

Diaz v Mestek, Inc.

2020 NY Slip Op 35044(U)

August 17, 2020

Supreme Court, Westchester County

Docket Number: Index No. 55656/2018

Judge: James W. Hubert

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
PABLO DIAZ,

Plaintiff,

-against-

MESTEK, INC., MESTEK MACHINERY, INC.,
and ENGEL INDUSTRIES, INC.,

Defendants.

-----X
MESTEK, INC., MESTEK MACHINERY, INC.,
and ENGEL INDUSTRIES, INC.,

Third-Party Plaintiffs,

-against-

CLEAN AIR QUALITY SERVICE, INC.,

Third-Party Defendants.

-----X
Hubert, J.S.C.

Index No. 55656/2018

Motions for Summary Judgment

DECISION & ORDER

Seq. Nos. 1 & 2

Before the Court are two motions pursuant to CPLR §3212. Motion Seq. No.1 was filed by the above-captioned Third-Party Defendant Clean Air Quality Service, Inc. (CAQSI) seeking summary judgment dismissing the Plaintiff Pablo Diaz’s (Diaz) complaint against the Defendants Mestek Inc., Mestek Machinery, Inc., and Engel Industries, Inc. (Mestek), as well as all claims by Third-Party Plaintiffs Mestek against CAQSI. Motion Seq. No. 2 was filed by Mestek seeking summary judgment dismissing Plaintiff’s complaint against Mestek.

The action filed by the Plaintiff Diaz alleges that he was injured while operating a machine known as a Dual Head Roll Machine (the “Pittsburgh”) which was used as part of a production line of several machines to fabricate sheet metal duct work. The Pittsburgh machine was manufactured by Mestek. Plaintiff alleges product liability on the part of Mestek as the

cause of the injuries he sustained on June 30, 2015 in the course of his employment with CAQSI. The lawsuit does not plead negligence, causation, lack of care, poor maintenance or any other liability on the part of Third-Party Defendant employer CAQSI.

The Plaintiff's complaint alleges that in designing, building and selling the Pittsburgh machine, Mestek "...represented and declared to Plaintiff, who relied thereon, that the machine, motor and component parts were capable of being operated and used and enduring the use to which similar machines, motors and component parts manufactured, assembled shipped and sold by [Mestek] were put." Complaint at ¶53.

The complaint alleges further that the Plaintiff's injuries were the result of Mestek's negligent, reckless, and careless design, construction, assemblage and installation, and in allowing and permitting the Pittsburgh machine to be put into the stream of commerce when the Defendant, knew, or should have known, that the machine was not fit for use, was unsafe and dangerous. Complaint at ¶54.

The motions by the first party Defendant (Mestek) and the Third-Party Defendant (CAQSI), deny the presence of any facts supporting a claim of product liability. Primarily, they seek judgment against the Plaintiff and dismissal of the complaint by focusing on an issue of "sole proximate cause," i.e, a claim that the accident was caused solely by the Plaintiff as a result of his alleged improper and dangerous operation of the production line, which included the Pittsburgh machine, on June 30, 2015.

Facts Not in Dispute

The Pittsburgh was manufactured by Mestek in 1985. CAQSI acquired the machine, secondhand, in 2007 by "aftermarket sale" through a company named Vicon. It was one of four

secondhand, aftermarket machines they acquired that year. All four were purchased by CAQSI, and “. . . was a used piece of equipment” not purchased from Mestek (Kirvanick Dep. at PP. 29-30).

The only machine in the CAQSI production line that was purchased directly through Mestek was the machine called the Compact 3. It was purchased new and positioned as the first machine in the production line used to fabricate air and heating ducts (Kirvanick Dep. at PP. 30-31).

The machines were used together by CAQSI, in a “U” shaped production/assembly alignment, to fabricate the metal air ducts. Sheets of metal (sheet metal) were fed into the production line at the “Compact 3” machine which uncoils the rolled sheet metal, cuts it to size, and moves the sheet to the “transfer table” (Transfer Table). From there the sheet is automatically moved (or manually moved if a jam occurs) into the Pittsburgh followed by automated transfer through the rest of the line.

