SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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LA NONA JEAN SALINAS,

Plaintiff,

-against-

WORLD HOUSEWARE PRODUCING CO. LTD., JOSIE ACCESSORIES, INC. and DOLGENCORP OF TEXAS, INC.,

Defendants.

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DECISION AND ORDER

Index No. 107662/2010

Mot. Seq. 007-009

HON. ANIL C. SINGH, J.:

In this action for, *inter alia*, negligence, breach of warranty, strict products liability, failure to warn and failure to recall, La Nona Jean Salinas ("Salinas" or "plaintiff") moves for a judgment against each of World Houseware Producing Co. Ltd. ("World"), Josie Accessories, Inc. ("Josie") and Dolgencorp of Texas, Inc. ("Dolgencorp" and together with World and Josie, "defendants"). Defendants' move for summary judgment pursuant to CPLR 3212.[1] Plaintiff opposes.

Facts

In this action for products liability, plaintiff seeks damages for personal injuries allegedly caused by the use of a potholder manufactured by World,

[1] Josie Accessories, Inc., World Houseware Producing Co. Ltd., and Dolgencorp of Texas, Inc. each moved for summary judgment separately (mot. seq. 007-009). As each of their arguments for summary judgment are identical for purposes of this decision, they have been consolidated.

distributed by Josie and sold by Dolgencorp. See Amended Complaint ("Compl."), ¶¶10-17. On December 11, 2008, plaintiff placed a biscuit sandwich in a pan on the top rack of her electric oven and proceeded to bake the biscuit. Affirmation of Theresa C. Villani ("Villani Aff."), ¶22. The oven is an electric oven wherein the heating element is suspended from the top of the oven. Id. ¶23. After a few minutes, plaintiff picked up the potholder at issue, folded it in half in her right hand and reached into the oven to pull out the rack. Id. ¶24. She pulled out the rack far enough to grab the biscuit pan. Id. While removing the pan, plaintiff noticed that the potholder had ignited into flames. Id. ¶¶24-25; Compl. ¶18.

After realizing that the potholder was on fire, Salinas turned and threw the potholder into the nearby sink. Villani Aff. ¶26. At this point she noticed flames on her night gown below her waist and above her knees. Id. The left hem of her nightgown allegedly ignited first. Id. Salinas rushed outside and rolled in the yard to extinguish the flames. Id. Salinas suffered serious injuries from the incident and is seeking recovery from the manufacturer, distributer, and seller of the pot holder, which plaintiff alleges was the source of her injuries.

Argument

Legal Standard

The standards for summary judgment are well settled. "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." Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. See id. Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. See Alvarez v. Propect Hosp., 68 N.Y.2d 320, 324 (1986).

Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. See Zuckerman v. City of New York, 49 N.Y.2d 557, 560 (1980). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 (1st Dept 1992), citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 (1st Dept 1989). The court's role is "issue-finding, rather than issue-determination." Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957) (internal quotations omitted).

Defendants' Motion for Summary Judgment

Choice of Law

As a preliminary matter, both parties agree that pursuant to New York's choice of law rules, Texas law governs all substantive issues and New York law

governs both procedural and evidentiary issues. See Schultz v. Boy Scouts of America, Inc., 65 N.Y.2d 189 (1985) ("The law of the jurisdiction having the greatest interest in the litigation will be applied and...the only facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict."); Norris v. Pfizer, Inc., 15 Misc.3d 1114(A) (Sup. Ct. N.Y. Cnty. Mar. 14, 2007) (In determining choice of law issues, the significant contacts are the parties' domiciles and the locus of the tort); Devore v. Pfizer Inc., 58 A.D.3d 138 (1st Dept 2008) (Where a plaintiff lives in Michigan, purchases a product in Michigan and the alleged injuries occur in Michigan, Michigan law will apply because Michigan has greater significant contacts with the litigation.).

Here, plaintiff is a resident of Texas who was injured in Texas by a product purchased in Texas. The only connection to New York is Josie's residence. Therefore, Texas has greater significant contacts and its law will apply to all substantive issues.

Defendants' Motion for Summary Judgment

Defendants' motion for summary judgment is granted. Under Texas law, a plaintiff can recover in a products liability action under three theories: (1) strict liability, (2) negligence and (3) breach of warranty. See Romo v. Ford Motor Corp., 798 F.Supp.2d 798, 895 (S.D. Tex. 2011) citing Dion v. Ford Motor Company, 804

S.W.2d 302, 309 (Tex. App. Eastland 1991); see also Disalvatore v. Foretravel, Inc., 2016 WL 3951426 (E.D. Tex. Lufkin Div. Jun. 30, 2016).

Each of the causes of action for strict liability, negligence, and breach of warranty requires plaintiff to prove that the injury was caused by the failure of the product in question. All of the claims for a cause of action alleging strict liability require that the defect existed and caused the injury in question. See Samuell v. Toyota Motor Corp., 2015 WL 1925902, at *4 (W.D. Tex. Apr. 27, 2015) citing Nissan Motor Co., Ltd. v. Armstrong, 145 S.W.3d 131 (Tex. 2004) (Stating that there are three types of strict liability defect claims: design defects, manufacturing defects, and marketing defects and all three claims require objective proof that the defect existed and caused the injury sustained.).

"All negligence causes of action in products liability cases require a showing of proximate causation-that is, a plaintiff must prove the breach of the duty was a cause-in-fact of the injury." Disalvatore, at *13 citing Brown v. Edwards Transfer Co., Inc., 764 S.W.2d 220 (Tex. 1988). The elements for a breach of a warranty are, among other things, that the plaintiff was injured by such failure of the product to comply with the warranty and that failure was the proximate cause of the plaintiff's injury. American Eurocopter Corp. v. CJ Sys. Aviation Group, 407 S.W.3d 274 (Tex. App. Dallas 2013) citing Great Am. Prods. v. Permabond Int'l, 94 S.W.3d 675 (Tex. App. Austin 2002).

The summary judgment evidence presented here establishes, as a matter of law, that the potholder in question did not cause plaintiff's injury. Defendants' expert, R. Thomas Long Jr. ("Long"), testified that based upon Salinas' sworn testimony that she did not come into contact with the exposed heating element in the oven and his examination of the pot holder, the potholder "will not ignite when the pot holder is used at, near or within the oven." Affidavit of R. Thomas Long Jr. ("Long Aff."), ¶9. According to Long, within a reasonable degree of scientific and engineering certainty, the "fire could not have originated at, near or within the incident oven as testified to by plaintiff in her sworn deposition testimony" because the testing clearly shows that the potholder could not have ignited at a distance of 1 inch from the element. Id. ¶10.

Plaintiff's expert, Michael Schulz ("Schulz") agrees with Long and testified that the pot holder would not have ignited if it did not contact the energized heating element because the heated air in the oven is not hot enough to cause ignition of the pot holder. See Affidavit of Michael Shulz ("Shulz Aff.") ¶98. Therefore, Schulz concludes that the cause of the fire was the ignition of the pot holder "by the operating broiler element of the artifact electric stove/oven combination appliance despite the fact that Ms. Salinas genuinely does not recall contacting the artifact textile pot holder to that heating element." Id. ¶89.

Plaintiff's second expert, David M. Hall ("Hall") testified that Salinas must have inadvertently touched the pot holder to the oven heating element, which would have caused the pot holder to combust. Affidavit of David M. Hall ("Hall Aff.") ¶¶6,7. However, the pot holder would not ignite if it was held no closer than one inch from the upper heating element at the time of the alleged ignition, as Salinas testified to in her deposition. See Long Aff., ¶¶9-10; see also Shulz Aff., ¶98.

Fatal to plaintiff's claim is Salinas' own deposition testimony in which she repeatedly states that she did not touch the heating element. Villani Aff. ¶27; see also Salinas Deposition at 89:7-90:22; 91:3—92:5 ("Q. Did your hand or the potholder come in contact with the element? A. No, sir. Q. How far away from the element was the potholder? A. I don't know. I wasn't touching it."); Salinas Deposition at 109:16-20 ("Q. Okay. The day of the incident when you had your accident, did any part of the potholder come in contact with the element on top of the oven? A. No, Sir."); Salinas Deposition at 247:18-248:3 ("Q. Okay. And other than touching the rack and the pan the biscuit was in, did the pot holder touch anything else before you noticed it was lit up? A. No."). Therefore, as per Shulz and Long's expert testimony, the only way the pot holder could have caught on fire is if Salinas touched the heating element. However, Salinas swears that she did not touch the heating element, which means that any alleged defect in the pot holder could not

have caused the fire. As a result, defendants' have established that any defects in the pot holder alleged by plaintiff could not have been the cause of plaintiff's injuries.

The opinions given by plaintiff's experts must be based on the facts that are in evidence. Admiral Ins. Co. v. Joy Contractors, Inc., 19 N.Y.3d 448 (2012); Cassano v. Hagstrom, 5 N.Y.2d 643 (1959). An expert opinion must be based upon facts in evidence or personally known to the witness. People v. Miller, 91 N.Y.2d 372 (1998); People v. Jones, 73 N.Y.2d 427 (1989). Where a plaintiff's expert testimony is completely inconsistent with the plaintiff's deposition testimony, the courts have found that this constitutes a feigned issue of fact and will not prevent a motion for summary judgment. See Wengenroth v. Formula Equip. Leasing, Inc., 11 A.D.3d 677, 679 (2d Dept 2004).

Plaintiff's expert testimony is completely inconsistent with plaintiff's deposition testimony. Compare, Hall Aff. ¶¶6,7 (plaintiff "genuinely does not recall" touching the pot holder to the heating element and must have "inadvertently" touched the pot holder to the heating element.); Shulz Aff. ¶98 ("Ms. Salinas genuinely does not recall contacting the artifact textile pot holder to that heating element.") with Salinas Deposition, *supra*. Plaintiff's experts cannot establish a material issue of fact by impeaching Salinas' testimony by opining that she must have touched the heating element.

Therefore, as the pot holder was not the proximate or producing cause of plaintiff's injuries and plaintiff has failed to raise any material issues of fact requiring a trial, defendants' motion for summary judgment, dismissing this action in its entirety, is granted.[2]

Accordingly, it is hereby

ORDERED that World Houseware Producing Co. Ltd.'s motion for summary judgment is granted; and it is further

ORDERED that Josie Accessories, Inc.'s motion for summary judgment is granted; and it is further

ORDERED that Dolgencorp of Texas, Inc.'s motion for summary judgment is granted.

Date: March 23, 2017
New York, New York

Anil C. Singh

[2] As the issue of causation is dispositive, any additional arguments by either party is hereby rendered moot.