

Montana v David Markowitz Metal Co., Inc.
2020 NY Slip Op 34524(U)
June 2, 2020
Supreme Court, Oneida County
Docket Number: CA2014-001788
Judge: David A. Murad
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At a Term of the Supreme Court held in and for
the County of Oneida at the Courthouse in
Utica, New York, on the 4th day of May, 2020.

PRESIDING: HON. DAVID A. MURAD
Justice of the Supreme Court

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONEIDA

**James and April Montana, Individually and as
Husband and Wife,**
Plaintiffs,

v.

**David Markowitz Metal Co., Inc. and
Markowitz Metals Group, LLC,**
Defendants.

DECISION AND ORDER

Index No.: CA2014-001788
RJI No.: RS-15-060UC

David Markowitz Metals Co, Inc.,
Third-Party Plaintiff,

v.

Revere Copper Products, Inc.
Third-Party Defendant.

Appearances:

- For Plaintiff:**
John C. Cherundolo, Esq.
Cherundolo Law Firm, PLLC
- For Defendants and Third Party Plaintiff:**
Michael J. Schacher, Esq.
Gordon Rees Scully Mansukhani, LLP
- For Third-Party Defendant:**
Kenneth M. Alweis, Esq.
Goldberg Segalla, LLP

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INTRODUCTION

Defendant/third-party plaintiff, David Markowitz Metal Co., Inc., (hereafter, "Markowitz") has made a motion for summary judgment pursuant to CPLR § 3212 for dismissal of plaintiff's amended complaint in its entirety. The papers reviewed by the Court on the motion are enumerated at the end of this Decision and Order.

Plaintiff James Montana alleges he was injured on August 13, 2013 when, as an employee of third-party defendant, Revere Copper Products, Inc., (hereafter, "Revere"), he was processing a bale of scrap brass metal that had been compressed and packaged by Markowitz. Specifically, he alleges that the bale of scrap brass unexpectedly exploded, or decompressed with a great force, after he removed one or two of the steel straps around the bale. The force knocked him to the floor and the bale, weighing about 2,800 pounds, landed on him, pinning him to the floor. He required assistance from co-workers and a forklift to be extracted from under the decompressed bale and alleges permanent and disabling injuries including a right leg amputation and complex regional pain syndrome.

Plaintiffs' amended complaint alleges five causes of action against Markowitz, including: negligence in the packaging of the bale of scrap brass; defective design and manufacture as a basis for strict liability in tort because the bale of scrap brass was not reasonably safe; breach of the implied warranties of merchantability (UCC § 2-314) and fitness for the particular purpose (UCC § 2-315); breach of the duty to warn of latent defects in the bale of scrap brass; and a derivative claim for the spouse of James Montana.

DEFENDANT'S MOTION TO DISMISS

Markowitz argues that each of plaintiffs' causes of action must be dismissed. In summary, Markowitz contends that it delivered a safe product that met industry standards; there is no evidence that the bale was negligently baled, wrapped, or delivered; defendant cannot be held liable for Revere's subsequent modifications that removed the safety features applied by defendant; Revere instructed its employees to remove the safety devices; plaintiff received improper and inadequate job training from Revere; the product was not used in a reasonably foreseeable manner; the bale and its banding components were not defectively designed, were safe, and no feasible alternatives were necessary or available; the product was fit for its ordinary purposes, as the bale and bands were sound; there were no latent dangers creating a duty to warn; there is no duty to warn of an open and obvious danger that a product user is actually aware of or should be aware of; and plaintiff April Montana's derivative claim should be dismissed because none of James Montana's underlying claims have merit.

Markowitz proffers the expert opinions of Stephen P. Andrew, P.E.; and John P. Gashinski, P.E. Andrew is a registered Professional Mechanical Engineer in California, Texas, and New York, with experience in investigating machinery and equipment failures; industrial and occupational safety; transportation safety; OSHA and ADA

evaluations; accident reconstruction; evaluation of worker, equipment and facility safety; as well as experience analyzing the safety of baler operations and evaluating balers for consistency with industry standards; and investigating claims relating to product packing, including products packaged with metal straps. Gashinski is a licensed Professional Engineer in New York, New Jersey, and Pennsylvania. He is a materials scientist and engineering consultant involved in product testing, contract research, and forensic failure analysis and evaluation of industrial and consumer products, including components of machinery and packaging; he has experience in materials science and metallurgical engineering, and specialized training and experience in the investigation, analysis and reconstruction of product failures relating to work-place accidents.

Andrew reviewed all the documentary and testimonial evidence in this matter and rendered his opinions to a reasonable degree of professional certainty based on his review of the referenced items and his knowledge and experience in the field of mechanical engineering and workplace safety. Andrew's opinions include the following: the brass bale packaged and sold by Markowitz to Revere was not defective or otherwise dangerous; the scrap brass depicted in the photo at Exhibit Y to defendant's motion papers is suitable material to be compressed and baled in the baler utilized by Markowitz; steel straps are commonly used in the baler industry to hold baled material together as it is transferred for further processing; the subject bale was appropriately baled and secured with steel straps in conformance with accepted practice and technique in the baling industry; Markowitz delivered to Revere a safe product fit for its intended use; Markowitz delivered to Revere, on several prior occasions, substantially similar bales of brass scrap that were accepted and processed without incident; the delivered brass bale conformed to Revere's specifications set forth in the Purchase Order; the brass bale was inspected and weighed by Revere and accepted by Revere; plaintiff, James Montana, inspected the bale and did not notice any abnormalities or defects; the bale of brass delivered to Revere conformed to industry standards and was reportedly in the same form and condition of similar brass bales Markowitz sold to Revere over the last twenty (20) years; the design, manufacturing and packaging of the brass bale was not the proximate cause of James Montana's injuries; Revere improperly instructed its employees to partially deconstruct brass bales by removing some of the steel bands, and created an unnecessary and dangerous hazard by instructing its employees to remove some of the steel bands before placement in the furnace; Revere did not have proper safety protocols to minimize likelihood of injury to employees who were instructed to remove some of the steel bands; and plaintiff James Montana's injuries were the direct and proximate result of Revere's improper instructions to its employees.

Gashinski also reviewed all the documentary and testimonial evidence in this matter. He rendered his opinions to a reasonable degree of engineering and scientific certainty based upon his review of the referenced items and his more than twenty-two (22) years of professional experience. Gashinski's opinions include the following: the subject bale could not have "exploded", and using the word "explosion" is a mischaracterization because what happened is a material's response to release or decrease in restraints when the brass was allowed to expand, due to its inherent elastic energy from the

baling operation, when steel strapping was removed; the subject bale of scrap brass as prepared by Markowitz was in compliance with Revere's requirements; the brass bale was not defective, it conformed to Revere's specifications, and was similar in type and construction to bales previously produced and sold to Revere over the twenty-one (21) year relationship between the companies; the physical evidence was neither preserved nor documented sufficiently, which compromised any attempt to determine the mode and cause of failure for the steel straps; the photos taken after James Montana was removed from under the bale do not document the number of straps used to compress the scrap brass or the condition of the straps in terms of width and failure mechanisms of the individual strands; to determine the cause of the incident, the individual straps would have to be counted, measured, and examined for physical damage and failure mode; Revere provided no instructions or requirements to Markowitz regarding the size or placement of steel bands other than requiring the brass scrap bundle be strapped; the subject bale was intentionally modified by Revere after inspecting and accepting its delivery; Markowitz was not informed that bands were to be cut and removed after Revere accepted shipment; the use of the bands was intended to restrain the compressed scrap from expanding; removal of the bands is detrimental to the integrity of the bale; Revere's instructions to its employees to remove bands were based on a financial decision to reduce costs; if Revere had requested brass transport in Gaylord boxes or required the bales not to be strapped with steel banding, the incident would not have occurred; the arrangement posed a unique, potential hazard to Revere employees; training by Revere in handling techniques should have occurred; and the subject incident was a result of a singular, unique set of circumstances and activities.

PLAINTIFFS' OPPOSITION

Plaintiffs contend that Markowitz failed to use reasonable care in the baling and packaging of the subject bale of brass. Specifically, plaintiffs argue that Markowitz failed to properly compress the brass into a safe and usable bale; Markowitz was negligent in failing to package the bale in accordance with Revere's specifications; and Markowitz was negligent in not having adequate systems in place to train its baling machine operators, and by not having adequate safety rules, regulations, or procedures in place for the manufacture of bales of brass scrap metal.

Plaintiffs also contend that Markowitz sold and delivered a bale of hard tempered skeletonized punch brass scrap metal in such a condition that the bale was not reasonably safe to be used for the purpose intended or for such uses as may be reasonably foreseeable, thereby making Markowitz strictly liable in tort for the injuries to James Montana. Specifically, plaintiffs argue there was a defect in manufacture of the bale of brass; a design defect; a failure to provide warnings of the unreasonably dangerous condition of the bale and of the latent defects and hazards in the bale at any time up to the incident causing plaintiff's injuries; and that Markowitz breached the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

In opposition to defendant's motion to dismiss, plaintiffs proffer the expert opinions of Sher Paul Singh, Ph.D., and Nicholas Cunningham, Ph.D., P.Eng. Singh is president of a Michigan company, a current professor emeritus at Michigan State University, and previously a professor at its School of Packaging, involved in teaching courses and conducting research on packaging, transportation, material handling and logistics. He has experience conducting testing of the integrity of packages, such as strapped and unitized products, and has consulted with various companies that manufacture metal and steel products for shipment, packaging and bundling methods. Cunningham is a registered Professional Engineering in Ontario, Canada, with knowledge of physical properties of a variety of materials, including brasses and bronzes. He has experience in materials engineering; materials testing; research and development in chemical and materials engineering; development of materials and processes; materials selection; field failure analysis; and evaluation of reliability of materials and products using accelerated life tests.

Singh reviewed all the documentary and testimonial evidence in this matter, as well as Occupational Safety and Health Administration (OSHA) and American Society of Testing and Materials (ASTM) standards and regulations pertaining to recycled metals and the safety of handling bales, and use of steel strapping for purposes of packaging. He visited the Markowitz office and facilities where the subject bale was prepared, inspected the baling machine that was used, and inspected other equipment such as crimping and tensioning tools and steel straps. Based upon the foregoing, Singh rendered his opinions within a reasonable degree of engineering and scientific certainty. Singh's opinions include that the following departures or deviations from good and accepted practice existed in the packaging of the brass scrap metal bale that was sold to Revere by Markowitz: Markowitz failed to use the standard of ordinary care in the packaging of the brass scrap metal when it was baled so as not to adequately compress the brass material that was being sold and delivered; Markowitz failed to use industry accepted practices and standards to design safe packaging for the product; the lack of ordinary care resulted in manufacture of a bale of brass that was not reasonably safe to handle in the usual, customary and foreseeable manner; the subject bale of brass was defective in design and manufacture in that it was not reasonably safe for the use intended or such other foreseeable use that it would be put to upon receipt by Revere; the packaging defect led to the incident while plaintiff was unpackaging the product; there were multiple feasible design alternatives that were safer and did not cost any additional money or other substantial cost; the subject bale of brass was not of a merchantable quality, not free from defects, and otherwise was a dangerous and defective product that was not reasonably safe in design or manufacture and not fit for the purposes intended or reasonably foreseeable; Markowitz breached the implied warranty of merchantability; the subject bale of brass was not fit for the particular purpose intended, which was to place it in the furnace at Revere to melt down to make copper and brass products; the subject bale of brass failed to have adequate warnings that the brass contents had not been suitably compressed to take out the spring qualities of the material; and all of the noted deficiencies contributed to the incident and the serious injuries plaintiff suffered as a result of the brass scrap metal exploding, knocking him over, and landing on him when the scrap brass released significant force.

Singh also stated opinions that: the Markowitz packaging system should have been tested, inspected and visually and mechanically evaluated by quality control for safety in both shipping and accessibility to the customer; Markowitz failed to provide adequate training to its employees with respect to producing safe bales of scrap brass and proper application of steel bands; and that Markowitz's experts have backgrounds in metallurgy, material science, and mechanical engineering, but the issues in this case are the negligent packaging of the bale of brass scrap and the failure to warn of a defective condition of the product; Markowitz's experts allege the packaging was safe without acknowledging the violent decompression and explosion of brass that occurred when plaintiff opened the package, or the need of the customer to be able to safely open the package and access the product; and without showing how Markowitz complied with industry standards.

Cunningham reviewed all the documentary and testimonial evidence in this matter, as well as Alloy C26000 typical properties from Copper Development Association (CDA), and stress-strain curves for the alloy C26000. Cunningham rendered his opinions within a reasonable degree of engineering and scientific certainty in the field of engineering and materials science. Cunningham's opinions include the following: the bale of skeletonized punched scrap brass was delivered to Revere in a package that was improperly prepared and packaged; much or all of the brass had not been sufficiently compressed or crushed to the point of failure, and stored a high level of mechanical energy; the lack of deformation allowed the skeletonized punched scrap brass to act as a coiled spring under pressure; the stored energy was retained in the bale by the steel bands Markowitz personnel wrapped around it; when plaintiff removed one or two of the steel bands holding the brass bale in position, a sudden release of stored energy and severe proportional forces caused the brass to uncoil and break through each, any, and all remaining steel bands; Markowitz personnel did not pay attention to whether or not the skeletonized punched brass scrap meal was actually deformed or compressed to its "yield" point by the baler, or to the point it would undergo permanent deformation and cease to retain stored energy; Markowitz employees had no rules, regulations, or procedures to follow when baling, and the large baler was not generally used to bale brass; to assess the stored energy in the final bale, or the extent to which steel bands would be needed to safely package the metal, operators would need to understand several parameters that Markowitz employees did not determine; there is no way the personnel operating the baler could determine how many steel metal straps were needed to provide a reasonable degree of safety for delivery to Revere or any other customer under the circumstances; there were multiple ways Markowitz could have packaged the brass more safely and appropriately without the hazard of sudden decompression, all of which were reasonable and feasible alternatives; the hazards of the brass bale would not be visible to the person opening the package at its destination; Markowitz was deficient in failing to do simple tests or calculations to determine the state of compression, and failed to warn or otherwise give notice of the hazards to the recipient; the baled package was not fit for the purpose intended when it was delivered to Revere; the package supplied to Revere was negligently and carelessly made; it was not reasonably safe; it was defective, unreasonably dangerous, and had latent defects not visible or observable; it did not comply with the purchase order and the attached

specifications because it required steel band removal before the brass could be placed in the furnace; and the baled material of brass was not of merchantable quality, did not comply with basic standards of care in the industry of packaging, it created significant risks and hazards, and these latent hazards led to the incident that injured plaintiff.

DEFENDANT'S REPLY

In reply to plaintiffs' opposition, Markowitz argues that it used reasonable care to bale and package the subject bale per industry standards; that plaintiff's argument that Markowitz was negligent because they failed to properly compress the bale has no merit; Markowitz did not breach a duty of care to plaintiff; Markowitz was not negligent in failing to package the bale in accordance with Revere's specifications, as Revere never rejected a scrap brass bale because it was banded with steel straps; Markowitz had adequate systems in place to train its baling machine operators and had adequate rules in place for the manufacture of the brass bales; plaintiff's strict products liability, breach of implied warranty and warranties of merchantability and fitness claims should be dismissed because the bale and its banding components were not defectively manufactured or designed, plaintiff failed to establish the existence of issues of fact sufficient to overcome defendant's substantial modification defense, the bale and its components designs were safe, and no feasible alternative was necessary or available; and plaintiff's failure to warn claim must be dismissed.

Defendant proffers a supporting affidavit of its expert, Andrew, in reply to plaintiffs' opposition. Andrew reviewed plaintiffs' experts' opinions and provided his further opinions to a reasonable degree of certainty in the field of mechanical engineering and workplace safety. In summary, Andrew opines that: Markowitz met the standard of care as to the subject bale; there is no requirement or expectation that the material within a bale will be fully deformed; the subject bale was accepted by Revere and met the requirements of the purchase order; the industry standard of care is to use straps, such as steel strapping, to contain and retain the spring energy remaining within the deformed material in the bale; the bale would not have come apart without removal of the straps regardless of the properties of the baled scrap; the accident would not have been prevented by knowing the material and its engineering properties because the variety of scrap materials in a bale are not homogenous or precisely controlled, making uniform deformation highly unlikely; it is appropriate to use experience in tensioning bales to determine how much the straps should be tightened; using a calibrated device to apply band tension would have minimal value because the straps are applied while the baled material is still compressed in the baler; the straps held the subject bale securely for hundreds of miles of travel in a truck and during movement in the warehouse; the bale didn't release until Revere personnel intentionally cut the bands; cutting the straps modified the means of safety used by Markowitz to hold the baled material together; Revere accepted the bales as supplied and decided to remove the bands before sending material to the furnace; the band removal process is out of the control of Markowitz; it is reasonable for Markowitz to expect Revere to remove bands in a safe fashion; Revere personnel could have used a number of techniques to restrain the material safely to cut the bands; and it is reasonable to expect Revere personnel to

follow good material handling processes.

APPLICABLE LAW

Plaintiff has pled theories of products liability under the categories of negligence, strict products liability, and breach of implied warranties. Within the category of strict products liability are theories of manufacturing defect, design defect, and inadequate warnings; the latter two theories of which are not truly strict liability.

It has been held that a manufacturing defect exists at the time the product leaves the control of the manufacturer and may be the result of not being built to specification, or a deviation from the specification or design. A design defect requires evaluation of the design and manufacturing decisions made by the manufacturer; it has been described as a multifactor, negligence-type analysis using a reasonable person standard, and the plaintiff must show that it was feasible to design the product in a safer manner. The analysis involves a weighing of the utility of the product against the likelihood of injury and other factors.

A claim of inadequate warning involves a manufacturer's duty to warn of latent dangers from foreseeable uses which the manufacturer knows or should have known; the duty to warn extends to purchasers and employees exposed to foreseeable and unreasonable risks of harm by a failure to warn. The implied warranties of merchantability and fitness for a particular use are set forth in the Uniform Commercial Code (UCC).

There is a plethora of decisional law on each theory of recovery for products liability. "To establish a prima facie case of strict products liability predicated on manufacturing defect, a plaintiff must prove that the product did not perform as intended and that the product was defective when it left the manufacturer's control ..." (*Wesp v Carl Zeiss, Inc.*, 11 AD3d 965, 968 [4th Dept 2004] [internal citations omitted].)

The Court of Appeals (*Matter of Eighth Judicial Dist. Asbestos Litig.*, 33 NY3d 488, 493–95 [2019] [internal citations omitted]) has recently stated:

"In New York, a product is considered 'defective,' and the manufacturer liable, if the product: (1) 'contains a manufacturing flaw,' (2) 'is defectively designed,' or (3) 'is not accompanied by adequate warnings for the use of the product' ..."

...

"[In the latter type of claim there is a] central question of whether the defendant manufacturer owes a duty to warn ... Although 'the existence and scope of . . . a duty [to warn] are generally fact-specific' ..., a manufacturer's duty typically 'extends to the original or ultimate purchasers of the product, to employees of those purchasers, and to third persons exposed to a foreseeable and unreasonable risk of harm by the failure to warn' ... Thus, a manufacturer can be held liable for failing to warn of 'latent dangers resulting from foreseeable uses of its product of which it knew or should have known'

..., as well as 'the danger[s] of unintended uses of a product provided these uses are reasonably foreseeable' ..."

"Failure-to-warn claims, like all strict products liability claims, sound in tort rather than contract; the defendant manufacturer's liability will 'ar [i]se out of the nature of [its] business and the danger to others incident to its mismanagement,' even where no privity exists between the maker of the hazardous article and its end user ... Although failure-to-warn claims 'can be framed in terms of strict liability or negligence, [such] 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'..."

The Fourth Department (*Houston v McNeilus Truck & Mfg., Inc.*, 115 AD3d 1185, 1186–87 [2014] [internal citations omitted]) has discussed the duty to warn as follows:

" 'A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known ... A manufacturer also has a duty to warn of the danger of unintended uses of a product provided these uses are reasonably foreseeable' ..."

" 'The nature of the warning and to whom it should be given depend upon a number of factors including the harm that may result from use of the product without the warnings, the reliability and adverse interest of the person to whom notice is given, the kind of product involved and the burden in disseminating the warning' " ... Consequently, '[i]n all but the most unusual circumstances, the adequacy of a warning is a question of fact' to be determined at trial ..."

In an examination of the differing analyses applied to design defects under products liability, based in tort law, and breach of implied warranty actions, based in contract law, the Court of Appeals (*Denny v Ford Motor Co.*, 87 NY2d 248, 256–59 [1995] [internal citations omitted]) has stated:

"Although the products liability theory sounding in tort and the breach of implied warranty theory authorized by the UCC coexist and are often invoked in tandem, the core element of 'defect' is subtly different in the two causes of action. Under New York law, a design defect may be actionable under a strict products liability theory if the product is not reasonably safe. Since this Court's decision in *Voss v Black & Decker Mfg. Co.* (59 NY2d 102, 108), the 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" ... 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 ... The above-described analysis is rooted in a recognition that there are both risks and benefits associated with many products and that there are instances in which a product's inherent dangers cannot be eliminated without simultaneously compromising or completely nullifying its benefits ... In such circumstances, a weighing of the product's benefits against its risks is an appropriate and necessary component of the liability assessment under the policy-based principles associated with tort law."

"The adoption of this risk/utility balance as a component of the 'defectiveness' element has brought the inquiry in design defect cases closer to that used in traditional negligence cases, where the reasonableness of an actor's conduct is considered in light of a number of situational and policy-driven factors. While efforts have been made to steer away from the fault-oriented negligence principles by characterizing the design defect cause of action in terms of a product-based rather than a conduct-based analysis ..., the reality is that the risk/utility balancing test is a 'negligence-inspired' approach, since it invites the parties to adduce proof about the manufacturer's choices and ultimately requires the fact finder to make 'a judgment about [the manufacturer's] judgment' ... In other words, an assessment of the manufacturer's conduct is virtually inevitable, and, as one commentator observed, '[i]n general, ... the strict liability concept of 'defective design' [is] functionally synonymous with the earlier negligence concept of 'unreasonable designing' ..."

"It is this negligence-like risk/benefit component of the defect element that differentiates strict products liability claims from UCC-based breach of implied warranty claims in cases involving design defects. While the strict products concept of a product that is 'not reasonably safe' requires a weighing of the product's dangers against its over-all advantages, the UCC's concept of a 'defective' product requires an inquiry only into whether the product in question was 'fit for the ordinary purposes for which such goods are used' ... The latter inquiry focuses on the expectations for the performance of the product when used in the customary, usual and reasonably foreseeable manners. The cause of action is one involving true 'strict' liability, since recovery may be had upon a showing that the product was not minimally safe for its expected purpose—without regard to the feasibility of alternative designs or the manufacturer's "reasonableness" in marketing it in that unsafe condition."

