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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O'MALLEY Justice

PART 47

SIMBO, VICTOR

v

-v-

MADKIN North America

INDEX NO. 0112851/01

MOTION DATE 8/20/04

MOTION SEQ. NO. 005

MOTION CAL. NO. 1

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion denied in accordance with accompanying memorandum

FILED
OCT 14 2004
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/5/04

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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VICTOR SIMBO

Index No. 112851/01

Plaintiff,

DECISION AND ORDER

-against-

WADKIN NORTH AMERICA, LLC, HOUDAILLE INDUSTRIES, INC. POWERMATIC, INC. HIT-BOUND MANUFACTURING, INC, and HIT DISTRIBUTORS, LTD.,

Defendants.

---------- X

HOUDAILLE INDUSTRIES, INC.

Index No. 03591225/03

Third-Party Plaintiff,

-against-

THE METROPOLITAN HARDWARE COMPANY

Third-Party Defendant.

---------- X

PAULA J. OMANSKY, J.:

Motion sequence nos. 005, 007 and 008 have been consolidated for disposition. This is an action for personal injury sounding in products liability, general negligence in the manufacture, distribution, failure to warn and maintenance of a table saw. Defendant and third party plaintiff Houdaille Industries, Inc. ("Houdaille") moves (motion sequence no. 005) and cross moves (motion sequence no. 007) for summary judgment and for an order dismissing the complaint of Victor Simbo and any cross/counter claims raised against it.

Defendant Powermatic, Inc. ("Powermatic Inc.") moves (motion sequence no. 007) for summary judgment and for an order dismissing

plaintiff's complaint and all cross/counter claims raised against it.

Defendant Home & Industry Tool Distributors, i/s/h/a Hit Distributors ("Home/Hit Distributors") moves (motion sequence no. 008) for summary judgment and an order dismissing plaintiff's complaint and all cross claims.

FACTS

Underlying Injury

Plaintiff commenced employment at third-party defendant Metropolitan Hardware and Lumber ("Metropolitan Lumber") in August 1997. On July 15, 1998, he was using a "Powermatic" model 72 table saw (serial number 8372019) to cut a three-quarter inch piece of plywood for a customer. The table saw in question was manufactured in 1983; the label affixed to the device states the name "Powermatic Houdaille, Powermatic Division Houdaille Industries, Inc., McMinnville, Tennessee." The date Metropolitan Lumber purchased or acquired the saw is not stated.

The saw allegedly kicked back, striking plaintiff's left hip causing plaintiff to fall on the moving blade and sever part of his left thumb. Plaintiff alleges that the saw did not have a blade guard installed at the time of the accident. Plaintiff testified that there was a blade guard on the saw at some point but that this device was missing for at least six months prior to his accident.

In addition, plaintiff alleges that Home/Hit Distributors visited his employer and performed work on the particular saw.

Home/Hit Distributors alleges that they did not manufacture

the saw in question. Frederic Roberts, the vice president of Home/Hit Distributors testified that his company only maintains sales records for a period of seven years and that he was unable to find records relating to the sale of Model 72 Powermatic saw. In addition, Roberts also stated that there are several other companies in the New York Metropolitan area that sold Powermatic table saws. Although Roberts states that Home/Hit Distributors perform repairs on table saws, company records do not indicate that Home/Hit Distributors worked on the saw in question prior to plaintiff's accident. Roberts testified that the only work relating to work for Metropolitan Lumber on a 72 Powermatic table saw relates to repairs performed on February 28, 2000, which was nineteen months after plaintiff's accident.

Defendants and the Chain of Distribution

Powermatic Inc. alleges that it is a defunct corporation and not liable to plaintiff. Powermatic Inc. states that it was initially incorporated in Tennessee and existed from 1963 through May 31, 1966. According to Powermatic Inc., the Tennessee corporation has not existed for the last 37 years. At some point the Powermatic brand name become the property of co-defendant Houdaille, and the latter owned the brand name at the time the table saw was manufactured, namely 1983. However, documents supporting the transfer of ownership of the Powermatic brand name from the Tennessee corporation to Houdaille have not been submitted.

