Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS**
Justice

IAS PART 4

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ANGELA ORDONEZ,

Plaintiff(s),

-against-

HYSTER-YALE GROUP, INC.,
MESSE, INC.,
TINGUE BROWN AND CO., and
MERITEX, INC.

Defendant(s).

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Index No.: 710074/2018

Motion Dated: July 28, 2020

Motion Cal. No.:

Motion Seq. No.: 2

The following papers numbered EF27 - EF61 read on this motion by defendant Hyster-Yale Group LLP (Hyster-Yale) for an Order pursuant to CPLR §3212, granting summary judgment dismissing the complaint and all cross-claims against defendant Hyster-Yale.

	Papers Numbered
Notice of Motion-Affirmation-Affidavit-Exhibits-Memorandum of Law.....	EF27-41
Opposing Affirmation--Exhibits-Affidavit of Service.....	EF53-59
Reply Affirmation.....	EF61

Upon the foregoing papers it is ordered that this motion is determined as follows:

The within action arises from an accident that occurred on January 21, 2016 in the basement of the Hilton New York& Towers in Manhattan. Angela Ordonez was employed by Hilton Worldwide Inc. as a housekeeper. She alleges that she had completed her shift and took the employee's elevator to the basement where she intended to go to the employee cafeteria. She was then struck by a laundry cart that had become detached from other carts being pulled by a tow tractor, and sustained personal injuries.

Plaintiff Angela Ordonez commenced this action on June 29, 2016 against Hyster-Yale, Meese Inc., Tingue, Brown and Co., and Meritex, LLC. The complaint alleges causes of action against all of the defendants for negligence, breach of express and implied warranty, failure to warn and strict products liability.

Defendant Hyster-Yale manufactured the subject tow tractor, model MTR005-E, serial number A902N01868D, at its plant in Greenville, North Carolina, on April 6,2006,and it was sold through a local distributor to Hilton New York& Towers,130 West 54th Street, New York, New York, with delivery on May 1, 2006.

Defendants Meese, Inc. and Tingue, Brown and Co. manufactured and supplied the laundry carts. They also manufactured and supplied the "tow bars" and "pins" that connected the laundry carts to each other.

Defendant Meritex, LLC, an affiliate of Hilton Hotels, provides commercial laundry services.

Defendant Hyster-Yale served an answer and interposed affirmative defenses, including statute of limitations as to the breach of warranty cause of action. Defendants Meese Inc. and Tingue, Brown & Co. served an answer and interposed 22 affirmative defenses and cross-claims for contribution, common law indemnification and breach of contract based upon the failure to procure insurance, pursuant to a contract or lease concerning the subject premises. Meritex LLC served an answer and interposed 39 affirmative defenses, and cross- claims for common law indemnification and contribution.

Plaintiff testified at her deposition via a Spanish interpreter that on January 21, 2016, she began work at 4:00 p.m, and was assigned to clean rooms on the 32nd floor. After she completed her assigned tasks, she took the employee's elevator to the basement where she intended to have tea in the employee cafeteria before leaving work at 9:00 p.m. She stated that she stepped off the elevator and took a few steps forward, when the accident occurred. It was approximately 8:30 p.m or 8:45 p.m. Ordonez stated that she has no recollection of the accident, and that after she regained consciousness she was sitting on the floor, bleeding. She further stated that at no time prior to her accident did she see the motorized tow tractor moving laundry carts in the basement.

Ms. Ordonez's accident was captured on a video camera in the hotel's basement. The video shows Ms. Ordonez exiting the elevator and taking a few steps towards a T-intersection of two adjoining hallways. She then stopped, and an electric powered tow tractor pulling three tall laundry carts loaded with linens and/or towels passed by. A fourth laundry, not attached to the others, moved in her direction, and as Ordonez stepped forward,

she was struck by the fourth cart. In a separate video taken from a different angle, the tow tractor can be seen towing four connected laundry carts in a hallway, and a person can be seen walking ahead of the tow tractor. In both videos the tow tractor is traveling in the middle of the hallway, in a straight line. Neither video depicts the fourth laundry cart detaching from the cart in front of it.

Matthew Hoffman, a senior engineer employed by Hyster-Yale testified at his deposition that the electric tow tractor or tugger model at issue here is typically used indoors, on hard firm flooring , and is not an outdoor truck. Hyster-Yale sells its products either directly to the customer or through a dealer who then sells it to a customer. The subject tow tractor was sold to a retailing dealer, Key Materials Handling. Hoffman states that all retailing dealers are trained and certified on the products sold to them by Hyster-Yale.

He testified that the subject tow tractor has a walking speed of 3.8 miles per hour and a top rapid speed of 7.8 miles per hour. He stated that the higher speed is activated by a switch that an operator steps on, and that the operator's manual provides guidance as to operating speeds.

There is a vertical plate at the rear of the tow tractor that protects the driver. Behind the vertical plate there is a clasp or coupler that allows the tow tractor to be attached to a cart. Hoffman stated that the coupler is bolted to the tow tractor at Hyster-Yale's assembly plant. There are two options for the coupler: a standard coupler described as having black casting with a hinged jaw that can be opened and closed; and an optional coupler clasp consisting of two parallel plates with a pin that goes through the plates. Hoffman stated that the standard coupler has a long arm with a ball on it and that the tow tractor can disconnect the coupling without having to get out of the tractor. He stated that Hyster-Yale does not make recommendations with using the standard or optional coupler or express a preference as regards these couplers, and that the use of the optional coupler does not change the tow tractor's performance or functionality.

Hoffman stated that Hyster-Yale's records show that the subject tow tractor was manufactured with the standard coupler. He stated that the dealer would order the particular coupler part depending on what the customer ordered. He also stated that if the tow tractor was ordered with the standard coupler, the customer could have the dealer order the optional coupler, and that these couplers could be removed by undoing the four bolts that attach the part to the tow tractor.

Hoffman stated the photograph of the subject tow tractor depicts a coupler that looked similar to the optional coupler manufactured by Hyster-Yale, but could not tell if it was manufactured by Hyster-Yale. He further stated that the photograph depicted a coupler with

a threaded rod, which does not look like a product manufactured by Hyster-Yale. He stated that the threaded rod is not the pin supplied by Hyster-Yale for the optional coupler. He also stated that he had never seen a tow tractor attached in this manner depicted in the photograph.

Hoffman testified that Hyster-Yale performs quality assurance to ensure that the parts match the design specifications; that factory testing is performed which tests the speed and functionality of the tow tractor; and that design testing is performed in order to test the tower's frame, traction system and coupler. He stated that the subject tow tractor has a maximum capacity draw bar pull of 700 pounds. He stated that during design testing phase, carts are attached to the hitch. Hoffman stated that the tow tractor is capable of holding multiple carts and that Hyster-Yale does not provide any device that permits carts to be attached to each other. He further stated that prior to shipping only a functionality test is performed on the coupler to determine its ability to latch and unlatch.

Hoffman stated that the tow tractor has two fixed rear wheels, and a front wheel that turns for steering purposes, and that instructions on the operation of the tow tractor are set forth in the operator's manual, as well as decals on the tractor itself. He stated that the user's employees are required to have training in accordance with OSHA requirements and be certified for the truck they are using, and that Hyster-Yale does not provide such training or certification.

Hoffman has submitted an affidavit in support of the within motion, in which he asserts, among other things, that at the time the parties examined the tow tractor at the Hilton hotel location, the coupler was equipped with a variation on the optional coupler provided by Hyster-Yale. Instead of using the plates and pin that comes with the optional coupler, a threaded rod or long bolt was utilized to hold the attached carts in tow. He states that the use of said bolt appeared to be an acceptable and safe variation on the optional coupler provided by Hyster-Yale, as the coupler held its load securely and did not contribute in any way to the accident. He further described the video surveillance recordings as depicting the tow tractor moving down a corridor towing four laundry carts filled with linens and/or towels, with a person walking ahead of the tow tractor at a normal pace; and a second video taken at a different angle, showing a person exiting an elevator, waiting for the tow tractor and three laundry carts to pass, who then enters the corridor and is struck by a fourth laundry cart that is not attached to the others or to the tow tractor.

Hoffman states that he has no knowledge about the means of the attachment between the laundry carts that were downstream of the tow tractor's coupler; that he has no knowledge as to who attached the third and fourth laundry cart to one another; that Hyster-Yale did not design, manufacture or supply the laundry carts or their means of attachment,

and had no control over their production, and derived no benefit from their sale. He further states that Hyster-Yale did not employ any persons involved in the attachment of the carts to the tow tractor or to one another.

