

<b>Rivera v A.L. Bazzini Co., Inc.</b>
2018 NY Slip Op 30315(U)
January 8, 2018
Supreme Court, Bronx County
Docket Number: 305276/2008
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 19

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JASON RIVERA,

Plaintiff,

DECISION AND ORDER

Index No. 305276/2008

- against -

A.L. BAZZINI CO., INC.,

Defendant.

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A.L. BAZZINI CO., INC.,

Third-Party Plaintiff,

Third-Party Index No.  
84110/2013

- against -

SAFELINE, INC.,

Third-Party Defendant.

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PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated June 22, 2017 of defendant and third-party plaintiff A.L. Bazzini Co., Inc. and the affirmation, affidavits and reports, exhibits, and memorandum of law submitted in support thereof (Motion Sequence #5); the notice of motion third-party defendant Mettler-Toledo, LLC sued herein as Safeline, Inc. and the affirmation, affidavit, exhibits and memorandum of law submitted in support thereof (Motion Sequence #6); the affirmation in opposition dated November 15, 2017 of defendant and third-party plaintiff A.L. Bazzini Co., Inc. and the affidavit and exhibits submitted therewith; the reply affirmation dated November 14, 2017 of third-party defendant Mettler-Toledo, LLC sued herein as Safeline, Inc. and the exhibit submitted therewith; and due deliberation; the court finds:

Plaintiff commenced this action sounding in negligence and strict products liability to recover

damages for injuries sustained on June 29, 2005 when he bit into a metallic object embedded in a Honey Nut & Seed Crunch bar (“crunch bar” or “crunch product”) manufactured and packaged by defendant A.L. Bazzini Co., Inc. (“Bazzini”). Plaintiff claims he sustained fractures to teeth #14 and #15; aggravation and exacerbation of a seizure condition caused by sleep deprivation due to dental pain; post-traumatic stress disorder; panic disorder with agoraphobia; and major depressive disorder. Bazzini asserted claims for contribution and contractual or common-law indemnification against third-party defendant Mettler-Toledo, Inc. sued herein as Safeline, Inc. (“Safeline”), the manufacturer of a metal detector Bazzini used to scan its products.

Bazzini (Motion Sequence #5) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint on grounds that (1) plaintiff cannot demonstrate Bazzini was negligent in producing the crunch bar and (2) plaintiff’s claimed injuries were unrelated to this incident. Submitted on Bazzini’s motion are the pleadings, deposition transcripts, medical records, and affidavits or affirmed reports from Joseph R. Morris, D.D.S., Daniel J. Feuer, M.D., and Philip R. Muskin, M.D. Safeline (Motion Sequence #6) moves for summary judgment dismissing the third-party complaint on the grounds that (1) there is no evidence Safeline was negligent and (2) there is no valid claim for contractual indemnification. Safeline submits the pleadings, discovery responses, deposition transcript excerpts, and an affidavit from John Smehyl. The two motions are consolidated for disposition.

Plaintiff testified that he purchased a crunch bar from a store in the building where he worked. After he put a piece in his mouth, “there was just something extremely hard that I had a hard time biting down on.” He heard a crack but kept chewing until the object became lodged between his gums. He spit the object out into his hand and saw “something metallic like a fresh penny.” He complained immediately of sharp pain and soreness in his mouth. X-rays taken the next day and three months later did not show a fracture. Additional x-rays taken four years after the incident revealed a fractured tooth. Plaintiff underwent a root canal procedure and the pain in his mouth ceased. Plaintiff suffered from

seizures prior to the incident and he treated with anticonvulsant medication. After the incident, he was unable to sleep due to dental pain and the number of seizures he experienced increased. His treating providers attributed the increase to a disrupted sleep pattern. The number of seizures he experienced subsided after the root canal procedure in 2009.

Bahir Karim ("Karim") created Bazzini's quality control program in 2002. He served as Bazzini's quality assurance manager for 10 years and supervised a staff of three. Karim described the process of how Bazzini used metal detectors to ensure that the finished crunch product contained no metal. The cooked crunch product left the production line in large squares. The squares were packed in layers in bulk boxes and each bulk box weighed 25 or 30 pounds. Each box passed through a Safeline metal detector. If metal was detected, an audible alarm sounded and the conveyer belt stopped. A supervisor unpacked the box and passed each layer through the detector until the contaminated layer was found. The contaminated layer was discarded and the box was re-packed with a new layer. The supervisor ran the entire box through the detector once more. If the crunch product was to be sold in smaller pieces, the squares, after passing through the first metal detector, were placed into a second machine. The second machine inserted each cut piece into a package and sealed it. Each package then passed through a second metal detector. If metal was detected, an alarm sounded and the machine blasted the contaminated package off the conveyor belt with a jet of air. Karim and his staff tested the metal detectors four times a day by passing cards made of ferrous metal, nonferrous metal, and stainless steel through each machine. They recorded the daily results on a weekly log. If a machine detected metal in a product, the machine was tested before it was put back into use. Karim checked the weekly log after he was notified of plaintiff's incident but found nothing unusual. He has never seen a copper-colored metal object in any of the products Bazzini produced. Karim also physically inspected the raw products Bazzini purchased from its vendors. The vendors provided Karim with letters stating that their products had been passed through metal detectors before they were shipped to Bazzini.

Bazzini's commodity buyer Thomas Rontiris ("Rontiris") testified that he could not recall ever receiving a claim for a metal object found in a Bazzini product in the 10 years he handled Bazzini's insurance claims. Although he did not supervise Karim or the quality assurance department, he was familiar with that department's general procedures. Rontiris testified that the crunch product passed through a metal detector at least once and that crunch product sold in 3-ounce packages passed through a metal detector two times. Bazzini used three cards made of metal to test its detectors. Rontiris could not recall any machine failing those tests.

"A product may be defective when it contains a manufacturing flaw, is defectively designed or is not accompanied by adequate warnings for the use of the product." *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 237, 700 N.E.2d 303, 305, 677 N.Y.S.2d 764, 766 (1998) (internal citations omitted). A plaintiff injured by a defective product may assert claims for express or implied contract, negligence and strict products liability against the manufacturer. *See Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102, 450 N.E.2d 204, 463 N.Y.S.2d 398 (1983). "[I]n strict products liability cases involving manufacturing defects, the harm arises from the product's failure to perform in the intended manner due to some flaw in the fabrication process." *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 257 n 3, 662 N.E.2d 730, 639 N.Y.S.2d 250 (1995). "[A] defendant seeking the dismissal of a strict products liability claim based on a manufacturing defect must submit admissible proof establishing, as a matter of law, that the product was not defective." *McArdle v. Navistar Intl. Corp.*, 293 A.D.2d 931, 932, 742 N.Y.S.2d 146, 148 (3d Dep't 2002) (internal citation omitted). Plaintiff must demonstrate "the existence of a triable issue as to whether, in fact, there was a defect." *Id.* "There is almost no difference between a prima facie case in negligence and one in strict liability." *Preston v. Peter Luger Enters., Inc.*, 51 A.D.3d 1322, 1325, 858 N.Y.S.2d 828, 832 (3d Dep't 2008).

Here, Bazzini's witnesses described the quality control process for the crunch product in detail and explained that each 3-ounce crunch bar, such as the one purchased by plaintiff, passed through two

different metal detectors before the crunch bar left the facility. The metal detectors were tested regularly and Rontiris could not recall receiving any claim other than plaintiff's describing a metal object found in a Bazzini product. Bazzini has established that the crunch bar was not defective when it left the facility. *See Rabon-Willimack v. Robert Mondavi Corp.*, 73 A.D.3d 1007, 905 N.Y.S.2d 190 (2d Dep't 2010); *Tardella v. RJR Nabisco*, 178 A.D.2d 737, 576 N.Y.S.2d 965 (3d Dep't 1991).

Bazzini has also demonstrated the lack of a causal connection between plaintiff's injuries and the incident. Dr. Morris concluded there was no evidence of a traumatic injury in the dental records. Drs. Feuer and Muskin opined there was no support for an exacerbation of plaintiff's underlying seizure disorder in the records. Dr. Feuer stated that dental pain and dental treatment were not considered primary or secondary risk factors for seizures. Dr. Muskin opined within a reasonable degree of medical certainty that plaintiff's psychological injuries and his need for treatment were unrelated to the incident. Dr. Muskin attributed plaintiff's seizures to the presence of scar tissue related to brain surgery performed when plaintiff was a teenager. The records reflected a disruption in sleep pattern, not sleep deprivation, and thus the increased frequency of seizures was not related to sleep deprivation. Plaintiff continued to complain of sleep deprivation even after his dental pain ended. The reduction in the number of seizures plaintiff experienced also coincided with an increase in the dosage of his anticonvulsant medication. The Mount Hope Family Practice records noted a prior history of "psych adm. in past due to anxiety" but this history was excluded in the report prepared by his treating therapist who diagnosed plaintiff with panic disorder and post-traumatic stress disorder. His psychologist considered plaintiff's symptoms of dizziness, trembling and imbalance as evidence of panic disorder but plaintiff reported experiencing those same symptoms prior to 2005.

Plaintiff has submitted no opposition. Thus, his complaint is dismissed.

Given the dismissal of the complaint against Bazzini, Safeline's motion for summary judgment dismissing the third-party complaint is denied as moot. *See Turchioe v. AT&T Communications*, 256

A.D.2d 245, 682 N.Y.S.2d 378 (1st Dep't 1998).

Accordingly, it is

ORDERED, that the motion of defendant A.L. Bazzini Co., Inc. for summary judgment dismissing plaintiff's complaint (Motion Sequence #5) is granted, without opposition; and it is further

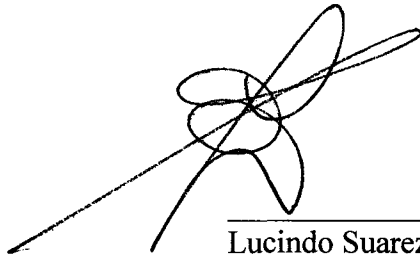
ORDERED, that the motion of third-party defendant Mettler-Toledo, LLC sued herein as Safeline, Inc. for summary judgment dismissing the third-party complaint (Motion Sequence #6) is denied as moot; and it is further

ORDERED, that the clerk of the court is directed to enter judgment in favor of defendant A.L. Bazzini Co., Inc. dismissing plaintiff's complaint; and it is further

ORDERED, that the clerk of the court is directed to enter judgment in favor of third-party defendant Mettler-Toledo, LLC sued herein as Safeline, Inc. dismissing the third-party complaint.

This constitutes the decision and order of the court.

Dated: January 8, 2018



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Lucindo Suarez, J.S.C.