Kivat v Kershis
2011 NY Slip Op 33477(U)
December 21, 2011
Sup Ct, Suffolk County
Docket Number: 08-11299
Judge: Thomas F. Whelan
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SHORT FORM ORDER

COPY

INDEX No. 08-11299

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7-21-11 (#001)
MOTION DATE 8-26-11 (#002)
ADJ. DATE 9-23-11
Mot. Seq. # 001 - MotD
002 - MD

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BENJAMIN KIVAT,

Plaintiff,

- against -

FRANK KERSHIS, FRANK KERSHIS, P.T., P.C., RICK GABRIEL, RICK GABRIEL P.T.A., P.C. and HYGENIC CORPORATION,

Defendants.

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Upon the following papers numbered 1 to 51 read on this motion for summary judgment; motion to strike pleading; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19 ; Notice of Cross Motion and supporting papers 20 - 43 ; Answering Affidavits and supporting papers 44 - 45; 46 - 47; 48 - 49 ; Replying Affidavits and supporting papers 50 - 51 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Hygenic Corporation for, inter alia, summary judgment dismissing plaintiff's complaint and all cross-claims against it is determined as follows; and it is further

ORDERED that the cross motion by plaintiff for an order pursuant to CPLR 3126 striking the answer of the defendant Kershis and defendant Gabriel on the ground that they spoliated evidence is denied.

Plaintiff Benjamin Kivat commenced this action to recover damages for personal injuries allegedly sustained on August 9, 2007 while he was receiving physical therapy treatment at a facility operated by defendant Frank Kershis, P.T., P.C, which is owned by defendant Frank Kershis. Plaintiff's injuries allegedly were sustained when the latex exercise band he was using to perform stretching exercises snapped. The complaint alleges that Kershis and defendant Rick Gabriel, a physical therapist assistant, failed to properly maintain and inspect the exercise band utilized by plaintiff prior to the incident. The complaint also alleges causes of action sounding in negligence, strict products liability and breach of warranty against defendant Hygenic Corporation, which allegedly manufactured the exercise band.

Hygenic now moves for summary judgment dismissing the complaint and all cross claims against it on the grounds that it cannot be established that it is the manufacturer of the subject exercise band, and that the accident was not necessarily attributable to a defect in the exercise band. Hygenic also moves for an order pursuant to CPLR 3126 dismissing the complaint and cross claims against it, arguing that spoliation of evidence makes it impossible to determine what entity manufactured the elastic band and what caused the band to break. In support of its motion, Hygenic submits, among other things, copies of the pleadings, a copy of the instruction manual for the Thera-Band brand exercise bands, transcripts of the parties' deposition testimony and a transcript of the deposition testimony of Chris Meglvevich. Gabriel opposes the branch of Hygenic's motion to dismiss the cross claims against it, arguing that there was no showing of bad faith or unreasonable neglect to support a claim of spoliation of evidence.

Plaintiff cross-moves to strike the answers of Kershis and Gabriel based upon spoliation of evidence. Plaintiff also opposes Hygenic's motion for summary judgment, arguing that Hygenic is the manufacturer of the subject band and that the band did not perform as intended. In support, plaintiff submits, among other things, copies of the pleadings, copies of various purchase records by Empi Inc. and Kershis, and correspondence with the assistant general counsel of Empi. Gabriel opposes plaintiff's cross motion, arguing that he was not responsible for the subject exercise band and that he did not discard it. Kershis also opposes the cross motion and asserts that he had no reason to anticipate that litigation would arise as a result of the latex band snapping.

At his examination before trial, plaintiff testified that after a motor vehicle accident and subsequent shoulder surgery, his treating physician prescribed physical therapy treatment and referred him to Kershis. He testified that he was performing exercises with an elastic exercise band during a therapy session when the band snapped. He explained that as he was laying on his back with his arms above him holding the exercise band, the band broke as he was pulling it down towards the floor.

At his examination before trial, Kershis testified that he is a certified physical therapist and that plaintiff was referred to his office for physical therapy. He testified that as part of plaintiff's treatment, exercise bands were used to perform certain exercises. He explained that an exercise band is essentially a thin, long rubber band which is used for strengthening and conditioning exercises. Mr. Kershis stated that the exercise bands in his office would be changed when they became dirty, and that the bands would become dirty before they lost their "integrity." He testified that all of his employees can make a determination as to when the bands need to be replaced. He further testified that Gabriel was in charge

of purchasing the bands, and that the bands were purchased from a company known as Empi.

At his examination before trial, Gabriel testified that he is a physical therapist assistant and works as an independent contractor for Frank Kershis Physical Therapy. He testified that the employees in the office visually inspect the exercise bands to determine if they need to be replaced prior to a patient using the them. He testified that on the day of the incident, plaintiff was performing exercises using a green band when the band broke, and that he evaluated plaintiff's shoulder after the incident. Gabriel stated that the "Thera-Bands break all the time, so it's not a big deal," and that the bands are thrown out when they break. He testified that Chris Meglvevich, a physical therapy aide at the office, threw the broken band in the garbage. He further testified that he was not responsible for ordering the exercise bands, but that when he has ordered the bands, they were purchased from a company known as Empi.

At his examination before trial, Dr. Phil Page, Director of Education and Research for Hygenic, testified that his duties include coordinating the clinical education as well as managing the clinical research that is performed with the company's products. He testified that Hygenic manufactures elastic exercise bands which have the brand name Thera-Band printed on them, and that he is not aware of any complaints regarding those bands. He testified that the exercise bands, which are packaged in rolls, have different resistence levels, and that different colors are used to identify the different amounts of resistance. Dr. Page testified that Empi Distribution is a distributor for Thera-Bands and other rehabilitation products. He testified that Hygenic has a quality assurance program to inspect the bands prior to distribution. He also testified that an exercise band may break if it has a tear or has been used for a long period of time, if it has been stored improperly, and if it is stretched too far. He testified that there is no time period as to when the exercise bands should be replaced, but that if there is visible damage to a band, such as cracking and tearing, it should be replaced.

There is a general rule that one of the elements a plaintiff in a strict products liability action must establish by competent proof is that it was the defendant who manufactured the product and placed it in the stream of commerce (*see* ***Healey v Firestone Tire & Rubber Co.***, 87 NY2d 596, 601, 640 NYS2d 860 [1996]; ***Hymowitz v Eli Lilly & Co.***, 73 NY2d 487, 504, 541 NYS2d 941 [1989]; ***D'Amico v Manufacturers Hanover Trust Co.***, 173 AD2d 263, 265, 569 NYS2d 962 [1st Dept 1991]). The identity of the manufacturer of a defective product may be established with circumstantial evidence, even if the allegedly defective product was destroyed after use (***Healey v Firestone Tire & Rubber Co.***, *supra*; *see e.g.* ***Otis v Bausch & Lomb***, 143 AD2d 649, 532 NYS2d 933 [2d Dept 1988]). If a plaintiff relies on circumstantial evidence to establish the identity of the manufacturer, such evidence "must establish that it is reasonably probable, not merely possible or evenly balanced, conjecture evidence of the manufacturer's identity is not enough" (***Healy v Firestone Tire & Rubber Co.***, *supra*, at 601-602 ; ***Brown v Elm Plumbing Supply, Ltd.***, 271 AD2d 469, 706 NYS2d 86 [2d Dept 1999]; ***Escarria v American Gage & Mfg. Co.***, 261 AD2d 434, 690 NYS2d 86 [2d Dept 1999]). Strict products liability or liability for breach of warranty may not be imposed upon a party outside the manufacturing, selling or distributive chain (*see* ***Spallholtz v Hampton C.F. Corp.***, 294 AD2d 424, 741 NYS2d 917 [2d Dept 2002]; ***Joseph v Yenkin Majestic Pain Corp.***, 261 AD2d 512; 690 NYS2d 611 [2d Dept 1999]).

Furthermore, in a products liability action where the alleged defective product is unavailable for testing, liability may be proven by circumstantial evidence, such that the plaintiff need not identify a

specific product defect (*see* ***Ramos v Howard Indus., Inc***., 10 NY3d 218, 855 NYS2d 412 [2008]; ***Speller v Sears, Roebuck & Co.***, 100 NY2d 38, 760 NYS2d 79 [2003]). However, "[i]n order to proceed in the absence of identifying a specific flaw, a plaintiff must prove that the product did not perform as intended and exclude all other causes for the product's alleged failure that are not attributable to the defendants" (*see* ***Speller v Sears, Roebuck & Co.***, *supra* at 42). In order to defeat summary judgment, the non-movant must raise a triable question of fact by offering competent evidence which, if credited by the fact finder, is sufficient to rebut the movant's alternative cause evidence (*see* ***Ramos v Howard Indus., Inc***., *supra*; ***Speller v Sears, Roebuck & Co.***, *supra*). In any event, where the circumstantial evidence presented leads to a genuine dispute as to the causation of the accident, summary judgment is not appropriate unless "only one conclusion may be drawn from the established facts" (*see* ***Speller v Sears, Roebuck & Co.***, *supra* at 43).

Here, although plaintiff must establish at trial the identity of the manufacturer of the allegedly defective band, Hygenic, which is seeking summary judgment dismissing the complaint and cross claims against it on the ground that it was not the manufacturer of the allegedly defective band, has the initial burden of establishing as a matter of law that it did not manufacture the product (*see* ***Bevens v Tarrant Mfg. Co., Inc.***, 48 AD3d 939, 851 NYS2d 707 [3d Dept 2008]; ***Baum v Eco-Tec, Inc.***, 5 AD3d 842, 773 NYS2d 161 [3d Dept 2004]; ***Abulhasan v Uniroyal-Goodrich Tire Co.***, 14 AD3d 900, 788 NYS2d 497 [3d Dept 2005]). Hygenic asserts that as the subject band has been discarded, plaintiff is not able to identify it as the manufacturer of the allegedly defective band. However, the discarded band is not necessarily dispositive of plaintiff's claim, for the identity of its manufacturer as well as the existence and nature of a defect may be proven circumstantially (*see* ***Healey v Firestone Tire & Rubber Co.***, *supra*). Merely highlighting apparent gaps in its adversary's case does not entitle the moving party to summary judgment (*see* ***Clark v Globe Bus. Furniture***, 237 AD2d 846, 655 NYS2d 184 [3d Dept 1997]; ***Antonucci v Emeco Indus***, 223 AD2d 913, 636 NYS2d 495 [3d Dept 1996]). Moreover, plaintiff submits, among other things, invoices from Hygenics to Empi regarding the sale of Thera-Bands from January 1, 2006 until August 9, 2007, as well as an invoice for the Thera-Bands from defendant Kershis' office dated March 30, 2007.

While defendant has failed to establish that it was not the manufacturer of the subject band, it has established that there was a likely cause of the band snapping unrelated to any defect in the design or manufacture of it (*see* ***D'Auguste v Shanty Hollow Corp.***, 26 AD3d 403, 809 NYS2d 555 [2d Dept 2006]; ***Galletta v Snapple Beverage Corp.***, 17 AD3d 530, 793 NYS2d 467 [2d Dept 2005]). Here, the deposition testimony of Dr. Page shows that Hygenic has a quality assurance program in place to inspect the bands prior to distribution. It shows that an exercise band may break if it has a tear, if it has been used for a long time, if it has been stored improperly or if it has been stretched too far. In opposition, plaintiff failed to come forward with competent evidence demonstrating that the product had a specific flaw which caused the accident or, in the alternative, that the product did not perform as intended while excluding all possible causes for the malfunction not attributable to defendant (*see* ***Speller v Sears, Roebuck & Co.***, *supra*; ***Wallace v Sitma U.S.A.***, 77 AD3d 918, 910 NYS2d 136 [2d Dept 2010]; ***D'Elia v Martin A. Gleason, Inc.***, 250 AD2d 803, 674 NYS2d 383 [2d Dept 1998]). Instead, plaintiff merely asserts that, as the exercise band broke, it did not perform as intended. Likewise, Kershis and Gabriel also failed to produce any evidence that the exercise bands were defective. Accordingly, the motion by Hygenic for summary judgment dismissing plaintiff's complaint and all cross claims against it is

granted.

As to plaintiff's cross motion to strike the answers of Kershis and Gabriel, the Court has broad discretion in determining the appropriate sanction for spoliation of evidence (*see* ***De Los Santos v Polanco***, 21 AD3d 397, 799 NYS2d 776 [2d Dept 2005]). Spoliation sanctions may be appropriate where a party negligently loses or intentionally destroys key evidence (***Kelley v Empire Roller Skating Rink, Inc.***, 34 AD3d 533, 827 NYS2d 70 [2d Dept 2006]). However, where the plaintiffs and the defendants are equally affected by the loss of the items and neither have reaped an unfair advantage in the litigation, it is improper to dismiss a pleading on the basis of spoliation (*see* ***De Los Santos v Polanco***, *supra*; ***Lawson v Aspen Ford***, 15 AD3d 628, 629-630, 791 NYS2d 119 [2d Dept 2005]; ***Ifraimov v Phoenix Indus. Gas***, 4 AD3d 332, 334, 772 NYS2d 78 [2d Dept 2004]).

Here, plaintiff has failed to demonstrate that the disposal of the subject band was the result of intentional or negligent spoliation (*see* ***Kelley v Empire Roller Skating Rink, Inc.***, *supra*; ***Andretta v Lenahan***, 303 AD2d 527, 756 NYS2d 454 [2d Dept 2003]). Moreover, plaintiff did not advise defendants that he intended to bring a suit against them and did not request that defendants preserve the band for inspection (*see* ***Piazza v Great Atlantic and Pacific Tea Company, Inc.***, 300 AD2d 381, 753 NYS2d 86 [2d Dept 2002]). Accordingly, plaintiff's cross motion is denied.

Dated: 12/21/11

THOMAS F. WHELAN, J.S.C.