

Phillipin v City of New York
2022 NY Slip Op 32062(U)
July 1, 2022
Supreme Court, New York County
Docket Number: Index No. 451086/2018
Judge: Judy H. Kim
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. JUDY H. KIM</u></p> <p align="center"><i>Justice</i></p> <p>-----X</p> <p>SHARON PHILLIPIN,</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>CITY OF NEW YORK, PEXCO LLC</p> <p align="center">Defendants.</p> <p>-----X</p>	<p>PART</p> <p>INDEX NO. <u>451086/2018</u></p> <p>MOTION DATE <u>01/18/2022</u></p> <p>MOTION SEQ. NO. <u>002</u></p> <p align="center">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 85, 86, 87, 88, 89, 90 were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing papers, Pexco LLC’s motion for summary judgment dismissing this action as against it is denied.

On February 26, 2018, plaintiff Sharon Phillipin commenced the instant action to recover for injuries she allegedly sustained on January 3, 2017, after tripping and falling on a “channelizer post”—a plastic post used for directing traffic also known as a flexible delineator, bollard, or pylon—which had been flattened against the ground at the intersection of Whitehall Street and Bridge Street. Plaintiff’s complaint asserts claims for, inter alia, negligence, negligent design, and strict product liability. Co-defendants the City of New York (the “City”) and Pexco LLC (“Pexco”) interposed Answers which, inter alia, asserted cross-claims against the other for contribution and indemnity (NYSCEF Doc. Nos. 7, 10).

In motion sequence 001, the Court granted the City’s motion for summary judgment dismissing this action as against it and referred this action to a non-City part. However, in the

interest of judicial economy, the Court now rescinds that prior referral of this action and addresses Pexco's motion for summary judgment.

Pexco moves, pursuant to CPLR §3212¹, for an order dismissing this action as against it, arguing that: (1) it has established that it did not manufacture the channelizer at issue; or, alternatively, (2) plaintiff has not demonstrated any design defect in the channelizer post. In support of its motion, Pexco submits the affidavit and examination before trial ("EBT") testimony of its Technical Business Development Manager, Peter Speer, as well as the EBT testimony Adam Weir, a Supervisor of Traffic Device Maintainers for the New York City Department of Transportation ("DOT").

Weir testified, in pertinent part, that New York City uses a specific model of channelizer post, which he referred to as "Davidson" (NYSCEF Doc. No. 57 [Weir EBT at p. 13, 21-22]). Weir also testified that the City's channelizer posts are frequently inspected and, where necessary, repaired or replaced (Id. at pp. 57-58).

Speer testified that Pexco's channelizer posts are tested at various times for conformity with certain state and national standards and to ensure they rebounded after ten impacts from a standard sedan (NYSCEF Doc. No. 56 [Speer Aff. at pp. 38-39]). After reviewing photos of the subject channelizer post shown to him by plaintiff, Speer testified that he could not determine whether the pictured post was manufactured by Pexco (Id. at pp. 13-14).

However, after his EBT concluded, Speer submitted an affidavit in which he attested that:

I have since examined the photograph and performed a thorough and exhaustive investigation and it is impossible to say that the post pictured is a post manufactured by Pexco. There are no markings visible. Markings are used on our products. The white post and the black base pictured are also devoid of writing. Our posts and bases are always identified by either company name or the date of manufacture or

¹ While Pexco's notice of motion states that Pexco moves to dismiss the complaint pursuant to both CPLR §3211(a)(7) and CPLR §3212, its motion only makes arguments pursuant to CPLR §3212 and does not argue that the complaint fails to state a cause of action pursuant to CPLR §3211(a)(7).

both. Our posts are identified with writing along the sides, bases have the company name and website molded into the top surface. As I testified to at my deposition, there are many imitators of our products and other manufacturers that sell posts. These manufacturers do not apply any identifying markings to their products.

(NYSCEF Doc. No. 59 [Speer Aff. at ¶7]).

In opposition, plaintiff points to Weir’s testimony that the City uses Davidson brand channelizer posts—a brand manufactured and sold by Pexco—and notes that New York City’s “Bollard Inspection & Repair Form” identify these posts as “Davidson” brand (NYSCEF Doc. No. 80 [Inspection & Repair Form]) and argues that issues of fact exist as to whether Pexco manufactured the subject channelizer post and whether the subject channelizer post was properly designed and used.

DISCUSSION

On a motion for summary judgment, the movant bears the burden to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence demonstrating the absence of any material issues of fact (JMD Holding Corp. v. Congress Financial Corp., 4 NY3d 373, 384 [2005]). If this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]). In support of its motion, Pexco argues that: (1) it has established that it did not manufacture the channelizer at issue; or, alternatively, (2) plaintiff has not demonstrated any design defect in the channelizer post. Neither of these arguments succeed.

