Bauman v Sirona Dental, Inc.
2021 NY Slip Op 33666(U)
July 7, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 65938/2014
Judge: Linda Kevins
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SHORT FORM ORDER

INDEX No. 65938/2014
CAL. No. 202000580OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:

Hon. LINDA J. KEVINS
Justice of the Supreme Court

MOTION DATE 11/18/20
ADJ. DATE 2/2/21
Mot. Seq. # 003 MG
Mot. Seq. # 004 MD

NICOLE BAUMAN,

Plaintiff,

- against -

SIRONA DENTAL, INC., d/b/a SIRONA DENTAL SYSTEMS, MANUFACTURER OF CEREC MILLING MACHINES, JOHN/JANE DOES 1 - 100, XYZ CORPORATION 1 - 100, ABC ENTITIES 1 - 100,

Defendants.

SIRONA DENTAL, INC., d/b/a SIRONA DENTAL SYSTEMS, MANUFACTURER OF CEREC MILLING MACHINES,

Third-Party Plaintiff,

- against -

KAPPLER USA, LLC,

Third-Party Defendants.

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SIRONA DENTAL, INC., s/h/a SIRONA DENTAL INC. d/b/a SIRONA DENTAL SYSTEMS, MANUFACTURER OF CEREC MILLING MACHINES,

Second Third-Party Plaintiff,

- against -

KAPPLER MED + ORG GMBH,

Second Third-Party Defendants.

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Upon the following papers read on these e-filed motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers filed by defendant Sirona Dental, Inc., s/h/a Sirona Dental Inc., d/b/a Sirona Dental Systems, on October 14, 2020 ; Notice of Cross Motion and supporting papers filed by second third-party defendant Kappler Med + ORG GmbH, on October 15, 2020 ; Answering Affidavits and supporting papers filed by plaintiff, on January 12, 2021; filed by plaintiff, on January 12, 2021 ; Replying Affidavits and supporting papers filed by second third-party defendant Kappler Med + ORG GmbH, on January 30, 2021; filed by defendant Sirona Dental, Inc., s/h/a Sirona Dental Inc., d/b/a Sirona Dental Systems, on February 1, 2021 ; Other ___; it is

ORDERED that the motion by defendant Sirona Dental, Inc. for summary judgment dismissing the complaint as asserted against it is granted; and it is further

ORDERED that the cross motion by second third-party defendant Kappler Med + ORG GmbH for, in effect, summary judgment dismissing the third-party complaint as asserted against it is denied; and it is further

ORDERED that if this Order has not already been entered, the movant is directed to promptly serve a certified copy of this Order, pursuant to CPLR §§ 8019 (c) and 2105, upon the Suffolk County Clerk, who is directed to hereby enter such Order; and it is further

ORDERED that upon Entry of this Order, the movant is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

This action was commenced by plaintiff Nicole Bauman to recover damages for injuries she allegedly sustained on March 20, 2012, when the lid (also referred to as the hood) of a cabinet, containing a CEREC dental milling machine, unexpectedly fell onto her head. Plaintiff asserts causes of action against defendant Sirona Dental, Inc., s/h/a Sirona Dental Inc., d/b/a Sirona Dental Systems (Sirona) for, inter alia, negligence, failure to maintain dental equipment and/or improper inspection of dental equipment, failure to warn, breach of express and implied warranty of fitness, strict liability for defective design, and strict liability for manufacturing defect. A third-party action was commenced by Sirona against Kappler USA, LLC, but was discontinued. A second third-party action was commenced

by Sirona against Kappler Med + ORG GmbH (Kappler), which manufactured the subject cabinet under an exclusive agreement with Sirona.