Based on his engineering knowledge, decades of experience in the materials handling field, and his observation of the available evidence herein, Hoffman states that the subject tow tractor did not malfunction in any way to contribute to the subject accident. He further states that the tow tractor performed in the manner it was designed to do, consistent with the applicable industry standards, and that the coupler performed properly and held its load in tow without failure. He asserts that the decoupling that led to plaintiff's injuries occurred well downstream of the tow tractor, and was caused by products and/or circumstances entirely outside the control of the tow tractor and its manufacturer.

As regards plaintiff's claim of inadequate warnings, Hoffman states that the use of powered industrial trucks in the workplace is governed by the OSHA regulations found at 29 CFR 1910.178. He asserts that the employer must ensure that each powered industrial truck operator is competent to operate safely, as demonstrated by successful completion of the training required in the regulation. He further states that the tow tractor's operating manual, which OSHA requires the operator to know and understand, contains numerous instructions and warnings with which the operator must be familiar in order to be in compliance with OSHA. The relevant instructions to the operator are to check the truck before use, do not handle an unstable load, and check the condition of the towing coupler or pin before operation.

It is well established that summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The party moving for summary judgment has the initial burden of making a prima facie showing of its entitlement to judgment as a matter of law. It is equally well settled that on such a motion, the facts must be viewed in the light most favorable to the non-moving party (*see e.g. Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). Further, "the motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2002], *citing Dolitsky v Bay Isle Oil Co.*, 111 AD2d 366 [1985]). Thus, the court is not to determine credibility, but whether a factual issue exists (*Capelin Assoc. v Globe Mfg.*, 34 NY2d 338 [1973]).

As the moving party, Hyster-Yale is required to show its entitlement to summary judgment as a matter of law. As a general rule, a party meets this burden by affirmatively demonstrating the merits of its claim or defense, not by pointing to gaps in the opponent's proof (*see Cox v Consol. Edison, Inc.*, 125 AD3d 923, 924 [2015]; *L & D Serv. Sta., Inc. v Utica First Ins. Co.*, 103 AD3d 782, 783 [2013]; *Englington Med., P.C. v. Motor Veh. Acc. Indem. Corp.*, 81 AD3d 223, 230 [2011]).

There are four separate theories under which a plaintiff may pursue a recovery based upon a claim of products liability: (1) strict liability; (2) negligence; (3) express warranty and implied warranty (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 106–107 [1983]; *see also Mangano v Town of Babylon*, 111 AD3d 801 [2013]). In order to establish a prima facie case with regard to any of these four theories, the plaintiff must show that the product at issue was defective and that the alleged defect was the actual and proximate cause of the plaintiff's injury (*Voss*, 59 NY2d at 107–09; *see Fahey v A.O. Smith Corp.*, 77 AD3d 612, 615,[2d Dept 2010]; *Beckford v Pantresse, Inc.*, 51 AD3d 958 [2008]; *Clarke v Helene Curtis, Inc.*, 293 AD2d 701, 742 NYS2d 325 [2002]). "Unless only one conclusion may be drawn from the established facts, it is for a jury to determine the issue of proximate cause" (*Reece v J.D. Posillico, Inc.*, 164 AD3d 1285 [2018]).

A cause of action against a manufacturer based upon breach of warranty must be commenced within four years after it accrues (*see*, UCC 2–725). Such a cause of action accrues on the date the party charged tenders delivery of the product (*see Heller v U.S. Suzuki Motor Corp.*, 64 NY2d 407 [1985]; *Csoka v Bliss*, 168 AD2d 664, 665 [1990]). Here, plaintiff's claim for breach of warranty was interposed some 10 years after the Hyster-Yales's sale and delivery of the tow tractor, via a dealer, to the Hilton in midtown Manhattan.

Plaintiff, in opposition, asserts that defendant has not established when it provided the optional coupler to the hotel. The evidence presented herein, however, establishes that at the time the subject tow tractor was ordered and delivered to the Hilton in 2006, it was equipped with the standard coupler. There is no evidence that the hotel purchased a optional coupler from Hyster-Yale or that its optional coupler utilizes a rod and bolt to attach the coupler to the tow tractor, as depicted in the photograph submitted herein. The court, therefore, finds that plaintiff has not raised a triable issue of fact with respect to the claims for breach of warranty. That branch of the motion which seeks to dismiss the cause of action for breach of express and implied warranty as time-barred, is granted.

"To prevail on a cause of action sounding in negligent design, a plaintiff must prove that the manufacturer failed to exercise reasonable care in designing the product. To prevail on a cause of action sounding in strict products liability, a plaintiff must prove that the product contained an unreasonably dangerous design defect (*see Lancaster Silo & Block Co.*

v. Northern Propane Gas Co., 75 AD2d 55, 62 [1980]). New York courts have deemed these concepts " 'functionally synonymous' " with respect to the manufacturer of the product (*Denny v. Ford Motor Co.,* 87 NY2d 248, 258 [1995]; *see; Sucher v Kutscher's Country Club.* 113 AD2d 928, 931 [1985])" (*Giunta v Delta International Machinery*, 300 AD2d 350 [2002]).

Generally, strict liability may be imposed on retailers, distributors and manufacturers who act to place the defective product in the stream of commerce regardless of privity, foreseeability or due care (*see Finerty v Abex Corp.,* 27 NY3d 236 [2016]). There are three distinct claims for strict products liability: a mistake in manufacturing, an improper design, or an inadequate or absent warning for the use of the product (*see Pierre-Louis v DeLonghi America, Inc.,* 66 AD3d 859 [2009]). A manufacturer is under a duty to use reasonable care in designing its product when used in the manner intended as well as unintended but yet reasonably foreseeable (*see Robinson v Reed - Prentice Div. of Package Mach. Co.,* 49 NY2d 471 [1980]). A manufacturer also has a duty to warn against latent dangers resulting from reasonably foreseeable uses of its product, whether intended or not (*see Liriano v Hobart Corp.,* 92 NY2d 232 [1998]). Liability may be premised upon the complete absence of warnings as to a particular hazard or upon the inclusion of warnings that are insufficient (*see Robinson,* 49 NY2d 471.) In the event a third party has made substantial alterations to the product rendering it defective or unsafe so as to be the sole proximate cause of a plaintiff's injuries, the manufacturer will not be held liable (*see Liriano,* 92 NY2d 232.) A manufacturer will not be held liable if the product is found to have no defect if used in the manner it was intended, or that was reasonably foreseeable (*see Robinson,49* NY2d 471).

Here, plaintiff in her complaint and bill of particulars only asserts boilerplate allegations against Hyster-Yale, and has not alleged a specific defect in the design or manufacture of the tow tractor. Nor has she identified an alternative safer design that should have been implemented. Defendant Hyster-Yale has established that tow tractor model MTR005-E was designed and manufactured in compliance with industry standard ANSIB56.9,Safety Standard for Operator Controlled Industrial Tow Tractors. It was further tested and certified by Underwriters Laboratories. The subject tow tractor model MTR005-E under went quality control checks during and after the build and assembly processes, all of which were documented. The tow tractor passed all quality control processes and inspections at the manufacturing facility before it was shipped. It again passed inspection upon delivery to the customer, Hilton New York & Towers, on May 1,2006. The tow tractor was delivered to Hilton with the standard coupler, and there is no evidence that Hilton purchased or otherwise obtained an optional coupler manufactured by Hyster-Yale.

The evidence presented establishes that the tow tractor has a waling speed of 3.8 miles per hour, and a maximum rapid speed of 7.8 miles per hour. The speed can be increased only by the tow tractor operator while standing in the tractor. The operator can either stand in the tractor or walk along side it, while it is being operated. The video evidence submitted herein

depicts a person walking ahead of the tow tractor at a normal pace, while it moves in a straight line in a hallway. There is no evidence of any change in the speed of the tow tractor in either video submitted herein. Plaintiff, in opposition, has failed to raise an issue of fact with respect to the speed of the tow tractor.

Defendant Hyster-Yale presented evidence in admissible form that there were no known failures of its couplers to maintain attachment of loads towed by its tow tractors. In addition, the coupler utilized here was attached to the first laundry cart and remained attached to that cart after the fourth cart separate from the third cart.

Defendant has established that its tow tractor was delivered to the Hilton in 2006 with a standard coupler. It has also established that it manufactures an optional coupler with a plate and pin attachment, and not a bolt and rod. The photograph submitted herein depicts a coupler attached to the subject tow tractor with a rod and bolt. There is no evidence that Hyster-Yale sold or delivered its optional coupler to the Hilton at any time. As the manufacturer of the coupler utilized by Hilton has not been identified as a Hyster-Yale product, defendant it is not required to establish that said coupler was free of manufacturing and design defects.

This Court therefore finds that defendant Hyster-Yale has established that the subject tow tractor was safely designed and manufactured and that it was free of defects in its design and manufacture, and was not negligently designed. Plaintiff, in opposition, has failed to raise an issue of fact as to the design and manufacture of the subject tow tractor.

"A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known (*Rastelli v Goodyear Tire & Rubber Co.,* 79 NY2d 289, 297 [1992]). A manufacturer also has a duty to warn of the danger of unintended uses of a product provided these uses are reasonably foreseeable (*see, Lugo v LJN Toys,* 75 NY2d 850 [1990]; *McLaughlin v Mine Safety Appliances Co.,* 11 NY2d 62 [1962]; Weinberger, New York Products Liability, § 17:07, at 17–10 [2d ed.])." (*Liriano v Hobart Corp.*, 92 NY2d at 237) . To recover on a strict products liability cause of action based on inadequate warnings, a plaintiff must prove causation, i.e., that if adequate warnings had been provided, the product would not have been misused (*see Reece v J.S. Posillico, Inc.*, 164 AD3d 1285; *Banks v Makita, U.S.A.,* 226 AD2d 659, 660 [1996]; *Johnson v Johnson Chem. Co.,* 183 AD2d 64, 70 [1992]). Or to put it another way, "[f]or there to be recovery for damages stemming from a product defective because of the inadequacy or absence of warnings, the failure to warn must have been a substantial cause of the events which produced the injury" (*Billsborrow v Dow Chem.,* 177 AD2d 7, 16 [1992]). "Generally, it is for the trier of fact to determine the issue of proximate cause" (*Kalland v Hungry Harbor Assoc., LLC,* 84 AD3d 889, 889 [2011]; *see Howard v Poseidon Pools,* 72 NY2d 972, 974 [1998]; *Scala v Scala,* 31 AD3d 423, 424 [2006]). "However, the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts" (*Kalland v Hungry Harbor Assoc., LLC,* 84 AD3d at 889).

Plaintiff, in her complaint and bill of particulars, has not identified any warnings that she claims Hyster-Yale should have provided. Nor does she allege that the tow tractor was misused in any manner. Rather, plaintiff asserts that defendant Hyster-Yale failed to provide warnings when using the subject model tow tractor to pull carts manufactured by Tingue, Brown and Co., and that have a hinged tow-bar and pins. She also asserts that said hinged tow-bar was defective. Plaintiff's duty to warn claim, thus, is premised upon concerted action.

The theory of liability based upon concerted action "provides for joint and several liability on the part of all defendants having an understanding, express or tacit, to participate in 'a common plan or design to commit a tortious act' " (*Hymowitz v Lilly & Co.*, 73 NY2d 487[1989], *quoting* Prosser and Keeton, Torts § 46, at 323 (5th ed.); *see Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 295 [1992] *Bichler v Lilly & Co.*, 55 NY2d 571 [1990]). It is essential that each defendant charged with acting in concert have acted tortiously and that one of the defendants committed an act in pursuance of the agreement which constitutes a tort (*see Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d at 295).

Here, there is no evidence that Hyster-Yale participated in any concerted action with Tingue, Brown and Co. Hyster-Yale did not design or manufacture the laundry carts or their hinged tow bars and pins, and there is no evidence that it received any benefit from the sale of the subject laundry carts and its attachments. There is also no evidence that Hyster-Yale controlled or employed any person who was involved in the attachment of the carts to one another or the attachment of the carts to the tow tractor. Defendant Hyster-Yale, thus, has established prima facie that it cannot be held liable to the plaintiff pursuant to a theory of concerted action. Plaintiff, in opposition, has failed to raise a triable issue of fact.

To the extent that plaintiff's counsel asserts, in opposition, that defendant Hyster-Yale failed to warn about jack-knifing of loads pulled by the subject tow tractor, there is no evidence that the subject laundry carts jack-knifed. Counsel's speculation in this regard is nothing more than an attempt to raise a feigned issue of fact.

In view of the foregoing, defendant Hyster-Yale's motion to dismiss the complaint and all cross- claims asserted against it, is granted in its entirety.

Dated: 9/24/2020

MARGUERITE A. GRAYS
J.S.C.

FILED

9/25/2020
10:31 AM

COUNTY CLERK 9
QUEENS COUNTY