevented the accident in this case. "Where, as here, a qualified expert opines that a particular product is defective or dangerous, describes why it is dangerous, explains how it can be made safer, and concludes that it is feasible to do so, it is usually for the jury to make the required risk-utility analysis" (*Wengenroth v Formula Equip. Leasing, Inc.*, 11 AD3d 677, 680 [2004]). R&B disagrees on the amount of force needed to topple the table, but it fails to address plaintiff's argument that there was a safer and feasible alternative design that would render the product safer. R&B's failure to explain how it is unfeasible to market a safer product is fatal to its summary judgment motion (*see Yun Tung Chow v Reckitt & Colman, Inc*, 17 NY3d 29, 34 [2011]).

The crux of R&B's argument claims that the weight of LT alone was insufficient to cause the table to upend, and that it was the added "dynamic load" caused by kicking her legs in the air while her torso remained on the table that caused the accident. "Manufacturers of defective products may be held strictly liable for injury caused by their products--meaning that they may be liable regardless of privity, foreseeability or

[4]R&B argument that plaintiff's expert lacks "the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable" (*Matott v Ward*, 48 NY2d 455, 459 [1979] is unavailing.

reasonable care" (*Sprung v MTR Ravensburg*, 99 NY2d 468, 472 [2003], *see also Wheeler v Sears Roebuck & Co.*, 37 AD3d 710, 711 [2d Dept 2007]).

> "[U]nder a doctrine of strict products liability, the manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his 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 . . . and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages" (*Codling v Paglia*, 32 NY2d 330, 343 [1973], *see also Wheeler*, 37 AD3d at 711).

New York Courts have long held that a child of three is incapable of negligence (*see Verni v Johnson*, 295 NY 436, 437 [1946]). Therefore, "plaintiff, at [three years] of age, [is] presumed to have been legally incapable of understanding danger and averting [her] injuries" (*Wheeler* at 711). Furthermore a factual issue exists whether LT's act of placing her torso on the table was "an unintended but reasonably foreseeable purpose" (*Lugo v LJN Toys*, 75 NY2d 850, 852 [1990]). Accordingly, whether LT's actions were the "sole proximate cause" of the accident presents a triable factual question (*see Yun Tung Chow* 17 NY3d at 34).

R&B's other requests for summary judgment dismissal of plaintiff's claims and TSI's cross claims for breach of contract and breach of actual or implied warranty are unopposed, and those claims warrant dismissal. Accordingly, it is

ORDERED that TSI's summary judgment motion, mot. seq. 13, is granted only to the extent of dismissing plaintiff's claims and TSI's cross claims sounding in breach of contract or breach of actual or implied warranty, and is otherwise denied; and it is further

ORDERED that R&B's summary judgment motion, mot. seq. 14, is granted only to the extent of dismissing plaintiff's claims and TSI's cross claims sounding in breach of contract or breach of actual or implied warranty, and is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.