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SHORT FORM ORDER

ORIGINAL WHEN BLUE

INDEX No. 09-13672
CAL. No. 15-01505OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 1-12-16
ADJ. DATE 4-26-16
Mot. Seq. #007 - MD
#008 - MD

ROBERT FERRARO and LISA FERRARO,

Plaintiffs,

- against -

ALLTRADE TOOLS LLC and SAINT-GOBAIN ABRASIVES, INC,

Defendants.

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Upon the following papers numbered 1 to 74 read on these motions for summary judgment ; Notice of Motion and supporting papers 1 - 19 ; Notice of Cross Motion and supporting papers 20 - 50 ; Answering Affidavits and supporting papers 51 - 57; 58 - 65 ; Replying Affidavits and supporting papers 66 - 68; 69 - 74 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. 007) by defendant Saint-Gobain Abrasives, Inc. and the motion (seq. 008) by defendant Alltrade Tools LLC are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Saint-Gobain Abrasives, Inc. for summary judgment dismissing all claims against it is denied; and it is further

ORDERED that the motion by defendant Alltrade Tools LLC for summary judgment dismissing all claims against it is denied.

Plaintiff Robert Ferraro commenced this action to recover damages for injuries he allegedly sustained on March 16, 2007 when the spinning abrasive "cut-off" wheel attached to the pneumatically-powered Air-Plus 2-IN-1 Cut-Off/Diegrinder tool he was using at home broke off and struck him in his neck. The pneumatic tool in question was manufactured by defendant Alltrade Tools LLC and the cut-off wheel in question was manufactured by defendant Saint-Gobain Abrasives, Inc. Defendant Saint-Gobain Abrasives has asserted a cross claim against Alltrade Tools LLC for indemnification. A stipulation discontinuing the derivative cause of action brought by Lisa Ferraro, dated May 21, 2014, was executed by the parties.

Defendant Saint-Gobain Abrasives (Saint-Gobain) now moves for summary judgment in its favor on the ground that plaintiff caused his own accident by disregarding all warnings printed on its product and using the cut-off wheel on a tool for which it was not designed. In support, it submits copies of the pleadings, the deposition testimony of the parties, a copy of an "Air-Plus Pneumatic Tool Instruction Manual," various photographs, and an affidavit of Thomas H. Service. Defendant Alltrade Tools LLC (Alltrade) also moves for summary judgment on the grounds that Alltrade's tool functioned in the manner intended, that the printed warnings on the tool's packaging were adequate, and that plaintiff's conduct was the sole proximate cause of his injuries. In support of its motion, Alltrade submits copies of the pleadings, the parties' deposition testimony, photographs, a copy of an "Air-Plus Pneumatic Tool Instruction Manual," and various shipping records. It also submits an affidavit of Hector Hernandez.

At a deposition, plaintiff testified that at approximately 6:00 p.m. on the date in question, he was in his garage using an "Air-Plus" pneumatic tool fitted with a "Norton Cut-Off Blade" to cut off steel clips which formerly attached a spoiler to the rear of his 1990 Pontiac Formula. He testified that he was wearing gloves and goggles at the time, that he was "feathering" the trigger on the cut-off tool in order to keep it spinning slower than full speed, and that he was about to cut off the last of the six metal clips when the blade "broke off . . . [sounding] like a gunshot." He further testified that multiple pieces of the broken blade struck him in the neck.

Regarding the tools themselves, plaintiff testified that he purchased the Air-Plus pneumatic tool at a BJ's Wholesale Club store approximately one year prior to his accident. He stated that the Air-Plus tool came in a set with many pieces, including other pneumatic tools, but did not include instructions for any of them. He testified that, though the instructions were missing, he did not return the tool set to the store or contact the manufacturer, as he had experience with cut-off tools. He indicated that the Air-Plus tool set included one cut-off blade to use with the cut-off tool, and that he used that tool and blade combination approximately twelve times without incident. Plaintiff testified that the Air-Plus cut-off tool he purchased did not come with a guard and that no cut-off tool he has ever used had one. He further testified that he powered his pneumatic tools with a Porter-Cable air compressor set at 80 pounds per square inch of pressure.

