

Biberman v City of New York
2022 NY Slip Op 32048(U)
July 1, 2022
Supreme Court, New York County
Docket Number: Index No. 157705/2016
Judge: Judy H. Kim
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDY H. KIM **PART** **05RCP**

Justice

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CAREN BIBERMAN,

Plaintiff,

- v -

THE CITY OF NEW YORK, PEXCO LLC d/b/a DAVIDSON
TRAFFIC CONTROL PRODUCTS FROM PEXCO LLC

Defendants.

-----X

INDEX NO. 157705/2016

MOTION DATE 02/08/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

Upon the foregoing papers, Pexco LLC’s motion for summary judgment dismissing this action as against it is denied.

Plaintiff alleges that on July 24, 2015, she tripped and fell over a channelizer post—a polyurethane post used for directing traffic also known as a flexible delineator, bollard, or pylon—extending horizontally into the crosswalk at the intersection of Maiden Lane and Water Street (NYSCEF Doc. No. 1 [Compl. at ¶11]). Plaintiff alleges, in relevant part, that the channelizer post was manufactured by defendant Pexco LLC (“Pexco”) and that “[a]t the time of its original sale, the [channelizer post] involved here was defective and not reasonably safe for its ordinary intended or reasonably foreseeable purposes” insofar as it “fail[ed] to bounce back to its normal vertical position when struck” (*Id.* at ¶¶ 9, 34, 37]). Plaintiff’s complaint asserts claims against Pexco sounding in negligence, strict product liability, and breach of express and implied warranties.

Pexco now moves, pursuant to CPLR §3212, for an order granting it summary judgment dismissing the complaint as against it. In support of its motion, Pexco submits the affidavit and examination before trial (“EBT”) testimony of its Technical Business Development Manager,

Peter Speer, and the EBT testimony Adam Weir, a Supervisor of Traffic Device Maintainers for the New York City Department of Transportation (“DOT”)

Weir testified, in pertinent part, that New York City uses one model of channelizer post, which he referred to as “Davidson” (NYSCEF Doc. Nos. 57 [Weir October 11, 2019 EBT at pp. 21, 52]). Weir further testified that he used the term “Davidson” to refer to a specific brand of channelizer post (NYSCEF Doc. No. 58 [Weir March 4, 2020 EBT at pp. 38-39]). Weir also testified as to his management of the DOT’s team responsible for the regular review, maintenance, and replacement of channelizer posts throughout New York City (NYSCEF Doc. No. 57 [Weir October 11, 2019 EBT at pp. 27-31]).

Speer testified that Pexco’s channelizer posts are tested at various times for conformity with certain state and national standards and to ensure they rebounded after ten impacts from a standard sedan (NYSCEF Doc. No. 56 [Speer EBT at pp. 99-106]). After reviewing photos of the subject channelizer post shown to him by plaintiff, Speer testified that he could not determine whether the pictured post was manufactured by Pexco (NYSCEF Doc. No. 56 [Speer EBT at pp. 165-166]).

However, after his EBT, Speer submitted an affidavit in which he attested that:

I have ... examined the photograph [of the channelizer that were previously provided by plaintiff] and performed a thorough and exhaustive investigation and I can conclusively say that the post pictured is not a post manufactured by Pexco. The square markings are not markings used on our products. The white post and the black base pictured are also devoid of writing. Our posts and bases are always identified by either company name or the date of manufacture or both. Our posts are identified with writing along the sides, bases have the company name and website molded into the top surface. As I testified to at my deposition, there are many imitators of our products and other manufacturers that sell posts. These manufacturers do not apply any identifying markings to their products

(NYSCEF Doc. No. 60 [Speer Aff.]).

Pexco also submits an installation guide for its channelizer posts in which the reflective tape on its posts is drawn as covering the entire circumference of the post (NYSCEF Doc. No. 61 [Installation Guide at p. 3]), in contrast to the photos of the channelizer post submitted by plaintiff, which has only square pieces of reflective tape (See NYSCEF Doc. No. 67).

In opposition, plaintiff submits an affidavit from Professional Engineer A.W. Bachner, attesting that:

Upon my foretated investigation, it is my opinion, with reasonable engineering certainty, (1) that the flattened post depicted in the photographs at the intersection of Water Street and Maiden Lane ... was indeed of the make and model manufactured and marketed under the Davidson Traffic Control Products from Pexco brand name.

...

It is my opinion within a reasonable degree of engineering certainty that the gray squares of retro-reflective tape depicted on the top surface of the flattened post show what is left of what originally were two bands of retro-reflective tape. The wearing away of the retro-reflective tape bands seems to commonly occur with the Davidson posts installed on the City roadways, as depicted by various photos. Indeed, it can be discerned from examination of the group of photos produced herein of the flattened post that the gray colored squares referred to by Mr. Speer's affidavit are indeed fraying remnants of retro-reflective tape, which were worn away by the same kind of vehicle contacts that resulted in flattening the post as it failed to rebound.

The Davidson posts were not designed and tested to withstand repeated wheel rollovers by heavy vehicles, including trucks and buses, that a delineator post situated where this post was installed within the roadway turning radius of 'off tracking' larger vehicles turning at that intersection. It was clearly foreseeable that such heavy vehicle impacts, and wheel rollovers were likely to occur with the delineator as situated and used here ...

(NYSCEF Doc. No. 65 [Bachner Aff. at ¶¶4-7]).

Plaintiff also points to Weir's testimony that the City uses Davidson brand channelizer posts—a brand manufactured and sold by Pexco—and notes that New York City's "Bollard Inspection & Repair Form" identifies these posts as "Davidson" brand (NYSCEF Doc. No. 69

[Inspection & Repair Form]), while New York City's purchase forms identifies the make and model of its purchased channelizer posts as Davidson FG series, which are manufactured by Pexco (NYSCEF Doc. Nos. 70 [Purchase Orders]).

DISCUSSION

On a motion for summary judgment, the movant bears the burden to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence demonstrating the absence of any material issues of fact (JMD Holding Corp. v. Congress Financial Corp., 4 NY3d 373, 384 [2005]). If this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]). In support of its motion Pexco argues that: (1) it has established that it did not manufacture the channelizer at issue; or, alternatively, (2) plaintiff has not demonstrated any design defect in the channelizer post. Neither of these arguments succeed.

Pexco has not carried its "initial burden of establishing as a matter of law that it did not manufacture or supply the product" (Ebenezer Baptist Church v Little Giant Mfg. Co., Inc., 28 AD3d 1173, 1174 [4th Dept 2006] citing Baum v Eco-Tec, Inc., 5 AD3d 842, 843-844 [3d Dept 2004]). As a threshold matter, the Court declines to consider Speer's affidavit attesting that the subject channelizer post was not manufactured by Pexco. Speer may not now, after his deposition, submit an affidavit contradicting the position taken at his deposition—i.e., that he could not determine whether Pexco manufactured the subject channelizer post—thereby depriving plaintiff of the opportunity to question him as to the basis for his new conclusion (See Jimenez v 470 Audubon Ave. Corp., 239 AD2d 106, 107 [1st Dept 1997] [trial court properly rejected plaintiff's affidavit in opposition to motion where affidavit, inter alia, "directly contradicted plaintiff's

deposition testimony that she could not identify the assailants”]). Even if this were not the case, the testimony of Weir and the various City records submitted by plaintiff provide sufficient circumstantial evidence to create a triable issue of fact as to whether Pexco manufactured the channelizer post in question (See e.g., Healey v Firestone Tire & Rubber Co., 87 NY2d 596, 601-02 [1996]). Accordingly, Pexco’s motion for summary judgment on this ground is denied.

Pexco’s alternative argument, that it is entitled to summary judgment because plaintiff has failed to demonstrate any design defect in the channelizer post, also fails. “[A] defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use and whose utility does not outweigh the danger inherent in its introduction into the stream of commerce” (Fasolas v Bobcat of New York, Inc., 33 NY3d 421, 429-30 [2019] quoting Voss v Black & Decker Mfg. Co., 59 NY2d 102, 107 [1983]). Proof of compliance with current industry standards is generally sufficient to establish, prima facie, that a product is not defectively designed (See e.g., Reeps v BMW of N. Am., LLC, 94 AD3d 475, 475-76 [1st Dept 2012]; see also Leone v BJ's Wholesale Club, Inc., 89 AD3d 406, 407 [1st Dept 2011]). Contrary to Pexco’s claim, however, it is Pexco that bears the initial burden to establish such compliance. Pexco has not done so here.

To the extent Speer testified that Pexco’s channelizer posts are tested by Pexco and various state and national bodies, his testimony on this point was vague and not substantiated by any documentary evidence. Neither has Pexco established that Speer is qualified as an expert to testify as to the design and manufacturing of the channelizer and industry standards related to that design and manufacture (See LaScala v QVC, 201 AD3d 798, 799 [2d Dept 2022] [defendants’ expert, conclusory affidavit opining that the hoverboard was not defectively designed, without providing

any explanation of the hoverboard's design, or any discussion of industry standards or costs ... was insufficient to affirmatively demonstrate, prima facie, that the hoverboard was reasonably safe for its intended use]).

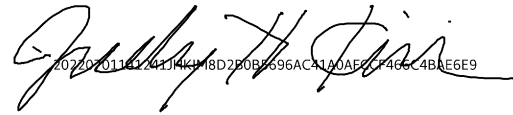
Pexco argues that Weir's testimony that the City regularly reviewed and frequently replaced channelizer posts throughout the City demonstrates that "the City was aware of the fact that nothing in a high impact zone [like New York City], where extremely heavy vehicles operate, park on channelizer posts, can insure complete resiliency or a never ending ability to bounce back" (NYSCEF Doc. No. 49 [Shetye Affirm. at ¶¶29, 36]), thus establishing that flattened channelizer posts were operating as expected. This circumstantial evidence of the City's subjective expectations regarding channelizer posts does not establish that this post operated in conformance with industry standards. Pexco's argument amounts to an assertion that it was generally accepted that channelizer posts will sometimes flatten but fails to address the ultimate underlying question at issue, namely whether, in light of industry and governmental standards, was it reasonable for the channelizer post to fail under the relevant conditions (See Yun Tung Chow v Reckitt & Colman, Inc., 17 NY3d 29, 33 [2011] [on summary judgment motion, "defendants cannot rely simply on the fact that their product is what they say it is and that everyone knows that lye is dangerous; that only begs the question at the heart of the merits of the defective design claim: knowing how dangerous lye is, was it reasonable for defendants to place it into the stream of commerce as a drain cleaning product for use by a layperson?"]). Accordingly, Pexco has failed to establish as a matter of law that there was no design defect in the channelizer post at issue.

In light of the foregoing, it is

ORDERED that the motion by defendant Pexco LLC for summary judgment dismissing this action as against it is denied; and it is further

ORDERED that within twenty days of entry, counsel for plaintiff shall serve a copy of this order with notice of its entry upon all parties and upon the Clerk of the Court (60 Centre St., Room 141B) in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on this court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



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7/1/2022
DATE

JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE