Vasquez v Ridge Tool Pattern Co.
2020 NY Slip Op 32218(U)
June 30, 2020
Supreme Court, New York County
Docket Number: 158040/2015
Judge: Lucy Billings
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
--------------------------------------x

TEOFANES CRUZ VASQUEZ,

Index No. 158040/2015

Plaintiff

- against -

DECISION AND ORDER

RIDGE TOOL PATTERN COMPANY a/k/a RIDGE TOOL, HOME DEPOT U.S.A., INC., NINETY RIVER WEST CORP., ORSID REALTY CORP., J. CALLAHAN CONSULTING, INC., CFS ENGINEERING, D.P.C., BERNARD M. PLUM, and PETER DINATALE & ASSOCIATES,

Defendants

--------------------------------------x
--------------------------------------x

NINETY RIVER WEST CORP. and ORSID REALTY CORP.,

Third Party Plaintiffs

- against -

BERNARD M. PLUM and PETER DINATALE & ASSOCIATES,

Third Party Defendants

--------------------------------------x

APPEARANCES:

For Plaintiff
Paul E. Carney Esq.
Ras Associates, PLLC
2500 Westchester Avenue, Purchase, NY 10577

For Defendants Ridge Tool Pattern Company and Home Depot, U.S.A., Inc.
Rosario M. Vignali Esq.
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
150 East 42nd Street, New York, NY 10017

For Defendants Ninety River West Corp. and Orsid Realty Corp.
Jeffrey Fippinger Esq.
Law Offices of Margaret G. Klein & Associates
200 Madison Avenue, New York, NY 10016

For Defendants Plum and Peter DiNatale & Associates
Laura R. Efrati Esq. and Amanda Prescott Esq.
Correia, King, Fodera, McGinnes & Liferiedge
1 Battery Park Plaza, New York, NY 10004

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff was employed by nonparty Gael Hardwood Flooring during renovation of an apartment leased by defendant Plum in a cooperative building owned by defendant Ninety River West Corp. and managed by defendant Orsid Realty Corp. Plaintiff sues to recover damages for personal injuries sustained May 14, 2014, while using a router sold by defendant Ridge Tool Pattern Company or defendant Home Depot U.S.A., Inc. Although Ninety River West and Orsid Realty commenced a third party action against Plum and the general contractor Peter Dinatale & Associates, plaintiff then joined these third party defendants as defendants in the main action, so that the third party claims are now cross-claims.

Plum and Dinatale & Associates move for summary judgment dismissing the complaint and all cross-claims against these defendants. C.P.L.R. § 3212(b). Plaintiff cross-moves for summary judgment in his favor against DiNatale & Associates on his claims for negligence and violation of Labor Law §§ 200 and 241(6). C.P.L.R. § 3212(b) and (e).

Ninety River West and Orsid Realty move for summary judgment dismissing the complaint and all cross-claims against these defendants and for summary judgment in their favor on their contractual indemnification claims against Plum. Plaintiff also cross-moves for summary judgment in his favor against Ninety River West and Orsid Realty on his claims for negligence and violation of Labor Law §§ 200 and 241(6).

Ridge Tool and Home Depot move for summary judgment dismissing the complaint against them. Plaintiff cross-moves for summary judgment against them on his claims for negligent product design and strict product liability.

In a stipulation dated July 11, 2019, the parties discontinued all claims against defendants J. Callahan Consulting, Inc., and CFS Engineering, D.P.C. In a stipulation dated August 13, 2019, plaintiff discontinued his (1) Labor Law §

240(1) claim, (2) claims against defendant Plum, and (3) claims for a manufacturing defect, for breach of an express warranty, and for violation of Labor Law §§ 200 and 241(6) against Ridge Tool and Home Depot.

II. PLAINTIFF'S LABOR LAW CLAIMS

A. TIMELINESS OF PLAINTIFF'S CROSS-MOTIONS AGAINST DINATALE & ASSOCIATES AND AGAINST NINETY RIVER WEST AND ORSID REALTY

Since plaintiff filed a note of issue December 21, 2018, the deadline for summary judgment motions was April 20, 2019. C.P.L.R. § 3212(a). DiNatale & Associates timely served its motion for summary judgment February 14, 2019. C.P.L.R. § 2211; Derouen v. Savoy Park Owner, L.L.C., 109 A.D.3d 706, 706 (1st Dep't 2013); Esdaille v. Whitehall Realty Co., 61 A.D.3d 435, 436 (1st Dep't 2009); Aqeel v. Tony Casale, Inc., 44 A.D.3d 572, 572 (1st Dep't 2007); Gazes v. Bennett, 38 A.D.3d 287, 288 (1st Dep't 2007). Ninety River West and Orsid Realty timely served their motion for summary judgment April 11, 2019. Plaintiff's cross-motions against DiNatale & Associates and against Ninety River West and Orsid Realty served May 10, 2019, were untimely. C.P.L.R. § 3212(a). The court may consider plaintiff's cross-motions, however, to the extent that they respond to and address claims "nearly identical" to the timely motions for

summary judgment by DiNatale & Associates and by Ninety River West and Orsid Realty dismissing plaintiff's negligence and Labor Law §§ 200 and 241(6) claims. Jarama v. 902 Liberty Ave. Hous. Dev. Fund Corp., 161 A.D.3d 691, 692 (1st Dep't 2018); Alonzo v. Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc., 104 A.D.3d 446, 449 (1st Dep't 2013).

