Benkov v TH Outdoor & Events, LLC
2013 NY Slip Op 32108(U)
September 5, 2013
Sup Ct, New York County
Docket Number: 101872/10
Judge: Debra James
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[* 1]

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

PRESENT: DEBRA A. JAMES Justice — PART 59

GERRI BENKOV and CHARLES BENKOV,

Plaintiffs,

- v -

TH OUTDOOR & EVENTS, LLC, CAMPBELL SOUP COMPANY, TIME INC., FLEXCON INC. and GRAPHITEK, INC.,

Defendants.

Index No.: 101872/10

Motion Date: 11/23/2012

Motion Seq. No.: 01, 02, 03

Motion Cal. No.: _____

The following papers, numbered 1 to 5 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1, 2, 3
Answering Affidavits - Exhibits	4
Replying Affidavits - Exhibits	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

In this negligence action, plaintiff Gerri Benkov ("Gerri") seeks damages for personal injuries she suffered as a pedestrian on a public sidewalk, located on the eastside of Seventh Avenue and which adjoined the building known as 1540 Broadway, New York, New York.

Plaintiff Gerri alleges that on October 3, 2009 as she walked with her husband in rainy weather, she slipped on a vinyl

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SETTLE/SUBMIT ORDER/JUDG.

floor graphic decal containing an advertisement for defendant Campbell Soup Company, affixed to the sidewalk. She alleges that defendants were negligent in either producing the defective floor graphic, which was unsafe, hazardous, dangerous and slippery ("it felt like ice") or causing such floor graphic to be placed on the public sidewalk.

Defendants Campbell Soup Company (Motion Sequence No. 1), Time Inc. (Motion Sequence No. 2), and Flexcon Co., Inc. (Motion Sequence No. 3) move for summary judgment dismissing the complaint and cross claims against each, respectively, which motions are hereby consolidated for disposition. Plaintiffs oppose the motions. Defendant Graphitek, Inc. ("Graphitek") opposes the motion of Campbell Soup Company to the extent that Campbell Soup Company seeks summary judgment on its cross claim for indemnification against Graphitek.

The alleged facts, viewed in the light most favorable to the plaintiffs as the court must in determining the motions, are as follows.

In July 2009, defendant Time, Inc. ("Time") asked Campbell Soup Company (Campbell Soup), through its media agent Media Edge, if Campbell Soup would be interested in promoting its Select Harvest soup brand at Farmer's Market events that were to held in various cities, including Union Square in New York City during the weekend of October 3-4, 2009. If Campbell Soup chose to

participate, Time would produce Select Harvest promotional cards to be handed out at the events, and would produce "Select Harvest street decals directing pedestrians to the market", which are also known as "street graphics" or "sidewalk graphics". This offer was made in consideration of the significant advertising space that defendant Campbell Soup had purchased in Time, Inc.'s Cooking Light Magazine. Campbell Soup agreed to participate in the Union Square Farmers Market event. Campbell Soup's authorization was needed for any of the Select Harvest media print that was used in the promotional campaign. Although Campbell Soup could have limited the campaign to media print other than sidewalk graphics, Campbell Soup chose to go forward with the sidewalk graphics as well.

Defendant TH Outdoor & Events LLC ("TH Outdoor") is an outdoor advertising company that does "brand ambassador staffing programs, projection media, and street level media." Such advertising includes placing graphics on sidewalks ("street graphics"). On August 7, 2009, TH Outdoor & Events, LLC (TH Outdoor) and Time entered into a contract for TH Outdoor to place two street graphics marketing Campbell Soup "Select Harvest Natural Soup" products in the area of Times Square, New York City, which directed pedestrians to the Union Square Farmer's Market where the Select Harvest brand was being promoted.

TH Outdoor contracted with defendant Graphitek, Inc. to manufacture or produce the street graphics. Graphitek admits that in producing the street graphic in question, it "mistakenly" applied a "Clear Velvet" over laminate manufactured by defendant Flexcon, which was not recommended for use on outdoor street graphics, but was for use on indoor floor graphics only, notwithstanding that TH Outdoor had ordered the graphics with the recommended Flexcon "Frosty Clear Pebble" over laminate, which was designed for outdoor street graphics because of its reported slip resistance under wet conditions. There is no dispute that for safety reasons, the Clear Velvet over laminate was not suitable for use on an outdoor street graphic, as it was not designed to be slip resistant even when dry, let alone when wet and/or exposed to wet weather conditions.

It is also undisputed that none of the defendants obtained a permit or permission from the City of New York for the installation of the subject floor graphic on the public sidewalk. Plaintiffs allege that the defendants knowingly installed the street graphic in a "guerilla manner", i.e. illegally, without a permit having been sought, let alone acquired.

New York City Administrative Code § 19-138 states, "Except as otherwise provided by law, it shall be unlawful for any person to deface any street by...attaching thereto, in any manner, any advertisement or other printed matter." No defendant sought

consent from the New York City Commissioner of Transportation to affix the street graphic and pay the fee associated with such permit under New York City Rules & Regulations, Department of Transportation (34 RCNY) § 7-04(a). Graphitek admits that its street graphic did not comply with 34 RCNY 7-04 (25) "Sidewalk plaque or logo", which states, inter alia, "the plaque or logo shall consist of material that provides a stable, firm and slip-resistant surface and shall be installed flush with the sidewalk surface."

None of the movants have met their burdens of showing that there is no issue of fact as a matter of law as to their liability to plaintiffs or their right to indemnification or contribution among themselves.

As for plaintiffs' common law tort claims against Campbell Soup and Time, this court agrees with plaintiffs that there are issues of fact as to whether Campbell Soup and Time were responsible, either directly or vicariously, for the application of the street graphic to the sidewalk. Plaintiffs cite the deposition testimony of witnesses that state that Campbell Soup in the first instance authorized and Time directed that the street graphic be affixed to the public sidewalk. Plaintiffs are correct that the facts of Walsh v Super Value, Inc., 76 A.D.3d 371 (2d Dept 2010), are analogous. In vacating the trial court's grant of summary judgment dismissing the complaint against

defendants Shell Oil Company and Shell Oil Products Company ("Shell"), the appellate court in Walsh reasoned that as Shell, which was the franchiser of the gas station, directed the use of the paint on the curb on which plaintiff slipped, there remained an issue of fact whether Shell knew or should have known that the particular paint created a dangerous condition. The Walsh court ruled that Shell Oil, along with the defendants gas station owner and tenant, were either directly or vicariously responsible for the application of the paint to the curb. So too here, Campbell Soup and Time owed a duty to plaintiff to take care when utilizing the sidewalk for the advertisement campaign, specifically to direct that the any floor graphic be affixed to the sidewalk only with the requisite care. Plaintiff comes forward with evidence, circumstantial and otherwise (see Wesp v Carl Zeiss, Inc., 11 A.D.3d 965, 968 [4th Dept 2004]), that having authorized that a street graphic be affixed to a public thorough fare without a permit and contrary to the New York City rules, Campbell and/or Time knew or should have known that the street graphic was slippery.

Nor is Campbell Soup entitled to a judgment of common law indemnification on its cross claim against Graphitek, as a matter of law. This court concurs with defendant Graphitek that Campbell Soup is admittedly a party not involved in the chain of distribution of the graphic advertising its product, and in fact

does not even occasionally sell the product in question, and therefore cannot be cast in damages for strict products liability. Sukljian v. Charles Ross & Son Co., Inc., 69 NY2d 89, 98 (1986). Although cross claims of contribution and apportionment of liability among the defendants must be determined at trial, this court concurs with Graphitek that because Campbell Soup cannot be held strictly or vicariously liable by imputation of law in the case at bar, Campbell Soup is not entitled to common law indemnification against Graphitek, assuming *arguendo* that plaintiffs recover from Graphitek on a theory of products liability. See Rogers v Dorchester Assoc., 32 N.Y.2d 553, 564 n 2 (1973).

Nor has Flexcon established its entitlement to summary judgment dismissing the complaint and all cross claims against it, as a matter of law. Plaintiff is correct that there are issues of fact with respect to whether Flexcon should be held strictly liable for plaintiff Gerri's injury. Among the issues that must be resolved by the trier of fact are whether it was reasonably foreseeable that the Clear Velvet finish, which was manufactured by Flexcon for use on indoor floor graphics only, would be mistakenly applied to the graphic in question and ultimately placed on an outdoor walking surface. See Lugo v LJN Toys, Ltd., 75 N.Y.2d 850 (1990).

Accordingly, it is

ORDERED that the motion of defendant Campbell Soup Company (Motion Sequence Number 001) and the motion of defendant Time Inc. (Motion Sequence Number 002) for summary judgment are denied in all respects; and it is further

ORDERED that the motion of defendant Flexcon, Inc. (Motion Sequence Number 003) for summary judgment dismissing the complaint and cross claims is denied in all respects; and it is further

ORDERED that should this action not be settled in Mediation-1, the parties are directed to attend a pre-trial conference on November 14, 2013 at 2:30 P.M., in IAS Part 59, Room 103, 71 Thomas Street, New York, New York 10013, to set a trial date.

This is the decision and order of the court.

Dated: September 5, 2013 ENTER:

DEBRA A. JAMES J.S.C.