The Plaintiff was employed by CAQSI for approximately fourteen (14) years prior to the accident. He started as an apprentice in the year 2000. In 2005, Mr. Diaz rose to the position of sheet metal worker. He ultimately rose to machine shop manager approximately four to five years before the accident. All told, he spent at least ten (10) years operating the machines on the duct fabrication line before the accident at issue. As manager, which he was on the date of the accident, he was not a new, or inexperienced employee.

Nevertheless, on June 30, 2015, the date of the accident, while operating the machines in the fabrication line, the Plaintiff’s right hand index finger was severed at a pinch, or “nip point,” in the Pittsburgh machine. Mr. Diaz was attempting, manually, to clear a metal sheet which had

become stuck in the Transfer Table by using his right hand. The Pittsburgh intake rollers were immediately next in line to the Transfer Table which, along with the Compact 3 coiling machine, had been programmed to feed the sheet into the Pittsburgh automatically.

Claims by the Parties

It is claimed by the Defendants that the Plaintiff's efforts to clear the metal sheet by hand, and doing so by reaching into and across a clearly marked hazard zone between the Pittsburgh and the Transfer Table without first shutting both off, was the sole cause of his injury.¹

Partly from the deposition testimony of the Plaintiff, and mostly through the affirmation and report of Eric Heiberg, a Professional Engineer retained by the Plaintiff, it is asserted by Mr. Heiberg that the Pittsburgh machine, as manufactured, had significant and dangerous design flaws. These flaws: (1) "failed to provide an adequate guard [that would have prevented a person from reaching in and contacting the nip-point] at the dangerous in-running nip point" [which severed the Plaintiff's finger]; (2) failed to include "safer designs . . . that were available [in newer Mestek roll forming machines manufactured after 1985] at the time of design and manufacture;" (3) failed to comply with ANSI B11.12 - 1983 standards regarding accidental entry of body parts into hazardous areas on the machine; and (4) failed to comply with ANSI B11.12 - 1996 safety standards regarding prevention of personnel from reaching into a hazard zone.

¹ By grabbing and pulling the far side near the leading edge of the jammed metal sheet with his gloved right hand, his fingers came in contact with the moving rollers of the Pittsburgh (the "nip-point"), which at that moment were rolling in anticipation of engaging and bending the metal sheet lodged in the Transfer Table. The result was the Plaintiff's injury.

Plaintiff's Deposition Testimony

The Plaintiff was deposed on June 6, 2019 (an interpreter was present to translate). Mr. Diaz testified that when he began working at CAQSI in the year 2000 or 2001, he was assigned there by the Union, Local 28, as an apprentice and shadowed certain employees to learn various tasks.

The Plaintiff received training through the Union over a four year period. He learned how to assemble the ducts and read the plans associated therewith. Mr. Diaz also stated he received OSHA training through the Union.

Mr. Diaz further stated that he moved from his apprenticeship to full time mechanic in 2005. He worked in the machine shop along side of the supervisor, Frank Ruperto, who taught him how to use the equipment, including the Pittsburgh and the operator console. Diaz testified that he also learned from Mr. Ruperto that if a machine jammed he was to call a person from the office to come and fix it. Mr. Diaz recalled the name of Bob Mocado as that person. On the question of whether Mr. Ruperto spoke to him about not putting his hands or other body parts near the moving machine parts, Mr. Diaz answered no, but deemed it to be a matter of "common sense" (Dep. at P.42).

While answering questions regarding how the machines folded, shaped and joined the sheet metal to make the duct, Mr. Diaz stated that after programing the automated process into the console, the operator was not supposed to touch or grab the metal as it came out of "the orange piece of equipment" (the Transfer Table machine). The Plaintiff further stated that if the machine was working correctly, there would be no need to touch the metal (Dep. at PP.58-59, 63-64).

However, when asked whether there were occasions when he took it upon himself to actually grab pieces of the metal being processed through the assembly line, Mr. Diaz responded affirmatively. He stated that he would position himself in a gap between the Transfer Table machine and the Pittsburgh and manually push the stalled metal sheet into the Pittsburgh with his right hand because it was closest to his position in front of the console (Dep. at PP.66-67).

The Plaintiff further testified that on the date of the accident the metal sheet had become “really stuck” and was not progressing toward the Pittsburgh. He was asked if at that moment he could have pressed the stop button, and if so, whether he knew where the button was. Diaz responded affirmatively to both questions. Mr. Diaz was then asked if he could have “just hit the stop button to clear the jam.” He responded saying “That could have been done” (Dep. at P.70).