Pexco has not carried its “initial burden of establishing as a matter of law that it did not manufacture or supply the product” (Ebenezer Baptist Church v Little Giant Mfg. Co., Inc., 28 AD3d 1173, 1174 [4th Dept 2006] citing Baum v Eco-Tec, Inc., 5 AD3d 842, 843-844 [3d Dept 2004]). As a threshold matter, the Court declines to consider Speer’s affidavit denying that the

subject channelizer post is produced by Pexco. Speer may not now, after his deposition, submit an affidavit contradicting the position taken at his deposition—i.e., that he could not determine whether Pexco manufactured the subject channelizer post—thereby depriving plaintiff of the opportunity to question him as to the basis for his new conclusion (See Jimenez v 470 Audubon Ave. Corp., 239 AD2d 106, 107 [1st Dept 1997] [trial court properly rejected plaintiff's affidavit in opposition to motion where affidavit, inter alia, “directly contradicted plaintiff's deposition testimony that she could not identify the assailants”]). Even if this were not the case, the testimony of Weir and the various City records submitted by plaintiff provide sufficient circumstantial evidence to create a triable issue of fact as to whether Pexco manufactured the channelizer post in question (See e.g., Healey v Firestone Tire & Rubber Co., 87 NY2d 596, 601-02 [1996]). Accordingly, Pexco's motion for summary judgment on this ground is denied.

Pexco's alternative argument, that it is entitled to summary judgment because plaintiff has failed to demonstrate any design defect in the channelizer post, also fails. “[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” (Fasolas v Bobcat of New York, Inc., 33 NY3d 421, 429-30 [2019] quoting Voss v Black & Decker Mfg. Co., 59 NY2d 102, 107 [1983]). Proof of compliance with current industry standards is generally sufficient to establish, prima facie, that a product is not defectively designed (See e.g., Reeps v BMW of N. Am., LLC, 94 AD3d 475, 475-76 [1st Dept 2012]; see also Leone v BJ's Wholesale Club, Inc., 89 AD3d 406, 407 [1st Dept 2011]). Contrary to Pexco's claim, however, it is Pexco that bears the initial burden to establish such compliance. Pexco has not done so here.

To the extent that Speer testified that Pexco's channelizer posts are tested by Pexco and various state and national bodies, his testimony on this point was vague and not substantiated by any documentary evidence. Neither has Pexco established that Speer is qualified as an expert to testify as to the design and manufacturing of the channelizer and industry standards related to that design and manufacture (See LaScala v QVC, 201 AD3d 798, 799 [2d Dept 2022] [defendants' expert, conclusory affidavit opining that the hoverboard was not defectively designed, without providing any explanation of the hoverboard's design, or any discussion of industry standards or costs ... was insufficient to affirmatively demonstrate, prima facie, that the hoverboard was reasonably safe for its intended use]).

Pexco argues that Weir's testimony that the City regularly reviewed and replaced flattened channelizer posts throughout the City demonstrates that "the City was aware of the fact that nothing in a high impact zone [like New York City], where extremely heavy vehicles operate, park on channelizer posts, can insure complete resiliency or a never ending ability to bounce back" (NYSCEF Doc. No. 51 [Lazar Affirm. at ¶29]), thus establishing that flattened channelizer posts were operating as expected. This circumstantial evidence of the City's subjective expectations regarding the channelizer posts does not establish that the posts operated in conformance with industry or governmental standards. Rather, this argument amounts to an assertion that it was generally accepted that channelizer posts will sometimes flatten but does not address the ultimate underlying question at issue, namely whether it was reasonable for the channelizer post, in light of industry standards, to fail under the relevant conditions (See Yun Tung Chow v Reckitt & Colman, Inc., 17 NY3d 29, 33 [2011] [on summary judgment motion, "defendants cannot rely simply on the fact that their product is what they say it is and that everyone knows that lye is dangerous; that only begs the question at the heart of the merits of the defective design claim: knowing how

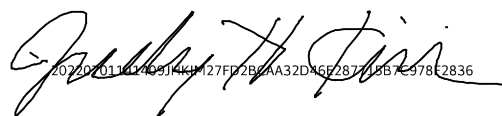
dangerous lye is, was it reasonable for defendants to place it into the stream of commerce as a drain cleaning product for use by a layperson?"). Accordingly, Pexco has failed to establish as a matter of law that there was no design defect in the channelizer post at issue.

In light of the foregoing, it is

ORDERED that the motion by defendant Pexco LLC for summary judgment dismissing this action as against it is denied; and it is further

ORDERED that within twenty days of entry, counsel for plaintiff shall serve a copy of this order with notice of its entry upon all parties and upon the Clerk of the Court (60 Centre St., Room 141B) in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on this court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



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7/1/2022
DATE

JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: