

Janof v Auto Warehouse
2023 NY Slip Op 35258(U)
October 2, 2023
Supreme Court, Ulster County
Docket Number: Index No. EF2016-3102
Judge: Kevin R. Bryant
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STATE OF NEW YORK
SUPREME COURT

ULSTER COUNTY

RICHARD JANOF,

Plaintiff,

-against-

AUTO WAREHOUSE, et. al,

Defendants.

**DECISION & ORDER
ON MOTION**

Index No.: EF2016-3102
(Motion Sequence # 6, 8)

Supreme Court, Ulster County
Present: Hon. Kevin R. Bryant, J.S.C.

Appearances:

Plaintiff:

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Defendant(s):

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Bryant, K.:

On or about March 16, 2017, a summons and verified complaint were filed by Richard Janof (hereinafter referred to as "Plaintiff") alleging, *inter-alia*, product liability, breach of warranties and personal injuries; and

Verified answers having been submitted to the Court by BMW of North America (hereinafter referred to as "Defendants"); and

Extensive discovery having been conducted by the parties in the six years between the filing of the complaint and the filing of the Note of Issue and Certificate of Readiness on March 15, 2023; and

No objection having been filed to the Note of Issue and Certificate of Readiness; and

After the matter was scheduled for trial, a Notice of Motion having been filed by Plaintiff on March 30, 2023, seeking an Order compelling discovery; and

A further Notice of Motion having been filed by BMW, requesting, *inter-alia*, an Order granting Summary Judgment; and

Affirmations in Opposition, Memoranda and further submissions having been filed with the Court with-regard-to the pending motions.

NOW, it is hereby ORDERED, that the motion to compel discovery and the motion for Summary Judgment are both hereby denied¹.

Findings of Fact

On May 26, 2016, Plaintiff was driving a 2008 Mini Cooper Clubman when the car went off the road and struck a utility pole. The front right side of the vehicle was crushed, and the air bag was deployed. Plaintiff alleges that he lost his left eye as the result of the impact and the

¹ In determining this motion, this Court has considered documents filed on NYSCEF as cited above as well as all other filings in this matter that have been electronically filed with the Court.

deployment of the air bag. According to Plaintiff, the air bag was designed in a defective manner, in part, because it did not contain “tethers” which are cloth strips sewn inside the air bag to prevent it from deploying too far towards an occupant in a crash. Plaintiff further alleges that Defendants failed to provide adequate warnings regarding the dangers of the untethered airbags and breached its warranties by failing to provide a reasonably safe vehicle. With-regard-to discovery, Plaintiff argues that they have made repeated efforts to secure discovery regarding Defendants’ use of tethered air bags in its vehicles and that Defendants have failed to provide necessary information.

Plaintiff’s Notice of Motion requests that this Court compel Defendant “to produce a list of all lawsuits, complaints, reports or incidents of which BMW AG is aware involving claims of eye injuries occurring in BMW 3 series vehicles and Mini vehicles from 1984 to 2008”². Plaintiff argues that the requested information is relevant to the claim that Defendant “knew or should have known of the dangers of the air bag at the time the subject vehicle was designed manufactured and distributed”. Plaintiff argues that the existence of two databases at BMW that could be accessed for this information was first disclosed during a deposition on August 11, 2022, and that post deposition demands were made and were not fully addressed, thereby necessitating this motion³.

In opposition to the motion for further discovery, Defendant argues that Plaintiff’s request is overbroad, unduly burdensome and part of a fishing expedition. Defendant notes that it has already provided voluminous records in response to prior requests and that in order to comply

² NYSCEF doc. 64

³ While counsel outlines discussions and correspondence between counsel and the court regarding this issue in early 2023, counsel provides no adequate explanation as to why these issues were not fully addressed in the six years between the time the complaint was filed, and the filing of the Note of Issue nor does counsel explain why he did file a Motion to vacate the Note of Issue or Certificate of Readiness.

with Plaintiff's latest request, Defendant would need to restore and run searches on outdated IT systems. Defendant further argues that Plaintiff previously made a similarly overbroad request for records in 2021 and that the then Presiding Judge issued an oral decision limiting the scope of discovery to "the full line of MINIs existing in Plaintiff's model year of 2008, over model years 2003-2013, an 11-year span, comprising 66 models . . . and denied Plaintiff's request for discovery into BMW model vehicles"⁴. Defendant argues that in this motion, Plaintiff is attempting to take advantage of the re-assignment of the case to the undersigned to revisit an issue that has already been decided⁵.

