Reese v Raymond Corp.
2020 NY Slip Op 33255(U)
September 30, 2020
Supreme Court, Broome County
Docket Number: EFCA2017001321
Judge: Eugene D. Faughnan

At a Special Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 28th day of July, 2020.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

BETTY A. REESE,

Plaintiff,

-against-

THE RAYMOND CORPORATION and ROGERS SERVICE GROUP, INC.,

Defendants.

DECISION AND ORDER

Index No. EFCA2017001321
RJI No.: 2018-0486-C

APPEARANCES:

Counsel for Plaintiff:

LAW OFFICES OF RONALD R. BENJAMIN
Ronald R. Benjamin, Esq.
126 Riverside Drive
PO Box 607
Binghamton, NY 13902-0607

Counsel for Defendant
The Raymond Corporation:

COUGHLIN & GERHART, LLP
By: Paul J. Sweeney, Esq.
99 Corporate Drive
Binghamton, NY 13902-2039

EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court to consider the motion made by Defendant, The Raymond Corporation ("Raymond"), for summary judgment dismissing the Amended Complaint of Plaintiff Betty A. Reese ("Reese"), pursuant to CPLR 3212; and the cross-motion of Plaintiff for an Order denying Raymond's motion and granting Plaintiff partial summary judgment on the question of liability.[1] The parties appeared before the Court for oral argument by Skype on July 28, 2020. After due deliberation, this constitutes the Court's Decision and Order.

BACKGROUND

Reese was injured on November 7, 2015 while she was working on an assembly line at Defendant Rogers Service Group, Inc's ("Rogers") facility in Kirkwood, NY. She was employed by a third entity, Contract Packaging Services, Inc. ("CWS"), which is not a party in this action.[2] Raymond, among other business ventures, markets and sells hand pallet trucks ("HPTs") which are assembled with the use of specific assembly line equipment located at the Rogers facility. Before August 2015, the HPTs were assembled by Raymond-Muscatine, Inc. ("Muscatine") in Iowa. In August 2015, Muscatine relocated its assembly line equipment to the Rogers facility. Since then, Rogers has assembled the HPTs under a "Manufacturing Service Agreement" ("MSA") with Raymond, using the assembly line equipment that had come from Muscatine. According to Raymond, the assembly line equipment is still owned by Muscatine. Rogers also sub-contracted with CWS to provide the labor for assembly of the HPTs.

Reese was operating an air-driven lift device known as a Coney table (also referred to as a 6-pack–flipper, or Roller Rack Tilter), which rotates groups of HPT frames 90 degrees by use of pneumatic air cylinders. One of the fittings that feeds the air cylinders failed, causing the

[1] All the papers filed in connection with this motion and cross-motion are included in the electronic file maintained by NYSCEF, and have been considered by the Court.

[2] CWS was named as a Defendant in the original Complaint, but by Order dated October 22, 2018, Plaintiff was allowed to remove CWS as a party Defendant and add Rogers.

table to flip and strike Reese in her left hand and arm, resulting in injuries and subsequent surgeries.

Reese commenced this action on June 15, 2017 asserting a claim for negligence. On October 22, 2018, she filed an Amended Complaint with four causes of action against Raymond: negligence, failure to warn, strict liability and breach of implied warranty. Rogers has already settled with Plaintiff and obtained a Release. The parties have completed discovery and a Trial Note of Issue was filed on December 20, 2019.

Raymond now moves for summary judgment on all causes of action against it. With respect to the negligence claims, Raymond contends that it owed no duty to Reese because it did not manufacture the Coney table, had no control over the operation of the assembly line, and had no information that the machine may have been in need of repair. Raymond claims that, under the MSA, Rogers was required to provide routine maintenance of the assembly line and Raymond was responsible for on-call repairs when one or more of the machines suffered a break down. Raymond claims that the MSA with Rogers did not create any duty to the Plaintiff or anyone else working on the assembly line. Further, even if there was a duty, Raymond argues that it did not breach any duty because it had no notice of a need to repair the air fittings on the assembly line. With respect to the remaining causes of action (strict products liability, breach of implied warranty and failure to warn), Raymond's position is that it cannot be held liable because it did not manufacture the equipment, nor did it place the machine into the stream of commerce.

