Verost v Mitsubishi Caterpillar Forklift Am. Inc.
2013 NY Slip Op 33972(U)
August 2, 2013
Supreme Court, Niagara County
Docket Number: 137929
Judge: Ralph A. Boniello III
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

DREW M. VEROST AND
KIMBERLY VEROST

Plaintiffs,

vs.

MITSUBISHI CATERPILLAR FORKLIFT AMERICA INC.,
NUTTALL GEAR, LLC,
NUTTALL GEAR CORPORATION,
DELROYD WORM GEAR,
ALTRA HOLDINGS, INC.,
ALTRA INDUSTRIAL MOTION, INC.,
WHEATFIELD BUSINESS PARK, LLC,
PROLIFT, INC.,
BUFFALO LIFT TRUCKS, INC., AND
MULLEN INDUSTRIAL HANDLING CORP.

Index No. 137929

Defendants.

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DECISION & ORDER

Boniello, III, J.

By Notice of Motion, Defendants Mitsubishi Caterpillar Forklift America Inc. (hereinafter, "MCFA"), Nuttall Gear, LLC, Nuttall Gear Corporation, Delroyd Worm Gear, Altra Holdings, Inc., Altra Industrial Motion, Inc. (hereinafter and collectively, "Nuttall"), Prolift, Inc., and Buffalo Lift Trucks, Inc. (hereinafter, "BLT") seek summary judgment dismissing the Plaintiffs' Complaint and all cross-claims. Defendant Mullen Industrial Handling Corp. (hereinafter, "Mullen") joins in MCFA's motion for summary judgment dismissing the Plaintiffs' Complaint or in the alternative, seeks common law indemnification from MCFA and reimbursement of costs, fees, expenses and disbursements incurred herein.

The record reflects that the Plaintiff was assigned to work at Defendant Nuttall's manufacturing facility in the Town of Wheatfield as a temporary employee through a staffing arrangement with SPS Temporaries, Inc. (hereinafter, "SPS"). Under the arrangement, SPS was responsible to provide trained employees to meet the job specifications set forth by Defendant Nuttall. On or about July 2006, Defendant Nuttall informed SPS that it needed a material handler to work at its facility to collect garbage and scrap metal debris and dump them into dumpsters at specified locations. Defendant Nuttall provided the tools and equipment to the Plaintiff who allegedly worked under the direction and control of Nuttall supervisors/employees. Upon arrival at Nuttall, the Plaintiff's duties included operating a lift truck manufactured by Defendant MCFA. Defendant BLT had arranged for the lift truck to be sold to Defendant Nuttall through Defendant Mullen in 1999.

The lift truck was a electric sit-down rider with a seat interlock safety switch designed to cut off all power to the lift truck in the event that the operator leaves his seat. However, the seat switch on the subject lift truck had been intentionally disabled/bypassed with a "jumper wire". While the Plaintiff was performing his job duties, he stood up and went between the mast and the overhead guard assembly of the lift truck to empty a "hopper" that was elevated by the "forks" of the lift truck into a large dumpster. At some point, the Plaintiff's body made contact with the lift truck's tilt controls which were still energized causing the mast of the truck to tilt backwards toward the Plaintiff resulting in his body being pinned against the machine and causing him to suffer severe injuries.

As a result, the Plaintiffs commenced the instant action with the filing of a Summons and Complaint on July 28, 2009, asserting various causes of action which the Plaintiffs have now narrowed down to claims of negligence (against MCFA and Nuttall) and strict products liability (against MCFA, BLT, Mullen).

Initially, the Court notes that there was no opposition to the relief sought by Defendant Prolift, Inc., and its summary judgment motion was granted from the Bench. Defendant Mullen's request for a conditional order of common law indemnification was also granted from the Bench. The Plaintiffs' responsive papers stated that there was no opposition to Defendant BLT and Mullen's motions seeking dismissal of the breach of warranties and negligence causes of action. Thus, the Court hereby dismisses such claims. As a matter of law, the Court also dismisses all claims brought against Defendant Nuttall (*see*, *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553 [1991]; *Rucci v Cooper Indus.*, 300 AD2d 1078 [4th Dept 2002]; *Davis v Butler*, 262 AD2d 1039 [4th Dept 1999]).