With regard to Summary Judgment, Defendant argues that Plaintiff has failed to allege a viable design defect claim and outlines its allegedly "high-level specifications" and "exhaustive pre-productive crash testing". Defendant relies upon the report and opinion of Michael E. Klima, P.E. who indicates that the airbag at issue "is reasonably safe, not defectively designed, and do not pose an unreasonable threat to the driver's eyes". Defendant also relies on the report and opinion of William R. Scott, Ph.D. who states that the airbag at issue is "well within the legal requirements of Federal Motor Vehicle Safety Standard" and that "the subject airbag system for the driver in the MINI R55 offered reasonable protection to Mr. Janof and his head in the subject crash". Mr. Scott further concludes that "[t]he deployment of the airbag also prevented more serious injuries that Mr. Janof could have sustained had it not deployed, which was its purpose"⁶. Defendant further argues that Plaintiff's proposed alternative design argument, specifically, the viability of a tethered airbag system, lacks merit. Once again, Defendant relies on the extensive

⁴ NYSCEF doc. 85, para. 16

⁵ The instant matter was transferred to the undersigned on or about May 24, 2022.

⁶ NYSCEF doc. 108, page 4

testing completed by Defendant and the opinions of their two experts. Defendant also argues that Plaintiff lacks a viable failure to warn claim and also lacks a viable breach of warranty claim.

In opposition, Plaintiff argues that there are material issues of fact that preclude summary judgment “such as whether the subject airbag was unreasonably dangerous or whether Plaintiff’s alternative design is feasible or what caused Mr. Janof’s eye injury”. Plaintiff’s point to the expert opinion of Neil Hannemann who concludes, *inter-alia*, that “the subject vehicle was defective when marketed and sold because it was designed with a large, aggressively deploying, untethered side air bag that was unreasonably dangerous”. Mr. Hannemann further concludes that “had the subject driver’s side air bag been equipped with tethers, the air bag would not have made contact with Mr. Janof’s face during the inflation phase of its deployment”, that the dangers of untethered airbags is “well known in the auto industry”, and that “a tethered air bag was both a technologically and economically feasible alternative to the untethered air bag used in the subject vehicle”⁷. Mr. Hannemann outlines numerous alleged flaws in the reports of Defendants’ experts.

Plaintiff also points to the opinion of biomechanics expert Paul Lewis, Jr. who similarly concludes that “[h]ad the subject airbag been smaller and tethered, its deployment characteristics . . . would have altered such that his severe eye injury would have been prevented and he would have been largely uninjured as a result of the subject incident. Mr. Janof’s facial and eye injuries were the result of a defective air bag and the negligence of BMW defendants”⁸. Mr. Lewis also addresses and dismisses the validity of the opinions of Defendants’ experts.

Plaintiff correctly argues that the parties’ experts reach opposite conclusions regarding the proximate cause of Plaintiff’s injuries. Consequently, Plaintiff argues that “injury causation in this case is a classic ‘battle of the experts’ and that “it is the jury’s role, not the Court’s, to weigh

⁷ NYSCEF doc. 158, page 3, 4

⁸ NYSCEF doc. 159, page 4

the opposing expert testimony and decide this material issue of fact”⁹. With regard to the breach of warranty claim, Plaintiff argues that “the purpose of an airbag is not just to prevent more serious injuries that may have occurred if the subject airbag did not deploy . . . The purpose of an airbag system is to prevent injuries [and] the subject airbag was not fit for its expected purpose because it caused an avoidable serious inflation related injury, specifically the loss of an eye”¹⁰.

Applicable Law

I. Discovery

It is well settled that “[t]he supervision of discovery, and the setting of reasonable terms and conditions for disclosure, are within the sound discretion of the Supreme Court. The Supreme Court’s discretion is broad because it is familiar with the action before it” (Hamed v. Alas Realty Corp., 209 A.D.3d 628 (2nd Dept., 2022)). See also, Umana v. Tower E. Condo., 208 A.D.3d 710 (2nd Dept., 2022)). Post-note-of-issue disclosure is not warranted when there is “a lack of diligence in seeking discovery that does not constitute unusual or unanticipated circumstances” Garrison v. Dick’s Sporting Goods, Inc., 187 A.D.3d 1379 (3rd Dept., 2020)).

This Court has considered the affirmations and the arguments presented in support and in opposition to the instant application and finds that there is no adequate explanation given as to why the allegedly outstanding discovery issues have not been fully addressed long ago. In determining this motion, the Court notes the significant delays in this proceeding, and the lack of any reasonably diligent effort to compel discovery through motion practice during the first six years that this matter has been pending. This Court also notes the absence of any persuasive argument regarding the necessity or relevance of the issues that Plaintiff seek to explore through further discovery.

⁹ NYSCEF doc. 164, page 15

¹⁰ Id. page 19

Based upon the pre-existing scheduling Orders, the history of this matter and the nature of the controversy before this Court, and, most notably, the prior determination made regarding the scope of discovery, in the exercise of this Court's discretion, it is the determination of this Court that discovery is complete and the Note of Issue and certificate of readiness has been properly filed in compliance with this Court's scheduling Order and applicable Court rules¹¹.

