

**Bilyeu v BMW of N. Am. LLC**

2024 NY Slip Op 34591(U)

December 31, 2024

Supreme Court, New York County

Docket Number: Index No. 152681/2019

Judge: Verna L. Saunders

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

Justice

INDEX NO. 152681/2019
MOTION SEQ. NO. 008

ZOSHA BILYEU and ADAM BILYEU,
Plaintiffs,

- v -

BMW OF NORTH AMERICA LLC, LUXURY VEHICLES OF
THE HUDSON VALLEY, INC. d/b/a BMW OF THE HUDSON
VALLEY, and BAYERISCHE MOTOREN WERKE AG,
Defendants.

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 138, 139, 140, 141, 142, 143,
144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166,
167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178

were read on this motion to/for

SUMMARY JUDGMENT

In this action sounding in strict product liability (first cause of action), negligence
(second cause of action), breach of warranty (third cause of action) and loss of services (fourth
cause of action), petitioner seeks recovery of damages allegedly sustained on March 26, 2018,
when the rear automatic tailgate door of the 2016 BMW 328i xDrive Gran Turismo ("subject
vehicle") used by plaintiffs<sup>1</sup> but purportedly designed, imported, and/or manufactured by
defendants, malfunctioned and closed on plaintiff Zosha Bilyeu's hand (hereinafter, "Zosha")
(NYSCEF Doc. No. 1, summons). According to Zosha, upon parking the subject vehicle in her
home garage after grocery shopping, she noticed out of the corner of her eye a case of glass
bottles falling from the hands of her stepson, who had picked up some of the groceries and was
standing by the rear license plate area of the subject vehicle. Zosha asserts that she instinctively
and reflexively extended her right hand outward and into the trunk compartment from the side of
the tailgate door. Unknown to her, her grandson had already commenced the closure of the
tailgate door by pressing the interior hatch button, and the tailgate door closed on her right hand
causing her to suffer a radial collateral ligament (RCL) tear and ulnar collateral ligament (UCL)
tear. Zosha claims she attempted to remove her hand before the tailgate door slammed on her
right hand (NYSCEF Doc. No. 139, statement of undisputed facts).

In the instant motion, defendants move, pursuant to CPLR 3212, for an order, dismissing
all claims. Defendants contend that it is physically and mechanically impossible for the tailgate
door to have closed completely on Zosha's entire right hand without amputating, severely
mangling, or, at the very least, fracturing bones in that hand. Neither the RCL nor UCL injuries
are plausible from the tailgate door closing on Zosha's hand, argue defendants. They articulate

<sup>1</sup> Plaintiff Adam Bilyeu executed a stipulation of voluntary discontinuance, dated September 15, 2023, discontinuing
all claims and causes of action against all parties (NYSCEF Doc. No. 137).

that the pre-litigation inspection of the subject vehicle established that the blockage detection system feature in the subject vehicle was properly functioning, and multiple experts have tested other cars of the subject vehicle model confirming that the automatic tailgate sensor stops when it encounters a hand in the location and manner as testified by plaintiff.

Defendants submit the following evidence with their motion: copies of deposition testimonies from Zosha and Adam Bilyeu; non-party Cameron Bilyeu, stepson; BMW Tech Leader for Exterior Functionality Florian Hirth; BMW's Department Head of Products Analysis Eduardo Aviles; Luxury's Director of Fixed Operations Lawrence Powell; a copy of Owner's Manual for the subject vehicle; a copy of BMW's Internal Field Report of the pre-litigation inspection; copies of Zosha's photographs of her hands on March 31, 2018; a copy of plaintiff's hand and wrist X-ray report; a copy of plaintiff's operative report by Dr. Sodha;<sup>2</sup> and copies of expert reports from automobile design expert Donald Parker ("Parker") and biomechanical engineer Matthew Greenston ("Greenston") (NYSCEF Doc. Nos. 146-162).

Defendants' expert Greenston examined the medical records, photographs, and deposition testimonies and wrote a report. He concluded that Zosha could not have suffered the injuries asserted by Dr. Sodha. In order to suffer a RCL injury, Greenston argues that Zosha's thumb would have had to have been pushed upward and away from the fingers before the accident. Additionally, to suffer a UCL injury, Zosha's thumb would have had to have been pushed downward and away from the fingers before the accident. Based on Zosha's testimony, this was not the case.

On July 7, 2021, defendants' expert, Parker, inspected a vehicle of the same model as the subject vehicle, testing the operation of its tailgate. Parker inserted his hand near the tailgate in the same manner that Zosha claims to have done. As a result, Parker concluded in his report that the tailgate stopped before contacting his hand. Greenston did similar tests with his hand with the same results. Defendants contend that defendant Luxury Vehicles of the Hudson Valley, Inc. d/b/a BMW of the Hudson Valley ("Luxury") performed pre-delivery inspections on its BMW's before selling them. Thus, defendants argue and maintain that the evidence demonstrates that the vehicle was safe, and the tailgate door functioned properly (NYSCEF Doc. No. 140, *memo of law in support of motion*).

Zosha opposes the motion for summary judgment, arguing that defendants' expert reports are unsworn and therefore inadmissible. Citing several First Department decisions, she also argues that even if defendants submitted sworn copies of this expert reports in reply, the evidence would still be inadmissible. Zosha contends that defendants cherry-pick evidence and ignore certain material facts such as portions of her deposition testimony, where she testified that the tailgate pushed her hand further into the trunk. Zosha notes that defendants refer to the wrong hand position and movement and the wrong part of the tailgate contacting plaintiff's hand. She argues that Parker, in his inspection of the tailgate, used the wrong hand position and measured the triggering forces at the wrong location, resulting in a force measurement much less than the forces at play on the day of the accident. Furthermore, Zosha argues that defendants failed to address plaintiff's primary injury. According to her, their expert Greenston disregarded the RCL injury and focused on the less severe UCL injury (NYSCEF Doc. No. 167, *opposition*).

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<sup>2</sup> Dr. Sodha, a hand surgeon, diagnosed plaintiff of the RCL and UCL tear in her right hand.

In support of her arguments, Zosha submits affidavits and reports from two experts, biomechanical engineer Kimberly Balogh (“Balogh”) and design engineer Erik Anderson (“Anderson”). Balogh articulates that Zosha attempted to extract her hand at the time of the accident, causing a change in hand movement with a rotation of the hand, consistent with her testimony of her hand position. Balogh concludes that given the force measurements notated by Zosha’s engineer expert, an RCL injury could rupture with sufficient force. Anderson also argues that defendants failed to implement safer alternative designs for this subject vehicle model, despite knowledge of safer designs and their availability on the market. He asserts that excessive forces were involved in the tailgate door closure. Anderson also claims that defendants failed to conduct adequate safety testing on the model vehicle and that there is sufficient evidence to conclude that the subject vehicle was defective in design (NYSCEF Doc. Nos. 169; 170).

In reply, defendants argue that in the interest of justice, the court should accept the submitted sworn affirmation of Parker and Greenston, *nunc pro tunc*. They argue that acceptance would not be prejudicial to plaintiff. Defendants contend that Zosha’s experts concede that the cause of plaintiff’s injuries is unrealistic. Despite this, claim defendants, these experts resort to distorting the facts in this case or making up alternative facts to maintain their opposition to this motion. Defendants argue that the evidence in opposition fails to raise a triable issue of fact as to a defective tailgate mechanism (NYSCEF Doc. No. 176, *reply*).

“[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 denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). “[I]t is insufficient to merely set forth averments of factual or legal conclusions” (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (see *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Here, although in support of their motion defendants submit expert reports, they are unsworn and therefore not in admissible form. This error may not be cured by submitting a sworn expert affidavit in reply papers (see *Accardo v Metro-North R.R.*, 103 AD3d 589, 589 [1st Dept 2013]; *Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010]). Thus, defendants fail to satisfy their prima facie burden of establishing entitlement to judgment as a matter of law on the strict products liability and negligence causes of action as these require expert opinions to establish that the subject vehicle functioned as intended on the date of Zosha’s injury (see *Suppiah v Kalish*, 76 AD3d 829, 832 [1st Dept 2010]). Even if defendants’ expert reports had been in admissible form, the competing expert reports as to whether Zosha’s injuries could have occurred in the manner as alleged and whether the detection mechanism functioned properly at the time of Zosha’s injuries raise credibility issues, and credibility determination is not appropriate on a summary judgment motion (see *St. Marks Assets, Inc. v Sohayegh*, 167 AD3d

458, 459 [1st Dept 2018]; *Hutchings v Yuter*, 108 AD3d 416, 417 [1st Dept 2013]). However, the court grants that branch of the motion seeking dismissal of the breach of warranty cause of action because Zosha does not address defendants' arguments in her opposition papers and, thus, it is deemed abandoned (see *Wing Hon Precision Indus. Ltd. v Diamond Quasar Jewelry, Inc.*, 154 AD3d 550, 551 [1st Dept 2017]; *Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014]). Accordingly, it is hereby

**ORDERED** that defendants BMW of North America LLC, Luxury Vehicles of the Hudson Valley, Inc. d/b/a BMW of the Hudson Valley, and Bayerische Motoren Werke AG's motion for summary judgment is granted solely with respect to the dismissal of the breach of warranty claim in the complaint and it is otherwise denied; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendants shall serve a copy of this decision and order, with notice of entry, upon plaintiff.

This constitutes the decision and order of this court.

December 31, 2024

  
HON. VERNA L. SAUNDERS, JSC

<b>CHECK ONE:</b>	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED			<input checked="" type="checkbox"/>	GRANTED IN PART		
<b>APPLICATION:</b>	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
<b>CHECK IF APPROPRIATE:</b>	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT		<input type="checkbox"/>
								REFERENCE