At an IAS Term, Part 78 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 31st day of October, 2019.

PRESENT:

HON. LAWRENCE KNIPEL,

Justice.

----------X

MORRIS PERRIN AND SHERRONDA PERRIN,

Plaintiffs,

- against -

Index No. 502809/12

KEY ENGINEERING SOLUTIONS, LLC, AND NIPPON PGM AMERICA, INC. (U.S.A.),

Defendants.

----------X

The following e-filed papers read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	73-87 88-91, 93-113, 116
Opposing Affidavits (Affirmations)	118-119 120-126
Reply Affidavits (Affirmations)	127 128
Plaintiffs' Memorandum of Law	92

Upon the foregoing papers, in this action by plaintiffs Morris Perrin (plaintiff) and Sherronda Perrin (Sherronda) (collectively, plaintiffs), defendant Key Engineering Solutions, LLC (Key Engineering) moves, under motion sequence number seven, for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiffs' complaint as against it. Plaintiffs move, under motion sequence number eight, for an order granting them partial summary judgment against Key Engineering on the issue of liability.

Facts and Procedural Background

Key Engineering is a company that was engaged in the business of recovering precious metals from used catalytic converters.[1] John Bruno (Bruno) is the president and sole member of Key Engineering. Key Engineering used cutting machines, which are also known as shears, decanners, and guillotines, in order to cut open the catalytic converters to obtain the precious metals inside of them. These cutting machines were built by Bruno for Key Engineering for use in Key Engineering's business.

When Bruno took a general manager position at another company, Nippon PGM America, Inc. (U.S.A.) (Nippon), Key Engineering ceased operating and wound down its business. Since there would no longer be any need for the cutting machines that Bruno had built, Bruno initially planned to keep them in storage until he could figure out what to do with them. While Bruno was working as the general manager for Nippon, he was approached by Steve Shalit (Shalit), an owner of Catalytic Converter Corporation, which was in the same line of business as Key Engineering had been. According to Bruno, Shalit requested that Bruno sell Shalit the cutting machines that Bruno had built for use in his business at Key Engineering. Bruno agreed to do so, and Key Engineering sold four of its cutting machines to Catalytic Converter Corporation. Key Engineering also sold two of its cutting machines to a company called Multimetco, and one of its cutting machines to a

[1]The precious metals platinum, palladium, and rhodium are in catalytic converters to reduce emissions of harmful compounds contained in car exhaust. Catalytic converters are required on most U.S. gasoline-powered vehicles.

company called ELVCR. Bruno asserts that all of these cutting machines that were sold were essentially salvage since they were not otherwise being used and were kept in storage.

Plaintiff was employed by Catalytic Converter Corporation. On October 6, 2011, plaintiff, during the course of his employment, was cutting a catalytic converter using one of the cutting machines which Key Engineering sold to Catalytic Converter Corporation. The cutting machine utilized a hydraulically driven blade to cut open catalytic converters in order to retrieve the precious metals from inside of them.

Plaintiff placed the catalytic converter, known as rabbit ears because it had pipes curved around it, into the cutting machine. Plaintiff held the catalytic converter in place by holding one of the pipes with his left hand and pulled the lever, which activated the blade, with his right hand. When the blade hit the catalytic converter, the catalytic converter and the pipe which was attached to it shot out and struck plaintiff in the face, causing him to sustain injuries.

On September 14, 2012, plaintiff, and his wife, Sherronda, filed this action against Nippon. On January 2, 2013, plaintiffs filed a supplemental summons and amended complaint, adding Key Engineering as a defendant. Plaintiffs' complaint, as amended,[2] alleges that Key Engineering was in the business of manufacturing cutting machines used to cut open catalytic converters to recover and collect platinum metals. Plaintiffs' complaint

[2]The court shall refer to plaintiffs' amended complaint as plaintiffs' complaint.

further alleges that Key Engineering was in the business of selling and distributing cutting machines for commercial use.

Plaintiffs claim that the cutting machine used by plaintiff contained a latent design defect and failed to provide adequate warnings of this defect. Plaintiffs assert that the cutting machine was an unreasonably dangerous and defective product. Plaintiffs' complaint alleges a first cause of action for negligence, a second cause of action for breach of warranties, a third cause of action for strict products liability, and a fourth cause of action for loss of consortium on behalf of Sherronda.

Key Engineering interposed an answer dated August 7, 2013. Discovery has been completed, including taking plaintiff's deposition and taking Bruno's deposition, on behalf of Key Engineering. On January 30, 2018, plaintiffs filed their note of issue. On July 11, 2018, plaintiffs' claims against Nippon were discontinued, with prejudice. By an order dated August 17, 2018, the time to file a motion for summary judgment was extended to October 16, 2018. On October 16, 2018, Key Engineering and plaintiffs filed their instant motions for summary judgment.

Discussion

Strict Products Liability

"Where a defective product is sold by a seller, dealer or distributor engaged in its normal course of business, the burden of strict liability has been imposed" (*Gebo v Black Clawson Co.*, 92 NY2d 387, 392 [1998]). "Similarly, the manufacturer of a defective

product engaged in its normal course of business may also be held strictly liable for injuries caused by a product, regardless of privity, foreseeability or the exercise of due care" (*id.*; *see also Jaramillo v Weyerhaeuser Co.*, 12 NY3d 181, 188 [2009]; *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 106 [1983]; *Codling v Paglia*, 32 NY2d 330, 337 [1973]).

The imposition of strict products liability on manufacturers and sellers "rests largely on considerations of public policy" (*Sukljian v Ross & Son Co.*, 69 NY2d 89, 94-95 [1986]; *see also Jaramillo*, 12 NY3d at 188). These policy considerations as to the manufacturers are that they "most often 'alone ha[ve] the practical opportunity, as well as a considerable incentive, to turn out useful, attractive, but safe products'" (*Sukljian*, 69 NY2d at 95, quoting *Codling*, 32 NY2d at 341). As to the sellers, which sell the product in their normal course of business, they, "by reason of continuing relationships with manufacturers, are most often in a position to exert pressure for the improved safety of products and can recover increased costs within their commercial dealings, or through contribution or indemnification in litigation" (*Sukljian*, 69 NY2d at 95). These policy considerations, however, which "have been advanced to justify the imposition of strict liability on manufacturers and sellers in the normal course of business obviously lack applicability in the case of a party who is not engaged in the sale of the product in issue as a regular part of its business" (*id.*).

Thus, the Court of Appeals has expressly held that a casual seller is not subject to strict products liability (*Jaramillo*, 12 NY3d at 189; *Gebo*, 92 NY2d at 393; *Stiles v Batavia Atomic Horseshoes*, 81 NY2d 950, 951 [1993], *rearg denied* 81 NY2d 1068 [1993]; *Sukljian*,

69 NY2d at 96). The Court of Appeals has explained that strict products liability should not be imposed on the casual seller, as a matter of public policy, since "[t]he casual or occasional seller of a product does not undertake the special responsibility for public safety assumed by those in the business of regularly supplying those products, nor is there the corollary element of forced reliance on that undertaking by purchasers of such goods" (*Sukljian*, 69 NY2d at 95; *see also Jaramillo*, 12 NY3d at 187).

The Court of Appeals has also specifically held that a casual manufacturer cannot be held subject to strict products liability (*see Gebo*, 92 NY2d at 393). The Court of Appeals has explained that a casual manufacturer, who builds a product for its own use, and not to sell or transfer the product to another, cannot be "held to the same standard as a product manufacturer' (*id.*). Thus, a defendant's mere act of design and assembly of a product, without being in the business of manufacturing this product and offering it for sale as part of the normal course of its business, "does not without more make it equivalent to a product manufacturer" (*id.*).

In support of its motion for summary judgment, Key Engineering argues that it is only a casual manufacturer and casual seller of the cutting machine. Key Engineering asserts that it manufactured the cutting machine solely for its own use in furtherance of its business of obtaining fine metals from used catalytic converters. Key Engineering further asserts that it was not a manufacturer of cutting machines for sale to the public and only sold the cutting machine at issue when Bruno took a general manager position at Nippon and Key

Engineering ceased operating as a business. Key Engineering explains that the cutting machines were not manufactured to enter them into the stream of commerce.