Plaintiff testified that she was employed as a dental assistant at the office of John Lagner, D.D.S., in East Northport, New York. She testified that she had been employed there since the summer of 2006, and that her duties included assisting the dentists during procedures, setting up stations, and operating the in-office CEREC dental milling machine. Plaintiff testified that the CEREC machine was used to create dental crowns and in-lays, and that it was housed in a specialized cabinet to help reduce the noise it created when it was milling porcelain. She testified that she received training directly from Dr. Lagner with respect to the use of the machine and the cabinet, and that she used it "very often." She testified that she had seen the machine serviced annually, and that she was tasked with calling Patterson for service, if the cabinet or machine needed it. She recalled previous service calls for motor burnouts and to replace chemicals. Plaintiff testified that approximately six to eight months before her accident, she began to notice problems with the cabinet, specifically that the hood of the cabinet started "slowly releasing" and that she believed the pistons that held the lid ajar began to weaken. She testified that she heard the sound of the air in the pistons weaken, and that she told Dr. Lagner of the issue with the pistons "on multiple occasions." Plaintiff testified that on March 20, 2012, at approximately 4:30 p.m., she was assisting another dentist, Dr. Kozlowski, in making a crown for a patient. She testified that as she went to retrieve the crown from the machine, she lifted the hood of the cabinet with her right hand, and then both hands, ensuring that it was locked in place. She testified that when she let go of the lid to open the drawer to retrieve the crown, the hood fell down, striking her on the head.

Dr. Lagner testified that he purchased a CEREC milling machine for use in his office in December 2004 from nonparty Patterson Dental Supply (Patterson). He testified that the machine had two components, a chair-side computer and camera component, and the milling machine, which was stored across a hallway in his office. He testified that at the time he purchased it, there was a service contract with Patterson, who would provide annual service and repairs, as needed. Dr. Lagner testified that in February 2006, he purchased a cabinet to house the milling machine, due to the noise it created while it was running. He testified that he purchased the cabinet from Patterson, but did not change his service agreement to include the cabinet. He testified that between February 2006 and March 2012, he used the milling machine and cabinet daily, and that he did not have any concerns regarding the cabinet, and that it did not need any service or repairs. He testified that no one in the office ever made any complaints to him about the cabinet.

Steven Sutton testified that he is the director of technical services for Sirona, that Sirona manufactured CEREC milling machines, and that Kappler manufactured the cabinetry to house the machines in dental offices. He testified that the cabinets are designed to store the milling machines and to reduce noise while the machines are in use. He testified that Sirona sold the CEREC machines to Patterson, who sold the machines exclusively. He further testified that although Sirona did not sell the CEREC machines to individuals, Sirona did receive records of complaints, if sent to Patterson. With respect to the cabinet, he testified that Sirona never received any complaints about the closing mechanism on the cabinet. Mr. Sutton explained that if a problem arose with the cabinet, Sirona would contact Kappler to obtain parts so that Patterson could provide service. He recalled that in 2005,

Kappler sent new gas springs which had increased resistence, for a voluntary change out, because some cabinets in that shipment had a "thump" in the last two-to-three inches of closing.

Holger Kappler testified that he is the CEO of Kappler, including Kappler USA, LLC and Kappler Med + ORG GmbH. He testified that Kappler had an original equipment manufacturing agreement with Sirona for the design and manufacture of dental cabinets. He testified that Kappler, in conjunction with Sirona, designed and developed the subject cabinets specifically to store CEREC machines, and that Sirona funded all of the research and development. He testified that after the original drawings were drafted, production and testing began. He explained that part of the testing included "lifetime testing," which evaluated how long the cabinets would last, including the pneumatic system on the lids of the cabinets. He testified that they chose Bansbach 110N pistons for the lid design, based on the smoothness of the closure. He testified that for one particular shipment of cabinets, they found that the lids were not closing as smoothly as they preferred, and that Kappler voluntarily sent replacement pistons, at 140N, if customers were unsatisfied with the smoothness of the closure.