Houdaille alleges that it is not a proper defendant as it is no longer responsible for liability arising from its products.

Houdaille bases its argument on the wording of a stock transfer agreement (the "Houdaille Sale Agreement") dated April 3, 1986. [1] Houdaille states that it sold its subdivisions, Penberthy-Houdaille, Inc. ("Penberthy"), Powermatic-Houdaille, Inc. and Universal-Houdaille, Inc. (collective the "Corporations") to CE Bradley Acquisition Corp. c/o Stanwich Partners ("Stanwich") (a non-party) on April 4, 1986.

Paragraph 6.02(a) of the Houdaille Sale Agreement, which is entitled "Insurance coverage," provides in pertinent part that

> Houdaille shall be responsible and liable for all workers' compensation claims and general liability (including, without limitation, product liability) claims and automobile liability claims of the Corporations on a claims made basis through the date of the Closing and any and all deductibles with respect thereto ....

Paragraph 6.02 (a) of the Houdaille Sale Agreement continues on to state that Houdaille shall not have any liability for any claims made subsequent to the date of the Closing. The following clause of the Houdaille Sale Agreement, paragraph 6.02(b), provides:

> Effective as of the beginning of the day immediately following the Closing, the Purchaser shall be responsible and liable for all workers' compensation claims, general liability (including, without limitation, product liability) claims and automobile liability claims of the Corporations on a claims made basis (irrespective of whether the incident giving rise to the claim occurred prior or through the Closing) and any and all deductibles with respect thereto. Neither Houdaille nor any Predecessor shall be liable for any claims or liabilities referred to in this Section 6.02(b).

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[1] The copy of the stock sale agreement submitted on Houdaille's motion (motion sequence no. 005) is dated January 10, 1986.

Stanwich agreed, among other things, to obtain insurance against Houdaille's liability as set forth in subsection (b). The purchaser agreed to obtain primary insurance and

> [s]uch insurance coverage shall include, without limitation, all claims made after the date of the Closing, including those attributable to (i) all matters arising both prior and through the closing relating to the Corporations or their products, or for which Houdaille or the Corporations directly or through any Predecessor is responsible, and (ii) all matters arising within the scope of workers' compensation coverage for the employee or former employees of the corporation or any Predecessor.

(Houdaille Sale Agreement ¶ 6.02[c]). However, this insurance coverage was to continue for not less than five years from the date of the closing (Houdaille Sale Agreement ¶ 6.02[e]).

Paragraph 6.03 of the Houdaille Sale Agreement (which is entitled "Change of Names") permits the Stanwich to use any remaining product labels, stationary, and sales literature, containing the word "Houdaille" for a brief time period. Moreover, paragraph 6.03 Houdaille Sale Agreement also permitted Stanwich to distribute Houdaille goods under certain circumstances. According to paragraph 6.03,

> [n]othing herein contained shall permit the Purchaser or the Corporations to ship products to customers bearing the word "Houdaille" after the date of the Closing unless products shipped from and after the date of the Closing shall bear permanent marking so as to identify them as products for which Houdaille is neither the vendor nor is otherwise liable pursuant to product liability or similar doctrines of law: except that (i) for a period of one hundred eighty (180) days following the Closing, Penberthy shall be permitted to ship its product inventory upon which the "Houdaille" name is permanently affixed and (ii) for a period of sixty (60) days following the closing, Powermatic shall be permitted to ship its product inventory upon which the "Houdaille" name is permanently affixed provided that Powermatic

> keeps a permanent record of serial number of such product inventory shipped after the Closing and provides Houdaille with reasonable access to such permanent record when reasonably requested to do so.

Stanwich subsequently changed its name to DeVlieg-Bullard and this entity eventually filed for bankruptcy in Ohio. On August 20, 1999, DeVlieg-Bullard, as seller and Sunhill NIC Company, Inc. ("Sunhill") negotiated an asset purchase agreement (the "August 1999 Proposal"). According to the August 1999 Proposal, Sunhill agreed to assume certain of DeVlieg-Bullard's liabilities, including "[a]ll liabilities for warranty claims with respect to products of the Business, regardless whether such claim occurred before, on or after the Closing Date" and "[a] all liabilities for product liability claims with respect to products of the Business sold on or after the Closing Date" (August 1999 Proposal, ¶ ¶ 1.4 [c] and 1.4[d]).

However, the August 1999 proposal never became a finalized agreement. In September 1999, Jet Equipment & Tools, Inc. (Jet) submitted a higher bid to the Bankruptcy Court and became the purchaser of the Powermatic assets from Stanwich (now DeVlieg-Bullard) (the "Jet Asset Purchase Agreement"). Paragraph J of the Ohio Bankruptcy Court order dated September 29, 1999 states that

> [a]fter the Closing, neither the Purchaser nor any of its affiliates shall be deemed to be a successor of Debtor and the Purchaser and its affiliates shall not be responsible for any of the Debtor's liabilities or obligations, other than those expressly assumed by the Purchaser pursuant to the Asset Purchase Agreement and the Amendment.

The Jet Asset Purchase Agreement and the Amendment, which was mentioned in the aforementioned order from the Ohio Bankruptcy

court had not been submitted to the court. A new entity, also known as Powermatic Inc., was incorporated by DeVlieg-Bullard in Delaware on March 10, 1986 and was dissolved by DeVlieg in Delaware on October 5, 1999. Defendant Powermatic Inc. alleges that the Delaware entity was only a "name-holding company."

On October 15, 1999, Jet assigned the assets it acquired in bankruptcy under the Jet Asset Purchase Agreement to its newly formed corporate affiliate, Powermatic Corporation, and all of the former's rights as the winning bidder. Powermatic Corporation alleges that it never assumed any product liability, including any liability to plaintiff for products of the Powermatic division of DeVlieg-Bullard sold by the latter prior to October 15, 1999.

DISCUSSION

Admissibility of Stock Transfer Agreements

Plaintiff argues that the court may not consider the submitted asset transfer agreements since these documents are hearsay and do not constitute evidentiary proof in admissible form (Zuckerman v City of New York, 49 NY2d 557, 563 [1980]). With a proper foundation, written contracts are admissible in New York under the business record exception to the hearsay rule (Northeast Caissons, Inc. v Columbus Constr. Corp., 268 AD2d 512 [2d Dept 2000] citing CPLR 4518[a]). The court shall consider these agreements even though there is no accompanying affidavit from the custodian or corporate officer since the court may consider purely legal issues, such as the interpretation of a contract, despite the fact that the submitted papers may fail to comport with the requirements (see,

Stainless, Inc. v Employers Fire Ins. Co., 69 AD2d 27, 32-33 [1st 1979 affd 49 NY2d 924 [1980]).

Plaintiff has also failed to raise any genuine issue as to the authenticity of these documents or to the corporate structure alleged by defendants.

1. Strict Products Liability

In New York, a plaintiff injured by an allegedly defective product may recover against the manufacturer and other entities under the theories of contact, express or implied, strict products liability, or negligence (Voss v Black & Decker Mfg. Co., 59 NY2d 102, 106 [1983][2]). "A defect in a product may consist of a mistake in manufacturing, an improper design or the inadequacy or absence of warnings for the use of the product" (Amatulli by Amatulli v Delhi Constr. Corp., 77 NY2d 525, 532 [1991]). In order for plaintiff to recover eventually for his injury, the "defect must have been a substantial factor in bringing about the injury or damage and ... at the time of the occurrence, the product must have been used for the purpose and in the manner normally intended or in a manner reasonably foreseeable" (Amatulli by Amatulli v Delhi Constr. Corp., supra, 77 NY2d, at 532). In addition, plaintiff must also establish that the inherent dangerousness of the product design at the time that the product was marketed outweighed its utility (Scarangella v Thomas Built Buses, Inc., 93 NY2d 655, 659 [1999]; Cover v Cohen, 61 NY2d 261, 266-267 [1999]. See also (Denny

[2]Plaintiff has not alleged any breach of express or implied warranty claims against any of the defendants.

v Ford Motor Co. 87 NY2d 248, 256 [1995], rearg denied 87 NY2d 969 [1996]).