Plaintiff testified that, at some point prior to his accident, he purchased a four-inch replacement blade for his Air-Plus cut-off tool from a Home Depot store, where it was displayed loose in a bin. The date of his accident, he indicated, was the first time he used the replacement blade. Plaintiff testified he had no understanding of what speed the blade was rated for, knowing only that it was intended to be used for cutting metal and looked similar in size to the original blade. Plaintiff further explained that he looked at the new blade, but could not read the writing on it because it was too small.

Hector Hernandez, deposed as a representative of Alltrade, testified that he is the director of quality control and research and development. Mr. Hernandez, in reviewing a copy of an instruction manual purported to pertain to the Air-Plus cut-off tool, indicated that the tool could be used as either a die grinder or a cut-off tool. If a user wished to employ the product as a cut-off tool, Mr. Hernandez explained, he or she would attach the shield to the tool and would only be able to fit a 3-inch cutting wheel to it. He testified that the shield must be removed in order to install a new cutting wheel. However, Mr. Hernandez stated that the instruction manual does not specify the correct cutting wheel size for the tool, and that there is no printed warning on its packaging that a consumer should not use a larger size cutting wheel. Additionally, Mr. Hernandez testified that while the instruction manual lists the cut-off tool as having a maximum speed of 20,000 RPM, it does not warn against using a lower-speed-rated cutting wheel.

Thomas Service, a mechanical engineer deposed as a representative of Saint-Gobain, testified that he is the manager of the World Product Safety Department. He testified that his responsibilities include assuring that Saint-Gobain's products are safe for their intended applications and meet all national safety standards. He stated that there is an American National Standards Institute (ANSI) standard governing the performance of grinding wheels, and that "Norton" is a brand name under which Saint-Gobain manufactures products. Upon being shown a cutting wheel identical to the one in question, Mr. Service testified that he could read the number 15280 followed by "RPM Max" on the face of the wheel. Asked to read additional safety warnings printed on the cutting wheel, Mr. Service testified that, among other things, the words "[u]se of this product on any machine not properly designed and guarded for a cutoff wheel may result in serious injury or even death" and "never exceed the maximum operating speed marked on the wheel" were printed on the wheel. He further testified that the cutting wheel has pictographic symbols showing a face shield, a wheel guard, and a triangle with "RPM" printed inside it, all designed to alert a user to potential dangers. Mr. Service testified that ANSI standard Z535.4 governs the manner of printed warnings, and that the warning indications printed on the cutting wheel comply with that standard.

Mr. Service further testified that, in his opinion, a user should never put a cutting wheel on a tool whose maximum speed exceeds the speed at which the wheel is rated, as the user should assume that the tool may reach its maximum speed at some point in time. He further testified that his preliminary impression as to the cause of plaintiff's cutting wheel shattering is "consistent with possibly over-speed combined with some twisting or side pressure." Regarding the packaging of the cutting wheels, Mr. Service testified that they are shipped to Home Depot in a box which, when opened, becomes a display for the product. That box, he stated, contained one "safety guide" pamphlet for each loose cutting wheel, that the retailer is told to provide one pamphlet with each wheel, and that the packing tape used to secure the shipping box is printed with that particular instruction to retailers. Finally, Mr. Service testified that, based on his 30 years of experience investigating grinding wheel accidents, "when people use [cutting wheel] guards they don't get injured."

Mr. Service also provided an affidavit in which he swears that, after examining the shattered remnants of the cutting wheel in question, he found no evidence of any negligence or defect in its manufacture. In addition, Mr. Service avers that it would be impossible to safely use a 4-inch cutting wheel with the Air-Plus tool because it would not fit under the guard designed to surround a 3-inch

cutting wheel, that if plaintiff was using the guard he would not have sustained the injuries he allegedly did, and that if plaintiff was using a face guard he would not have sustained said injuries.

A party moving for summary judgment 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 (***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, 26 NY3d 40, 19 NYS3d 488 [2015]; ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, *supra*; *see also* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (***Daliendo v Johnson***, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, *supra*; *see also* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

Plaintiff asserts claims against defendants for negligence in their respective product's design, manufacture, sale, inspection, delivery, packaging, and warning, strict products liability, and breach of warranty. A manufacturer who places a defective product into the stream of commerce may be liable for injuries or damages caused by such product (***Gebo v Black Clawson***, 92 NY2d 387, 392, 681 NYS2d 221 [1998]; ***Liriano v Hobart Corp.***, 92 NY2d 232, 235, 677 NYS2d 764 [1998]; ***Amatulli v Delhi Constr. Corp.***, 77 NY2d 525, 532, 569 NYS2d 337 [1991]). Depending upon the factual circumstances, a person injured by a defective product may maintain causes of action under the theories of strict products liability, negligence or breach of warranty (*see* ***Voss v Black & Decker Mfg. Co.***, 59 NY2d 102, 463 NYS2d 398 [1983]). Whether an action is pleaded in strict products liability, negligence, or breach of warranty, plaintiff has the burden of establishing that a defect in the product was a substantial factor in causing the injury, and that the defect existed at the time the product left the manufacturer or other entity in the chain of distribution being sued (*see* ***Clarke v Helene Curtis, Inc.***, 293 AD2d 701, 742 NYS2d 325 [2d Dept 2002]; ***Tardella v RJR Nabisco***, 178 AD2d 737, 576 NYS2d 965 [3d Dept 1991]; *see also*, ***Robinson v Reed-Prentice Div. of Package Mach. Co.***, 49 NY2d 471, 426 NYS2d 717 [1980]; ***Dickinson v Dowbrands, Inc.***, 261 AD2d 703, 689 NYS2d 548 [3d Dept], *lv denied* 93 NY2d 815, 697 NYS2d 563 [1999]).

Under the doctrine of strict products liability, a manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in causing the injury or damages, provided

> (1) that at the time of the occurrence the product is being used * * * for the purpose and in the manner normally intended, (2) that if the person injured or damaged is himself [or herself] the user of the product he [or she] would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted [his or her] injury or damages

(***Wheeler v Sears Roebuck & Co.***, 37 AD3d 710, 831 NYS2d 427 [2d Dept 2007]; ***Carrao v Heitler***, 117 AD2d 308, 502 NYS2d 424 [1st Dept 1986]; *see* ***Amatulli v Delhi Constr. Corp.***, *supra*). "A product has a defect that renders the manufacturer liable for the resulting injuries if it: (1) contains a manufacturing flaw; (2) is defectively designed; or (3) is not accompanied by adequate warnings for the use of the product" (***Matter of NY City Asbestos Litig.***, ___NY3d___, 2016 NY Slip Op 05063 [2016]); ***Sprung v MTR Ravensburg***, 99 NY2d 468, 472, 758 NYS2d 271 [2003]; ***Gebo v Black Clawson Co.***, *supra*; ***Liriano v Hobart Corp.***, *supra*; ***Voss v Black & Decker Mfg. Co.***, *supra*). A plaintiff in a strict products liability action is not required to prove the exact nature of the defect (***Caprara v Chrysler Corp.***, 52 NY2d 114, 123, 436 NYS2d 251 [1981]; ***Halloran v Virginia Chems.***, 41 NY2d 386, 388, 393 NYS2d 341 [1977]), and proof of liability may be established by direct or circumstantial evidence (*see* ***Speller v Sears, Roebuck & Co.***, 100 NY2d 38, 760 NYS2d 79 [2003]; ***Pollock v Toyota Motor Sales U.S.A.***, 222 AD2d 766, 634 NYS2d 812 [3d Dept 1995]; ***Narciso v Ford Motor Co.***, 137 AD2d 508, 524 NYS2d 251 [2d Dept 1988]).

A defectively designed product is one in which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use (***Robinson v Reed-Prentice Div.***, *supra*; *see* ***Voss v Black & Decker Mfg. Co.***, *supra*; ***Bombara v Rogers Bros. Corp.***, 289 AD2d 356, 734 NYS2d 617 [2d Dept 2001]). Stated differently, a defective product is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce (***Robinson v Reed-Prentice Div.***, *supra*; *see* ***Denny v Ford Motor Co.***, 87 NY2d 248, 639 NYS2d 250 [1995]; ***Voss v Black & Decker Mfg. Co.***, *supra*). To establish a strict liability claim based on a defective design, a plaintiff must show the product as designed posed a substantial likelihood of harm, that it was feasible for the manufacturer to design the product in a safe manner, and that the defective design was a substantial factor in causing plaintiff's injury (*see* ***Voss v Black & Decker Mfg. Co.***, *supra*; ***Gonzalez v Delta Intl. Mach. Corp.***, 307 AD2d 1020, 763 NYS2d 844 [2d Dept 2003]; ***Ramirez v Sears, Roebuck & Co.***, 286 AD2d 428, 729 NYS2d 503 [2d Dept 2001]).

A manufacturer may be held liable for the failure to warn of the latent dangers resulting from the foreseeable uses of its product which it knew or should have known (*see* ***Liriano v Hobart Corp.***, *supra*; ***Rastelli v Goodyear Tire & Rubber Co.***, 79 NY2d 289, 582 NYS2d 373 [1992]). Liability may be imposed based on either the complete failure to warn of a particular hazard or the inclusion of warnings that are inadequate (*see* ***DiMura v City of Albany***, 239 AD2d 828, 657 NYS2d 844 [3d Dept 1997]; ***Johnson v Johnson Chem. Co.***, 183 AD2d 64, 588 NYS2d 607 [2d Dept 1992]). However, a manufacturer has no duty to warn product users of dangers that are obvious, readily discernable or apparent (*see* ***Martino v Sullivan's of Liberty***, 282 AD2d 505, 722 NYS2d 884 [2d Dept 2001]; ***Pigliavento v Tyler Equip. Corp.***, 248 AD2d 840, 669 NYS2d 747 [3d Dept 1998], *lv dismissed in part, denied in part* 92 NY2d 868, 677 NYS2d 773 [1998]; ***Lonigro v TDC Elecs.***, 215 AD2d 534, 627 NYS2d 695 [2d Dept 1995]). The duty to warn of a specific hazard also does not arise if the injured person, through common knowledge or experience, already is aware of such hazard (*see* ***Warlikowski v Burger King***, 9 AD3d 360, 780 NYS2d 608 [2d Dept 2004]; ***Payne v Quality Nozzle Co.***, 227 AD2d 603, 643 NYS2d 623 [2d Dept 1996], *lv denied* 89 NY2d 802, 653 NYS2d 279 [1996]; ***Banks v Makita, U.S.A.***, 226 AD2d 659, 641 NYS2d 875 [2d Dept 1996]).

"Failure to warn liability is intensely fact-specific," involving issues such as the obviousness of the risk, the knowledge of the product user, and proximate cause (***Liriano v Hobart Corp.***, *supra*; *see* ***Brady v Dunlop Tire Corp.***, 275 AD2d 503, 711 NYS2d 633 [3d Dept 2000]; ***Rogers v Sears, Roebuck & Co.***, 268 AD2d 245, 701 NYS2d 359 [1st Dept 2000]). Nevertheless, a court can decide as a matter of law that there was no duty to warn or that the duty was discharged (*see* ***Passante v Agway Consumer Prods.***, 294 AD2d 831, 741 NYS2d 624 [4th Dept 2002], *appeal dismissed* 98 NY2d 728, 749 NYS2d 478 [2002]; ***Dias v Marriott Intl.***, 251 AD2d 367, 674 NYS2d 78 [2d Dept 1998]; ***Schiller v National Presto Indus.***, *supra*; ***Jackson v Bomag GmbH***, 225 AD2d 879, 638 NYS2d 819 [3d Dept 1996], *lv denied* 88 NY2d 805, 646 NYS2d 985 [1996]; ***Oza v Sinatra***, 176 AD2d 926, 575 NYS2d 540 [2d Dept 1991]). As with a claim of design defect, a plaintiff alleging liability based on a failure to warn must establish that the manufacturer had a duty to warn and that the failure to warn was a substantial cause of the event which produced the injuries (*see* ***Banks v Makita, U.S.A.***, *supra*; ***Billsborrow v Dow Chem.***, 177 AD2d 7, 579 NYS2d 728 [2d Dept 1992]).

Here, Alltrade established a prima facie case of entitlement to summary judgment (*see* ***Magadan v Interlake Packaging Corp.***, 45 AD3d 650, 845 NYS2d 443 [2d Dept 2007]; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). Alltrade met its initial burden by presenting evidence that it warned users of potential dangers by printing warnings on the subject product's outer packaging and inclusion of an instruction manual with each tool set it sold (*see* ***Liriano v Hobart Corp.***, *supra*). Alltrade also produced evidence that each Air-Plus tool was sold with a protective shield attached, intended to protect a user from flying debris (*see id.*). Finally, Alltrade has established that the Air-Plus tool was reasonably suited for, and operated in conformity with, its intended purpose (*see* ***Robinson v Reed-Prentice Div.***, *supra*).

Saint-Gobain, likewise, has established a prima facie case of entitlement to summary judgment (*see* ***Magadan v Interlake Packaging Corp.***, *supra*; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). It produced evidence that the cutting wheel in question included extensive warnings as to it proper use and its potential dangers printed directly on the item, that it supplied a safety pamphlet with each cutting wheel sold and instructed the retailer to distribute said pamphlets, that those printed warnings conformed to ANSI standards, that the wheel in question is designed to be used on a shielded tool, and that there is no indication that the subject wheel was designed or manufactured improperly.

In opposition, plaintiff submits his own affidavit, the affidavit of James Pugh, and various photographs. Such submissions are sufficient to raise triable issues with respect to both defendants (*see generally* ***Alvarez v Prospect Hosp.***, *supra*). By his own affidavit, plaintiff swears that when using the cut-off tool with the Norton wheel, he never brought the speed of the wheel higher than 3,500 to 4,000 RPMs, that he did not twist or apply side pressure to the wheel as he was cutting with it, and that if adequate instructions were provided he would have used a safety shield and a cutting wheel rated for 20,000 RPMs.

James Pugh, a licensed professional engineer, swears that the warnings Alltrade included with the cut-off tool were inadequate in that they "do not recommend or even mention the use of a wheel guard or face guard for safety," do not warn that any attachment must be rated to withstand 20,000 RPMs, and that the maximum speed of the tool was not prominently marked on the tool itself.

Regarding the Norton cut-off wheel, Mr. Pugh avers that most of the warnings printed on the wheel itself were so small, and so blurred, as to be illegible. Mr. Pugh also suggests that the maximum speed rating of the cut-off wheel is difficult to ascertain by a user because the number "15280" is legible, making it appear to be a product number, not the its maximum rated speed. Mr. Pugh further swears that he conducted a thorough inspection of the damaged cut-off wheel, which "revealed a defect in bonding of the aggregate fibers to the abrasive substance of the wheel and therefore showed delaminations consistent with composite material failure and defective manufacture."

Therefore, triable issues have been raised by plaintiff as to Alltrade, including whether or not the Air-Plus tool lacked sufficient printed warnings regarding the device's maximum rotational speed, the absolute requirement of using a shield for all cutting operations, the requirement of using a 3-inch cut-off wheel, and the requirement that a user not attach a cutting wheel unable to withstand at least 20,000 RPMs (*see* ***Matter of NY City Asbestos Litig.***, *supra*; ***Liriano v Hobart Corp.***, *supra*; ***DiMura v City of Albany***, *supra*). There also remains the triable question of whether the tool was defectively designed, since it allowed its safety shield to be easily removed by a user (*see* ***Lopez v Precision Papers***, 67 NY2d 871, 501 NYS2d 798 [1986]; ***Voss v Black & Decker Mfg. Co.***, *supra*; *see also* ***Hoover v New Holland, Inc.***, 23 NY3d 41, 988 NYS2d 543 [2014]).

Plaintiff also submitted sufficient evidence to raise triable issues of fact regarding whether the cutting wheel in question, due to a manufacturing defect, shattered at a speed lower than that which it is rated to withstand, and whether Saint-Gobain's methods of warning the user of potential dangers were adequate (*see* ***Matter of NY City Asbestos Litig.***, *supra*; ***Magadan v Interlake Packaging Corp.***, *supra*).

Accordingly, both Saint-Gobain's and Alltrade's motions for summary judgment are denied.

Dated: OCT 04 2016

ANDREW G. TARANTINO JR

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION