Brown v Baraya
2016 NY Slip Op 32954(U)
March 2, 2016
Supreme Court, Bronx County
Docket Number: 22048/2013E
Judge: Mary Ann Brigantti

FILED: BRONX COUNTY CLERK 03/08/2016 03:04 PM INDEX NO. 22048/2013E
NYSCEF DOC. NO. 130 RECEIVED NYSCEF: 03/08/2016

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti

X

FELICIA BROWN,

DECISION/ORDER

Plaintiff,

-against- Index No.: 22048/2013E

EDGAR BARAYA, MD.,

Defendant.

X

The following papers numbered 1 to 5 read on the below motion noticed on November 17, 2015 and duly submitted on the Part IA15 Motion calendar of **November 17, 2015**:

Papers Submitted	Numbered
TPD's NOM, Affirmation, Exhibits, Memo. of Law	1,2,3,4
Def.'s Affirmation in Opposition, Exhibits	5,6
TPD's Reply Affirmation, Exhibits, Memo. of Law	7,8,9

Upon the foregoing papers, third party defendant Staples, Inc. ("Staples"), and second third-party defendant Four Star Group ("FS USA")(collectively, the "TPD's") move for summary judgment, dismissing the third-party claims filed by defendant/third-party plaintiff Dr. Edgar Baraya ("Defendant"), pursuant to CPLR 3212. Defendant opposes the motion.

I. Background

This matter arises out of an alleged incident that occurred on February 22, 2013, at Defendant's medical office. The plaintiff Felicia Brown ("Plaintiff") was on the premises to audit records for insurance purposes. Defendant's staff directed her to a desk and chair located in an examination room. Plaintiff described the chair as a black leather office chair with no arms that was old, wrinkled, and a "little wobbly." Plaintiff sat in the chair continuously for approximately 2 ½ hours without incident when the chair suddenly broke and collapsed. Plaintiff testified that the chair broke when the seat plate fell from the supporting post that connected it with the base of the chair. Plaintiff thereafter brought this action against, inter alia, the Defendant. In response to this complaint, Defendant brought a third-party action against

Staples, and later against FS USA, seeking contribution and indemnification under the theory that the TPD's "did design, manufacture, inspect, assemble, sell, and distribute the chair." At his deposition, Defendant testified that he purchased all of his office chairs from Staples, and likely purchased this particular chair at some point in 2002.

TPD's now move for summary judgment, dismissing the third party complaint in its entirety. TPD's argue that there is no evidence that Defendant actually purchased the chair from Staples. Even if he did, a "task chair" like the one at issue would have only been one particular model, that was manufactured in China. These chairs contained "hang tags" that contained warranties contemplated 8 hour-per-day usage for users weighing up to 225 pounds. Further, the warranty was limited to replacement of 100% of the purchase price. It did not apply to accidents. An instruction sheet included with the task chairs directed that all screws should be tightened each month. TPD's assert that Staples had no record of any complaints or lawsuits regarding these "task chairs" despite shipment of over 380,000 chairs between November 2002 and February 2008.

TPD's assert that FS USA is only a "service provider" for a completely different entity called "Four Group, Inc.," a non-party located in Taiwan. TPD's refer to this entity as "FS ASIA." TPD's argue that FS USA, as a mere service provider, is not liable for negligence or products liability since it did not have any communications or dealings with manufacturers of the chair in Asia, and was not involved in the design or inspection of the chairs, and did nothing to distribute the product. Moreover, FS USA is not a "seller" and cannot be liable for breach of implied warranty under the New York Uniform Commercial Code. Such claims are also time-barred, as they were brought after the applicable statute of limitations had lapsed. Further, FS USA made no express warranties to Defendant.

With respect to Staples, the TPD's assert that there is no evidence that Staples sold the chair at issue, and Defendant' s bald assertion to the contrary is insufficient. Even if the chair was purchased at Staples, TPD's argue that there was no evidence that it was defective at the time of purchase. At the time of the accident, the chair was "old" and Defendant had no prior issues with it. Further, Plaintiff herself never asserted any products liability claims against the TPD's. In the alternative, TPD's argue that the chair was not properly used, and any alleged

defect could have been discovered through the exercise of ordinary care. Plaintiff observed that the chair was "wobbly" but no one checked to see if it was safe, and Plaintiff nevertheless used the chair and did not ask for a different one. TPD's further allege that the chair was designed only for users weighing up to 225 pounds, that Plaintiff testified that she weighed 250 pounds as of the date of the accident. Additionally, TPD argues that Defendant did not ensure that the chair was regularly maintained.

TPD's further contend that since Plaintiff's first-party action against Defendant fails, there is no basis for Defendant's third-party claims for indemnification and contribution. TPD's argue that Plaintiff caused her own injuries by exceeding the weight limit for this particular chair, and using it despite its "wobbly" condition. Further, Defendant cannot be held liable for this accident because they had no prior notice of the allegedly defective chair.

TPD's add that any attempt to link FS USA or Staples to the chair based on "tags" must be precluded. Defendant asserts that there was a tag affixed to the underside of the chair that identified "FOURSTAR GROUP INC." This tag, however, somehow became detached from the chair shortly after the accident but before TPD's had an opportunity to inspect it. TPD's therefore assert that this creates an independent reason for dismissal of the third party complaint.

Finally, TPD's assert that they are entitled to dismissal of the third-party complaint due to various procedural defects. Defendant served his third party pleadings after the Plaintiff served her original complaint. Plaintiff, thereafter, served an amended complaint, but Defendant never served an additional third-party complaint. TPD's argue that since the original complaint had been superseded by the amended complaint, the Defendant was obligated to proceed as if the original complaint was never filed. Second, the Plaintiff's complaint and amended complaint were verified, but the third-party pleadings were not, in violation of CPLR 3022. TPD's assert that Defendant was given notice of the defects, and was even ordered to serve verifications after a compliance conference. Defendant, however, never cured these defects.

Defendant opposes the motion. Defendant contends that TPD's have failed to satisfy their initial summary judgment burden, as the evidence demonstrates that both Staples and FS USA were involved in placing the task chair at issue into the stream of commerce. Defendant plainly testified that he purchased all of his office supplies from Staples. Witnesses from Staples

and FS USA reviewed photographs and markings on the chair and confirmed that it was a "Staples brand." It is plainly evident that the chair was defective because task chairs simply do not break away in the manner this chair broke. While TPD's claim that FS USA was a mere service provider, Defendant argues that the witnesses produced on behalf of Staples and FS USA had limited knowledge as to FS USA's precise role. The Staples witness testified that the preparation of certain instruction manuals for the task chair would have been the responsibility of FS USA. FS USA's president confirmed that they would store products such as chairs at a facility in Ohio. Further, the label on the underside of the chair "named [FS USA] as the manufacturer of the chair." Defendant contend that TPD's have not provided an expert report or any evidence in admissible form proving that the chair was not defective. Defendant refutes TPD's contention that if there was a defect, it could have been discovered with the exercise of reasonable care. Further, if Defendant were to be found liable for the accident, Defendant would be entitled to common law contribution and indemnification from the TPD's.

Regarding the alleged spoliation of evidence, Defendant contends that any sanctions would be inappropriate. Defendant testified that there was a tag affixed underneath the chair, and the tag fell off some time after the accident. Defendant kept the tag in an envelope in his closet and produced it upon request. A review of the photographs shows that the tag underneath the chair, and the tag produced, are one in the same. Defendant therefore argues that there can be no argument that he wilfully or negligently spoliated evidence. As for the alleged procedural defects, Defendant essentially argues that none of the alleged deficiencies warrant dismissal of the third-party complaint. TPD's never advised that they would treat the unverified pleadings as nullities, and the request for verifications outlined in the Compliance Conference Order were not addressed at a subsequent compliance conference.

TPD has filed a reply affirmation and memorandum of law. The pertinent arguments contained therein will be addressed and discussed *infra*.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "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 from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

Defendant's third-party claims for contribution and indemnification against the TPD's are premised on the allegation that the chair that they allegedly distributed was defective. A party seeking recovery for injuries caused by an allegedly defective product may assert one or more of the following theories of liability: (1) negligence, (2) strict liability, (3) breach of express warranty, and (4) breach of implied warranty (*Brooks v. Outboard Marine Corp.*, 47 F. Supp. 2d 380 [W.D.N.Y. 1999]; *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102 [1983]). Relief may be sought against the product manufacturer or others in the distribution chain if the defect was a substantial factor in causing the injury (*see Fernandez v. Riverdale Terrace*, 63 A.D.3d 555 [1st Dept . 2009], citing *Speller v. Sears Roebuck & Co.*, 100 N.Y.2d 38, 41 [2003]). "In this regard, '[t]he distributor of a defective product is subject to the doctrine of strict liability even if the distributor has merely taken an order and directed the manufacturer to ship the product directly to the purchaser, and has never inspected, controlled, installed, or serviced the product'" (*id.*, 86 N.Y.Jur.2d Prod. Liab. §108, see *Perillo v. Pleasant View Assoc.*, 292 A.D.2d 773 [4th Dept.

2002]). Further, a seller who was regularly engaged in the business of selling the [product] in issue may be subject to strict products liability (*Sukjian v. Charles Ross & Son Co.*, 69 N.Y. 89, 94 [1986]).

FS USA

TPD's assert that FS USA is entitled to dismissal of Defendant's negligence and strict products liability claims because it did not manufacture, sell, design, assemble, inspect, or label the chair at issue. TPD alleges that the party served, Four Star Group, is "Four Star USA," is a service provider to the similarly-named "Four Star ASIA" ("FS ASIA"), a non party. FS USA assists FS ASIA in communication and follow-up with its retailer-customers, and in answering questions about packaging, ship dates, and details about products. FS USA is a service company for FS ASIA. FS ASIA is a "sourcing agent" for retailers, meaning that it is an intermediary between the retailer and the factory. FS ASIA is not in itself a retailer or manufacturer. FS USA does not have any dealings with the manufacturers in Asia. FS ASIA was the intermediary between Staples and product factories for several (but not all) contracts. TPD's assert that if Defendant indeed purchased the chair from Staples, it could only be a model "11123 Chair," a low-cost office chair that was manufactured in China by three different factories between 2002 and 2008. Chairs like the one involved in this lawsuit were directly contracted for between Staples and the manufacturer, a non-party Chinese factory called "Wonderful Year" (a/k/a Wanyi Hardware). TPD's argue that FS USA was not involved in the design of chairs and not aware of any customer complaints concerning these chairs in the past.

On the record, however, FS USA's involvement with the chair of the type that was used in this accident is unsettled. Defendant testified that he purchased the chair in 2002, and it had a label affixed to its underside that named "Fourstar Group, Inc" along with a Chinese street address. Defendant submits a photocopy of this label in his opposition papers. David LeClair, of Staples, testified that he only recently became involved with "task chairs" such as this one, and was unfamiliar with anything pertaining to the sale of those chairs between 2002 and 2008. He further admitted that he did not inspect the chair in question and had no knowledge as to how it was assembled. Mr. LeClair also testified he that wasn't aware of the entity "Fourstar" until this

lawsuit was commenced. FS USA's president, Bruce Peloquine, explained that FS USA does not have any communications or dealings with the product manufacturers, located in Asia. When asked specifically about the distribution of "task chairs" such as this one from the manufacturer to the retailer, however, he testified that there "may be some" chairs shipped to FS USA's United States offices as "backup inventory." He further confirmed that the chair at issue was a "Staples" brand of chair, and that "depending on the situation," FS USA may become involved with the inspection of these types of chairs after they are manufactured. He had no information as to whether FS USA ever inspected this specific task chair (Peloquine EBT at 52:1-21). The above evidence raises an issue of fact as to FS USA's role in the product distribution chain. On this record, it cannot be stated as a matter of law that FS USA's responsibilities regarding the chair were "so peripheral to the manufacture and marketing of the product" so as to bar Defendant's third-party claims sounding in products liability and/or negligence (*see, e.g., Brumbagh v. CEJJ, Inc.*, 152 A.D.2d 69 [3rd Dept. 1989]; *Sukjian v. Charles Ross & Son Co., Inc.*, 69 N.Y.2d 89 [1986]).

Defendant's third-party claims for breach of implied warranty of merchantability or fitness for a particular purpose against FS USA, however, must be dismissed. In New York, claims for breach of warranty are subject to §2-725 of the New York Uniform Commercial Code, which provides that such claims are subject to a four-year statute of limitations, and that a breach occurs when tender of delivery is made (*see Snyman v. W.A. Baum Co., Inc.*, 2008 WL 4452139 [S.D.N.Y. Sept. 30, 2008]; *see Riverbay Corp. v. Thyssenkrupp Northern Elevator Corp.*, 116 A.D.3d 487 [1st Dept. 2014]; N.Y. UCC §2-725). Here, Defendant estimated at deposition that he purchased the chair in 2002, and the record reflects that at the very latest, the chair was purchased in or around 2005. Defendant commenced this third party action more than four years later. Defendant failed to address the Statute of Limitations issue in his opposition papers, and has thus failed to raise a question of fact as to whether the limitations period was tolled or otherwise inapplicable (*see Loidice v. BMW of North America, LLC.*, 125 A.D.3d 723 [2nd Dept. 2015]). For the same reasons, Defendant's breach of implied warranty claims asserted against Staples must also be dismissed.

Defendant, moreover, does not oppose that branch of FS USA's motion seeking dismissal of the third-party claims for breach of express warranty. These claims must be dismissed as they are time-barred (UCC §2-725), and moreover, Defendant admitted that he never had any communications with FS USA, and testified that he was unaware of any warranty that accompanied the chair at issue. There is no indication, therefore, that the Defendant relied on any affirmations or promises made by FS USA (or Staples) as required to sustained a breach of express warranty cause of action (*see Meyer v. Alex Lyon & Sons Sales Managers & Auctioneers, Inc.*, 67 A.D.3d 547 [1st Dept. 2009]; *Scaringe v. Holstein*, 103 A.D.2d 880 [3rd Dept. 1984]). Again, Defendant's breach of express warranty claims must also be dismissed as to Staples, as Defendant did not rely on any warranties made by that entity.

TPD's contend that the Defendant cannot link FS USA or Staples to the chair based on "tags," that were allegedly affixed to it because Defendant wilfully or negligently removed the tags from the chair after the accident, but before TPD had an opportunity to inspect it. This argument is unavailing. Spoliation sanctions are appropriate where a party destroys physical evidence, and its opponents are "prejudicially bereft of appropriate means to confront a claim with incisive evidence" (*see Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170, 174 [1st Dept. 1997]). Where, however, the evidence lost is not central to the case or its destruction is not prejudicial, either a lesser sanction, or no sanction, may be appropriate (*see Klein v. Ford Motor Co.*, 303 A.D.2d 376 [2nd Dept. 2003]). In this matter, TPD's have not established that they were prejudiced in any way by the alleged removal of a tag on the chair that identified "Fourstar Group Inc." Defendant testified that the tag was attached to the underside of the chair. Photographs of the chair submitted in support of TPD's motion depict this tag affixed underneath the broken chair after the accident occurred. Defendant testified that after it became detached from the chair, he kept it in an envelope in his office. Defendant produced a copy of it in opposition papers. TPD's assertions in reply papers noting discrepancies in the photographs, and allegedly "confirming" spoliation, are simply insufficient to establish prejudice endured as a result of the spoliation so as to warrant any sanctions (*see, e.g., Quinn v. City of New York*, 43 A.D.3d 679 [1st Dept. 2007]).

Staples

TPD's argue initially that the third-party complaint must be dismissed as to Staples because Staples did not sell the chair at issue. In order to maintain an action sounding in products liability against a particular entity, a plaintiff needs to establish that it is "reasonably probable, not merely possible or evenly balanced, that the defendant was the source of the offending product" (*see Healey v. Firestone Tire & Rubber Co.*, 87 N.Y.2d 596, 601 [1996]). In this matter, Defendant testified that he purchased all of his office chairs from Staples, and no other office supply store, from 2002 to the present. When a chair broke, he would replace it with another Staples chair. FS USA's witness, Mr. Peloquine, reviewed a label for the type of chair involved in this accident, and confirmed that it was a "Staples" brand of chair. There is, in total, sufficient circumstantial evidence to identify defendant Staples as the "reasonably probable" provider of the allegedly offending product. The fact that Defendant failed to retain the receipt for this specific chair does not satisfy the TPD's burden on summary judgment of proving that Staples did not sell him the chair.

Alternatively, TPD's argue that Staples is entitled to summary judgment because the chair was not defective in design or manufacture at the time Defendant purchased it. Under some circumstances, however, a plaintiff may demonstrate that a product is defective by merely showing that the product did not function as intended, even if it did not contain a specific defect (*see Winckel v. Atlantic Rentals & Sales*, 159 A.D.2d 124 [2nd Dept 1990]). It is axiomatic, moreover, that it is the defendant's burden on a motion for summary judgment to prove, prima facie, that the product was not defective at the time it left the defendant's hands (*see Porter v. Uniroyal Goodrich Tire Co.*, 224 A.D.2d 674 [2nd Dept. 1996]). Here, the evidence shows that the chair did not function as intended, as Plaintiff testified that she had been simply sitting in the chair for approximately two hours when the seat "broke" and "came away from the base of the chair." TPD's has provided no evidence from an individual with personal knowledge evincing that the chair was not defective at the time it left the retailer's hands. While TPD's assert that it produces thousands of these types of chairs, and is unaware of any prior claims, TPD offers no testimony from an expert or fact witness who examined this specific chair, so as to demonstrate the absence of any defect. The mere fact that Defendant did not notice any problem with the

chair, and had no issues with it before the accident, is not dispositive of the issue. TPD's essentially focus on deficiencies in the Defendant's proof to carry their burden, which is insufficient to support a motion for summary judgment (*see Antonucci v. Emeco Industries, Inc.*, 223 A.D.2d 913, 915 [3rd Dept. 1996]; *see Winckel v. Atlantic Rentals & Sales*, 159 A.D.2d 124 at 127 [defendants failed to offer any cogent reason for the chair's collapse, and thus plaintiffs were entitled to rely on circumstantial evidence]).

TPD's alternatively argue that they are entitled to summary judgment because the chair was not properly used, and any alleged defect could have been discovered through the use of ordinary care. TPD's asserts first that the possibility that the seat-plate could have disconnected from the supporting post could have been discovered before the accident because Plaintiff had observed that the chair was "wobbly." This Court, however, declines to find that Plaintiff's election to sit on an office chair that was "wobbly" but otherwise had no other visible defects constituted a mishandling of a product so as to deem Plaintiff the "sole proximate cause" of her injuries (*see Amatulli by Amatulli v. Delhi Constr. Corp.*, 77 N.Y.2d 525 [1991]; *see Howard v. Poseidon Pools, Inc.*, 72 N.Y.2d 972 [1988]). Moreover, the chair was being used as intended at the time of the accident. The fact that Plaintiff may have exceeded the weight limit for this product, and the fact that Defendant allegedly did not regularly tighten its screws, does not sever potential liability on the part of the TPD's. It is reasonably foreseeable that a product such as an office chair would be used in such a manner (*see, e.g., Johnson v. Johnson Chemical Co., Inc.*, 183 A.D.2d 64, 69 [2nd Dept. 1992]).

TPD's further contend that they are entitled to summary judgment because the Plaintiff's first-party negligence claims fail. Thus, there is no basis for Defendant's third-party indemnification and contribution claims. TPD argues that Plaintiff was the sole proximate cause of the accident because she used an old "wobbly" office chair, and exceeded the weight limit for the chair by 25 pounds. As noted above, however, Plaintiff was using the chair as intended, and it cannot be stated as a matter of law that Plaintiff's own conduct was the "sole proximate cause" of the accident. TPD has, moreover, failed to conclusively establish on the present papers that Defendant had no actual or constructive notice of a problem with the chair. Plaintiff testified that the chair was "wobbly" before she sat in it, thus raising an issue of whether there was an

"apparent" defect that needed to be addressed. Further, there is no admissible evidence as to the last time this particular chair was inspected, if ever, and thus TPD's have failed to establish that the Defendant lacked constructive notice of the defect as a matter of law (*see,e.g., Neve v. City of New York*, 117 A.D.3d 1006 [2nd Dept. 2006]; *cf. Levinstim v. Parker*, 27 A.D.3d 698 [2nd Dept. 2006]).

***

TPD's finally contend that, independent of the merits, this Court should grant them summary judgment due to several procedural defects. TPD's assert that after Plaintiff served her original complaint, Defendant brought this third party action against TPD's seeking indemnification and contribution. Plaintiff, thereafter, served an amended complaint. Defendant, however, failed to thereafter serve a new third-party complaint, and thus his third-party claims were premised solely on the original complaint, which had been superseded by the amended complaint. Second, Plaintiff's complaint and amended complaint are verified, but Defendant's third-party complaint is not. Defendant was required to verify that pleading, pursuant to CPLR 3020(a) and 3022. Defendant was given notice of these defects with due diligence, and was ordered to serve verified pleadings by November 8, 2014, but failed to do so.

Regarding the failure to serve an additional third-party complaint after service of an amended original complaint, the Court finds that under these circumstances, this failure is not a jurisdictional defect but rather a curable irregularity (CPLR 2001). Regarding the failure to verify the pleading, TPD's have not demonstrated that it suffered any prejudice as a result of this failure so as to warrant dismissal of the third-party action (*see, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. State Div. of Human Rights*, 48 A.D.2d 391 [1st Dept. 1975]). To the extent that TPD's seeks dismissal for failure to comply with the October 8, 2014 Compliance Conference Order, the movants have not established that this noncompliance was wilful or constituted a pattern of misconduct so as to warrant the extreme sanction of dismissal (*see Corner Realty 30/7, Inc. v. Bernstein Management Corp.*, 249 A.D.2d 191 [1st Dept. 1998]). Defendant is therefore directed to serve responsive pleadings with respect to the amended complaint, along with proper verifications, within thirty (30) days after service of a copy of this Order with Notice of Entry.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that the branch of TPD's motion for summary judgment seeking dismissal of Defendant's third-party claims for breach of implied and express warranty is granted, and those claims are dismissed with prejudice, and it is further,

ORDERED, that the remaining branches of TPD's motion for summary judgment are denied, and it is further,

ORDERED, that Defendant is directed to serve third-party pleadings responsive to the amended complaint, along with proper verifications as contemplated in the October 8, 2014 Compliance Conference Order, within thirty (30) days after service of a copy of this Order with Notice of Entry.

This constitutes the Decision and Order of this Court.

Dated: March 2nd ,2016

Mary Ann Brigantti

Hon. Mary Ann Brigantti, J.S.C.