Bruno, in his sworn affidavit, attests that at no time did Key Engineering market for sale, offer for sale to the public, or advertise for sale, cutting machines for cutting open catalytic converters. Bruno also attests that at no time did Key Engineering service, maintain, or repair such cutting machines for other businesses. Bruno states that the cutting machines built by Key Engineering were for its own use, and each cutting machine was a unique machine, assembled based upon his need at the time, using parts either ordered from various metal fabrication companies and/or what spare parts he had on hand at the time that he built the cutting machine. Bruno sets forth that none of the cutting machines were built to order or otherwise built for sale.

Bruno explains that in his position as the general manager of Nippon, he came into contact with companies that were also involved in the business of recovering precious metals from scrap catalytic converters, including Catalytic Converter Corporation, Multimetco and ELVCR. Bruno sets forth that while Key Engineering was no longer operating, he sold off the inventory of cutting machines that he had built and used at Key Engineering, specifically, four cutting machines to Catalytic Converter Corporation, two cutting machines to Multimetco, and one cutting machine to ELVCR, and that he also included spare parts and blades as part of these sales. Bruno explains that the used cutting machines that were sold

were essentially salvage since Key Engineering was not operating during this time and was not using the cutting machines.

Bruno's statements in his affidavit are consistent with his deposition testimony. Bruno testified, at his deposition, that Key Engineering was in "mothballs" and was not doing any business anymore when he sold the cutting machines (Bruno's April 18, 2018 deposition tr at 41-42). Thus, Key Engineering has made a prima facie showing of its entitlement to summary judgment, shifting the burden to plaintiffs to raise a genuine triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

In opposition, plaintiffs argue that Key Engineering was not a casual seller or a casual manufacturer. Plaintiffs contend that Key Engineering held itself out as an expert in the field of designing, developing, engineering, and building cutting machines for the processing of catalytic converters and then sold multiple cutting machines to Catalytic Converter Corporation. As support for this contention, plaintiff points to Bruno's website, which states that Bruno "started his business [Key Engineering Solutions] as a vehicle to do design and development work, engineer and build machinery for the processing of catalytic converters and sampling and analysis."

This argument is rejected. This statement on Bruno's website does not indicate that Key Engineering was in the business of manufacturing cutting machines and selling the cutting machines manufactured by it, or that it regularly offered the cutting machines that it manufactured for sale in the stream of commerce. Rather, this statement only relates to Key

Engineering's use of the cutting machines in its own business. Key Engineering has shown that the only sales of cutting machines made by it were incidental, and occurred during Key Engineering's winding down of its business and not in its regular course of its business.

Plaintiffs, in contending that Key Engineering held itself out as having expertise in manufacturing the cutting machines which its sole member, Bruno, designed and built, also rely upon Bruno's deposition testimony that Catalytic Converter Corporation specifically wanted the cutting machines that Key Engineering manufactured because they were better machines (Bruno's April 18, 2018 deposition tr at 70). Plaintiffs point out that Catalytic Converter Corporation liked Key Engineering's cutting machines so much that it wound up purchasing three more machines from Key Engineering after purchasing the first one (*id.* at 73).

Bruno's deposition testimony, however, actually specified that Catalytic Converter Corporation wanted to purchase the cutting machines from Key Engineering because it knew that Bruno had designed the cutting machines, and Catalytic Converter Corporation was familiar with prior cutting machines that Bruno had built for another company, A-1 Specialized Services and Supplies (A-1) (*id.* at 69). Such deposition testimony is irrelevant to the issue of whether Key Engineering was a casual manufacturer. Bruno's deposition testimony simply shows that Catalytic Converter Corporation sought out Key Engineering to buy its cutting machines when it heard that it was winding down its operations.

Bruno testified, at his deposition, that Catalytic Converter Corporation purchased one cutting machine from Key Engineering, and after using it, got rid of its own old cutting machines and bought three more cutting machines from Key Engineering in a separate transaction, all over a period of a couple of months in 2009 (*id.* at 73-74). Bruno further testified that all of the cutting machines purchased by Catalytic Converter Corporation were used machines and were picked up by Catalytic Converter Corporation, and not delivered by Key Engineering (Bruno's June 1, 2018 deposition tr at 47-48, 58, 124). Bruno also testified that Key Engineering sold the remainder of its cutting machines to Multimetco and ELVCR in two separate transactions, and that both of these companies purchased the cutting machines for the purpose of ripping them apart and building their own cutting machines (Bruno's April 18, 2019 deposition tr at 84-86).

In an effort to show that Key Engineering was not a casual manufacturer, plaintiffs note that Key Engineering was formed in 2002, and point to the fact that Key Engineering was providing consulting services to A-1 on "developing, or building machines, or sampling systems and process equipment for their catalysts" (*id.* at 13-14). However, even if[3] Key Engineering provided consulting services to A-1, this does not show that Key Engineering was in the business of manufacturing or selling cutting machines.

---

[3]Key Engineering denies that it provided these consulting services. It claims that Bruno was personally consulting with A-1 from 1992 through 2002, as a member of another company he owned, Industrial Waste Management, at a time before Key Engineering was incorporated (Bruno's April 18, 2018 deposition testimony at 28).

Plaintiffs further point to Bruno's deposition testimony that in the 20 years before Key Engineering was formed, Bruno, individually, and while employed by companies other than Key Engineering, had been involved in the design of "maybe thirty" variations or improvements to the same basic cutting machines (*id.* at 63-65). However, it is undisputed that these cutting machines were for these companies' own internal use and not for sale to the public.

Plaintiffs assert that Bruno testified that some of the cutting machines that were sold to plaintiff's employer, Catalytic Converter Corporation, were designed and developed by Key Engineering, but never utilized by Key Engineering to cut open a catalytic converter (Bruno's June 1, 2018 deposition tr at 52-55). Plaintiffs contend that these cutting machines were sold in an unused condition to Catalytic Converter Corporation. While Bruno's deposition testimony was equivocal as to whether some of the cutting machines had actually been used or were just planning to be used,[4] Bruno unequivocally testified that all of them were manufactured for Key Engineering's own use (*id.* at 56).

Plaintiffs note that the four machines sold to Catalytic Converter Corporation were sold for $25,000 each, and that the three machines sold to the other companies were sold for approximately $30,000 each (Bruno's April 18, 2018 deposition tr at 83-85, 88). However,

---

[4]Bruno testified that the four cutting machines were operating on a limited basis for testing and not being used to cut open catalytic converters in 2003 (Bruno's June 1, 2018 deposition tr at 44). Bruno further testified that some cutting machines were built and planned to be used, and some were running (*id.* at 52-54). Bruno also testified that all four cutting machines sold to Catalytic Converter Corporation were used by Key Engineering (*id.* at 47-48, 58).

it is undisputed that Key Engineering designed the cutting machines for its own use, and that when Key Engineering stopped operating because its sole shareholder, Bruno, took another job at Nippon, the cutting machines were left idle until plaintiff's employer, Shalit of Catalytic Converter Corporation, ran into Bruno at his new job in 2009 and asked him if it could purchase Key Engineering's cutting machines. It was only then that Key Engineering, for the first time since its inception in 2002, engaged in the sales of its excess equipment to plaintiff's employer at its request, and the remaining sales to companies that intended to "rip apart" the cutting machines for parts. Bruno testified, at his deposition, that while he was working for Nippon, whatever work that he had been doing for Key Engineering stopped, and that during the period from 2005 to 2010, he was concentrating his efforts on Nippon, and this is why the cutting machines were sold (*id.* at 42, 46).

Plaintiffs assert that Bruno testified that an employee of Key Engineering helped Catalytic Converter Corporation install the cutting machine at its facility. However, Bruno actually testified that Catalytic Converter Corporation installed the cutting machine, and that Key Engineering merely sent some guys over to help it (Bruno's June 1, 2018 deposition tr at 14). Bruno explained that Catalytic Converter Corporation had an electrician, but had some questions (*id.*). Bruno testified that Catalytic Converter Corporation picked up the cutting machine at Nipon and brought it to its facility (*id.* at 15).

Plaintiffs argue that Key Engineering should not be considered a casual seller or a casual manufacturer because it did not make additions to a cutting machine that it previously

purchased from someone else, nor was its sale of its cutting machines a one-time occurrence. Plaintiff relies on the fact that Key Engineering designed and built its own cutting machines, and that seven of these cutting machines were sold in four different transactions to three different companies over the course of at least a year.