Plaintiff presents the affidavit of an expert witness, Robert Grunes, professional engineer, who opines that

> [b]ased on his review ... I found with a reasonable degree of engineering certainty that the design of the model 72 Powermatic saw was defective. The manufacturer of the saw (Houdaille Industries according to the manufacturer's plate riveted to the side of the saw) failed to anticipate that the saw would be used in conjunction with the extension tables to accommodate the cutting of large pieces of wood. It should have been reasonably anticipated and foreseeable by the manufacturer that this flat table saw would be used for such large pieces of wood, such as plywood sheets. The guard the saw originally came with, which extended up from the back of the saw, would not accommodate the cutting of large pieces of wood in that the arm of that blade guard would interfere with the cutting of large pieces of wood as it passed around the blade. As a result the guard was not adequate for the purpose reasonably foreseeable in cutting large, flat pieces of wood and had to be removed in order to accommodate cutting such wood.

(Grunes 7/23/2004 Aff. at ¶ 5).

Grunes also states that the lack of the safety guard was the proximate cause of plaintiff's injuries:

> [t]he Powermatic model 72 saw in issue did not have any devices attached to it which would prevent the wood from springing back against the side of the moving blade while being passed around the blade during a cut. As a result, the wood would seize around the blade, causing it to kick back into the operator as it did in Mr. Simbo's case. I can state with a reasonable degree of engineering certainty that the lack of splitting device for a saw which reasonably should have been anticipated as being used for cutting large pieces of wood is a manufacturing defect and said defect was a substantial cause of Mr. Simbo's injuries. Splitting devices have been installed on table saws for well over twenty (20) years. In order to correct this defect, the Model 72 Powermatic could have had a short piece of metal placed perpendicular on the table two (20) to three (3) inches behind the blade.

(Grunes 7/23/2004 Aff. at ¶ 6). Grunes also states that a boom guard should have been in place before plaintiff's accident.

Houdaille maintains that it has not been in the saw business since its transferred its Powermatic division. Houdaille further maintains that the statements in Grunes' opinion concerning alternative guard refers to a Biesemeyer/Rockwell extended guard which first became available in 1987 when Houdaille was no longer manufacturing saws.

However, Houdaille has not submitted any testimony or statement or affidavit which refutes plaintiff's underlying claim of design defect. The court is unable to determine, as a matter of law, whether the design of the saw in 1983 was defective (Scarangella v Thomas Built Buses, Inc., supra, 93 NY2d, at 659; Cover v Cohen, supra, 61 NY2d, at 266-267). Furthermore, it is unclear whether the table saw was ever modified by Metropolitan Lumber or its workers. There is also no evidence, at this point, that the plaintiff himself removed any safety features, used the table saw improperly, or that the table saw was not designed to cut wood the size and thickness of the plank upon which plaintiff was working.

Based on the limitations of the present record, this court is unable to determine the validity of plaintiff's design defect claim and all applications to dismiss this cause of action are denied.

a. Manufacturer Houdaille

The original Powermatic Inc., which was incorporated in Tennessee, terminated business more than a decade prior to the manufacture of the table saw in 1983. The record supports

plaintiff's allegation that Houdaille, or one of its divisions, was the manufacturer of the saw in question.

Contrary to Houdaille's assertions, a defendant manufacturer may not avoid liability to potential plaintiffs under a theory of strict products liability by merely selling the division which manufactured the allegedly defective product. A corporate manufacture's sale of its assets and even its dissolution does not automatically preclude liability in New York (Grant-Howard Assocs. v General Housewares Corp., 63 NY2d 291, 297 [1984]; Dominquez v Fixrammer Corp., 172 Misc2d 868, 870 [Sup Ct, Bronx County 1997], citing Business Corporation Law § 1006[b]). "[T]he injured party can elect to proceed against the defunct corporation, the successor corporation, or both" (Grant-Howard Assocs. v General Housewares Corp., supra).

