Vitti v Superior Overhead Garage Door Co.
2017 NY Slip Op 32608(U)
November 29, 2017
Supreme Court, Suffolk County
Docket Number: 29177/08
Judge: Jr., Paul J. Baisley
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Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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CHRISTOPHER VITTI and KARRIE ANNE VITTI,

Plaintiffs,

-against-

SUPERIOR OVERHEAD GARAGE DOOR CO., INC, d/b/a SUPERIOR OVERHEAD DOOR INC., CHAMBERLAIN GROUP, INC., AS SUCCESSOR IN INTEREST OF ABL ENTERPRISES INC., DUCHOSSOIS INDUSTRIES INC., AS SUCCESSOR IN INTEREST OF CHAMBERLAIN GROUP, INC., D & D DOORS, INC., AND WAYNE-DALTON CORP.,

Defendants.

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D & D DOORS, INC.,

Third-Party Plaintiff,

- against -

ALL AMERICA INSURANCE COMPANY,

Third-Party Defendants.

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D & D DOORS, INC.,

Second Third-Party Plaintiff,

-against-

MAVIS DISCOUNT TIRE INC. and WAYNE-DALTON CORP.,

Second Third-Party Defendants.

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INDEX NO.: 29177/08
CALENDAR NO.: 201601063OT
MOTION DATE: 8/31/17
MOTION SEQ. NO.: 010 MOT D;
011 MOT D; 012 MD

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Upon the following papers numbered 1 to 59 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-8; 9-32; 38-45 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 33-37; 46-50; 51-55 ; Replying Affidavits and supporting papers 56-57; 58-59 ; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the following motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion (motion sequence no. 010) of Chamberlain Group, Inc. and Duchossois Industries, Inc. for summary judgment dismissing the complaint and all cross claims asserted against them is granted to the extent indicated herein; and it is further

ORDERED that the motion (motion sequence no. 011) of D & D Doors, Inc. for summary judgment dismissing the complaint and all cross claims asserted against it and for conditional common-law indemnification against Chamberlain Group, Inc., and Duchossois Industries, Inc. and against Wayne-Dalton Corp. is granted to the extent indicated herein; and it is further

ORDERED that the motion (motion sequence no. 012) of Wayne-Dalton Corp. for summary judgment dismissing the complaint and all cross claims asserted against it, and for conditional summary judgment on its cause of action for indemnification against Mavis Tire Group is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Christopher Vitti on February 23, 2008 as a result of his hand getting caught in unspooled cable from a commercial garage door opener while working at a Mavis Discount Tire Store in Lindenhurst, New York. Plaintiff alleges claims sounding in strict products liability; negligence arising from product design, manufacture, and warning; breach of implied warranty of fitness for a particular purpose; breach of implied warranty of merchantability; and breach of express warranty. Plaintiff's wife, Karrie Anne Vitti, also alleges a cause of action for loss of consortium. Superior Overhead Door, Inc. has cross-claimed against Chamberlain Group, Inc. as successor in interest of ABL Enterprises, Inc. and Duchossois Industries, Inc. (hereinafter collectively "Chamberlain"). D & D Doors, Inc., has cross-claimed against Chamberlain, and brought third-party actions against All American Insurance Company and Mavis Tire Supply Corp. Issue has been joined, discovery has been completed, and a note of issue was filed on June 15, 2016. By e-mail to chambers of the previously assigned judge, the time for summary judgment motions was extended to November 17, 2016.

Chamberlain now moves for summary judgment dismissing the complaint and all cross-claims asserted against it, maintaining that plaintiff cannot show his injury was a result of any defect in the motor of the garage door opener. In support of the motion Chamberlain submits, among other things, the pleadings and the deposition transcripts of plaintiff and Ira Davall.

D & D Doors, Inc., also moves for summary judgment dismissing the plaintiffs' complaint against it and for summary judgment on its cross-claims against Chamberlain and Wayne-Dalton, Corp. In support of the motion, D & D Doors submits, among other things, the pleadings; the deposition transcripts of plaintiff, Thomas Santoro, Ira Davall, Donald Wilson, Dave Monsour, John Spina, David Sorbaro, and Robert Maikowski; and the expert affidavit of Donald Wilson. In opposition to both motions, plaintiffs submit, among other things, the deposition transcript of Jeffrey Ketchman, an invoice, and an expert affidavit from Michael Panish.

Wayne-Dalton Corp. moves for summary judgment dismissing plaintiffs' complaint and all cross-claims against it, and for common law indemnification against Mavis Discount Tire, Inc., and in opposition to D & D Doors' motion for summary judgment insofar as it seeks conditional indemnity against Wayne-Dalton. In support of the motion, Wayne-Dalton submits, among other things, the deposition transcript of Ian Rosalia, Dave Monsour's response to interrogatories, and a fax cover sheet. In opposition, plaintiffs submit the deposition transcript of Jeffrey Ketchman, a Wayne-Dalton warning sheet, and an expert affidavit of Gary S. Nelson. Mavis Tire Supply Corp. (hereinafter "Mavis") submits, in opposition to the motion, the deposition transcripts of plaintiff and Ian Rosalia.

Plaintiff testified that on February 23, 2008 he was employed as the manager of the Mavis Discount Tire store located at 110 East Sunrise Highway in Lindenhurst, New York. He testified that to assist low profile vehicles onto the lift in the alignment bay, Mavis employees placed two two-by-seven wooden boards underneath vehicles, and that the use of such boards was a Mavis "company policy." Plaintiff testified that on February 23, 2008, at approximately 4:30 p.m., the alignment bay garage door was "cocked open" with one of the two-by-seven wood boards positioned underneath the garage door. He testified that the board was positioned on an angle in the track of the garage door, that the garage door motor was running, and that the garage door cable was unspooling. Plaintiff testified to gain access to the stop button in the alignment bay he put his right hand through the coiled cable hanging from the garage door. He testified that when he was attempting to reach the stop button, the wood board kicked out and caused the cable to go from a coiled position to a taut position, and that the cable caught the fingers of his right hand and "ripped them off."

Plaintiff testified that he had made numerous complaints to Mavis about the alignment bay door, and that he had recommended to his supervisors that the doors be replaced or altered due to safety issues. In response to his complaints, plaintiff testified that Superior Garage Door performed maintenance and service work eight to ten times to repair the garage doors. He testified that Superior Garage Door recommended that the doors be replaced, but Mavis failed to make the proper repairs. He testified as a manager at Mavis he never read any owner or user manual for the alignment doors, and that he did not read any labels or stickers on them. Plaintiff testified that D &D Doors did not make any repairs or service the doors, and that he never observed D & D Doors at the Lindenhurst location.

Donald Wilson testified on behalf of D & D Doors. He avers that he is vice president of D & D Doors and that on May 19, 1999, D & D Doors installed six Wayne-Dalton model 400 full view garage doors, each connected to an ABL model J motor unit at Mavis in Lindenhurst. He avers D &D Doors was hired to install the garage doors and motor units, but not the push button controllers or any aspect of the electrical installation at the subject location. Wilson testified that he personally tested the doors, motor units, and slip clutch. He avers a slip clutch is designed to stop the door at an obstruction and then shut the motor after a few seconds when a breaker would trip. He avers that when the clutch is slipping, the cable does not unspool from the drum. Wilson further avers that D & D Doors installed the doors and motors pursuant to the manufacturers' specifications. He avers that he had multiple discussions with Mavis about the availability and cost of optional safety equipment and Mavis declined to purchase that equipment. Wilson avers

that on January 13, 2000, D & D Doors replaced a door that was under warranty from the manufacturer, and in February 2000 it replaced a motor. He avers since that time D & D Doors has not been to Mavis, and that it was not hired to maintain or repair the doors.

Ian Davall testified on behalf of Chamberlain Group, which he testified is a predecessor in interest to ABL Enterprises. He testified that ABL sourced the subject door's motor and incorporated it into an operating system sold to its customers. Davall testified that a garage door in proper working order, with a clutch in proper working order, would upon obstruction cause the clutch to slip and the cable not to de-spool further. Davall testified that if a cable de-spooled in a garage door that was going down, but was blocked from going down, the clutch was not properly maintained.

Dave Mansour testified on behalf of Wayne-Dalton, where he was employed as a design engineer. He testified that Wayne-Dalton manufactured the model 400 door to accommodate safety devices that were UL 325 compliant. He testified that Wayne-Dalton was aware that the door would be used with an operator or manually with a chain hoist, and that a door does not have to be UL compliant, but a door system must be UL compliant.

John Spina testified that he has worked for Mavis Tire for 24 years, and that it was his responsibility to open new Mavis locations. He testified that Mavis did not have a maintenance contract for garage doors. He testified that D & D Doors installed the subject Wayne-Dalton door, and that D & D Doors installed the operator of the door. He testified that D & D Doors did not discuss the availablility of certain safety features with respect to the Mavis door.

Dave Sorbaro testified that he is the owner of Mavis, and that no conversation were held between Mavis and D & D Doors with regard to elective safety features. He testified that Mavis did not have a maintenance agreement for the garage door, and that Mavis employees are not permitted to manipulate or touch cables associated with operating systems and are instructed to never attempt to repair garage doors themselves.

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 issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The elements of a negligence claim are the existence of a duty, a breach of that duty, and damages proximately caused by that breach of duty (*Lapidus v State*, 57 AD3d 83, 866 NYS2d 711 [2d Dept 2008]). In an action for strict products liability, breach of warranty or negligence, it is a plaintiff's burden to show that a defect in the product was a substantial factor in causing the injury (*see Beckford v Pantresse, Inc.*, 51 AD3d 958, 858 NYS2d 794 [2d Dept 2008]; *Rizzo v Sherwin-Williams Co.*, 49 AD3d 847, 854 NYS2d 216 [2d Dept 2008]). A claim of strict

products liability can assert either a (1) manufacturing defect, (2) a design defect, or (3) a failure to provide adequate warning regarding the use of a product (*see Doomes v Best Tr. Corp., No. 170*, 17 NY3d 594, 935 NYS2d 268 [2011]; *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398 [1983]). Where plaintiffs allege a design defect, the relevant inquiry is whether the product, as designed, was not reasonably safe (*see Doomes v Best Tr. Corp., No. 170, supra*; *Voss v Black & Decker Mfg. Co., supra*). When a product is made in accordance with plans and specifications provided by the purchaser, the manufacturer is not liable for design defects, unless the specifications are so patently defective that a manufacturer of ordinary prudence would be placed on notice that the product is dangerous and likely to cause injury (*see Houlihan v Morrison Knudsen Corp.*, 2 AD3d 493, 768 NYS2d 495 [2d Dept 2003]). This exemption from liability for adherence to specifications does not apply where the manufacturer is involved in the design and installation of the allegedly defective product (*see Bailey v Disney Worldwide Shared Servs.*, 35 Misc 3d 1201(A), 950 NYS2d 607 [Sup Ct, New York County 2012]; *see e.g. Sprung v MTR Ravensburg, Inc.*, 99 NY2d 468, 758 NYS2d 271 [2003]).

Here, Chamberlain has not established its *prima facie* entitlement to summary judgment as a matter of law. Chamberlain maintains that plaintiff cannot show how the garage door opener caused or contributed to his injury, and that plaintiff cannot identify any defect in the design or manufacture of the commercial door opener at issue. Chamberlain argues that "this was an old operator with no evidence that it was properly maintained," and that no warnings were required because plaintiff was injured in an open and obvious risk by placing his hand in a de-spooled cable. Chamberlain presents no competent evidence that its product was not defective in its design and manufacture, and has not established that de-spooling is an open and obvious risk (*Ramos v Howard Industries, Inc.*, 10 NY3d 218, 855 NYS2d 412 [2008]).

In any event, in opposition plaintiff raises triable issues of fact. Plaintiff's expert, Michael Panish, opines that the automatic door system installed at the alignment bay was operating in an unsafe and hazardous manner. Moreover, Dave Monsour of Wayne Dalton testified that an operator that does not have entrapment protection or a built-in slip clutch is not reasonably safe. Ira Davall of Chamberlain testified that there was a reasonable alternative design to Chamberlain's design, and that Chamberlain's design did not incorporate an entrapment safety device. Accordingly, Chamberlain's motion for summary judgment in its favor is denied.

D & D Doors also moves for summary judgment in its favor dismissing the complaint and cross claims asserted against it and for common law indemnification from Wayne Dalton and Chamberlain. Under a strict product liability theory, it may have had a duty to warn as it is alleged to have manufactured, distributed, wholesaled, or retailed the product. Because it may have placed a defective product into the stream of commerce or distribution chain it is subject to strict liability (*see Montemarano v Atlantic Express Transportation Group, Inc.*, 123 AD3d 675, 997 NYS2d 700 [2d Dept 2014]; *Treston v Allegretta*, 180 AD2d 616, 581 NYS.2d 288 [1st Dept 1992]). While a question of fact exists as to whether the garage door was defectively designed, D & D Doors has not established that it was outside the manufacturing, selling, or distribution chain of the garage door, and therefore, had no duty to warn. An installer, who was not negligent and who follows the exact manufacturer's specifications, and is not in the distribution chain, does not incur liability. Here, D & D Doors has no liability as an installer. Nevertheless, evidence exists,

including the testimony of Donald Wilson, that D & D Doors not only installed the doors, but sold and distributed them. D & D Doors however, has established that the claim for breach of warranty is time-barred by the four-year statute of limitations and accordingly that cause of action is dismissed as to all defendants.

As to that branch of the motion which seeks common law indemnification from Wayne-Dalton and Chamberlain, the key element of a common-law cause of action for indemnification is a duty owed from the indemnitor to the indemnitee arising from the principle that "every one is responsible for the consequences of his own negligence, and if another person has been compelled * * * to pay the damages which ought to be have been paid by the wrongdoer, they may be recovered from him" (*Raquet v Braun*, 90 NY2d 177, 659 NYS2d 237 [1997], quoting *Oceanic Steam Nav. Co. (Ltd.) v Compania Transatlantica Espanola*, 134 NY 461 [1892]; *see Charles v William Hird & Co., Inc.*, 102 AD3d 907, 959 NYS2d 506 [2d Dept 2013]). Because the predicate of common-law indemnity is vicarious liability without actual fault on part of proposed indemnitee, a party which has itself participated to some degree in the wrongdoing cannot receive the benefit of the doctrine (*Ferguson v Shu Ham Lam*, 74 AD3d 870, 903 NYS2d 101 [2d Dept 2010]; *Kagan v Jacobs*, 260 AD2d 442, 687 NYS2d 732 [2d Dept 1999]; *see also Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 899 NYS2d 30 [1st Dept 2010] [party seeking common-law indemnification must be "free from negligence"]). Here, D & D Doors has not established its *prima facie* entitlement to summary judgment on the issue. Accordingly, the motion by D & D Doors for summary judgment dismissing the complaint and the cross claims against it and for indemnification is denied.

Wayne Dalton moves for summary judgment in its favor on the complaint and the cross claims and on its claim for common law indemnification against Mavis Discount Tire, Inc. At the outset, the motion is dated March 21, 2017, and is untimely, as all motions for summary judgment were due by November 17, 2016. In any event, Wayne Dalton has not established its *prima facie* entitlement to summary judgment dismissing the complaint or any cross claim. Under plaintiff's strict product liability theories, factual issues exists as to whether Wayne Dalton, as the manufacturer of the door, had a duty to warn customers of the alleged dangers resulting from the foreseeable use of the door. The duty to warn gives rise to liability not only against the manufacturer, but against the distributor as well (*Filer v Keystone Corp.*, 128 AD3d 1323, 9 NYS3d 480 [4th Dept 2015]; *Johnson v Johnson*, 183 AD2d 64, 588 NYS2d 607 [2d Dept 1992]).

As to that branch of the motion seeking common law indemnification against Mavis Discount Tires, Inc., the motion is untimely and Wayne Dalton has not established that it was free from fault (*Correia v Professional Data Mgmt.*, 259 AD2d 60, 693 NYS2d 596 [1st Dept 1999]). Accordingly, the motion by Wayne Dalton is denied.

Dated: November 29, 2017

HON. PAUL J. BAISLEY, JR.
J.S.C.