The Plaintiff was asked whether the jamming of the sheet metal in the Transfer Table machine had happened before. He responded yes. Mr. Diaz stated that on those prior occasions he stopped the machine, pulled out the piece of metal and restarted the equipment (Dep. at P.71).

The Plaintiff was next asked why he did not do what he had seen Frank Ruperto do when the sheet metal became jammed in the orange machine (which was to move out of the console position inside of the “U” and go around to the opposite side of the Transfer Table machine and Pittsburgh machine). He responded that “there was no time” (Dep. at P.71-72).

Mr. Diaz was then asked whether he was standing between the “orange [Pittsburgh] and yellow [Transfer Table] pieces of equipment” right before the accident. He replied yes. He further stated that he was able to move the piece of metal toward the Pittsburgh with his right hand but had to reach around the console and bend forward to put his hand on the metal, that being “the only way to do it” (Dep. at P.73). Getting his hand on the sheet stuck at the Transfer

Table also meant he had to reach around the Pittsburgh machine which brought his hand between five and ten inches from the Pittsburgh's in-running rollers (Dep. at P.78).

As to when, exactly, the glove on the right hand got caught between the rollers in the Pittsburgh, Mr. Diaz stated he could not see exactly how it happened nor remember. However, when his hand became caught, he called out to a person on the other side of the machine who came over and shut down the machine at the console (Dep. at P.82).

Under further questioning, Mr. Diaz was asked how often sheets got stuck in the machine. He responded that sheets got stuck in the same way as on date of the accident every time he used it. Mr. Diaz further stated that many times, when the sheet would become stuck, he would move his hand in the same way as on the date of the accident to move the sheet (Dep. at PP.92-93).

When asked whether the problem was caused by the metal (thickness or shape) or was caused by the machine, Mr. Diaz testified that the machine caused the problem. The machine that flattened the coiled sheet (the Compact 3), and then pushed the sheet to the Transfer Table, did not have enough power. He stated that the machine's failure to push with sufficient power caused the sheet to become stuck in the Transfer Table; "so little by little [it] had to be pushed [forward by hand]."

Mr. Diaz further stated that he complained to Steve Mulholland (CAQSI) about this problem because the mechanics were "not supposed to push the piece [of sheet metal], neither from the back or from the side, by hand". The "Bosses" would only call Bob Mocado when he complained to Mr. Mulholland and Mocado did not have experience in how to fix the machine. (Dep. at PP.98-101).

Deposition Testimony of Dave Kirvanick

On August 8, 2019, Dave Kirvanick, the Mestek Aftermarket Sales and Support/Service Manager, was deposed. In addition to selling new and old equipment, he services and repairs the equipment sold by Mestek and will “trouble shoot” problems experienced on the field by the companies that purchase or use the equipment (Dep. at P.9).

Earlier in August (prior to the deposition), at the request of the litigants, Mr. Kirvanick went to CAQSI’s Hawthorn, NY location to inspect the machines in the production line (referenced, by him, as the “Components”) that produced the metal ducts and were involved in Mr. Diaz’s accident. This included the Pittsburgh, the Transfer Table, and the Compact 3 (Dep. at PP.17-18).²

All of the machines utilized in the sheet metal production line at CAQSI were designed by Mestek. However, other than the Compact 3, none were purchased from Mestek (Dep. at PP.27-28). The other machines were purchased after market through a company called Vicon. The Components were acquired secondhand by CAQSI to add to the line and incorporate them with the Compact 3 which had been purchased in the year 2000 (Dep. at PP.29-30). At the time of acquisition by CAQSI (2007), with the exception of the Compact 3, the Components purchased through Vicon were not purchased from an authorized/qualified dealer for Engle [Mestek] products (Dep. at PP. 79-81). Only the Compact 3 was purchased from Mestek by CAQSI. Thus, Mestek was not involved in the installation of the Components and played no role in the set-up. Mr. Kirvanick stated “I knew nothing about this add-on [of the Components] at the time” (Dep. at PP. 31-32).

² The Plaintiff’s expert, Eric Heiberg, participated in the inspection as well.

Mr. Kirvanick was shown a copy of the manual that accompanies the Compact 3 when purchased from Mestek. The manual showed the Compact 3, as well as the entire year 2000 Mestek product line (including the Compact 3), configured for use in a duct assembly line. Mr. Kirvanick was asked if the CAQSI production line he inspected in 2019 was in the same configuration as what was shown in the Compact 3 manual. He replied in the negative. The difference, he stated, was the 1985 Pittsburgh machine purchased by CAQSI, which in the year 2000 had been redesigned. It was a “duplex.” The Components installed at CAQSI (including the Pittsburgh) were manufactured in 1985, with the exception of the Compact 3 which was designed and manufactured after 1985 and was purchased by CAQSI in 2000 (Dep. at PP. 39-43). As stated earlier, the Component machines (including the Pittsburgh) were purchased secondhand through an aftermarket seller.

Mr. Kirvanick testified that the controls on the Compact 3 were made by Mestek. However, the controls governing the other Components were “AMS” controls (not Mestek controls and not installed by Mestek). Thus, in total, the production line as configured on June 30, 2015, had three sets of controls and they were not mutually compatible. The Compact 3 and the Components had to be run independently: the Compact 3 by its own controls; the CAQSI Transfer Table and Pittsburgh by AMS controls.

At the inspection in 2019 at CAQSI, the AMS controls didn’t work properly and the Transfer Table would not run the metal sheet properly through the Pittsburgh machine. Mr. Kirvanick stated it would be necessary for a worker to shut the machine down to find out what was going on. Mr. Kirvanick emphasized that the sheet metal should never be hand fed to the machines (Dep. at PP. 44-54).

With respect to guards or warnings that were present on the 1985 Pittsburgh machine, there were no guards that specifically blocked the rollers against hand intrusion. However, guarding (with written warning signs) did exist at the time of the accident as depicted in the photographs shown to the witness. (Dep. at PP. 61-62).

Applicable Law and Relevant Facts

On a motion for summary judgment, it is well established that resolving questions of credibility, determining the accuracy of witnesses, and reconciling the testimony of witnesses are for the trier of fact. *Kahan v. Spira*, 88 A.D.3d 964, 966, 932 N.Y.S.2d 76 (2d Dept 2011). The court's function, on summary judgment, is to identify material triable issues of fact, not to make credibility determinations. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 942 N.Y.S.2d 13 (2012). The party (or parties) seeking summary judgment has (have) the well established burden of setting forth *prima facie* evidence in admissible form demonstrating the absence of disputed material facts as a matter of law. *Giuffrida v. Citibank*, 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003). A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers. However, if the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980).

In the instant matter, the Plaintiff's claim pleads causation of injury as a result of a defectively designed product (the Pittsburgh machine). The Defendants' motions for summary judgment claim that it was the Plaintiff's actions and conduct on June 30, 2015 that constituted

the sole proximate cause of his injury.

The deposition testimony of the Plaintiff, and the testimony of the Mestek Aftermarket Sales and Support/Service Manager Dave Kirvanick, have been fully set forth in relevant part. Their respective testimonies clearly set forth *prima facie* claims in support of sole proximate cause on the part of the Plaintiff. Their testimony shifts, to the Plaintiff, the burden of presenting evidentiary proof in admissible form raising material issues of triable fact. What, then are the evidentiary proofs that would support denial of the Defendants' motions?

The Plaintiff fully admits in his sworn deposition the following: (1) the operator was not supposed to touch or grab the metal as it came out of "the orange piece of equipment;" (2) he learned from his supervisor Mr. Ruperto that if a machine jammed he was to call a person from the office to come and fix it; (3) over the ten year period before the accident, Mr. Diaz was first a metal sheet worker and then became the machine shop supervisor operating the fabrication machines (including the Pittsburgh) on a daily basis; (4) when asked if his predecessor warned him about putting his hands or other body parts near the moving machine parts, Mr. Diaz answered no, but deemed it to be "a matter of common sense;" (5) at the time immediately before the accident Mr. Diaz admitted he could have pressed the stop buttons to safely clear the jam, knew where the buttons were and affirmed "[t]hat [it] could have been done;" and, (6) Mr. Diaz further stated that on prior occasions when the sheet metal became jammed, he stopped the machine, pulled out the piece of metal and restarted the equipment. There can be no question that the Plaintiff was fully aware of the danger in attempting to manually clear jammed sheet metal. That the Plaintiff knew he was not to engage in the acts that caused his injury, but did so anyway, is uncontested.

The Plaintiff's expert, Eric Heiberg, performed an inspection of the machinery and product line at the CAQSI facility in Hawthorne on February 18, 2019. He reviewed a number of documents including the motions of the parties, the deposition transcripts of the Plaintiff, Mestek Aftermarket Sales and Support/Service Manager Dave Kirvanick, and CAQSI employee Russell Seacor. He noted "Guards" attached to the Pittsburgh machine that were yellow in color. He noted a written warning on the side facing the control panel area which directed that the machine not be operated without the guards in place: a warning hard to miss by the operator. He further noted a gap between the Pittsburgh and the "uncoiling machine." Mr. Heiberg measured the gap to be two feet wide, and from the inside of the U shaped layout he was able to reach around the guard and access the Pittsburgh rollers with his hand.

Mr. Heiberg reviewed the Engel Coiline Manual that accompanied the Compact 3 "uncoiling machine." The information therein highlighted the potential hazards if listed safeguards were not in place and properly observed by an operator. It further highlighted the need to maintain "alert[ness] for loose, worn and broken parts." The manual warned of, and identified the existence and location of "pinch points" that could injure the operator's hands.

Mr. Heiberg set forth his opinions regarding the responsibilities of manufacturers and installers. It was his expressed opinion that manufacturers had a responsibility to protect users from hazards they might encounter through normal product use, as well as "reasonably foreseeable misuse." He states that "[h]azzards should be designed out of the product" but if that cannot be done, the manufacturer should reduce exposure to hazzard "such that it is not dangerous" (safeguarding). When this is not feasible, manufacturers must warn the user of the dangers posed by the product.

Mr. Heiberg identified a “nip-point” as a hazard caused by two counter-rotating cylindrical parts which could catch and pull a finger or hand into the rollers and crush it. The rollers on the Pittsburgh, of course, were the tools by which the sheet metal could be fabricated into a desired shape. He acknowledges that Mestek posted written warning directly on the Pittsburgh machine, but concludes (without explanation) that “. . . Mestek should have adequately addressed [the nip-point hazard] by means of design hierarchy.” He further concludes that hazard and exposure make the Pittsburgh “unreasonably dangerous and unfit for its intended purpose”.

Nowhere in his report does Mr. Heiberg define, explain, or otherwise show what “design hierarchy” is and how it should (or could) have been implemented on the Pittsburgh. The rollers are indisputably the bedrock tool component of the Pittsburgh. It “forms” the metal. To credit the expert’s conclusions, there should have been proof presented as to what “the adequate address” should have been and how it would have still supported the machines utility. Mr. Heiberg’s report, in relevant part, expresses opinion without factual support. As a mere conclusion it is not admissible fact. *See, Plainview Water Dist. v. Exxon Mobil Corp.*, 66 A.D.3d 754, 755, 888 N.Y.S.2d 521(2d Dep’t 2009)(an expert cannot reach his [or her] conclusion by assuming material facts not supported by evidence).

Plaintiff’s expert goes on to opine that “it is foreseeable that a worker may reach into an unguarded machine to correct a jam” and that “others agree.” He then draws a conclusion in his report that Mestek should have foreseen this would happen and should have designed the Pittsburgh in a way that would have prevented Mr. Diaz from reaching into the area of the jammed sheet metal without shutting down the Pittsburgh. Thus, Mr. Heiberg concludes “. . .

that Mestek's failure to include a safer design was a proximate cause of Mr. Diaz's accident and injury.

In reaching his conclusion, Mr. Heiberg relies upon a book written by an author named R. Matthew Seiden. The book is entitled "Product Safety Engineering for Managers". At no point in Mr. Heiberg's report is the "book" set forth as an industry accepted treatise which establishes a standard of manufacturing care and safety. Mr. Heiberg's basis for reliance on the text is nowhere stated. It is simply Seiden's written opinion adopted by Mr. Heiberg and set forth as evidence.

Although an opinion set forth and expressed in a publication (such as a book), which is used by an expert to support his own conclusion, may be used to impeach an expert; use of such opinion as direct evidence constitutes impermissible hearsay. *See, Lipschitz v. Stein*, 10 A.D.3d 634, 635, 781 N.Y.S.2d 773(2d Dep't 2004); *see, also, Spensieri v. Lasky*, 94 N.Y.2d 231, 701 N.Y.S.2d 689 (1999)(lower court's rejection on hearsay grounds of admission in evidence of excerpts from the Physician's Desk Reference [published annually] which was offered to establish, by itself, standard of care, sustained on appeal).

In addition to the hearsay problem, Mr. Heiberg's affidavit is simply a proffer by the Plaintiff of secondary evidence being used as direct evidence in support of the Plaintiff's claims. As pleaded in Plaintiff's opposition to the motions of the Defendants, it is specifically used to meet the Plaintiff's burden to produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. The Plaintiff's expert's reliance on Seiden's book falls squarely into the category of an expert's use of hearsay evidence, which is inadmissible.

It is well established that "[e]xpert opinion, based on unreliable secondary evidence, is

nothing more than conjecture . . .” See, *Wagman v. Bradshaw*, 292 A.D.2d 84, 87,739 N.Y.S.2d 421 (2d Dep’t 2002). Seiden’s book is secondary evidence and it’s content is not admissible. *Id.* In his affidavit, Mr. Heiberg sites a list of possible motivations (mentioned in Seiden’s book) that a worker might have which could compel the worker to reach into an unguarded machine (even when he knows he should not). However, Mr. Heiberg offers no factual link between the comments in the book, his conclusions, and the facts in this case. The accuracy or applicability of the assumptions in the book, as presented, is unsupported. Are their statistical studies, work place evidence, actual observations and data from work sites? Have Pittsburgh machines been studied and evaluated? How was this secondary evidence accumulated and is it reliable and widely accepted by the industry? The evidence as presented by Mr. Heiberg’s affidavit does not answer these questions and is, therefore, conjecture.

Whether the guards, as seen at the 2019 inspection, were insufficient to physically block any attempt by anyone (motivated or not) to do what the Plaintiff did on the date of the accident; whether the guards designed and manufactured by Mestek for the post 1985 version of the Pittsburgh could have secured absolute safety regardless of possible, much less foreseeable, motivation on the part of Mr. Diaz; it remains the rule that strict product liability is not triggered simply by the danger a machine poses to its operator. The issue ultimately is whether the manufactured product (the Pittsburgh) is reasonably safe for its intended use; i.e., does the utility of the product outweigh its inherent danger. See, *Gorbatov v. Matfer Group*, 136 A.D.3d 745, 746, 26 N.Y.S.3d 92 (2d Dep’t 2016); *Conte v. Orion Bus Industries*, 162 A.D.3d 638, 639, 78 N.Y.S.3d 236 (2d Dep’t 2018)(whether action is pleaded in strict liability, breach of warranty, or negligence, plaintiff has the burden of showing that product defect was a substantial factor in

causing the injury); *Bruno v. Thermo King Corp.*, 66 A.D.3d 727, 888 N.Y.S.2d 523 (2d Dep't 2009)(plaintiff knew that it was dangerous to place his hand near the belt while it was moving and disregarded a warning label cautioning against such conduct); *cf, Yun Tung Chow v. Recckett & Colman, Inc.*, 17 N.Y.3d 29, 34, 926 N.Y.S.2d 377 (2011)(summary judgment may be granted to a defendant on the basis of the plaintiff's conduct when plaintiff's actions constitute the sole proximate cause of injury).

It is undisputed that guards, and visible written warnings regarding their use and purpose, were present and known to Mr. Diaz at all relevant times. Mr. Diaz's sworn testimony establishes these facts. The opinions and conclusions of the Plaintiff's expert as to "foreseeable" motivation and a requirement of absolute safety are speculative and rely upon inadmissible hearsay and secondary evidence.

The Plaintiff's proofs in opposition to the motions of the Defendants fail to address important relevant facts on the question of product liability on the part of Mestek. While acknowledging the possibility of "installer" liability (which was Vicon), Mr. Heiberg, instead, focuses entirely on what he believes were the responsibilities of Mestek as the designer/manufacturer.

As previously stated, the Pittsburgh was designed by Mestek in 1985. It was changed and modified by Mestek in the year 2000. The discontinued version was purchased aftermarket by CAQSI second hand in 2007 through Vicon. It was installed by Vicon along with controls made by a different company (AMS) which were non-compatible with Mestek's Compact 3controls.

Mestek played no roll in installation or use of the discontinued version by CASQSI, or the use of non-compatible controls. CAQSI CEO, Russell T. Seacor, deposed on November 4,

2019, fully acknowledged that only the Compact 3 machine was installed at CAQSI by Mestek: seven years prior to second hand purchase of the 1985 Pittsburgh. Neither Vicon, nor the seller Walsh Atkinson Machinery, were authorized/qualified dealers for Engle [Mestek] products, including the Pittsburgh (Kirvanick Dep. at PP. 79-81).

Mestek was not consulted by CAQSI at any time on the question of the aftermarket machines' compatibility with the Compact 3. Nor were they consulted about adaptable use of the aftermarket machines with the Compact 3.

Mr. Seacor was asked, at his deposition, whether it was his understanding that the aftermarket machinery was designed for automated process of sheet metal for purposes of fabrication along with the Compact 3. His answer was "to some degree" (Dep. at p.52). He was then asked if someone could be operating the console and process the metal without having to manually grab the sheet metal and push it through. His response was "not to my knowledge" (Dep. at p.53). CEO Seacor went on to state that as to automated processing of sheet metal through the Compact 3, into the Transfer Table and into the Pittsburgh, it could only be done with a certain size sheet (Dep. at p.54). Mr. Seacor acknowledged that Walsh Atkinson of Vicon, and Vicon's installers, set up the aftermarket machines and taught CAQSI workers that the Transfer Table "would need someone to manually process the sheet metal into the Pittsburgh" from the Transfer Table by pushing the sheet from it's trailing end (Dep. at pp.55-57). This was the direct result of the use by Vicon and CAQSI, not Mestek, of products (AMS controls) sold by another manufacturer and incompatible with the Compact 3 - products not designed, manufactured or sold by Mestek to CAQSI. These facts were nowhere considered or discussed by the Plaintiff's expert Mr. Heiberg.

Accordingly, given the evidence proffered by the Plaintiff in rebuttal to the *prima facie* showing of Mestek's entitlement to judgment on its motion, the Court determines that the Plaintiff has failed to meet his burden of producing evidentiary proof in admissible form sufficient to require trial on material questions of fact on which the Plaintiff's claim rests.

It is the conclusion of the Court that the Plaintiff was the sole proximate cause of the accident and his resulting injuries. Accordingly, the motions by the Defendants and the Third-Party Defendant are granted *in limine*, and it is hereby

ORDERED, that so much of the motion by the Mestek Defendants (Motion Seq. No. 2) seeking summary judgment against the Plaintiff Diaz, is granted and the Plaintiff's complaint is hereby dismissed as to its claims against the Mestek Defendants; and it is further

ORDERED, that so much of the motion by Third-Party Defendant CAQSI (Motion Seq. No. 1) seeking summary judgment against the Plaintiff Diaz as to the Plaintiff's claims against Defendant is granted, in as much as the dismissal by this Court of the Plaintiff's complaint against the Mestek Defendants renders the Third-Party claims of the Third-Party Plaintiffs Mestek against the Third-Party Defendants CAQSI moot, and it is further

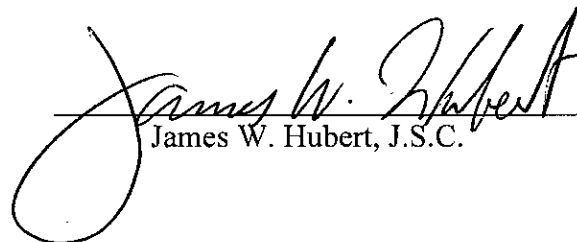
ORDERED, that so much of the Third-Party Plaintiff's motion for summary judgment against Third-Party Defendant CAQSI, which seeks an order of this Court finding issues of material fact precluding summary judgment in favor of Third-Party Defendant CAQSI is denied as moot given this Court's ruling dismissing the Plaintiff's claims against the Defendant Mestek (Motion Seq. No. 2), and it is further

ORDERED, that so much of the motion by the Third-Party Defendant CAQSI seeking summary judgment against the Third-Party Plaintiff's Mestek is denied in as much as the

dismissal by this Court of the Plaintiff's complaint against the Mestek Defendants renders the Third-Party Defendant's claims for summary judgment against the Third-Party Plaintiff's Mestek moot.

The forgoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
August 17, 2020


James W. Hubert, J.S.C.