Breach of implied warranties are based in the UCC. New York UCC § 2-314 is titled "Implied Warranty: Merchantability; Usage of Trade", and states in relevant part:

- (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. ...
- (2) Goods to be merchantable must be at least such as
 - (a) pass without objection in the trade under the contract description; and
 - (b) in the case of fungible goods, are of fair average quality within the description;

and

- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and
- (f) conform to the promises or affirmations of fact made on the container or label if any.

- (3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

New York UCC § 2-315 is titled "Implied Warranty: Fitness for Particular Purpose", and states:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

"[T]he issues of warranty and breach thereof are generally questions of fact for the jury to resolve". (*Emerald Painting, Inc. v PPG Indus., Inc.*, 99 AD2d 891, 892 [3rd Dept 1984] [internal citations omitted].)

CONCLUSIONS

"[T]he proponent of a summary judgment motion 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 ... Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers ... Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action ..." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-25 [1986] [internal citations omitted].)

The Court finds that Markowitz met its initial burden to establish entitlement to judgment as a matter of law for dismissal of plaintiffs' complaint, through the opinions of its two experts, Andrew and Gashinski. Defendant's experts address each of the claimed causes of action and provide opinions that the subject bale of scrap brass was prepared and packaged in accordance with accepted industry practices; was not defective in manufacture or design, and did not contain any latent hazard that required a warning; and did not breach either the implied warranty of merchantability or fitness for its intended purpose. Defendant's experts opine that plaintiff, James Montana's removal of the steel straps, and the safety and training practices of his employer, were the proximate cause of the incident and plaintiff's injuries.

Upon shifting of the burden, the Court finds that plaintiffs have raised issues of fact on each of the pleaded causes of action through the opinions of their two experts, Singh and Cunningham. These experts provide opinions in direct conflict with defendant's experts. The record before the Court presents a quintessential battle of the experts on every issue, such that "we note that the [experts'] affidavit[s] submitted by plaintiff[s] in opposition to the motion 'presented a credibility battle between the parties' experts, and issues of credibility' may not be decided on a motion for summary judgment ..."
(*Houston v McNeilus Truck & Mfg., Inc.*, 115 AD3d 1185, 1187 [4th Dept 2014].)


Accordingly, it is hereby:

ORDERED, that defendant David Markowitz Metal Co., Inc.'s motion to dismiss is **DENIED** in its entirety; and it is further

ORDERED, that plaintiffs shall file and serve notice of entry of this Decision and Order within 20 days of this Decision and Order.

Dated: June 2, 2020
Utica, New York

ENTERED



Hon. David A. Murad
Justice of the Supreme Court

PAPERS CONSIDERED BY THE COURT

- Notice of Motion dated 12/30/19;
- Affirmation in Support of Motion for Summary Judgment of Michael J. Schacher, Esq., dated 12/30/19, with Exhibits A - CC;
- Supporting Affidavit of Stephen P. Andrew, P.E., (Exhibit X to Schacher affirmation), sworn to 12/27/19, with Exhibits X2 - X8;
- Supporting Affidavit of John P. Gashinski, P.E., (Exhibit Z to Schacher affirmation), sworn to 12/30/19, with Exhibits Z2 - Z8;
- Affirmation of John C. Cherundolo, Esq., dated 2/25/20, with Exhibits 1 - 7;
- Affidavit of Sher Paul Singh, Ph.D., sworn to 2/26/20 (Exhibit 6 to Cherundolo affirmation), with Exhibit A;
- Affirmation of Nicholas Cunningham, Ph.D., P.Eng., dated 2/24/20 (Exhibit 7 to Cherundolo affirmation), with Exhibit A;
- Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, dated 2/25/20;
- Reply Affirmation of Michael J. Schacher, dated 3/4/20, with Exhibit A;
- Supporting Affidavit of Stephen P. Andrew, P.E., (Exhibit A to Schacher reply affirmation), sworn to 3/4/20.