Trotter v Rashti & Rashti

2012 NY Slip Op 31072(U)

April 18, 2012

Supreme Court, New York County

Docket Number: 102350/2009

Judge: Louis B. York

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SCANNED ON 4/23/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Index Number : 102350/2009
TROTTER, RICHARD
vs.
RASHTI & RASHTI
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

[redacted] IS DECIDED IN ACCORDANCE
[redacted] ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

APR 23 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/18/12

_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

----------x

RICHARD TROTTER and LEAH ROSE TROTTER, Individually and as Next Best Friends of DAVID TROTTER, A Minor,

Plaintiffs,

Index No.: 102350/09

-against-

DECISION

RASHTI & RASHTI a/k/a RASHTI & COMPANY, INC., a/k/a HARRY J. RASHTI & COMPANY, INC., and FISHER PRICE,

Defendants.

----------x

FILED

APR 23 2012

NEW YORK
COUNTY CLERK'S OFFICE

LOUIS B. YORK, J.:

Defendant Rashti & Rashti a/k/a Rashti & Company, Inc., a/k/a Harry J. Rashti & Company, Inc. (Rashti) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as asserted against it. Previously, this matter was settled with defendant Fisher-Price, Inc. s/h/a Fisher Price.

BACKGROUND

On or about December 25, 2007, plaintiff Richard Trotter placed his son, plaintiff David Trotter, who was two months old at the time, in a bouncer chair that was resting on top of a kitchen table and covered him with a blanket designed, manufactured and marketed by Rashti. There was a candle on the table, close to the bouncer chair, and the bouncer chair and the blanket caught fire, burning the bouncer chair and injuring

David's arm and leg. According to the complaint, David's torso was unharmed because he was wearing a flame-resistant suit. At the exact time of the occurrence, Richard had left David alone while he, Richard, went to the bathroom.

The complaint alleges three causes of action against Rashti: (1) strict products liability, based on design, marketing and manufacturing defects; (2) negligence; and (3) breach of implied warranty. At oral argument on this motion, plaintiffs withdrew their claim based on manufacturing defects.

At his examination before trial, Richard testified that, prior to leaving David alone, he did not check to see whether the candle was lit, but agreed that it is possible that, when he placed the blanket over David, he may have accidentally placed it onto the candle as well. Richard EBT, at 180. At the time that he left David alone, Richard did not inform his wife, plaintiff Leah Rose Trotter, that he was leaving David alone, did not ask her to come into the room to watch David, and there was no baby monitor in the room where David was left. Richard could not see David while he was in the bathroom.

When the bouncer and blanket started to burn, David starting screaming, which brought both Richard and Leah running into the room where David was sitting. They removed David from the flames and they extinguished the fire, and they immediately called 911. Richard admitted bearing some responsibility for David's

injuries, saying that if he had not left David alone in a room with a lit candle, the accident may never have happened, and he stated that he did not need anyone to tell him that fabric can burn. Further, Richard, who is a licensed attorney, said that it is not his practice to read warnings on products that are used by his family.

The candle has a warning that advises that it should never be left unattended, and the bouncer chair warned that it should not be used on an elevated surface, which it was at the time of the accident.

Michael C. Rashti (Michael) was deposed in this matter and testified that the baby blanket that was manufactured by Rashti was constructed of 100% woven acrylic fiber with a 100% polyester satin border. The blanket, which is part of a set with a baby pillow, was designed and sold by Rashti. The blanket was manufactured in China by another company, then assembled in China by a different company. Michael averred that he has been in this business for over 50 years, that this is the first time that any claim has been made that a child was burned in connection with one of Rashti's blankets, and that he was unaware of any of Rashti's acrylic blankets ever failing a flammability test.

Michael stated that the model blanket was tested pre-sale by an outside third-party laboratory, both pre- and post-production, and passed both tests.

According to the affidavit of Clyde Cantor, a textile flammability expert, there is no mandated flammability standard for baby blankets or blankets in general; however, ASTM D-4151, entitled "Standard Test Method for Flammability of Blankets," has been the voluntary standard used by the blanket industry since 1972. Cantor had the opportunity to inspect the remnant of the blanket in question, as well as a Rashti sample. The acrylic baby blanket sold by Rashti passed this flammability test, as well as a more stringent test that pertains to clothing in general.

Cantor opined that there are no other commercially available materials for baby blankets that are more fire resistant than acrylic, which is far less flammable than wool or silk. Further, Cantor said:

> "Warning labels regarding flammability of this blanket or other ordinary blankets are not necessary and would be contrary to industry standards. Mr. Trotter testified that he knew fabrics could catch on fire from a candle and cause burn injuries. A warning label on this blanket would not have prevented this burn incident. The plaintiff did not heed warnings that appeared on both the candle and bouncer.
> It is my opinion that this fire incident was caused by the carelessness on the part of Richard Trotter who put his infant child in a bouncer that was on a kitchen table close to a lit candle on that same table, and while covering the infant with a blanket he allowed a portion of the blanket or bouncer to contact open flame or spark from a lit candle after which he left the child unattended."

Rashti contends that plaintiffs cannot establish a claim for design defect because: (1) the blanket was not unreasonably

dangerous; (2) there is no safer alternative design; and (3) Richard's conduct, not the blanket, was the cause of the accident. Further, regarding any claim of a marketing defect, Rashti argues that it does not have a duty to warn of open and obvious conditions, such as the flammability of fabrics, a condition of which Richard admitted that he was aware. Further, Richard admitted that it is not his practice to read warning labels.

Rashti also maintains that the claims for negligence and breach of an implied warranty must be dismissed as they are subsumed by the strict liability claims and, since there was no design defect, these claims cannot be maintained.

Lastly, Rashti asserts that plaintiffs are not entitled to punitive damages.

In opposition to the instant motion, plaintiffs contend that there are material questions of fact regarding the issue of the design of the blanket so as to preclude summary judgment, as well as questions regarding negligence and breach of an implied warranty. Plaintiffs also assert that their ability to claim punitive damages is a question that should be left up to a jury, based on the facts presented at trial.

In support of their position that the blanket was defectively designed, plaintiffs provide the affidavit of Christopher W. Lautenberger (Lautenberger), a professional fire

protection engineer licensed by the State of California, who averred that: (1) compliance with the tests enumerated by Cantor has little correlation with real-world fire hazards, since almost all textiles readily pass these tests; (2) that, because the blanket was intended to be used by infants, compliance with children's sleepwear standards would be more appropriate, and acrylic fabrics, such as the one used by Rashti, rarely pass these tests; (3) acrylic is one of the most flammable materials from which a child's blanket could be manufactured; and (4) children's blankets can be manufactured with less flammable textiles than acrylic, such as wool or silk. Lautenberger opined that:

> "It is my opinion that David Trotter's burn injuries would have been prevented, or reduced greatly in severity, if the shawl [blanket] he was covered with was manufactured from wool or silk." Opp., Ex. 2.

Lautenberger also stated that another potential fabric for blanket manufacture, which is less expensive than wool or silk, is 100% polyester, which would have propagated flame very slowly or self-extinguished, and that polyester fabrics usually pass the children's sleepwear flammability test.

In reply, Rashti maintains that the blanket was not improperly designed and was safe for its intended use. Rashti also challenges Lautenberger's opinion that there are alternative fabrics available that would have been safer, but the court notes that this challenge is only made by Rashti's attorney in his

affirmation. Otherwise, Rashti reiterates its arguments presented in its motion papers.

DISCUSSION

Both parties agree that, at least for the purposes of this motion, Texas law applies to all of the substantive issues presented by the alleged causes of action, but that New York law controls the applicable standard for determining motions for summary judgment.

"The 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 eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Section 82.001 of the Texas Civil Practice and Remedies Code defines a "products liability action" as:

> "[A]ny action against a manufacturer or seller for recovery of damages arising out of personal injury,

> death, or property damage allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination or theories."
>
> "A product may be unreasonably dangerous because of a defect in manufacturing, design, or marketing. A defendant's failure to warn of a product's potential dangers when warnings are required is a type of marketing defect. Liability will attach if the lack of adequate warnings or instructions renders an otherwise adequate product unreasonably dangerous.
>
> . . .
>
> [T]here is no duty to warn when the risks associated with a particular product are matters 'within the ordinary knowledge common to the community.' ... In these circumstances, a warning is not required. Thus, the duty to warn is limited in scope, and applies only to hazards of which the consumer is unaware [internal citations omitted]"

Caterpillar, Inc. v Shears, 911 SW2d 379, 382 (Tex 1995); *Shaw v Trinity Highway Products, LLC*, 329 SW3d 914 (Ct App, Dallas, Tex 2010).

All of the evidence presented, including Richard's own testimony, substantiate Rashti's contentions that a warning label was not necessary for the baby blanket. Not only is it common knowledge that consumers know that fabrics may catch fire and burn, but Richard himself testified that he was aware of this potential danger associated with fabrics. Moreover, competent evidence demonstrates that such warnings are not typically placed on fabrics. Hence, plaintiffs cannot maintain a cause of action for strict products liability based on a marketing defect.

"To recover for a products liability claim alleging a

> design defect, a plaintiff must prove that (1) the product was defectively designed so as to render it unreasonably dangerous; (2) a safer alternative design existed; and (3) the defect was a producing cause of the injury for which plaintiff seeks recovery. To determine whether a product was defectively designed so as to render it unreasonably dangerous, Texas courts have long applied a risk-utility analysis that requires consideration of the following factors:
>
> > (1) the utility of the product to the user and to the public as a whole weighed against the gravity and likelihood of injury from its use; (2) the availability of a substitute product which would meet the same need and not be unsafe or unreasonably expensive; (3) the manufacturer's ability to eliminate the unsafe character of the product without seriously impairing its usefulness or significantly increasing its costs; (4) the user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions; and (5) the expectations of the ordinary consumer."

Timpte Industries, Inc. v Gish, 286 SW3d 306, 311 (Tex 2009)[internal citations omitted]; *Champion v Great Dane Limited Partnership*, 286 SW3d 533 (Ct App, 14th Dist, Tex 2009).

> "A 'safer alternative design' is:
> a product design other than the one actually used that in reasonable probability:
> (1) would have prevented or significantly reduced the risk of the claimant's personal injury, property damage, or death without substantially impairing the product's utility; and
> (2) was economically and technologically feasible at the time the product left the control of the manufacturer or seller by the application of existing or reasonably achievable scientific knowledge."

Damian v Bell Helicopter Textron, Inc., 352 SW3d 124, 145 (Ct App, Fort Worth, Tex 2011).

In the case at bar, the parties have presented conflicting affidavits of industry experts who disagree on whether alternative fabrics would have eliminated or reduced the risk of the blanket contributing to David's injuries. Further, evidence has been provided indicating that substitute fabrics would not necessarily have increased Rashti's costs, and that such alternative fabrics are commonly used in the design and manufacture of infant's garments because of their flame retardant qualities.

In a products liability action based on a design defect, summary judgment is unwarranted when conflicting expert affidavits are presented that raise questions of fact as to whether the product was defectively designed based on the availability of feasible alternative designs. *Sugrim v Ryobi Technologies, Inc.*, 73 AD3d 904 (2d Dept 2010); *Cwiklinski v Sears, Roebuck & Co., Inc.*, 70 AD3d 1477 (4th Dept 2010).

In addition, there are questions of fact as to whether Richard leaving David alone and unattended next to a lit candle was the cause, or a significant contributing factor, of the accident.

Based on the foregoing, that portion of Rashti's motion seeking summary judgment on its cause of action based on strict products liability is denied.

That portion of Rashti's motion seeking summary judgment on its causes of action based on negligence and breach of an implied warranty are also denied.

The only argument posited by Rashti on these issues is that these causes of action are subsumed in the products liability cause of action and, since there was no design or marketing defect, these claims must be dismissed. *See Toshiba International Corp. v Henry,* 152 SW3d 774 (Ct App, Texarkana, Tex 2004); *see also Ford Motor Company v Miles,* 141 SW3d 309 (Ct App, Dallas, Tex 2004). However, since this court has determined that questions of fact exist as to whether the blanket was properly designed, these causes of action cannot be dismissed at this time.

Lastly, the question as to whether plaintiffs are entitled to punitive damages cannot be determined at this juncture, since a claim for punitive damages is inextricably linked to the underlying causes of action, which cannot be decided in this motion. *Rocanova v Equitable Life Assurance Society of U.S.,* 83 NY2d 603 (1994); *see Miles v Ford Motor Co.,* 2001 Tex App Lexis 4405 (Ct App, Dallas, Tex 2001).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment is denied.

Dated: 4/18/12

FILED

APR 23 2012

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NEW YORK

ENTER:

Louis B. York, J.S.C.

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J.S.C.