Summary Judgment is, of course, a drastic remedy and generally there is considerable reluctance to grant it in negligence actions (Siegel, NY Prac § 278, at 459-460 [4th ed]; *Ugarriza v Schmieder*, 46 NY2d 471 [1979]; *Arumugam v Smith*, 277 AD2d 979 [4th Dept 2000]; *Kelsey v Degan*, 266 AD2d 843 [4th Dept 1999]). On a motion for summary judgment, the proponent of the motion must set forth evidentiary proof, in admissible form, eliminating any material issue of fact from the suit (*Dix v Pines Hotel, Inc.*, 188 AD2d 1007 [4th Dept 1992]). Once the moving party makes this prima facie showing, the burden shifts to the opposing party to produce admissible evidence, sufficient to create material issues of fact requiring a trial (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Wilson v Woodward Builders, Inc.*, 140 AD2d 957 [4th Dept 1988]). In determining a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment *Id.* A court must view the evidence in the light most favorable to the party opposing the motion (*Damerau v Johnson*, 265 AD2d 927 [4th Dept 1999]; *Dix v Pines Hotel, Inc., supra*). Thus, a court is required to accept the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*Damerau v Johnson, supra*). However, the law is clear that the existence of a bona fide issue must be raised by evidentiary facts and not be based upon conclusory allegations or unsubstantiated assertions in order to defeat a motion for summary judgment even if alleged by an expert (*Alvarez v Prospect Hosp., supra*; *Rachlin v Volvo Car Corp.*, 289 AD2d 981 [4th Dept 2001]; *Loomis v Sun Oil Co.*, 79 AD2d 889 [4th Dept 1980]).

Defendant MCFA asserts that there is no evidence in admissible form establishing any design defect of the lift truck and/or that there were inadequate warnings concerning the

foreseeable use/misuse of the lift truck. Defendant MCFA points to the fact that there was a substantial modification of the original design of the subject lift truck. Specifically, the lift truck had been designed with a seat interlock safety switch which shuts off the vehicle's power including the mast controls as soon as the driver leaves the seat of the lift truck or in the event that the switch itself malfunctions. However, the seat interlock safety switch on the subject lift truck had been disabled/bypassed through the use of a "jumper wire" defeating the safety device.

In further support of its position, Defendant MCFA cites the *deposition* testimony of Kenneth Van Hook, an MCFA company representative and consultant with over 30 years experience in the forklift industry. According to Mr. Van Hook, the use of the seat interlock safety switch for the "power travel"controls had been mandated by OSHA for many years and should never have been bypassed. Notwithstanding, Mr. Van Hook testified that despite the fact that the seat interlock safety switch had been bypassed, the power could have still been disabled by turning the "key switch" on the lift truck to the "off" position.

In addition, Mr. Van Hook inspected the subject lift truck and found that the original seat by MCFA had been replaced with a seat made by a different company contrary to the express instructions found in MCFA's operational manual of the lift truck. Moreover, Mr. Van Hook's inspection of the lift truck also revealed that several warning labels had become worn out and/or were missing entirely from the lift truck. In fact, according to Mr. Van Hook the "main warning label" which is located on the front panel of the lift truck and listed several hazards and instructions for the operator was missing. Mr. Van Hook also testified that replacement warning labels are provided in the parts books or through dealers and testified that it is a requirement of OSHA that if a warning label is no longer legible that it must be changed. Mr. Van Hook went

on to state that the lift truck still had separate warning labels in two different locations on the mast regarding "pinching" along with several references in the operator's manual indicating that no part of a body should be placed into the mast structure at anytime. Ultimately, Mr. Van Hook testified that he believed the lift trucks manufactured by Defendant MCFA were safe.

Clearly, Defendants have made a prima facie showing of entitlement to judgment as a matter of law, by demonstrating that the lift truck was not defective when it left MCFA's control, sufficient warnings existed and that there were other causes of the accident not attributable to the lift truck (*see, Olan v Farrell Lines, Inc.*, 64 NY2d 1092 [1985]; *Geddes v Crown Equip. Corp.*, 273 AD2d 904 [4th Dept 2000]). Thereby, shifting the burden to the Plaintiffs to produce evidentiary material in admissible form establishing the existence of a factual issue requiring a trial of the action (*see, Zuckerman v City of New York, supra*; *Mfrs. & Traders Trust Co. v True-Tone Sound*, 288 AD2d 951[4th Dept 2001]).

In response, the Plaintiffs assert that Defendants are not relieved of liability in spite of the fact that there was a substantial modification made to the lift truck. The Plaintiffs allege an additional design defect regarding the location of the mast controls as well as a failure to warn against the foreseeable modification of the seat safety interlock switch. In support of their position, the Plaintiffs have submitted the expert affidavit of a professional engineer, Thomas A. Berry, P.E. Mr. Berry inspected the subject lift truck and provided extensive detail regarding the location of the "mast controls" and the lack of any "shield" or "guard" to prevent against the hazard of inadvertent activation. Mr. Berry opined that MCFA's reliance solely on the seat safety interlock switch was inadequate especially since MCFA knew or should have known that users could disable the device with relative ease. Mr. Berry goes on to conclude that the subject lift

truck was defective and unsafe, in that, it failed to properly eliminate the foreseeable hazard and/or misuse as well as protect and/or warn the operator from such hazard.

It is well settled that "material alterations at the hands of a third party which work a substantial change in the condition in which a product was sold by destroying the functional utility of a key safety feature, however foreseeable that modification may have been, are not within the ambit of a manufacturer's responsibility" (*Magee v E. W. Bliss Co., Div. of Gulf & Western*, 120 AD2d 926 [4th Dept 1986]). A review of Mr. Berry's affidavit fails to overcome the undisputed fact that had the seat safety interlock switch not been bypassed the accident would not have happened regardless of the placement of the mast controls (*see, Bouter v Durand-Wayland, Inc.*, 221 AD2d 902 [4th Dept 1995]; *Frey v Rockford Safety Equipment Co.*, 154 AD2d 899 [4th Dept 1989]). In fact, Mr. Berry concedes that the bypassed switch was a substantial factor in causing the injuries to the Plaintiff. Notwithstanding, Mr. Berry claims that the lift truck was defective and unsafe due to the location of the mast controls and/or the lack of a guard or shield over such controls. However, such opinion was not supported by foundational facts, such as a deviation from industry standards or statistics showing the frequency of injuries resulting from the design of the lift truck (*see*, *Rutherford v Signode Corp.*, 11 AD3d 922 [4th Dept 2004]).

The law is clear that a manufacturer's duty does not extend to designing a product that is impossible to abuse nor incorporating safety features into its product so as to guarantee that no harm will come to every user of its product (*Robinson v Reed-Prentice Div. of Package Machinery Co.*, 49 NY2d 471 [1980]). Further, there is no evidence in the record to establish that the subject lift truck was intentionally designed by MCFA to permit its operation with the seat safety interlock switch disabled (*see, Lopez v Precision Papers*, 67 NY2d 871 [1986];

Moore v Deere & Co., 195 AD2d 1044 [4th Dept 1993]). As a result, the Court finds the Plaintiffs' papers are insufficient to raise an issue of fact as to the dismissal of the strict products liability claim.

Though a manufacturer is under no duty to design a product so that its safety devices may not be disabled, it may be liable for a failure to warn of the consequences of using the machine when the safety devices are rendered inoperative (*Liriano v Hobart Corp.*, 92 NY2d 232 [1998]; *Gian v Cincinnati Inc.*, 17 AD3d 1014 [4th Dept 2005]). Defendants assert that the Plaintiff who was an experienced lift truck operator according to his testimony as well as the job application he submitted to SPS should have appreciated the danger of placing his body between the mast and the overhead guard of the lift truck. Despite the fact that some warning labels may have been missing and/or worn, Defendants point to the fact that the subject lift truck still had separate warning labels in two different locations on the mast regarding "pinching". Thus, the Defendants claim that there was no duty to warn given that the danger was open and obvious. The Court agrees.

It is well settled that there is no duty to warn of an open and obvious danger of which the end user is actually aware or should have been aware as a result of ordinary observation or as a matter of common sense (*see, Cwiklinski v Sears, Roebuck & Co., Inc.*, 70 AD3d 1477 [4th Dept 2010]; *Dunn v Black Clawson Co., Inc.*, 38 AD3d 1212 [4th Dept 2007]; *Felle v W.W. Grainger, Inc.*, 302 AD2d 971 [4th Dept 2003]; *Conn v Sears Roebuck & Co.*, 262 AD2d 954 [4th Dept 1999]). Significantly, the Plaintiff testified to having had several years of experience operating sit down forklifts and being familiar with seat switch and aware that such device is intended to cut off all the machines power in the event that the operator leaves the seat. The Plaintiff further

acknowledged to having seen warning labels on forklift trucks but could not recall actually reading any of them though the Plaintiff conceded that it was not the "best idea" to get out of the operator's seat while a load was in the air.

Under these circumstances, the Court concludes that any additional or different warnings by MCFA would have added nothing to the Plaintiff's appreciation of the danger in leaving the operator's seat knowing the power was not shut off and placing his body between the mast and the overhead guard of the lift truck (*see generally, Liriano v Hobart Corp., supra*; *Hall v Husky Farm Equip., Ltd.*, 92 AD3d 1188 [3rd Dept 2012]; *Fisher v Flanigan*, 89 AD3d 1398 [4th Dept 2011]; *Faery v City of Lockport*, 70 AD3d 1375 [4th Dept 2010]; *Robinson v Barone*, 48 AD3d 1179 [4th Dept 2008]).

All other allegations asserted by the Plaintiffs against the Defendants not specifically addressed herein have been considered by the Court and are found to be without merit.

Accordingly, the motions for summary judgment by Defendants MCFA, BLT and Mullen requesting dismissal of the Plaintiffs' Complaint are granted. Defendants Prolift, Inc., and Nuttall motions are also granted as previously set forth herein.

The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

This constitutes the Judgment and Order of this Court and shall be filed as such.

RALPH A. BONIELLO, III.
Supreme Court Justice

Dated: August 2, 2013
Niagara Falls, New York

GRANTED

AUG 2 _ 2013

BY: CYNTHIA A. WARREN
COURT CLERK