Sirona now moves for summary judgment dismissing the complaint as asserted against it, arguing that it had no duty to maintain the subject dental cabinet used at Dr. Lagner's office, that there was no defect in the design or manufacture of the subject cabinet, that there was no failure to warn plaintiff of the wear and tear of the pistons, and that no warranty existed at the time of plaintiff's accident. In support of its motion, Sirona submits, inter alia, the affidavits of David A. Guido and Michael A. Dunlap, and copies of the transcripts of the depositions of plaintiff, Steven Sutton, Holger Kappler, Dr. Lagner, and Dr. Kozlowski. Kappler cross-moves for, in effect, the same relief as Sirona, and adopts Sirona's arguments seeking to dismiss plaintiff's complaint. Plaintiff opposes the motions, arguing that triable issues of fact exist with respect to whether Sirona and Kappler defectively designed and manufactured the subject cabinet, whether adequate warnings were provided, and whether they failed to maintain the cabinet. Plaintiff submits the affidavit of Ali M. Sadegh.

A manufacturer who places a defective product into the stream of commerce may be liable for injuries or damages caused by such product (*see* ***Gebo v Black Clawson***, 92 NY2d 387, 392, 681 NYS2d 221 [1998]; ***Liriano v Hobart Corp.***, 92 NY2d 232, 235, 677 NYS2d 764 [1998]; ***Amatulli v Delhi Constr. Corp.***, 77 NY2d 525, 532, 569 NYS2d 337 [1991]). A product may be defective due to a mistake in the manufacturing process, an improper design or a failure to provide adequate warnings regarding the use of the product (***Gebo v Black Clawson***, *supra*; ***Voss v Black & Decker Mfg. Co.***, 59 NY2d 102, 463 NYS2d 398 [1983]). Depending upon the factual circumstances, a person injured by a defective product may maintain causes of action under the theories of strict products liability, negligence or breach of warranty (*see* ***Voss v Black & Decker Mfg. Co.***, 59 NY2d 102, 463 NYS2d 398 [1983]). Whether an action is pleaded in strict products liability, negligence or breach of warranty, the plaintiff has the burden of establishing that a defect in the product was a substantial factor in causing the injury, and that the defect existed at the time the product left the manufacturer or other entity in the chain of distribution being sued (*see* ***Clarke v Helene Curtis, Inc.***, 293 AD2d 701, 742 NYS2d 325 [2d Dept 2002]; ***Tardella v RJR Nabisco***, 178 AD2d 737, 576 NYS2d 965 [3d Dept 1991]).

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, is unreasonably dangerous for its

intended use, and whose utility does not outweigh the danger inherent in its introduction into the stream of commerce (***Hoover v New Holland, Inc.***, 23 NY3d 41, 53-54, 988 NYS2d 543 [2014], quoting ***Voss v Black & Decker Mfg. Co.***, *supra* at 107). To determine whether a plaintiff has made this showing, "certain risk-utility factors must be considered," which are:

> (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; (6) the degree of awareness of the potential danger that can be attributed to the injured user; and (7) the manufacturer's ability to spread the cost of safety-related design changes

(***Fasolas v Bobcat of N.Y., Inc.***, 33 NY3d 421, 104 NYS3d 550 [2019]). However, a manufacturer's duty "does not extend to designing a product that is impossible to abuse or one whose safety features may not be circumvented [or, to incorporating] safety features into its product so as to guarantee that no harm will come to every user no matter how careless or even reckless" (***Robinson v Reed-Prentice Div. of Package Mach. Co.***, 49 NY2d 471, 480-481, 426 NYS2d 717 [1980]).

Distributors of defective products, as well as retailers and manufacturers, are subject to strict products liability (*see* ***Harrigan v Super Prods. Corp.***, 237 AD2d 882, 654 NYS2d 503 [1997]; ***Giuffrida v Panasonic Indus. Co.***, 200 AD2d 713, 607 NYS2d 72 [2d Dept 1994]). Strict products liability extends to retailers and distributors in the chain of distribution even if they "never inspected, controlled, installed or serviced the product" (***Perillo v Pleasant View Assocs.***, 292 AD2d 773, 739 NYS2d 504 [4th Dept 2002]). It is established law that a products liability case can be proven absent evidence of any particular defect by presenting circumstantial evidence excluding all causes of the accident not attributable to defendant, thereby giving rise to an inference that the accident could only have occurred due to some defect in the product (*see* ***Graham v Walter S. Pratt & Sons Inc.***, 271 AD2d 854, 706 NYS2d 242 [3d Dept 2000]).

A manufacturer may be held liable for the failure to warn of the latent dangers resulting from the foreseeable uses of its product which it knew or should have known (*see* ***Liriano v Hobart Corp.***, *supra*; ***Rastelli v Goodyear Tire & Rubber Co.***, 79 NY2d 289, 582 NYS2d 373 [1992]). Liability may be imposed based on either the complete failure to warn of a particular hazard or the inclusion of warnings that are inadequate (*see* ***DiMura v City of Albany***, 239 AD2d 828, 657 NYS2d 844 [3d Dept 1997]; ***Johnson v Johnson Chem. Co.***, 183 AD2d 64, 588 NYS2d 607 [2d Dept 1992]). However, a manufacturer has no duty to warn product users of dangers that are obvious, readily discernable or apparent (*see* ***Martino v Sullivan's of Liberty***, 282 AD2d 505, 722 NYS2d 884 [2d Dept 2001]; ***Pigliavento v Tyler Equip. Corp.***, 248 AD2d 840, 669 NYS2d 747 [3d Dept], *lv dismissed in part, denied in part* 92 NY2d 868, 677 NYS2d 773 [1998]; ***Lonigro v TDC Elecs.***, 215 AD2d 534, 627 NYS2d 695 [2d Dept 1995]). The duty to warn of a specific hazard also does not arise if the injured person, through common knowledge or experience, already is aware of such hazard (*see* ***Warlikowski v Burger King***, 9 AD3d 360, 780 NYS2d 608 [2d Dept 2004]; ***Payne v Quality Nozzle Co.***, 227 AD2d 603, 643 NYS2d 623 [2d Dept 1996], *lv denied* 89 NY2d 802, 653 NYS2d 279 [1996]; ***Banks v Makita, U.S.A.***, 226 AD2d 659, 641 NYS2d 875 [2d Dept 1996]).

"Failure to warn liability is intensely fact-specific," involving issues such as the obviousness of the risk, the knowledge of the product user, and proximate cause (***Liriano v Hobart Corp.***, *supra*, at 243, 677 NYS2d 764; *see* ***Brady v Dunlop Tire Corp.***, 275 AD2d 503, 711 NYS2d 633 [3d Dept 2000]; ***Rogers v Sears, Roebuck & Co.***, 268 AD2d 245, 701 NYS2d 359 [1st Dept 2000]). Nevertheless, a court can decide as a matter of law that there was no duty to warn or that the duty was discharged (*see* ***Passante v Agway Consumer Prods.***, 294 AD2d 831, 741 NYS2d 624 [4th Dept 2002], *appeal dismissed* 98 NY2d 728, 749 NYS2d 478 [2002]; ***Dias v Marriott Intl.***, 251 AD2d 367, 674 NYS2d 78 [2d Dept 1998]; ***Schiller v National Presto Indus.***, *supra*; ***Jackson v Bomag GmbH***, 225 AD2d 879, 638 NYS2d 819 [3d Dept 1996], *lv denied* 88 NY2d 805, 646 NYS2d 985 [1996]; ***Oza v Sinatra***, 176 AD2d 926, 575 NYS2d 540 [2d Dept 1991]). As with a claim of design defect, a plaintiff alleging liability based on a failure to warn must establish that the manufacturer had a duty to warn and that the failure to warn was a substantial cause of the event which produced the injuries (*see* ***Banks v Makita, U.S.A.***, *supra*; ***Billsborrow v Dow Chem.***, 177 AD2d 7, 579 NYS2d 728 [2d Dept 1992]).