Reese opposes the motion contending that Raymond should be considered the manufacturer of the machine, and further that Raymond was solely responsible for all maintenance on the machine and not a mere on-call service provider. Plaintiff also alleges that the evidence shows that Raymond maintained ownership as well as exclusive control and dominion over the equipment in Muscatine and later, in Kirkwood, and that the Court should pierce the corporate veil. Reese maintains that Raymond had ultimate control over the timing of repairs, ordering parts, and supervision of the repairs, with all such efforts being intended to maximize Raymond's profits. Reese additionally points out that the Coney table was not working on October 5, 2015 and that repairs were apparently made by Raymond, but the Coney table was still dangerous, imposing a duty on Raymond to warn of a defect or danger.

LEGAL DISCUSSION AND ANALYSIS

When seeking summary judgment, "the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact." *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3rd Dept 2014) *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986) and *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (other citation omitted); *see Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987); *Bulger v. Tri-Town Agency*, 148 AD2d 44 (3rd Dept. 1989), *app dismissed* 75 NY2d 808 (1990). Such evidence must be tendered in admissible form. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 (1979). Once this obligation is met, the burden shifts to the respondent to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3rd Dept. 2001); *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2nd Dept. 2004) *aff'd as mod.* 4 NY3d 627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853. "When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination *(see, Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact." *Boston v. Dunham*, 274 AD2d 708, 709 (3rd Dept. 2000); *see, Boyce v. Vazquez*, 249 AD2d 724, 726 (3rd Dept. 1998). The motion "should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists." *Haner v. De Vito*, 152 AD2d 896, 896 (3rd Dept. 1989) (citation omitted); *Lacasse v. Sorbello*, 121 AD3d 1241; *Asabor v. Archdiocese of N.Y.*, 102 AD3d 524 (1st Dept. 2013). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact." *Vega v. Restani Constr. Corp.*, 18 NY3d 499, 505 (2012) (citation omitted).

1. Negligence claims

The "threshold question" in any negligence action is whether a defendant owes "a legally recognized duty of care to plaintiff." *Hamilton v. Beretta U.S.A. Corp.*, 96 NY2d 222, 232 (2001). The existence and scope of duty present a "legal issue for the courts to decide." *Oddo v. Queens Vil. Comm. for Mental Health for Jamaica Community Adolescent Program, Inc.*, 28 NY3d 731, 735 (2017); *see Espinal v. Melville Snow Contrs. Inc.*, 98 NY2d 136 (2002); *Di Ponzio v. Riordan*, 89 NY2d 578 (1997). To make out a claim for negligence, a plaintiff must "demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom." *Solomon v. City of New York*, 66 NY2d 1026, 1027 (1985) (citation omitted); *Vogle v. North Country Prop. Mgt., LLC*, 170 AD3d 1491, 1492 (3rd Dept. 2019); *Keating v. Town of Burke*, 86 AD3d 660, 660-661 (3rd Dept. 2011).

Plaintiff's claim for negligence has two bases. First, the Amended Complaint asserts that "Raymond was negligent in their [sic] manufacture, fabrication, disassembly and assembly of the Coney table prior to November 7, 2015." Secondly, the Amended Complaint alleges that "Raymond was negligent in allowing [the Coney table] to be used for assembly line production" because it was in "poor condition" prior to November 7, 2015, and should have been replaced long before.

In support of its motion for summary judgment, Raymond submitted an attorney's affirmation, as well as affidavits from Joerg Klose, a Raymond employee, Alan Bartels, a Director of Muscatine Operations of Raymond-Muscatine, and Nicholas Chambers, an employee of Rogers who was the HPT Project Manager. Raymond also submitted deposition transcripts of witnesses who testified in this case.