B. LABOR LAW § 200 AND NEGLIGENCE CLAIMS

At oral argument July 11, 2019, DiNatale & Associates conceded that it was the general contractor on the renovation project. DiNatale & Associates and the owner and its managing agent, Ninety River West and Orsid Realty, deny liability because they did not supervise or control plaintiff's work. Plaintiff claims that all three defendants were negligent and violated Labor Law § 200 because they failed to provide gloves, a table, and a tool suitable for the work plaintiff was to perform, and they were aware of those work conditions. He was injured while using the router when it kicked back after striking a hard piece of the wood he was working on, causing the bit to lacerate and sever his left thumb.

Labor Law § 200 codifies an owner's and a general contractor's duty to maintain construction site safety. Rizzuto v. L.A. Wegner Contr. Co., 91 N.Y.2d 343, 352 (1998); Comes v.

New York State Elec. & Gas Corp., 82 N.Y.2d 876, 877-78 (1993). An owner's managing agent also may be subject to liability under Labor Law § 200. Burgund v. Cushman & Wakefield, Inc., 167 A.D.3d 441, 442 (1st Dep't 2018); DeJesus v. 888 Seventh Ave. LLC, 114 A.D.3d 587, 588 (1st Dep't 2014). If a dangerous condition arising from subcontractor Gael Hardwood Flooring's work caused plaintiff's injury, DiNatale & Associates, Ninety River West, and Orsid Realty may be liable for negligently allowing that condition and violating Labor Law § 200, if they supervised or exercised control over the activity that caused his injury. Rizzuto v. L.A. Wegner Contr. Co., 91 N.Y.2d at 352; Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d at 877; Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d 621, 626 (1st Dep't 2015); Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d 139, 144 (1st Dep't 2012). See Ocampo v. Bovis Lend Lease LMB, Inc., 123 A.D.3d 456, 457 (1st Dep't 2014); Francis v. Plaza Constr. Corp., 121 A.D.3d 427, 428 (1st Dep't 2014). If a dangerous condition on the work site caused plaintiff's injury, liability depends on these defendants' creation or actual or constructive notice of the condition. Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d at 626; Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d at 144.

Contrary to plaintiff's contention, his injury arose from

the methods or means of his work, rather than any condition of the premises. Gilligan v. CJS Bldrs., 178 A.D.3d 566, 566 (1st Dep't 2019); Nelson v. E&M 2710 Clarendon LLC, 129 A.D.3d 568, 569 (1st Dep't 2015); Castellon v. Reinsberg, 82 A.D.3d 635, 636 (1st Dep't 2011). Plaintiff identifies defects related only to the router that caused his injury and not any defect inherent in the site. Villanueva v. 114 Fifth Ave. Assoc. LLC, 162 A.D.3d 404, 406 (1st Dep't 2018); Singh v. 1221 Ave. Holdings, LLC, 127 A.D.3d 607, 608 (1st Dep't 2015); Castellon v. Reinsberg, 82 A.D.3d at 636.

Plaintiff testified at his deposition that he only followed instructions and used equipment from his employer Gael Hardwood Flooring's owner Roland Stuttard or its foreman Oscar Hernandez and that no one else instructed him. See Haynes v. Boricua Vil. Hous. Dev. Fund Co., Inc., 170 A.D.3d 509, 511 (1st Dep't 2019); Howard v. Turner Constr. Co., 134 A.D.3d 523, 525 (1st Dep't 2015); Singh v. 1221 Ave. Holdings, LLC, 127 A.D.3d at 608. Santos Tricoche, Ninety River West's superintendent at the premises, testified at his deposition that he did not instruct any workers involved in the renovation. Peter DiNatale, the owner of DiNatale & Associates, testified at his deposition that he did not observe any building personnel supervising the

renovation workers. Harvey Ginsberg, Orsid Realty's property manager, testified that he never visited the apartment under renovation and did not know who directed the work for the renovation. See Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d at 626; Singh v. 1221 Ave. Holdings, LLC, 127 A.D.3d at 608.