Where plaintiffs allege a design defect, the relevant inquiry is whether the product, as designed, was not reasonably safe (*see* ***Doomes v Best Tr. Corp.***, 17 NY3d 594, 935 NYS2d 268 [2011]; ***Voss v Black & Decker Mfg. Co.***, *supra*). 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, and whose utility does not outweigh the danger inherent in its introduction into the stream of commerce" (***Hoover v New Holland N. Am., Inc.***, *supra*, at 53-54, 988 NYS2d 543, quoting ***Voss v Black & Decker Mfg. Co.***, *supra*, at 107, 463 NYS2d 398 [internal quotations omitted]; *see* ***Conte v Orio Bus Indus., Inc.***, 162 AD3d 638, 78 NYS3d 236 [2d Dept 2018]; ***Gorbatov v Matfer Group***, 136 AD3d 745, 26 NYS3d 92 [2d Dept 2016]).

A plaintiff injured by an alleged defective product seeking damages under a negligence theory must, as in any negligence action, establish the existence of a legal duty of care, a breach of that duty, and damages resulting from such breach (*see* ***Micallef v Miehle Co., Div. of Miehle-Goss Dexter***, 39 NY2d 376, 384 NYS2d 115 [1976]; *see generally* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Luina v Katharine Gibbs School N.Y.***, 37 AD3d 555, 830 NYS2d 263 [2d Dept 2007]). A manufacturer is under a nondelegable duty to design and produce a product that is not defective, and a defectively designed product is one which "is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use" (***Robinson v Reed-Prentice Div. of Package Mach. Co.***, *supra*, at 479, 426 NYS2d 717). Furthermore, liability for breach of the implied warranty of fitness and merchantability under UCC §§ 2-314 requires the plaintiff to show that the product at issue was not reasonably fit for the ordinary purposes for which it was intended, and that such product was the proximate cause of his or her injury (*see* ***Denny v Ford Motor Co.***, 87 NY2d 248, 639 NYS2d 250 [1995]; ***Wojcik v Empire Forklift***, 14 AD3d 63, 783 NYS2d 698 [3d Dept 2004]; ***Finkelstein v Chevron Chem. Co.***, 60 AD2d 640, 400 NYS2d 548 [2d Dept 1977], *lv denied* 44 NY2d 461, 405 NYS2d 1025 [1978]).

Here, Sirona has established a prima facie case of entitlement to summary judgment in its favor (*see* ***Conte v Orion Bus Indus., Inc.***, 162 AD3d 638, 78 NYS3d 236 [2d Dept 2018]; *see generally* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Sirona submits the affidavit of David A. Guido, who avers that he is a professional engineer, licensed in New York, and that he has

more than 35 years of experience in the field. He states, within a reasonable degree of engineering certainty, that the CEREC tabletop milling cabinet was safe for its intended use when maintained in a reasonable and expected manner. He avers that the lid was adequately supported by two gas springs, and notes that the springs have a one-year warranty. Mr. Guido avers that the condition of the springs, as described by plaintiff, was consistent with seal wear within the gas spring itself, and that such deterioration is expected over time as the result of a loss in the gas-tight seal. Mr. Guido avers that an on-product label indicating that such a spring would wear over time is not necessary or required, and that there is no applicable code or engineering standard which required such a warning. Mr. Guido avers that a lack of maintenance and service over a six year period, and notes that Sirona did not have the responsibility to maintain, inspect, or repair the cabinet or springs.