Houdialle's assertion that it may avoid liability to injured persons for defective products by transferring its assets also fails on public policy grounds. New York's public policy does not permit manufacturers to avoid liability for personal injury arising from products it actually produced (Gebo v Black Clawson, 92 NY2d 387, 392 [1998]; Liriano v Hobart Co., 92 NY2d 232, 235 [1998]; Amatulli by Amatulli v Delhi Constr. Corp., supra, 77 NY2d, at 532). Products "liability rests not upon traditional considerations of fault and active negligence, but rather upon policy considerations which dictate that those in the best 'position to exert pressure for the improved safety of products' bear the risk of loss resulting from the use of the product" (Gody

v Abamaster of Miami, Inc., 302 AD2d 57, 60 [2d Dept], lv dismissed 100 NY2d 614 [2003], quoting Sukljian v Charles Ross & Son Co., 69 NY2d 89, 95 [1986] [remaining citation omitted]). "'To allow a manufacturer, ... which sells a product ... with no safety device, to shift the ultimate duty of care to others through boilerplate language in a sales contract, would erode the economic incentive manufacturers have to maintain safety and give sanction to the marketing of dangerous, stripped down, machines'" (Scarangella v Thomas Built Buses, Inc., supra, 93 NY2d, at 661, quoting Rosado v Proctor & Schwartz, 66 NY2d 21, 26-27 [1985]).

Since remote manufacturers which place a defective product into the stream of commerce are not excluded from this public policy protecting consumers, Houdaille may not evade its duty to plaintiff for goods it manufactured prior to the closing by transferring its assets (Bellevue South Assocs. v HRH Construction Corp., 78 NY2d 282, 290, rearg denied 78 NY2d 1008 [1991]).

Furthermore, paragraph 6.02(b) of the Houdaille Sale Agreement, which provides that the purchaser "shall be responsible and liable for all workers' compensation claims, general liability (including, without limitation, product liability)" only applies to contract's signors which are entitled to determine the allocation of liability for future claims between themselves (Grant-Howard Assocs. v General Housewares Corp., supra, 63 NY2d, at 297[3]). Stanwich

[3]New York does not bar agreements in asset purchase contracts, which require the purchaser to be liable for the defective goods sold or produced by the seller (cf., General Obligations Law §§ 5-322.1 and 5-324).

waived it right to sue Houdaille for indemnification for claims arising from Houdaille products. Plaintiff, however, was not a party to the Houdaille Sale Agreement and did not waive any right to maintain tort claims against Houdaille (Grant-Howard Assocs. v General Housewares Corp., supra, 63 NY2d, at 297).

Accordingly, Houdaille's motion (motion sequence no. 005) and cross motion (motion sequence no. 007) to dismiss the underlying complaint and all cross and counterclaims are denied.

b. Successor Corporations

Contractual Assumption of Debt

Powermatic Inc. (the Delaware corporation), is liable in this action only if plaintiff proves that the former either accepted liability from Houdaille's purchaser or was in the chain of distribution of the table saw which caused plaintiff's alleged injuries.

In New York, the mere sale of corporate property from one company to another does not, as a general rule, make the purchaser liable for the unassumed tort liabilities of the seller (Flecha v Seybold Mac. Co., 146 AD2d 515 [1st Dept 1989]; cf., (Sullivan v Joy Mfg. Co. 70 NY2d 806, 808 [1987] [Successor corporation liable if it succeeded to predecessor's service contracts or had knowledge of the defects and the location of the owner and purchaser of the machine]). The Court of Appeal found in Grant-Howard Assocs. v General Housewares Corp. (supra, 63 NY2d, at 296) that a corporation may only be held for the torts of its predecessor if

> "(1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of

> seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations."

(ibid. quoting Schumacher v Richards Shear Co., Inc. 59 NY2d 239, 245 [1983]).

The Houdaille Purchase Agreement contains lengthy and complicated sections dealing with the transfer of future products liability claims. These assumption of liability clauses are placed under the heading of "Insurance Coverage" and are intertwined with the signatories' insurance procurement obligations.

Houdaille agreed to pay for liability insurance up to and including the date of the closing. In addition, Houdaille retained its obligation to pay the Corporations' product liability claims but only "on a claims made basis through the date of the Closing and any and all deductibles with respect thereto, including without limitation, all claims listed on Exhibit 2.12(2)" (Houdaille Sale Agreement ¶ 6/02[a]). The term "claims made basis" is employed by the insurance industry to refer to polices which limit coverage to claims first made against the insured during the policy period (Cocoran v National Union Fire Ins. Co. of Pittsburgh, Pa, 143 AD2d 309, 310 [1st Dept 1988]; 7 Couch on Insurance § 102:24 [3d ed]). The date of the occurrence of the accident is not dispositive; rather the date that the claim is made to the carrier is the critical factor, meaning that "claims-made" policy carriers may disclaim coverage for claims which are not made during the policy

period (Fogel v Home Ins. Co., 129 AD2d 508, 511 [1st Dept 1987][4]).

Houdaille clearly intended to adopt the usage of the insurance industry into asset purchase agreement. Paragraph 6.02(a) of the Houdaille Purchase Agreement provides that

> [f]or purposes of this Section 6.02, any and all references to "claim" or to "claims" shall be construed to mean a claim or claims made or threatened in writing against any Corporation or Houdaille or the Purchaser which are of a type covered by the Insurance or comparable insurance to be maintained by the Purchaser pursuant to this agreement, without regard to affirmative defenses or any deductible or limits of coverage currently in effect or permitted pursuant to this agreement.

Accordingly, Houdaille agreed with Stanwich that the former would remain liable only for claims which were filed prior to the closing date. These claims were clearly within Houdaille's insurance coverage duty under the Houdaille Sale Agreement.

Despite Houdaille's assertions to the contrary, Stanwich, the initial purchaser, did not assume blanket liability for all future injuries arising out of defects in Houdaille's products (cf., City of New York v Charles Pfizer & Co. Inc., 260 AD2d 174, 175 [1st Dept 1999]). Rather, paragraph 6.02(a) of the insurance coverage section of the Houdaille Purchase Agreement provides that Stanwich would only accept for liability for product liability claims raised against the Corporations "on a claims made basis;" that is, claims which were actually filed after the Closing. Stanwich further agreed to obtain primary insurance coverage naming Houdialle and

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[4]Occurrence policies cover claims made against the insured at any time, so long as the bodily injury or property damage at issue occurred during the policy period 7 Couch on Insurance § 102:24 [3d ed]).

its Corporations as an additional insureds for the five-year period immediately following the sale (Houdaille Sale Agreement ¶¶ 6.02 [d] and [e]).

Although plaintiff was allegedly injured during Stanwich's ownership of the Corporations, plaintiff's claim was not made during Stanwich's ownership of the Corporations. Plaintiff filed this action in 2001 after Stanwich transferred its interest in the Corporations to Jet. As a result plaintiff's claims did not fit within the scope of Stanwich's liability which was subject to a "claims made basis" time frame (the action claim had to be filed during Stanwich's ownership). Moreover, plaintiff's action is also outside Stanwich's five-year insurance procurement period.

The court's interpretation of paragraph 6.02(a) of the Houdaille Purchase Agreement is consistent with the right of a purchaser to limit liability. Were the court to ignore the limiting language and find that Stanwich owed blanket liability, "a purchaser would be unable to meaningfully limit its liability as every item ever sold by the predecessor would be a potential source of assumed liability" (Grant-Howard Assocs. v General Housewares Corp., supra, 63 NY2d, at 297).

There is no other basis to hold Stanwich liable under the terms of the Houdaille Sale Agreement. The other obligations transferred to Stanwich in the Houdaille Sale Agreement referred to Stanwich's acceptance of specific accounts, obligations to employees, and pre-existing contracts (Subramani v Bruno Machinery Corp., 289 AD2d 167, 168 [1st Dept 2001]).

Both Houdaille and plaintiff have failed to show that Stanwich is liable under the remaining examples outlined in Grant-Howard Assocs. v General Housewares Corp. (supra, 63 NY2d, at 296) and Schumacher v Richards Shear Co., Inc. (supra, 59 NY2d, at 245). There is no evidence that Houdaille actually merged with Stanwich or that the purchasing corporation was a mere continuation of the selling corporation or that the stock transfer was fraudulent. Stanwich's acquisition of assets from Houdaille does not constitute a defacto merger (Jelvakov v AHL Processing Equipment Co., 3 AD2d 519 [2d Dept 2004]). Furthermore, the record does not show that Stanwich serviced the table saw or had any other continuing relationship with Houdaille after the closing (Schumacher v Richards Shear Co., Inc., supra, 59 NY3d, at 245).

The First Department has not adopted the product line exception whereby the purchasing corporation would be liable for product liability claims arising for goods made or sold by the selling corporation prior to the transfer of assets (Pfizer & Co. Inc. v Keene Corp., supra, 260 AD2d, at 176). Accordingly, Stanwich is not liable to plaintiff under the law of corporations[5].

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[5] The Third Department has adopted the product line exception and would hold an entity liable if (1) the original parties remedy against the original manufacturer was virtually destroyed by the successor's acquisition of substantially all the predecessor's assets, (2) the successor continued to manufacture essentially the same line of products as its predecessor, (3) the successor had the ability to assume the original manufacture's risk-spreading role, and the successor benefitted from the original manufacturer's good will (Hart v Bruno Machinery Corporation, 250 AD2d 58, 60 [3d Dept 1998]; see, Rivera v Anderson United Co., 283 AD2d 563, 564 [2d Dept 2001]).

Role as Distributor

Stanwich (and any of its successor corporations), however, could still be liable to plaintiff, under tort law, if the former actually sold, distributed or marketed the table saw in question to Metropolitan Lumber (cf., Porter v LSB Industries, Inc., 192 AD2d 205, 210 [4th Dept 1993]). In New York, wholesalers, distributors, or retailers which sell a product in defective condition are liable for injury which results from the use of the product regardless of privity, foreseeability or exercise of due care. Strict products liability extends to all retailers and distributors in the chain of distribution, even if they never inspected, controlled, installed, or serviced the product in question (Perillo v Pleasant View Assocs., 292 AD2d 773 [4th Dept 2002]; Joseph v Yenkin Majestic Paint Corp., 261 AD2d 512 [2d Dept 1999]).

Paragraph 6.03 of the Houdaille Sale Agreement potentially placed Stanwich in the chain of distribution because the agreement permitted the Corporations purchased by Stanwich to continue to ship Houdaille goods for a limited time period after the closing provided that the goods bore a label which was permanently affixed to the item. However, there is no evidence concerning the number of goods actually sold by the Corporations during the window period. Accordingly, the court is unable to determine whether Stanwich functioned as a distributor for Houdaille goods or as a mere casual seller (cf., Srung v MTR Ravensburg, Inc., 99 NY2d 468 [2003]; Spallhotz v Hampton C.F. Corp., 294 AD2d 424, [2d Dept 2002]).

The court, however, shall not order further discovery to determine Stanwich's role as a distributor since the present record contains no evidence that Stanwich or one of the purchased Corporations actually sold the allegedly defective saw to plaintiff's employer.

Liability of Remaining Corporations

The court's analysis concerning Stanwich's liability to plaintiff also applies to remaining corporations including, the creation of defendant Powermatic Inc. (Delaware) and Powermatic Corporation.

None of the entities which followed Stanwich (now DeVlieg-Bullard) as owners agreed to accept the seller's liability. Jet, the next in line, had not accepted any additional liability outside those of its asset purchase agreement with Stanwich/DeVlieg-Bullard, given the terms of the Ohio Bankruptcy Court's order dated September 29, 1999. Since plaintiff's claims did not fall within Stanwich/DeVlieg-Bullard's contractual obligations to Houdaille, Stanwich/DeVlieg-Bullard did not pass on that liability to its purchaser, Jet.

Although it is true that plaintiff was injured prior to the closing date of the Jet Purchase Agreement, plaintiff did not file his action during the time that Stanwich owned the company. The claim was not part of Stanwich's potential liability. Jet did not agree to agree to assume claims outside those in the Jet Purchase agreement. Plaintiff has not submitted any evidence that Jet agreed to adopt the "claim made basis" time frame. Accordingly,

plaintiff cannot show that his claims fell within the scope of liabilities assumed by Jet.

There is also no evidence that Jet, Powermatic Inc. (Delaware) or Powermatic Corporation actually sold or distributed the table saw which injured plaintiff. Accordingly. Powermatic Inc. is entitled to summary judgment since this defendant has demonstrated that in had no role in the manufacturer, sale or distribution of the produce at issue (Joseph v Yenkin Majestic Paint Corp., 261 AD2d 512 [2d Dept 1999]).

That branch of defendant Powermatic, Inc.'s motion (motion sequence no. 007) motion which seeks summary judgment on plaintiff's strict products liability claims is granted.

Negligence

Under the theory of negligence, plaintiff has the burden of establishing that the negligent failure of defendants to warn him of the dangers in using the table saw caused him injury or that the defendant improperly designed the machine and that his injury was the result of his use of it (Sawyer v Dreis Krump Mfg. Co., 67 NY2d 328, 331-332 [1986]).

Since the court is unable, at this juncture to determine whether the table saw's design was defective, the court is unable to determine whether Houdaille's failure to include a warning label constituted negligence. However, plaintiff's duty to warn claims fail against defendants Powermatic Inc. and Home/Hit Distributors, since the record does not contain any evidence which show that these corporations had a sufficient link to the products

manufactured by Houdaille (Rothstein v Tennessee Gas Pipeline, 259 AD2d 54 [2d Dept 1999]).

In particular, the record contains no evidence that Powermatic, Inc. or Home/Hit Distributors sold the defective saw to Metropolitan Lumber or that either entity repaired the saw prior to plaintiff's accident. Accordingly, there is no duty to correct any purported design defect or to warm the injured plaintiff's employer of such a defect (Ward- Lithibar v Matick, Inc., 6 AD3d 424 [2d Dept 2004]). Moreover, Home/Hit Distributors' repair work after plaintiff's injury is not dispositive. A single service call, especially one which occurred subsequent to the injury, is not sufficient to establish a special relationship between Home/Hit Distributors and Metropolitan Lumber (Sullivan v Joy Mfg. Co. 70 NY2d 806, 808 [1987]).

The remaining branches of the applications of Powermatic, Inc.'s motion (motion sequence no. 007) and Home/Hit Distributors (motion sequence no. 008) for summary judgment and for an order dismissing plaintiff's complaint and all cross/counter claims are granted.

Accordingly, it is

ORDERED that Houdaille's motion (motion sequence no. 005) and cross motion (motion sequence no. 007) to dismiss the underlying complaint and all cross/counterclaims are denied; and it is further

ORDERED that Powermatic, Inc.'s motion (motion sequence no. 007) for summary judgment and for an order dismissing plaintiff's

complaint and all cross/counter claims is granted. All causes of action and claims against this defendant are severed and dismissed; and it is further;

ORDERED that Home/Hit Distributors' motion (motion sequence no. 008) for summary judgment and to dismiss plaintiff's complaint and all cross claims is granted. All causes of action and claims against this defendant are severed and dismissed; and it is further

ORDERED that the parties are directed to appear for a Pre-trial, conference on November 5, 2004, at 11 a.m. at 71 Thomas Street, Room 205, New York, N.Y.

DATED: October 5, 2004 **ENTER:**

PAULA J. OMANSKY
J.S.C.