Plaintiff nevertheless maintains that Ninety River West's superintendent Tricoche monitored the progress of the work, that its Alteration Agreement imposed requirements for the work, and that DiNatale & Associates was at the apartment daily, directed the work there, and bore contractual responsibilities to supervise the project and oversee safety. Supervisory and overall safety responsibilities, Haynes v. Boricua Vil. Hous. Dev. Fund Co., Inc., 170 A.D.3d at 511; McLean v. Tishman Constr. Corp., 144 A.D.3d 534, 535 (1st Dep't 2016); Howard v. Turner Constr. Co., 134 A.D.3d at 525, regular inspections, Varona v. Brooks Shopping Ctrs. LLC, 151 A.D.3d 459, 460 (1st Dep't 2017); Singh v. 1221 Ave. Holdings, LLC, 127 A.D.3d at 608, and the ability to stop unsafe work practices do not establish the requisite control. Villanueva v. 114 Fifth Ave. Assoc. LLC, 162 A.D.3d at 406; Galvez v. Columbus 95th St. LLC, 161 A.D.3d 530, 531-32 (1st Dep't 2018); Varona v. Brooks Shopping Ctrs. LLC, 151 A.D.3d at 460; McLean v. Tishman Constr. Corp., 144 A.D.3d at

535. Tricoche's daily presence at the worksite without exercising supervisory authority over plaintiff does not establish Ninety River West's liability. De La Rosa v. Philip Morris Mgt. Corp., 303 A.D.2d 190, 192 (1st Dep't 2003). The managing agent Orsid Realty, conceding it was a statutory agent of Ninety River West, is likewise neither negligent nor liable under Labor Law § 200 because the managing agent owed no obligation to oversee operations in the apartment where the renovation occurred. See Burgund v. Cushman & Wakefield, Inc., 167 A.D.3d at 442. DiNatale testified that he or his foreman merely reported unsafe conditions to the subcontractor and otherwise exercised no responsibilities for them. For all these reasons, the court grants the motions by DiNatale & Associates and by Ninety River West and Orsid Realty for summary judgment to the extent of dismissing plaintiff's Labor Law § 200 and negligence claims against these defendants and denies plaintiff's cross-motion for summary judgment on their liability for violation of Labor Law § 200 and for negligence. C.P.L.R. § 3212(b).

C. LABOR LAW § 241(6) CLAIM

The duty to comply with the regulations under Labor Law § 241(6) is non-delegable, subjecting the owner and general

contractor to liability for a violation even if the owner and general contractor exercised no supervision or control over plaintiff's work and received no notice of work site conditions. Balbuena v. IDR Realty LLC, 6 N.Y.3d 338, 361 n.8 (2006); Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d at 878; Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 502-503 (1993). While a failure to take the safety measures required by this statute, proximately causing injury, does not impose absolute liability absent negligence, the statute imposes liability on an owner and general contractor for injuries caused by another party's negligence regardless of the owner's or general contractor's own negligence. Rizzuto v. Wegner Contr. Co., 91 N.Y.2d 343, 349-50 (1998); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d at 502 n.4.

In the stipulation dated August 13, 2019, plaintiff limited his Labor Law § 241(6) claim to violations of 12 N.Y.C.R.R. §§ 23-1.12(a), (c), and (f) and 23-9.2 (a), (b), and (d). Although the written stipulation cites 12 N.Y.C.R.R. § 23-1.2, the court assumes that the parties intended to write § 23-1.12, consistent with plaintiff's pleadings and the parties' stipulation on the record July 11, 2019. Plaintiff claims the failure by DiNatale & Associates, Ninety River West, and Orsid Realty to provide a

guard and guide bar for the router violated these regulations. DiNatale & Associates, Ninety River West, and Orsid Realty maintain that the regulations cited by plaintiff are inapplicable or do not impose sufficiently specific safety standards to support liability under Labor Law § 241(6).

12 N.Y.C.R.R. § 23-1.12(a) only imposes unspecific safety standards and directs compliance with Industrial Code Part 19, a regulation that has been repealed. 12 N.Y.C.R.R. § 23-1.12(c) does not apply because the tool plaintiff used was not a saw, but a router. See Hernandez v. Seadyck Realty Co., LLC, 137 A.D.3d 656, 657 (1st Dep't 2016); Sovulj v. Procida Realty & Constr. Corp. of N.Y., 129 A.D.3d 414, 415 (1st Dep't 2015). Contrary to plaintiff's contention, his engineer James Pugh does not attest that a router is a saw. Pugh simply concludes that defendants violated 12 N.Y.C.R.R. § 23-1.12(c), an ultimate legal determination reserved for the court or the jury and not a question on which the court may consider an expert witness' opinion. Morris v. Pavarini Constr., 9 N.Y.3d 47, 51 (2007); Buchholz v. Trump 767 Fifth, 5 N.Y.3d 1, 7 (2005); Lopez v. Chan, 102 A.D.3d 625, 626 (1st Dep't 2013); McCoy v. Metropolitan Transp. Auth., 53 A.D.3d 457, 459 (1st Dep't 2008). Similarly, since no evidence establishes that the router was a friction-disc

drive, plaintiff fails to establish a violation of 12 N.Y.C.R.R. § 23-1.12(f).

DiNatale & Associates, Ninety River West, and Orsid Realty maintain that 12 N.Y.C.R.R. § 23-9.2 does not apply because it is limited to heavy equipment. "The provisions of this Subpart shall apply to power-operated heavy equipment or machinery used in construction, demolition and excavation operations." 12 N.Y.C.R.R. § 23-9.1. These defendants interpret "heavy" as modifying both "equipment" and "machinery" and rely on Misicki v. Caradonna, 12 N.Y.3d 511 (2009), to support their contention, but the Court of Appeals expressly ruled that it was not determining whether § 23-9.2 applied to the hand held grinder in that action. Id. at 519.

12 N.Y.C.R.R. § 23-9.2(b)(1), which requires that all "power-operated equipment used in construction, demolition or excavation operations shall be operated only by trained, designated persons and all such equipment shall be operated in a safe manner at all times," does not impose a sufficiently specific safety command to support liability under Labor Law § 241(6). Scott v. Westmore Fuel Co., Inc., 96 A.D.3d 520, 521 (1st Dep't 2012). 12 N.Y.C.R.R. § 23-9.2(d) requires that: "Gears, belts, sprockets, drums, sheaves and any points of

contact between moving parts of power-operated equipment or machines when not guarded by location shall be guarded in compliance with this Part (rule) and with Industrial Code Part (rule) 19." No evidence shows that the listed parts were not guarded. See Fisher v WNY Bus Parts, Inc., 12 A.D.3d 1138, 1140 (4th Dep't 2004). The part that injured plaintiff was not guarded, but did not contact another moving part. The regulation also requires a guard in compliance with the rule that has been repealed.

12 N.Y.C.R.R. § 23-9.2(a) applies to machinery that is not heavy, Alameda-Cabrera v. Noble Elec. Contr. Co., Inc., 117 A.D.3d 484, 485-86 (1st Dep't 2014); Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d at 147, but only the third sentence of § 23-9.2(a) constitutes a concrete specification supporting a Labor Law § 241(6) claim: "Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement." Becerra v. Promenade Apts. Inc., 126 A.D.3d 557, 558 (1st Dep't 2015). See Misicki v. Caradonna, 12 N.Y.3d at 521. For defendants to be liable for violating § 23-9.2(a), they must have received actual notice of the defect or unsafe condition, Misicki v. Caradonna, 12 N.Y.3d at 521; Shields v. First Ave. Bldrs. LLC, 118 A.D.3d 588, 589

(1st Dep't 2014), and the violation must be a proximate cause of plaintiff's injury. Misicki v. Caradonna, 12 N.Y.3d at 521; Salsinha v. Malcolm Pirnie, Inc., 76 A.D.3d 411, (1st Dep't 2010).

Ninety River West and Orsid Realty demonstrate their lack of notice of the router's unsafe condition. The testimony by Ginsberg and Tricoche establishes that Ginsberg never visited the apartment during the renovation, and Tricoche visited the apartment occasionally to check on plumbing.

DiNatale testified that he was at the apartment once or twice a week, but did observe not any routers. Plaintiff attests, however, that DiNatale & Associates' employees, in particular its project manager at the apartment, were aware that the router plaintiff was using lacked a guide bar to keep the blade from kicking back and a guard around the spinning bit that injured him. Pugh concludes that the router was unsafe and caused plaintiff's injury because the router lacked a guide attachment to stabilize the router and prevent kickback injuries and lacked a "point of contact" guard. Aff. of Jim Pugh ¶ 18. He does not clarify whether or not the latter safeguard refers to a point of contact between moving parts, which does not apply to the part that injured plaintiff, as it did not contact another

moving part. Plaintiff points out that he worked in plain view in the apartment and that the foreman had observed plaintiff's co-worker using the unguarded router 4-8 times and plaintiff using it at least once before his injury.

These allegations about the router's condition and use observed by DiNatale & Associates' foreman raise an issue whether the general contractor violated 12 N.Y.C.R.R.§ 23-9.2(a) and thus Labor Law § 241(6), for which the owner Ninety River West is vicariously liable. Plaintiff's failure to establish that the lack of a guard around the spinning bit was unsafe or that the foreman, while observing the lack of a guide bar, discovered that the router was unsafe without that attachment, on the other hand, precludes summary judgment to plaintiff based on this regulatory provision. It requires actual, not just constructive, notice of an unsafe condition. Misicki v. Caradonna, 12 N.Y.3d at 521; Shields v. First Ave. Bldrs. LLC, 118 A.D.3d at 589.

Finally, DiNatale & Associates contends that plaintiff's misuse of the router by placing the wood on which he was using the router on an overturned bucket instead of on an available table to support the wood was the sole proximate cause of his injury. While plaintiff admitted that his failure to use the table was unwise, he does not attribute his injury to his use of

the bucket, but rather to the router kicking back after hitting a hard piece of wood. If the lack of safeguards to prevent the router from kicking back or to protect plaintiff's hands from laceration by the router's blade contributed to his injury, plaintiff was not the sole proximate cause of his injjry. Ferguson v Durst Pyramid, LLC, 178 A.D.3d 634, 635 (1st Dep't 2019); Cuentas v Sephora USA, Inc., 102 A.D.3d 504, 504 (1st Dep't 2013).

For all the above reasons, the court grants the motions by DiNatale & Associates and by Ninety River West and Orsid Realty for summary judgment dismissing plaintiff's Labor Law § 241(6) claims against these defendants except to the extent that the claim is against DiNatale & Associate and Ninety River West based on 12 N.Y.C.R.R. § 23-9.2(a). C.P.L.R. § 3212(b) and (e). The court denies plaintiff's cross-motion for summary judgment on all three defendants' liability for violation of Labor Law § 241(6). C.P.L.R. § 3212(b).

III. CROSS-CLAIMS

Plum, DiNatale & Associates, Ninety River West, and Orsid Realty seek dismissal of all cross-claims against them because they are not liable to plaintiff. Ninety River West and Orsid Realty only oppose dismissal of their cross-claims against Plum

for contractual indemnification and seek summary judgment in their favor on those cross-claims for their defense expenses. Ridge Tool and Home Depot do not oppose dismissal of their cross-claims.

Ninety River West and Orsid Realty base their contractual indemnification claims on the Alteration Agreement executed by Plum, a shareholder in the cooperative corporation, and Ninety River West, the corporation, which the parties stipulate is authenticated and admissible for purposes of the current motions. The agreement identifies Orsid Realty as the managing agent and provides that:

> Shareholder hereby indemnifies and holds harmless the Corporation, the Corporation's Designated Engineer and employees, the Managing Agent, and other shareholders and residents of the Building against any damages suffered to persons or property as a result of the Work. Shareholder shall reimburse the Corporation, the Corporation's Designated Engineer, Managing Agent, and other shareholders and residents of the Building for any losses, costs, fines, fees and expenses (including, without limitation, reasonable attorney's fees and disbursements) incurred as a result of the Work.

Aff. of Harvey Ginsberg Ex. 2 ¶ 6.

New York General Obligations Law § 5-321 provides that:

> Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees,

> in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.

Plum contends that General Obligations Law § 5-321 prohibits enforcement of the Alteration Agreement's indemnification provision because it allows Ninety River West and Orsid Realty to recover for their own negligence. Since Ninety River West and Orsid Realty were not negligent in causing plaintiff's injury, General Obligations Law § 5-321 poses no bar to contractual indemnification against Plum. Guzman v. 170 W. End Ave. Assoc., 115 A.D.3d 462, 464 (1st Dep't 2014); Dwyer v. Central Park Studios, Inc., 98 A.D.3d 882, 884 (1st Dep't 2012). Therefore Ninety River West and Orsid Realty are entitled to their defense expenses. See Ajche v. Park Ave. Plaza Owner, LLC, 171 A.D.3d 411, 414 (1st Dep't 2019); Michigan Mut. Ins. Co. v. American & Foreign Ins. Co., 251 A.D.2d 141, 141 (1st Dep't 1998).

IV. PLAINTIFF'S CLAIMS AGAINST RIDGE TOOL AND HOME DEPOT

Plaintiff held a Ridgid Model 2401 router in his right hand and the wood on which he was working in his left hand. As set fort above, he was injured when the router kicked back after striking a hard piece of the wood, causing the bit to lacerate and sever his left thumb. He claims negligent design of the

router, strict product liability, and breach of implied warranties against Ridge Tool and Home Depot. Ridge Tool and Home Depot seek dismissal of all those claims. Plaintiff seeks summary judgment on his negligent design and strict product liability claims.

A. TIMELINESS OF PLAINTIFF'S CROSS-MOTION

Ridge Tool and Home Depot timely served their motion for summary judgment March 15, 2019. C.P.L.R. § 2211; Derouen v. Savoy Park Owner, L.L.C., 109 A.D.3d 706; Esdaille v. Whitehall Realty Co., 61 A.D.3d at 436; Aqeel v. Tony Casale, Inc., 44 A.D.3d 572; Gazes v. Bennett, 38 A.D.3d at 288. Plaintiff's cross-motion against Ridge Tool and Home Depot served May 8, 2019, was untimely. C.P.L.R. § 3212(a). The court may not consider plaintiff's untimely cross-motion for summary judgment on his negligent design and strict product liability claims except to the extent that he claims the router lacked an interlock, because his cross-motion otherwise is not nearly identical to the motion by Ridge Tool and Home Depot. Muqattash v. Choice One Pharm. Corp., 162 A.D.3d 499, 500 (1st Dep't 2018); Rubino v. 330 Madison Co., LLC, 150 A.D.3d 603, 604 (1st Dep't 2017); Belgium v. Mateo Prods., Inc., 138 A.D.3d 479, 480 (1st Dep't 2016); Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d at 628.

B. A TRADEMARK LICENSOR'S LIABILITY

Ridge Tool claims that it is merely affiliated with the entities that licensed the router's trade name. A trademark licensor uninvolved in the manufacture, design, sale, distribution, or quality control of a defective product is not liable for it. Harrison v. ITT Corp., 198 A.D.2d 50, 50 (1st Dep't 1993); Bova v. Caterpillar, Inc., 305 A.D.2d 624, 626 (2d Dep't 2003); D'Onofrio v. Boehlert, 221 A.D.2d 929, 929 (4th Dep't 1995); Porter v. LSB Indus., 192 A.D.2d 205, 215 (4th Dep't 1993). A trademark licensor is not liable based on either strict product liability or breach of a warranty. Laurin Mar. AB v. Imperial Chem. Indus., 301 A.D.2d 367, 367-68 (1st Dep't 2003).

Daniel Terpstra, Ridge Tool's consultant, attests that Ridgid is a trademark that Emerson and Ridgid Inc. licensed to Home Depot to market power tools. He attests that Ridge Tool never designed or manufactured Ridgid power tools and was uninvolved in their product warnings or instructions.

Terpstra also attests, however, that Ridge Tool's business purpose and role were sale and service of Ridgid products. Terpstra relied on plaintiff's testimony that the router that injured him was purchased at Home Depot, but that testimony is based on inadmissible hearsay from a co-worker. Therefore Ridge

Tool fails to demonstrate that it was uninvolved in sale of the product that injured plaintiff.

C. PRODUCT DEFECT CLAIMS

The product defects for which product manufacturers and sellers are liable are defects in manufacturing or design or inadequacies in warnings about use of the product. Matter of New York City Asbestos Litig., 27 N.Y.3d 765, 787 (2016); Doomes v. Best Tr. Corp., 17 N.Y.3d 594, (2011); Amatulli v. Delhi Const. Corp., 77 N.Y.2d 525, 532 (1991).

1. Design Defect Based on a Missing Interlock

A product is defectively designed if, when it leaves the seller, it poses a danger for its intended use and is not in a condition reasonably contemplated by the consumer, and the inherent danger from its introduction into the stream of commerce outweighs its utility. Fasolas v. Bobcat of N.Y., Inc., 33 N.Y.3d 421, 429-30 (2019); Hoover v. New Holland N. Am., Inc., 23 N.Y.3d 41, 53-54 (2014); Adams v. Genie Indus., Inc., 14 N.Y.3d 535, 542 (2010); Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102, 107 (1983). Plaintiff identifies the absence of an interlock on the router among its defects.

The sole defense of Ridge Tool and Home Depot to this claim is that the absence of an interlock is an insufficient basis for

liability as a matter of law, citing Patino v. Lockformer Co., 303 A.D.2d 731, 733 (2d Dep't 2003), and Giunta v. Delta Intern. Mach., 300 A.D.2d 350, 351 (2d Dep't 2002), which so held without explanation. Giunta cites David v. Makita U.S.A., Inc., 233 A.D.2d 145 (1st Dep't 1996), and Banks v. Makita, U.S.A., 226 A.D.2d 659 (2d Dep't 1996), as authority for that conclusion, but neither of these decisions involved an interlock.

Pugh attests that the absence of an interlock device, which would have stopped rotation of the bit when it lost contact with the cutting surface, was a defect in the router. Because an interlock automatically interrupts operation of a machine, Adams v. Genie Indus., Inc., 14 N.Y.3d 535, 540 (2010), absence of an interlock may form the basis for a product liability claim. Id. at 543; Daley v. Gemini Bakery Equip. Co., 228 A.D.2d 210, 211 (1st Dep't 1996). See Sanchez v. Martin Maschinenbau GmbH & Co., 281 A.D.2d 284, 285 (1st Dep't 2001). Having presented no evidence to show that the router was safe without an interlock, Ridge Tool and Home Depot fail to meet their initial burden in moving for summary judgment dismissing plaintiff's claim that the absence of an interlock was an actionable defect in the router. Daley v. Gemini Bakery Equip. Co., 228 A.D.2d at 212. The court may not consider the expert affidavit presented for the first

time by Ridge Tool and Home Depot in reply. Eujoy Realty Corp. v. Van Wagner Communications, LLC, 22 N.Y.3d 413, 422-23 (2013); Amtrust-NP SFR Venture, LLC v. Vazquez, 140 A.D.3d 541, 541-42 (1st Dep't 2016); Friedman v. BHL Realty Corp., 83 A.D.3d 510, 510 (1st Dep't 2011); Kennelly v. Mobius Realty Holdings LLC, 33 A.D.3d 380, 381 (1st Dep't 2006).

Pugh's affidavit is the only evidence regarding the danger posed by a router lacking an interlock, see Adams v. Genie Indus., Inc., 14 N.Y.3d at 543, but this evidence is scant. It fails to establish any of the elements of a defectively designed product. See Fasolas v. Bobcat of N.Y., Inc., 33 N.Y.3d at 429-30; Hoover v. New Holland N. Am., Inc., 23 N.Y.3d at 53-54; Adams v. Genie Indus., Inc., 14 N.Y.3d at 542; Voss v. Black & Decker Mfg. Co., 59 N.Y.2d at 107. Pugh's conclusory affidavit thus fails to support plaintiff's cross-motion for summary judgment finding a design defect. Ford v. Riina, 160 A.D.3d 588, 590 (1st Dep't 2018); Caruso v. John St. Fitness Club, LLC, 34 A.D.3d 296, 296 (1st Dep't 2006); Finguerra v. Conn, 252 A.D.2d 463, 466 (1st Dep't 1998).

2. Failure to Warn

A product manufacturer or seller is liable for failing to warn of its product's hidden dangers "resulting from foreseeable

uses of its product of which it knew or should have known." Matter of Eighth Jud. Dist. Asbestos Litig., 33 N.Y.3d 488, 495 (2019); Liriano v. Hobart Corp., 92 N.Y.2d 232, 237 (1998); Hartnett v. Chanel, Inc., 97 A.D.3d 416, 419 (1st Dep't 2012); Stewart v. Honeywell Intl. Inc., 65 A.D.3d 864, 865 (1st Dep't 2009). A product manufacturer or seller owes the duty to warn to the product's purchaser, the purchaser's employees, and third persons subject to foreseeable and unreasonable risks of harm arising from the failure to warn. Matter of Eighth Jud. Dist. Asbestos Litig., 33 N.Y.3d at 495; Matter of New York City Asbestos Litig., 27 N.Y.3d at 788-89. See Hartnett v. Chanel, Inc., 97 A.D.3d at 419. Plaintiff is not required to specify a defect other than the failure to warn of hidden dangers in the product's intended use or reasonably foreseeable unintended use. Matter of Eighth Jud. Dist. Asbestos Litig., 33 N.Y.3d at 499; Matter of New York City Asbestos Litig., 27 N.Y.3d at 778, 788; Lugo v. LJN Toys, 75 N.Y.2d 850, 852 (1990); Hartnett v. Chanel, Inc., 97 A.D.3d at 419. A product manufacturer or seller owes no duty, however, to warn of patently dangerous or open and obvious hazards. Liriano v. Hobart Corp., 92 N.Y.2d at 241; Narvaez v. Wadsworth, 165 A.D.3d 407, 408 (1st Dep't 2018); Hartnett v. Chanel, Inc., 97 A.D.3d at 420.

Ridge Tool and Home Depot urge that the danger of operating the router near one's hand was open and obvious, negating the duty to warn. Shamir v. Extrema Mach. Co., Inc., 125 A.D.3d 636, 637 (2d Dep't 2015); Cwiklinski v. Sears, Roebuck & Co., Inc., 70 A.D.3d 1477, 1479 (4th Dep't 2010); Lamb v. Kysor Indus. Corp., 305 A.D.2d 1083, 1084 (4th Dep't 2003); Banks v. Makita, U.S.A., 226 A.D.2d at 660. Factors to considered in determining whether a hazard is open and obvious are plaintiff's experience, Stewart v. Honeywell Intl. Inc., 65 A.D.3d at 865; Shamir v. Extrema Mach. Co., Inc., 125 A.D.3d at 637; Rodriguez v. Sears, Roebuck & Co., 22 A.D.3d 823, 824 (2d Dep't 2005); Lamb v. Kysor Indus. Corp., 305 A.D.2d at 1084, and prior use of the allegedly defective tool. Shamir v. Extrema Mach. Co., Inc., 125 A.D.3d at 637; Sugrim v. Ryobi Tech., Inc., 73 A.D.3d 904, 905 (2d Dep't 2010).

Plaintiff testified that he had experience using a metal cutting machine and powered saws and was aware of the dangers in using them, but had not used a router before the renovation and had used it only once before his injury. He attests further in his affidavit that "amputating a finger . . . does not appear possible by the look of the device." Aff. of Teofanes Cruz Vasquez ¶ 15. Pugh concurs that "the spinning bit . . . was

somewhat innocuous to the novice user such as Plaintiff, as it appears to be a small and therefore minor although important feature of the unit." Pugh Aff. ¶ 10.

Unlike Cwiklinski v. Sears, Roebuck & Co., Inc., 70 A.D.3d at 1479, where the plaintiff read the product manual, plaintiff here was not even provided the manual. This evidence raises a factual issue whether the dangers of using the router were open and obvious. Narvaez v. Wadsworth, 165 A.D.3d at 408. While evidence that plaintiff read warnings in the product manual, Achatz v. Rollerblade, Inc., 227 A.D.2d 199, 199 (1st Dep't 1996), or failed to read the manual before using the product may defeat a claim for failure to warn, Boyle v. City of New York, 79 A.D.3d 664, 665 (1st Dep't 2010), plaintiff not only testified that he was never given the manual for the router, but also attests that, had the instructions for the router been available to him, he would have read them.

A warning on a product to read its manual before operating the product also may satisfy the duty to warn. David v. Makita U.S.A., Inc., 233 A.D.2d at 146; Banks v. Makita, U.S.A., 226 A.D.2d at 660. As depicted in a photograph of the router taken by an expert for Ridge Tool and Home Depot and authenticated by plaintiff, the router bore a label directing the user to read the

Operator's Manual. As Pugh observes, the warning on the router itself nowhere warned of the risk of amputation from use of the router. Although the Operator's Manual for the router warned about the circumstances that caused plaintiff's particular injury, Pugh also concludes that the warning to read the Operator's Manual was an inadequate warning of the hazards to the user that these circumstances caused. The manual warns that:

> Because of the extremely high speed of cutter rotation during a proper feeding operation, there is very little kickback to contend with during normal conditions. However, should the cutter strike a knot, hard grain, foreign object, etc., that would affect the normal progress of the cutting action, there could be a slight kickback. Kickback could be sufficient to spoil the trueness of your cut if you are not prepared. Such a kickback is always in the direction opposite the direction of cutter rotation.

Aff. of Rosario Vignali Ex. G, at 10. Notably, this advisory fails to warn of amputation or other injury from a kickback, although the manual does separately warn of cut or burn injuries from positioning hands near the cutter. Therefore factual issues remain regarding the adequacy of the warnings provided by the router and its Operator's Manual to the extent that they do not warn of amputation or other injury from a kickback. Anaya v. Town Sports Int'l, Inc., 44 A.D.3d 485, 487 (1st Dep't 2007).

D. IMPLIED WARRANTIES

At oral argument August 13, 2019, Ridge Tool and Home Depot conceded that the implied warranties of merchantability and fitness for a particular purpose apply to plaintiff. The Operator's Manual for the router, however, includes an express disclaimer of the implied warranties of merchantability and fitness for a particular purpose. N.Y.U.C.C. § 2-316(2); West 63 Empire Assoc., LLC v. Walker & Zanger, Inc., 107 A.D.3d 586, 586 (1st Dep't 2013). Plaintiff merely points out that his claim for breach of the implied warranties is separate from his strict product liability claim, but does not challenge the disclaimer, which requires dismissal of his claim for breach of the implied warranties. Denny v. Ford Motor Co., 87 N.Y.2d 248, 258 (1995).

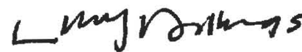
V. CONCLUSION

In sum, for the reasons explained above, the court grants defendants' motions for summary judgment to the following extent. C.P.L.R. § 3212(b) and (e). The court dismisses plaintiff's Labor Law § 200 and implied warranty claims and the negligence claims and all cross-claims against defendants Peter DiNatale & Associates, Plum, Ninety River West Corp., and Orsid Realty Corp., except Ninety River West Corp.'s and Orsid Realty Corp.'s cross-claims for contractual indemnification against Plum. The

court dismisses plaintiff's Labor Law § 241(6) claim against Peter DiNatale & Associates and against Ninety River West Corp. and Orsid Realty Corp., except to the extent that the claim is against Peter DiNatale & Associates and Ninety River West Corp. based on 12 N.Y.C.R.R. § 23-9.2(a). The court also grants Ninety River West Corp.'s and Orsid Realty Corp.'s motion for summary judgment on their contractual indemnification claims against Plum. The court grants the motion by defendants Ridge Tool Pattern Company and Home Depot U.S.A., Inc., for summary judgment dismissing plaintiff's implied warranty claims, but otherwise denies their motion, and denies plaintiff's cross-motions for summary judgment on defendants' liability in full. C.P.L.R. § 3212(b).

This decision constitutes the court's order and judgment. The Clerk shall enter a judgment accordingly.

DATED: June 30, 2020



LUCY BILLINGS, J.S.C.