In his affidavit, Michael A. Dunlap avers that he is an engineer, and that he possesses a bachelor's of science degree in automotive engineering technology, and a masters in management from the University of Michigan. Mr. Dunlap avers that between 1978 and 2002, he was employed as a sales engineer for SUSPA, Inc., which was dedicated to the design and application of gas springs, and that he is familiar with the end uses, sizes, lengths, strokes, and output forces for specific and custom applications of gas springs. Mr. Dunlap opines that the dental cabinet was designed in conformity with good and accepted engineering standards, and was designed as safe for use by intended users in the dental industry. He further opines that the use of dual 110N gas springs for the cabinet lid was in conformance with good and accepted engineering practices, and that they were appropriate to use. With respect to the purported loss of pressure in the gas spring, Mr. Dunlap avers that it is unlikely that a lid, such as the lid on the subject cabinet, would fall suddenly and without warning, but would rather either not raise fully open, or will descend partially closed. He avers that routine wear and tear on a gas spring takes place slowly, over time, and provides an obvious warning to the user that the springs are aging and in need of repair or maintenance. He avers that this gradual wear and tear, and the erosion of the performance of the spring, is consistent with plaintiff's testimony of a gradual deterioration over a six to eight month period. Mr. Dunlap opines that the accident was the result of a lack of usual and routine maintenance, and that plaintiff and other office staff had adequate notice to request maintenance from Patterson.

Further, it is undisputed that Dr. Lagner's office had possessed the subject cabinet for approximately six years at the time of plaintiff's injury, and that Dr. Lagner reported no problems with any portion of the cabinet, including the gas springs, to Sirona, Patterson, or Kappler. Plaintiff testified that she began to notice wear and tear on the subject gas springs, that they were not holding the lid up as strongly as before, approximately six to eight months before her accident, and that she reported the condition to Dr. Lagner. Dr. Lagner testified that he could not recall any complaints that plaintiff made to him about the cabinet, and testified that he never made any complaint or request for maintenance to Patterson, or to Sirona or Kappler. The owner of a product does bear the responsibility of maintenance by, among other things, "having it inspected periodically so that worn parts may be replaced" (***Hoover v New Holland, Inc.***, 23 NY3d 41, 59, 988 NYS2d 543 [2014]). Further, the Mr. Guido and Dunlap opine that there was no defect in the design or the manufacture of the subject cabinet, and that the cabinet was safe for its intended use. Further, Sirona has established that Patterson had the exclusive authority to maintain and repair the subject dental cabinet for Dr. Lagner (*see* ***Troy v Grosso***, 173 AD3d 1110, 100 NYS3d 880 [2d Dept 2019]).

In opposition, plaintiff fails to raise a triable issue of fact. Plaintiff submits the affidavit of Ali M. Sadegh, who avers that he is an engineer licensed in New York. Mr. Sadegh opines, within a reasonable degree of biomechanical and engineering certainty, that there was a defect in the design of the cabinet, specifically in the choice of gas spring, and that the gas springs should have been changed from 110N to 140N, to support a soft closing of the lid. Mr. Sadegh avers that had the cabinet been properly designed, the springs should have lasted 20 years, or 100,000 openings/strokes. However, there is no definitive evidence in the record of how many times per day the cabinet was opened or closed during its use by all members of the office. Further, Mr. Sadegh avers that on May 4, 2018, more than six years after the plaintiff's accident, he conducted a physical inspection of the subject cabinet, and found that the gas springs did not hold the door when it was released by hand, and that the lid dropped suddenly. He states that the gas springs were "defected" and did not support the weight of the door. However, this assertion, based solely on testing he performed on the subject hood more than six years after the accident, is conclusory and, therefore, insufficient to raise a triable issue as to whether plaintiff's injury was caused by a design defect. "An expert's affidavit proffered as the sole evidence to defeat summary judgment must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor" (***Romano v Stanley***, 90 NY2d 444, 452, 661 NYS2d 589 [1997]; *see* ***Sirianni v Town of Oyster Bay***, 156 AD3d 739, 66 NYS3d 524 [2d Dept 2017]).

Accordingly, the motion by Sirona for summary judgment dismissing the complaint as asserted against it is granted. As such, the cross motion by Kappler for, in effect, summary judgment dismissing the complaint as asserted against Sirona is denied, as moot.

Dated: 7/7/21

HON. LINDA KEVINS

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**