II. Summary Judgment

"A party moving for summary judgment must demonstrate that the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in the moving party's favor . . . the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering evidence to demonstrate the absence of any material issues of fact"¹² (Jacobsen v. N.Y.C. Health and Hospitals Corp., 22 N.Y.3d 824 (2014)). "On a motion for summary judgment, the movant must establish his or her entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact. Only when the movant satisfies his or her obligation does the burden shift to the nonmovant to present evidence demonstrating the existence of a triable issue of fact" (White Knight Constr., LLC v. Haugh, ___ A.D.3d ___, 2023 NY Slip Op 02730 (3rd Dept., May 18, 2023)). See also, Grant v. Temple, 216 A.D.3d 1351 (3rd Dept., 2023); P.R.B. v. State of New York, 201 A.D.3d 1237 (3rd Dept., 2022)). "To determine whether there are any factual issues, this Court must view the evidence in a light most favorable to the nonmoving party and give that party the benefit of every favorable inference"

¹¹ In deciding this motion, the Court notes the numerous letters that were exchanged between the parties and the Court regarding Plaintiff's requests for years before the Note of Issue was filed and the numerous scheduling orders that have been entered by the Court and seemingly ignored by the parties in a matter that has been pending for a period of over six and-one-half years.

¹² Internal citations, quotations and punctuation omitted in all quotations contained herein.

(McEleney v. Riverview Assets, 201 A.D.3d 1159 (3rd Dept., 2022)). See also, American Food & Vend. Corp. v. Amazon.com, Inc., 214 A.D.3d 1153 (3rd Dept., 2023)).

“A party injured as a result of a defective product may seek relief against the product manufacturer if the defect was a substantial factor in causing the injury . . . A strict products liability cause of action may be premised on a defect in the manufacturing process, a defect in the design or a failure by the manufacturer to provide adequate warning or instructions” (Fitzpatrick v. Currie, 52 A.D.3d 1089 (3rd Dept., 2008)). See also, Robinson v. Reed-Prentice Div. of Package Mach. Co., 49 N.Y.2d 471 (1980)). “In order to establish a prima facie case in strict products liability for design defects, the plaintiff must show that the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and the defective design was a substantial factor in causing the plaintiff’s injury” (Hall v. Husky Farm Equip., Ltd., 92 A.D.3d 1188 (3rd Dept., 2021)). “To demonstrate a product was not reasonably safe, the injured party must demonstrate both that there was a substantial likelihood of harm and that it was feasible to design the product in a safer manner” (Voss v. Black and Decker Mfg., 59 N.Y.2d 102 (1983)). See also, Lyall v. Justin Boot Co., 194 A.D.3d 1237 (3rd Dept., 2021); Darrow v. Hetronic Deutschland GMBH, 181 A.D.3d 1037 (3rd Dept., 2020); Barclay v. Techno-Design, Inc., 129 A.D.3d 1177 (3rd Dept., 2015).

In consideration of the factual disagreement between the expert witnesses regarding the controlling factual issues, it is the finding of this Court that Defendants are not entitled to Summary Judgment and there remain significant issues regarding liability that still must be addressed at trial. Moreover, there remains a question of fact as to whether a particular negligent act of Defendants was the sole or one of several proximate causes of Plaintiff’s injuries.

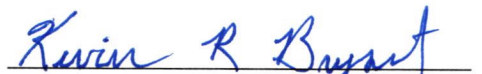
This Court has considered Defendants' additional arguments in support of their request for Summary Judgment and finds them to be without merit. Specifically, it is the finding of this Court that the questions of fact regarding the safety of the design of the airbag as well as the feasibility of the alternative design including tethers, precludes a summary determination on the issue of the alleged failure to warn and the alleged breach of an implied warranty. In this regard, there remains a question of fact regarding the reasonableness of the warnings that were provided and the question of whether a reasonable person would believe that an airbag is intended to prevent injuries in general or whether it is intended to mitigate or prevent serious injuries. Given the differing opinions of the experts, it would be improper for this Court to summarily decide these questions of fact.

As such, it is the finding of this Court that Defendants failed to establish, *prima facie*, that they were free from negligence and that their negligence was not at least one of the proximate causes of the accident (see, Pilgram v. Vishwanathan, 151 A.D.3d 769 (2nd Dept., 2017) and, viewing the conflicting evidence and reports in the light most favorable to the non-moving party, this Court cannot determine that Defendants are entitled to judgment as a matter of law. Under the circumstances, it is the finding of this Court that these are significant outstanding issues of fact that cannot be summarily determined and, as such, the motion for Summary Judgment is denied.

The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

Dated: October 2, 2023
Kingston, New York

ENTER,


HON. KEVIN R. BRYANT, J.S.C.