Bartels states that Muscatine purchased the HPT assembly line in 2011 from a company in Ontario, Canada, and that Muscatine has been the owner of the line ever since then. Muscatine is unaware of the original designer or manufacturer of the machine. It was used by Muscatine in Iowa from 2011 to 2015, then moved to the Rogers facility. Muscatine disassembled the HPT line equipment in Iowa and moved it to New York, where Muscatine employees re-assembled it, and trained the New York employees on its use and operation. Since

August 2015, Rogers has been assembling the HPTs using Muscatine's assembly line equipment. Klose, an employee of Raymond, and Chambers, a Rogers employee, also confirmed that the equipment belonged to Muscatine and was moved to Kirkwood by Muscatine.

Klose and Chambers also state that Raymond was not responsible for the daily inspections and routine maintenance of the HPT assembly line. Per the MSA, Raymond was responsible for repairs if notified by Rogers of the need for repairs. Klose also reviewed the daily status reports that were submitted to him. Although there was a report of an air fitting failure on November 7, 2015, the line was up and running that day, indicating that it was repaired by someone else prior to the work shift that day. Klose states that Raymond has no information that any of its employees performed any repairs to the air fitting on November 7, 2015, and that it has no knowledge whether it was fixed by an employee of Rogers or another entity. This evidence is consistent with the claim that Raymond did not have control over the HPT line or who used it and when, but rather it was up to Rogers.

Joseph Villanella, a CWS employee, provided deposition testimony in this case. He and another worker travelled to Muscatine for three days to see how the assembly line was run, prior to it being moved to Rogers' facility. He also confirmed that if there were any problems with the line, the workers were told to notify Rogers, not Raymond. He stated that the assembly line was not a modern production line, and was more like 1970s or 1980s style equipment. He also testified that he was not aware of any issues with the air fitting or pneumatic components prior to November 7, 2015.

On both of Plaintiff's bases for a claim of negligence, Raymond has made a *prima facie* showing that it is entitled to judgment as a matter of law. *See e.g. Vesligaj v. PMT Forklift Corp.*, 213 AD2d 541 (2nd Dept. 1995); *Pangallo v. Mitsubishi Int'l Corp.*, 220 AD2d 650 (2nd Dept. 1995). First, the affidavits by Raymond indicate that Raymond was not involved in the design, assembly, manufacture, sale or distribution of the Coney table. *Vesligaj v. PMT Forklift Corp.*, 213 AD2d 541. There is no information as to the actual manufacturer of the assembly line, but it was purchased from a Canadian company many years ago. The affidavits and testimony also support a conclusion that Muscatine disassembled the line, moved it to Kirkwood and set it back up. Thus, Raymond has set forth admissible evidence that it had nothing to do with the design or manufacture of the Coney table and assembly line, and was not involved in the

assembly, sale or distribution of the table or line. This would entitle Raymond to summary judgment. *Id.* On Plaintiff's second basis for claiming negligence, she alleges that the Coney table was in poor condition and Raymond should not have permitted it to be used. Raymond's evidence shows that Raymond did not have supervision or control of the assembly line and the daily operations of the Coney table, and was not in a position to discover and remedy any problems. Since Raymond was not involved in the daily operations, and did not control the use of the Coney table, it could not be negligent in allowing Plaintiff to use the machine.

The burden is thus shifted to Plaintiff to raise a triable issue of fact. In opposition, Plaintiff has submitted an Attorney Affirmation with Exhibits. The Exhibits include portions of the deposition testimony of Reese, and deposition testimony from Rebecca Villanella, another assembly line worker employed by CWS. Plaintiff also submitted other corporate documents and email evidence, and an affidavit of Ralph L. Hensler, apparently submitted as an expert affidavit.

Hensler's affidavit consists of six pages, plus his curriculum vitae. He has a degree in physics from Rutgers University and claims an "expertise in the design and use of industrial equipment." He provides several opinions in his affidavit. First, based on his review of affidavits and the MSA, he concludes that "Raymond was in fact the owner of the Coney table, and the idea of Muscatine being the corporation that owned the Coney table, or the entire assembly line for that matter, is simply not true." Second, he states that he reviewed the incorporation documents and the list of officers for Muscatine and Raymond, that "it would appear Muscatine is a shell corporation that Raymond initiated perhaps for the very purpose of avoiding liability should accident such as the instant one arise, but regardless of why Muscatine was formed it should not be considered a separate entity but simply a part of the Raymond Corporation" and further that he "believe[s] all of the employees were ultimately Raymond Corporation employees and that since Raymond had sole control over the Coney table, disassembled it in Iowa, and reassembled it in New York, it should be treated as both the manufacturer and designer of the table." Third, he opines that "there should have been routine and periodic inspections of the Coney table at least on a weekly basis and the failure to do so resulted in an air hose failing on November 7, 2015 causing plaintiff's injury." He also opines that emails sent on October 5, 2015 showing the Coney table was not working properly should

have resulted in Raymond taking "the Coney table out of service and it was negligent to allow the table to be used on November 7, 2015." Further, he opines that Raymond should have provided warning to the workers that the table was unsafe. He concludes that Raymond should be held strictly liable.

"Generally speaking, a predicate for the admission of expert testimony is that its subject matter involve information or questions beyond the ordinary knowledge and experience of the trier of the facts. Moreover, the expert should be possessed of 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) (citations omitted); *Chirumbolo v. 78 Exch. St., LLC*, 137 AD3d 1358 (3rd Dept. 2016); *Flanger v. 2461 Elm Realty Corp.*, 123 AD3d 1196 (3rd Dept. 2014). Here, Hensler has a degree in physics and his curriculum vitae reveals he has experience in airbag and automobile designs, groundwater pollution, and the energy industry. He has also testified as an expert witness in products liability and patent infringement lawsuits. However, in his affidavit he provides opinions with respect to legal ownership of the equipment; the interpretation of a contract (the MSA); the legal effect of incorporation documents and overlapping officers; the employment status of workers at the site, and liability under a theory of strict liability. His qualifications do not reveal any basis upon which he is qualified to render legal opinions. This is even more significant where his opinions are on conclusions of law reserved to the Court, such as ownership of the equipment, the legal effect of corporate structures and liability. His opinions on legal issues are clearly unfounded and inappropriate.

Furthermore, Hensler's credentials do not show any expertise concerning assembly lines, the Coney table, air hose fittings, the manufacture of HPTs or any aspect of the HPT industry. He did not visit the site, or conduct any inspection or testing of the assembly line or any of its component parts. He has no first-hand knowledge of the facts in this case. His opinions concerning negligence by not taking the Coney table out of service, and an alleged failure to follow safe practices by not requiring weekly inspections are not supported by any evidentiary basis or safety standards. He has not set forth any basis to find that the Coney table should have been inspected weekly. As such, Hensler's opinions are unsupported, speculative, and conclusory. The Court concludes that Plaintiff has not established that Hensler has the requisite

qualifications and expertise to provide opinions in this matter. Accordingly, his affidavit will not be considered. *See, Superhost Hotels Inc. v. Selective Ins. Co. of Am.*, 160 AD3d 1162 (3rd Dept. 2018); *Chirumbolo v. 78 Exch. St., LLC*, 137 AD3d 1358; *Flanger v. 2461 Elm Realty Corp.*, 123 AD3d 1196.

The remainder of Plaintiff's opposition papers do not raise any issues with respect to Raymond's claim that the machine was manufactured by an unknown entity, and purchased by Muscatine from a Canadian company. Nor do Plaintiff's papers dispute Raymond's recitation about the disassembly of the HPT line, transfer to New York and then re-assembly by Muscatine. On the pertinent facts regarding how the HPT line came to be set up in the Rogers' facility, Plaintiff has not produced any admissible evidence contradicting Raymond's claim that it had no involvement whatsoever. Plaintiff has not provided any admissible evidence to support the contention that Musactine employees were actually Raymond employees. Therefore, Plaintiff has not raised a triable issue with respect to her first bases of negligence.

Turning to the second prong of Plaintiff's claim of negligence based on the operations of the assembly line at the Rogers facility, Plaintiff points to other deposition evidence. Those transcripts do not support Plaintiff's claims. Rebecca Villanella testified that the machines were breaking down all the time, and when they did, the workers informed Rogers, who then contacted Raymond. She also agreed that the training was provided by an individual from Muscatine, who travelled to the Rogers facility. She also testified that the workers were specifically instructed not perform any maintenance on the machines and were not to contact Raymond directly, but rather, notify Rogers. Reese also confirmed in the one page of her deposition transcript that was included, that the CWS workers were instructed not to undertake any repairs. Those descriptions are consistent with Raymond's assertion that Rogers was responsible for day to day operations and maintenance.

Plaintiff submitted email evidence to show that Raymond was aware of the problems with the Coney table, and failed to fix it or warn of problems. A Rogers employee sent an email to Mr. Klose on October 5, 2015 stating that the table was not working properly and had to be manually pushed. Jim Zemanick, project manager for Raymond, replied that the line was in need of repair and update, which would be set up, and everyone would need to work around the issues until the line was updated. Joerg also later replied that they were seeking to shut down the

assembly line a few days later to evaluate the equipment. Plaintiff claims these emails show that the ultimate decisions with respect to the operation of the assembly line were made Raymond.

The Court views the emails as confirming the role of Rogers to perform routine maintenance, and Raymond's role as on "on-call" service provider for those items which were beyond routine maintenance, and to seek long term solutions to maintain the assembly line in good working order. Plaintiff's submission does not raise any dispute that Raymond had no control over the daily operations of the HPT, or any control over its usage.

The Court finds that Plaintiff has failed to raise a triable issue on the claims of negligence, with respect to the design, manufacture, assembly or distribution of the Coney table (*see, Pangallo v. Mitsubishi Int'l Corp.*, 220 AD2d 650), or with respect to the maintenance of same. Given Raymond's lack of involvement in the manufacture of the assembly line equipment, and Raymond's lack of control over the use of the assembly line equipment, Plaintiff has failed to establish any duty upon which Raymond's liability might attach.

2. Was any duty created as a result of the MSA?

Plaintiff argues that the MSA is a "wholly separate basis upon which Raymond has duties to the plaintiff including the use of reasonable care in the assembly and testing of the Coney table, as well as a duty to warn regarding any facts that may render that table unsafe for use." (Plaintiff's Memorandum of Law at p.4). Reese was not a party to the MSA, so the question is whether a party to the MSA owes a duty to a third person who might be using the equipment. A contractual obligation by itself generally will not give rise to liability to a third person. *Espinal v. Melville Snow Contrs., Inc.* 98 NY2d 136; *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 NY2d 220, 226-227 (1990). In certain contractual situations, an entity may assume a duty to third persons, where the entity undertakes exclusive responsibility under the contract, and the performance of those duties has caused detrimental reliance, and defendant's failure to properly perform those duties causes injury to a plaintiff. *See, Palka v. Servicemaster Mgmt. Servs. Corp.*, 83 NY2d 579 (1995); *see also Espinal v. Melville Snow Contrs., Inc.* 98 NY2d 136. If the

contract is "comprehensive and exclusive" (*Palka*, 83 NY2d at 588) and requires an entity to conduct inspections and repairs, then the contractual duty may lead to a duty to third parties injured by the defendant's failure to perform under the contract.

Plaintiff argues that Raymond assumed a duty of care by virtue of the MSA, and that Raymond assumed all duties with respect to the maintenance and care of the assembly line and had a duty to warn of any facts that may have made the table unsafe. As already discussed above, although Hensler claimed that weekly testing of the Coney table was appropriate, he provided no basis for that opinion, and his affidavit is not being considered by the Court. Other than that inadmissible affidavit, Plaintiff has not produced any evidence to support a need for weekly testing. Furthermore, even if weekly testing was appropriate that responsibility would have fallen to Rogers, as routine maintenance under the terms of the MSA.

Although Plaintiff points to the MSA as evidence that Raymond had total control over the assembly line and should have been responsible for any warnings that might need to be given, that position is belied by the MSA and other evidence. Per the express terms of the MSA, Rogers was responsible for the day to day operation and routine maintenance. Plaintiff has failed to rebut Raymond's evidence that it was an "on-call" service provider.

Plaintiff has not raised a triable issue with respect to any duty arising from the MSA. The terms of the MSA clearly place the responsibility for routine maintenance on Rogers. Plaintiff has failed to raise a triable issue that Raymond assumed "comprehensive and exclusive" control over the operation of the assembly line by virtue of the MSA or the actual practices of the parties or that Raymond entirely displaced Rogers' duty to maintain the equipment (*see*, *Vogle v. North Country Prop. Mgmt.*, 170 AD3d 1491). Therefore, Plaintiff has not shown any duty running to the Plaintiff as a result of the MSA.

3. Piercing the corporate veil

Plaintiff's argument to "pierce the corporate veil" is also without merit. Plaintiff submitted documents concerning the incorporation of Muscatine, and highlights that the officers

of Muscatine were all Raymond officers as well. In order to succeed on this argument, however, more is required.

> "Generally, ... piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the [petitioner] which resulted in [that petitioner's] injury." (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 141-142, 603 N.Y.S.2d 807, 623 N.E.2d 1157 [1993]). Under New York law, the corporate veil will be pierced to achieve equity, even absent fraud, "when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego" (*Austin Powder Co. v McCullough*, 216 A.D.2d 825, 827, 628 N.Y.S.2d 855 [1995]; *see Wm. Passalacqua Bldrs., Inc. v Resnick Devs. South, Inc.*, 933 F.2d 131, 138-139 [1991]).

Island Seafood Co. v. Golub Corp., 302 AD2d 892, 893 (3rd Dept. 2003).

Plaintiff claims that Muscatine is a mere shell corporation for Raymond, and she submits a report from the Iowa Secretary of State showing that the officers of Muscatine are also officers with Raymond, and they list their address as the Raymond facility. Plaintiff further argues that Raymond made the decision to move the assembly line to Kirkwood, not Muscatine. However, the fact that the officers are the same is insufficient for piercing the corporate veil. In analyzing the issue, courts consider factors such "as whether there is an overlap in ownership, officers, directors and personnel, inadequate capitalization, a commingling of assets, or an absence of separate paraphernalia that are part of the corporate form ..., such that one of the corporations is a mere instrumentality, agent and alter ego of the other." *Island Seafood Co. v. Golub Corp.*, 303 AD2d at 893-894 (citations omitted).

In the instant case, the evidence shows that Muscatine is a separate corporate entity, incorporated under the laws of Iowa. Raymond and Muscatine have separate business locations and perform different work, with different employees. Bartels avers that "[i]n order to meet space demands for other operations at [the Muscatine factory], the HPT assembly line equipment had to be moved to another production facility." He further noted that there are still employees working for Muscatine. Other than the fact that the companies have overlapping officers, Plaintiff has not presented any evidence that would support a conclusion that Muscatine is a

mere instrumentality of Raymond. Even if Plaintiff had made a showing that Raymond completely controlled Muscatine, Plaintiff would have to establish that Raymond used that domination to commit a wrong against Plaintiff. No such evidence has been offered. Based upon the evidence submitted, the Court finds insufficient grounds to "pierce the corporate veil" and impute the actions and responsibilities of Muscatine to Raymond.

4. Claims for strict liability, breach of implied warranty and duty to warn

Having disposed of the issues of negligence and "piercing the corporate veil", the Court next turns to the remaining causes of action for strict products liability, breach of implied warranties and failure to warn. The Courts have observed that "'[a] party injured as a result of a defective product may seek relief against the product manufacturer or others in the distribution chain if the defect was a substantial factor in causing the injury.'" *Darrow v. Hetronic Deutschland GMBH*, 181 AD3d 1037, 1039 (3rd Dept. 2020) *quoting Stalker v. Goodyear Tire & Rubber Co.*, 60 AD3d 1173, 1174 (2009) (other citation omitted). "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 reasonable care." *Sprung v. MTR Ravensburg, Inc.*, 99 NY2d 468 (2003). A claim for strict products liability may be based on a mistake in the manufacturing process, an improper design or the failure to provide proper warnings regarding use of the product. *Matter of New York City Asbestos Litigation*, 27 NY3d 765, 787 (2016); *Voss v. Black & Decker Mfg. Co.*, 59 NY2d 102 (1983); *Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 NY3d 488 (2019); *Stalker v. Goodyear Tire & Rubber Co.*, 60 AD3d 1173; *Darrow v. Hetronic Deutschland GMBH*, 181 AD3d 1037; *See Pierre-Louis v. DeLonghi America, Inc.*, 66 AD3d 859 (2nd Dept. 2009) (there are three distinct claims for strict liability).

"[A] defectively manufactured product is flawed because it is misconstructed without regard to whether the intended design of the manufacturer was safe or not. Such defects result from some mishap in the manufacturing process itself, improper workmanship, or because defective materials were used in construction." *Pierre-Louis v. DeLonghi America, Inc.*, 66 AD3d at 861, *quoting Caprara v. Chrylser Corp.*, 52 NY2d 114, 128-129 (1981); *Perazone v.*

Sears, Roebuck & Co., 128 AD2d 15 (3rd Dept. 1987). The next category is the improper design and "[w]here a product presents an unreasonable risk of harm, notwithstanding that it was meticulously made according to detailed plans and specifications, it is said to be defectively designed." *Robinson v. Reed-Prentice Div.*, 49 NY2d 471, 479 (1980). Stated differently, "[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 and is unreasonably dangerous for its intended use; that is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce." *Scarangella v. Thomas Built Buses, Inc.* 93 NY2d 655, 659 (1999); *see also Pierre-Louis v. DeLonghi America, Inc.*, 66 AD3d 859. "[T]he standards for imposing liability for such unreasonably dangerous design defects are ... general negligence principles." *Bolm v. Triumph Corp.*, 33 NY2d 151, 157-158 (1973). The third line of strict liability is the failure to warn. The Court of Appeals has stated that "[i]n the failure-to-warn context, [courts] have imposed a duty upon a manufacturer whose wares serve a standardized purpose, such that the product's latent dangers, if any, are known, or should be known, from the time it leaves the manufacturer's hands." *Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 NY3d 488, 494 (citations omitted). "[F]ailure-to-warn claims are premised not on a physical defect in a product's constituent parts, but rather the 'dangers resulting from foreseeable uses of [the] product of which [the manufacturer] knew or should have known.'" *Id.* at 499, *quoting Liriano v. Hobart Corp.*, 92 NY2d 232 237 (1998).

An entity cannot be held liable under a claim for strict liability or breach of warranty if "they are outside the manufacture, sale and distribution chain." *Dann v. Family Sports Complex, Inc.*, 123 AD3d 1177, 1179 (3rd Dept. 2014); *Joseph v. Yenkin Majestic Paint Corp.*, 261 AD2d 512 (2nd Dept. 1999); *See, Tyminskyy v. Sand Man Bldg. Materials, Inc.*, 168 AD3d 1118 (2nd Dept. 2019). As already discussed, Raymond has submitted evidence that the assembly line machine was manufactured long before it ever came to Muscatine, and that Raymond never had ownership of the Coney table of the assembly line equipment. Rather, it was purchased by Muscatine, and Raymond's evidence showed it has remained under Muscatine's ownership. There are no allegations that Raymond designed or manufactured the Coney table in the first instance. Further, Raymond did not place the machine into the stream of commerce. It could not, because it did not own it, and it did not re-sell it. Plaintiff's submissions do not raise a

triable issue of fact with regard to Raymond's evidence that it was outside the manufacture, sale and distribution chain. Thus, Raymond is entitled to summary judgment on the causes of action sounding in strict products liability and breach of implied warranty.

Plaintiff has also failed to raise a triable issue of fact on her claim of failure to warn. The Court of Appeal has stated that "claims based on ... a lack of adequate warnings, can be framed in terms of strict liability or negligence, [and] failure-to-warn claims grounded in strict liability and negligence are functionally equivalent, as both forms of a failure-to-warn claim depend on the principles of reasonableness and public policy at the heart of any traditional negligence action... Given that failure-to-warn cases are governed by negligence principles, it is incumbent on the court in such cases, as in any case featuring a claim of negligence, to decide whether an applicable legal duty exists....[T]he court must decide whether there is any proof in the record that might support the recognition of a duty to warn owed by the manufacturer to the injured party." *Matter of New York City Asbestos Litigation*, 27 NY3d at 787 (internal citations and end citations omitted). As the Court has already discussed above, Raymond did not assume "comprehensive and exclusive" control over the operation of the assembly line and its duty to warn is limited to defects it discovered in the equipment, or if it undertook responsibility for routine maintenance. *See Pollock v. Toyota Motor Sales U.S.A.*, 222 AD2d 766 (3rd Dept 1995). The Court has already concluded that Raymond did not assume responsibility for routine maintenance, and that such responsibility stayed with Rogers per the MSA and actual practice. Nor has Plaintiff raised a triable issue that Raymond was aware of a latent defect requiring it to provide warnings. In his affidavit, Klose states that Raymond had no records that it dispatched anyone to perform any air fitting failures prior to November 7, 2015, and surmises that the issue on November 7, 2015 was fixed by "someone" not employed by Raymond prior to the work shift starting that day. Although Plaintiff points to the emails from October 2015 as evidence that Raymond was aware that there was a problem with the Coney table, those emails do not raise an issue of fact that Raymond had a duty to warn of a defect. The repair log attached to Klose's affidavit show that Raymond made repairs on October 6, 2015, the day following the emails about the Coney table not working. Those repairs involved replacing a fuse and repairing a wire. There is nothing in the emails or the repair report indicating a specific problem with an air fitting. Thus, Plaintiff has not produced any evidence that Raymond knew, or should have

known, that there was a latent defect with the air fitting or pneumatic device that could have led to a duty to warn others. All that it shows is that Raymond made a repair as requested by Rogers and got the assembly line up and running again. There is no evidence that it was aware of any defect with the air fitting which ultimately failed. Therefore, the Court finds that Raymond did not have a duty to warn of any latent defect, since it was not aware of that itself, and it was not responsible for daily and routine maintenance of the equipment.

Plaintiff has also sought partial summary judgment on liability. All of her arguments have been addressed above. Raymond did not design or manufacture the assembly line equipment and was not in the chain of distribution, so the principles of strict products liability and breach of implied warranty do not apply. Raymond was not responsible under the MSA for routine maintenance and daily operations, but was an "on-call" service provider. As such, it did not have a duty to warn of potential hazards, and there is insufficient evidence that it was even aware of the latent defect which led to Plaintiff's injuries. Accordingly, Plaintiff's cross-motion for summary judgment must be denied.

CONCLUSION

Based on all the foregoing, it is hereby

ORDERED, that Raymond's motion for summary judgment is GRANTED, and it is further

ORDERED, that Plaintiff's cross-motion for summary judgment is DENIED.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: September 30, 2020
Binghamton, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice