

Cecere v Zep Mfr. Co.
2012 NY Slip Op 33589(U)
April 27, 2012
Sup Ct, Westchester County
Docket Number: Sup Ct, Westchester County
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED ON 5/1 2012 WESTCHESTER COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF WESTCHESTER PRESENT: HON. SAM D. WALKER, J.S.C.

FILED MAY - 1 2012 TIMOTHY C. IDONI COUNTY CLERK COUNTY OF WESTCHESTER

GARY CECERE,

Plaintiff,

-against-

ZEP MANUFACTURING CO. and ACUITY SPECIAL PRODUCTS GROUP, INC.

Defendants.

Index No. 602/2008 DECISION & ORDER Motion Sequence 1

The underlying action to the present motion arises from injuries sustained by Plaintiff due to Defendants' allegedly defective product. Defendants now moves for judgment as a matter of law contending that Plaintiff cannot sustain his claim that Defendants were negligent. The following papers numbered 1 through 8 were received and considered in connection with the above-captioned matter:

Table with 2 columns: PAPERS and NUMBERED. Rows include Notice of Motion/Affirmation in Support/Exhibits A-L (1-3), Affirmation in Opposition (4), Expert Affidavit/Exhibits 1&2 (5-6), Exhibits A-C (7), Reply Affirmation/Exhibits A-G (8).

Plaintiff commenced a products liability action as a result of personal injuries he sustained when he came into contact with Defendant's product, Zep Sewer Aide F.A., a commercial grade crystallized drain opener during his employment with the Town of Ossining Highway Department. On or about June 23, 2006, as Plaintiff poured the sewer aid into the floor grate, the product allegedly exploded and/or erupted causing Plaintiff to suffer chemical burns to his face, eyes, neck and shoulders, resulting in permanent scarring and some loss of vision.

As a result of the accident, Plaintiff filed a summons and verified complaint on January 10, 2008. Issue was joined when Defendants answered on or about March 19, 2008. Plaintiff provided a Verified Bill of Particulars on September 26, 2008, and a Supplemental Bill of Particulars on or about January 29, 2009. The parties conducted depositions, and a trial readiness order was filed and entered on July 26, 2011.

Defendants now move this Court for judgment as a matter of law contending that Plaintiff cannot sustain his claim against Defendants because Plaintiff is unable to prove that the product was defective and that such defect was a substantial cause of Plaintiff's injury. Defendants claim that Plaintiff did not follow the explicit warning and safety directions before proceeding to use the sewer drain product. Plaintiff opposes Defendants' motion, claiming that Defendants have not made a *prima facie* showing of entitlement to judgment as a matter of law as there remain material questions of fact including whether the product "erupted" or "exploded" and how much protective equipment is necessary when using the product.

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement judgment as a matter of law. *Weingrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The party that moves for summary judgment must also make a *prima facie* showing of

entitled to judgment as a matter of law by establishing the absence of any material issues of fact. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). To demonstrate its entitlement to relief the moving party must come forward with evidentiary proof that establishes the absence of any material issues of fact. *McDonald v. Mauss*, 38 AD3d 727, 728 (2nd Dept. 2007).

Here Defendants argue that Plaintiff's negligent conduct was the sole and proximate cause of his accident as a matter of law because Plaintiff failed to utilize proper protective equipment. Plaintiff counters Defendants claims for summary judgment by arguing that Defendants have not made their prima facie showing. Specifically Plaintiff points to a question of fact regarding the distinction between an "eruption" and an "explosion," and a question of fact regarding the amount of protective equipment necessary when using Sewer-Aid.

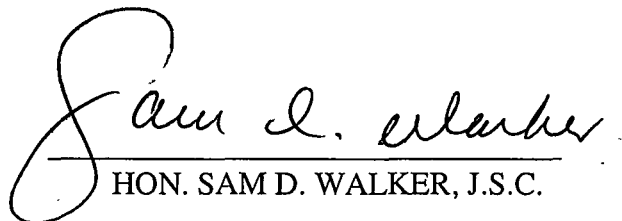
In *Sabattino v. Rosin & Sons Hardware & Paint*, 253 A.D.2d 417 (2nd Dept. 2008) the Court granted Defendants summary judgment against Plaintiffs' claims of failure to warn, negligence, breach of express and implied warranty, and strict products liability. In *Sabattino*, Plaintiff sustained chemical burns as a result of using "Hot Shot," a sulfuric acid-based drain cleaner manufactured by Defendant. Plaintiff claimed that he was injured when, almost immediately after pouring the drain cleaner into his clogged kitchen sink, the drain cleaner *exploded* out of the drain and splashed over various portions of Plaintiff's body (emphasis added). Plaintiff thereby brought suit against various Defendants including the manufacturer of the "Hot Shot" product. Defendants moved for summary judgment claiming that Plaintiffs could not sustain their cause of action as Plaintiff failed to follow the precautionary measures detailed on the warning label on the product. The Court held that Plaintiffs "failed to demonstrate that the drain cleaner was defective", and that

the “superseding cause of the accident was Plaintiff’s failure to heed to the product warning.”
Sabattino at 420.

Here, this Court similarly finds that the cause of Plaintiff’s injuries was in fact his failure to follow the explicit instructions of the product’s warning label. Plaintiff, unlike the Plaintiffs in *Sabattino*, is a professional trained in using products such as Sewer-Aid. As such Plaintiff knew or should have known the potential hazards associated with said product and either failed to follow the instructions or disregarded same. Furthermore, in his own deposition testimony, Plaintiff testified that although he was aware of the warnings on the product’s label, he was not wearing all of the necessary protective equipment. As such, Defendants have made a *prima facie* showing sufficient to satisfy this Court of its entitlement to judgment as a matter of law. Plaintiff has failed to raise a triable issue of fact and as such, Defendants are entitled to the relief they seek.

Accordingly, Defendants’ motion for summary judgment is hereby GRANTED, and Plaintiff’s Complaint is dismissed. To the extent any relief requested in Motion Sequence 1 was not addressed by the Court, it is hereby deemed denied. The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
April 27, 2012


HON. SAM D. WALKER, J.S.C.

CC:

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