"While no one factor decides whether an entity is a casual manufacturer or seller . . . certainly the [c]ourt must consider the day-to-day business of the defendant[] and whether [it] had previously made or sold [the product at issue]" (*McCarthy v Checchin*, 18 Misc 3d 1134[A], 2004 NY Slip Op 51918[U], *4 [Sup Ct, Clinton County 2004]). Bruno testified that Key Engineering was formed "for the purpose of buying scrap catalytic converters, processing them, and selling the refined precious metals that [were] recaptured from the refining process" (Bruno's April 18, 2018 deposition tr at 46). Key Engineering's day-to-day business was not the sale of the cutting machines. In fact, Key Engineering needed the cutting machines to carry on the very purpose of its business since the cutting machines were used to cut the catalytic converters in order to retrieve the precious metals from them. While Key Engineering designed the cutting machines, it did so for its own use, and the seven sales that occurred all took place in the same year or shortly thereafter, at a time when Key Engineering had ceased doing business.

"[W]here distribution of an allegedly defective product is incidental to [the] defendant's regular business, the principles of strict products liability have no relevance" (*Sukljian*, 69 NY2d at 96; *see also Goldman v Packaging Indus.*, 144 AD2d 533, 536 [2d

Dept 1988]). Here, the sale of the cutting machines were only incidental to Key Engineering's regular business and were made in connection with the winding down of that business. Plaintiffs do not dispute that the cutting machines were not built for market sale in the regular course of Key Engineering's business (*compare Sprung v MTR Ravensburg*, 99 NY2d 468, 474 [2003]). Key Engineering did not engage in sales of the cutting machines as a "regular part of its business" (*Stiles*, 81 NY2d at 951). There is no basis in the undisputed facts to support an inference that Key Engineering, in incidentally disposing of the cutting machines in the manner it did, undertook any special responsibility to the public for product safety, or was perceived by the public as having done so (*see Sukljian*, 69 NY2d at 97). Therefore, there is no basis in public policy for the imposition of strict liability on Key Engineering.

Thus, the court finds that Key Engineering was only a casual seller and a casual manufacturer, which cannot be subject to strict products liability (*see Gebo*, 92 NY2d at 393; *Stiles*, 81 NY3d at 951; *Sukljian*, 69 NY2d at 96; *Hauerstock v Barclay St. Realty LLC*, 168 AD3d 519, 520 [1st Dept 2019]; *McCarthy v Checchin*, 24 AD3d 1080, 1082 [3d Dept 2005], *lv denied* 6 NY3d 709 [2006]). Consequently, summary judgment dismissing plaintiffs' third cause of action for strict products liability against Key Engineering must be granted (*see* CPLR 3212 [b]).

Negligence

With respect to imposing negligence on casual sellers, the Court of Appeals imposes "only a duty to 'warn the person to whom the product is supplied of known defects that are not obvious or readily discernible'" (*Gebo*, 92 NY2d at 393, quoting *Sukljian*, 69 NY2d at 97). Since "the casual seller 'is not part of the regular commercial network for that product,' no greater duties are imposed" (*Gebo*, 92 NY2d at 393, quoting *Sukljian*, 69 NY2d at 97; *see also Hauerstock*, 168 AD3d at 520).

As to the issue of whether negligence may be imposed on a casual manufacturer, the Court of Appeals has held that "the duty of a casual manufacturer, like a casual seller, is also solely "to warn the person to whom the product is supplied of known defects that are not obvious or readily discernible" (*Gebo*, 92 NY2d at 393). Thus, a casual manufacturer is "subject to the same limited duty as a casual seller" (*Sukljian*, 69 NY2d at 97; *see also Gebo*, 92 NY2d at 393).

Bruno, in his sworn affidavit, attests that the cutting machines that Key Engineering sold were only sold to companies engaged in the business of recovering precious metals from scrap catalytic converters, and that these companies were fully aware of the risks attendant to using cutting machines to cut open and retrieve the precious metals from catalytic converters since they were already using similar machines. Bruno asserts that when plaintiff was injured by the cutting machine, the cutting machine had operated as intended, and that plaintiff was injured because he put a noncompatible catalytic converter into the cutting

machine. Bruno states that there is no question that plaintiff was aware of the risk involved with the large catalytic converter since plaintiff testified, at his deposition, that he got it from the "broken bin" (Plaintiff's July 10, 2015 deposition tr at 57).

Bruno testified, at his deposition, that Shalit (who, as noted above, was an owner of Catalytic Converter Corporation) was very familiar with catalytic converters, and he reminded Shalit to avoid the long pipes and to trim the long pipes before using the cutting machine on them because the cutting machine was not really made for them (Bruno's June 1, 2018 deposition tr at 43). Bruno further testified that Shalit agreed, and that Shalit was very familiar with this (*id.*).

Since Key Engineering was a casual seller and a casual manufacturer, it only had a duty to warn Catalytic Converter Corporation, as the purchaser of the cutting machine, of known defects in the cutting machine, which were not obvious, apparent, or readily discernible (*see Gebo*, 92 NY2d at 393; *McCarthy*, 24 AD3d at 1082; *Frisbee v Cathedral Corp.*, 283 AD2d 806, 807 [3d Dept 2001]). Thus, Key Engineering cannot be held liable for a failure to warn of a known defect or obvious risk, of which plaintiff was already aware (*see Gebo*, 92 NY2d at 393; *Sukljian*, 69 NY2d at 97; *Frisbee*, 283 AD2d at 807).

Here, the design defect alleged by plaintiffs is the absence of a guard or similar safety device. Plaintiffs assert that the cutting machine could not be operated safely because there was no guard between the blade and the user's hands, and because the user had to hold the catalytic convertor in place with his or her left hand. According to plaintiffs' expert, Harold

Ehrlich (Mr. Ehrlich), who is an industrial engineer, the cause of plaintiff's injuries was the failure to protect him, as the user of the cutting machine, from the cutting area where the blade met the catalytic convertor. Mr. Ehrlich, in his expert affidavit, sets forth that the cutting machine was defective in design because it had no barrier guard to protect operators from point of operation hazards. Mr. Ehrlich also sets forth that there was no warning to alert people as to the need for personal protective equipment, such as a face shield.

This alleged design defect, however, was known, obvious, and readily discernible by plaintiff. Plaintiff was well aware of the specific danger posed by the cutting machine when cutting catalytic converters (*see Frisbee*, 283 AD2d at 807).

Plaintiff testified, at his deposition, that he had taken the catalytic converter that he was cutting when the accident happened from the "broken bin," which contained the catalytic converters that were harder to cut (Plaintiff's July 10, 2015 deposition tr at 57). Plaintiff explained that the use of the cutting machine on the catalytic converter was subject to having "a kickback," and, on that day, when it kicked back, it shot back hard and hit him (*id.* at 60-62).

Plaintiff further testified, at his deposition, that catalytic converters were "always shooting" back (Plaintiff's Feb. 2, 2016 deposition tr at 55). Plaintiff explained that there was an issue with the catalytic converters shooting out of the cutting machine, and this was not something new (*id.* at 57). Plaintiff also testified that there had been previous accidents with catalytic converters shooting out of the cutting machine (*id.* at 58-59).

Plaintiff testified that for a year's time, he did not have a problem with his cutting machine (*id.* at 61). Plaintiff explained that the kickback could happen with any catalytic converter, but it also depended on the catalytic converter itself because each one had a different casting (*id.* at 64).

Plaintiff testified that he discussed the issue of the catalytic converters shooting out of the cutting machine with both Shalit and Neil, the owners of Catalytic Converter Corporation, several times, and they knew about it, but since no one had gotten hurt, they did not take any safety measures (*id.* at 62-63). Plaintiff testified that no protection was provided to him by Catalytic Converter Corporation (*id.* at 64). Plaintiff stated that Shalit or Neil first bought face masks for the cutting machine operators after his accident occurred (*id.* at 57-58).

Thus, plaintiff's deposition testimony demonstrates that he was aware of the dangers posed by the cutting machine and that the absence of a guard or other safety device to protect him from the danger of a kickback was obvious and readily discernible. Consequently, summary judgment dismissing plaintiffs' first cause of action for negligence must be granted (*see* CPLR 3212 [b]).

Breach of Warranties

As to plaintiffs' second cause of action for breach of warranties, plaintiffs do not specify any express warranties of fitness given to plaintiff's employer, Catalytic Converter Corporation, when it purchased the cutting machine. Therefore, insofar as this cause of

action purports to assert a claim for breach of express warranties, summary judgment dismissing such claim must be granted (*see* CPLR 3212 [b]).

With respect to plaintiffs' claims for breach of implied warranties, plaintiffs argue that Key Engineering breached the implied warranty of fitness and the implied warranty of merchantability. In support of this argument, plaintiffs assert that since the catalytic converter kicked back towards him and struck him in the face when the blade made contact with it, this means that the cutting machine did not operate in the manner in which it was intended to operate. Plaintiffs contend that, therefore, Key Engineering is liable for breach of the implied warranty of fitness and breach of the implied warranty of merchantability.

With respect to the implied warranty of merchantability, UCC 2-314 (1) provides that "[u]nless excluded or modified . . . , a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." UCC 2-314 (2) (c) sets forth that in order for "[g]oods to be merchantable, "they "must be at least . . . fit for the ordinary purposes for which such goods are used." UCC 2-314, Comment 3, however, provides that "[a] person making an isolated sale of goods is not a 'merchant' within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply." Thus, it has been held that a casual seller cannot be held liable for breach of the implied warranty of merchantability (*see Rogers v HSN Direct Joint Venture*, 1999 WL 595533, *3, 1999 US Dist LEXIS 12111, *8-9 [SD NY Aug. 6, 1999, No. 97-Civ-7710 (LLS)], *Colopy v Pitman Mfg. Co.*, 206 AD2d 864, 864 [4th Dept 1994];

McCarthy, 2004 NY Slip Op 51918[U], *4; *Kates Millinery v Benay-Albee Corp.*, 114 Misc 2d 230, 231-232 [Civ Ct, Queens County 1982], *affd* 120 Misc 2d 429 [App Term 1983]). Therefore, since Key Engineering is a casual seller, summary judgment dismissing plaintiffs' claim for breach of the implied warranty of merchantability must be granted (*see* CPLR 3212 [b]).

With respect to the implied warranty of fitness for a particular purpose, UCC 2-315 provides as follows:

> "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."

Comment 4 to UCC 2-315 provides that "[a]lthough normally the warranty will arise only where the seller is a merchant with the appropriate "skill or judgment," it can arise as to nonmerchants where this is justified by the particular circumstances." Here, there are no particular circumstances which would justify the application of this warranty to Key Engineering, who, as a casual manufacturer and casual seller, is not a merchant. Significantly, "[t]he existence of this warranty. . . depends in part upon the comparative knowledge and skill of the parties" (*Saratoga Spa & Bath v Beeche Sys. Corp.*, 230 AD2d 326, 331 [3d Dept 1997], *lv dismissed* 90 NY2d 979 [1997]; *see also McCarthy*, 2004 NY Slip Op 51918[U], *5; *Kates Millinery*, 114 Misc 2d at 232). There is no showing that Catalytic Converter Corporation relied on Key Engineering's skill or judgment to select or

furnish suitable goods. Rather, it has been established that Catalytic Converter Corporation was experienced in cutting machines, was replacing its own cutting machines, and asked Key Engineering if it could purchase Key Engineering's cutting machines. Thus, summary judgment dismissing plaintiffs' claim for breach of the implied warranty of fitness for a particular purpose must be granted (*see* CPLR 3212 [b]). Consequently, summary judgment dismissing plaintiffs' second cause of action for breach of warranties in its entirety is warranted.

Loss of Consortium

Since summary judgment dismissing all of plaintiff's claims against Key Engineering is granted, the fourth cause of action for loss of consortium, which is asserted by Sherronda and is derivative of plaintiff's claims, must also be dismissed (*see* CPLR 3212 [b]).

Conclusion

Accordingly, Key Engineering's motion for summary judgment dismissing plaintiffs' complaint as against it is granted. In view of this ruling, plaintiffs' motion for partial summary judgment on the issue of liability is denied as academic.

This constitutes the decision, order, and judgment of the court.

KINGS COUNTY CLERK
FILED
2019 NOV -1 AM 8:04

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
Administrative Judge

2019 NOV -6 AM 9:12
KINGS COUNTY CLERK
FILED

Nancy T. Sunshine
NANCY T. SUNSHINE
Clerk