SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

----------x	**TRIAL PART: 19**
ASSOCIATED MUTUAL INSURANCE COOPERATIVE a/s/o HAVANA TROPICS d/b/a HAVANA'S FOCCACIA	**NASSAU COUNTY**
Plaintiff,	**INDEX NO:4257/07**
-against-	**MOTION SEQ: 1**
WELLS MANUFACTURING, SPECIALTY EQUIPMENT COMPANIES and CARRIER COMMERCIAL R EFRIGERATION, INC.	
Defendants.	**SUBMIT: 1/12/09**
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The following papers having been read on this motion:

Notice of Motion..... 1
Opposition..... 2
Reply..... 3

The motion by Carrier Commercial Refrigeration, Inc. i/s/h/a Wells Manufacturing Specialty Equipment Companies ("Carrier") for summary judgment pursuant to CPLR 3212 dismissing the complaint of plaintiff, Associated Mutual Insurance Cooperative ("Associated") is denied for the reasons set forth herein.

Associated commenced this action to recover monies paid to Associated's subrogor, Havana Tropics d/b/a Havana's Foccacia ("Havana"), the owner and operator of a restaurant located at 323 Merrick Road, Lynbrook, N.Y.

Havana had purchased a counter top fryer that had been manufactured by Carrier. On January 16, 2005, a fire occurred at Havana with Havana sustaining $47,043.19 in property damage. Associated alleges the fire and resulting property damages was caused by the negligence of Carrier in improperly designing, assembling, manufacturing and inspecting the countertop fryer Model LLF-14. Associated also alleges Carrier failed to properly warn of the dangers associated with the operation of the countertop fryer.

Carrier alleges that Associated has failed, *prima facie*, to point out any specific design, assembly, manufacturer or inspection defects of the counter top fryer. Carrier also contends Associated has failed to show that the warnings attached to the fryer were insufficient.

Carrier has offered the deposition testimony of its engineering expert, Robert S. Ritter (see Exhibit F annexed to Carrier's motion; the following pages refer to that exhibit). Ritter was at the time of the deposition, February 28, 2008, a quality assurance manager with Wells Manufacturing. As Carrier owned Wells until August, 2007 (p. 5). Ritter was a project engineer before that (p. 6). Ritter inspected the counter top fryer at issue and found it was not properly connected as per the warning and the counter top unit had been serviced by a person or persons unknown between 1996 and 2005 (p. 28). Ritter offered no opinion in his evaluation of how the counter top fryer was involved in a fire (p. 28). Ritter indicated the counter top fryer was connected to a light duty ungrounded cord (p. 29). He found servers were missing at the bottom of the control panel and retainers were missing from the high limit thermostat capillary bulb (p. 29). Also, he found baskets were missing and the "cord set" was disconnected from the unit (p. 30).

Associated has offered the affidavit of its engineering expert Steven Pietropaolo (see Exhibit A annexed to Associate's affirmation in opposition for the affidavit and the April 24, 2006 report). Pietropaolo indicated the counter top fryer started the fire from the fryer's own defective power cord in the subject unit (¶ 7). The strain relief on the cord failed, allowed the cord to become damaged, the damaged cord became more susceptible to shorting that would result in arcing and fire (¶ 8). Pietropaolo indicated his testing examined all other potential malfunctions of the fryer (¶ 4).

A manufacturer is under a duty to use reasonable care in designing its products when used in the manner for which the product was intended as well as an unintended yet reasonably foreseeable use (*Micallef v Miehle Co.*, 39 NY2d 376).

A manufacturer who places into the stream of commerce a defective product which causes injury may be liable for such injury (*Amatulli v Delhi Construction Corp.*, 77 NY2d 525).

A party injured as a result of a defective product may seek relief against a product manufacturer or others in the distribution chain if the defect was a substantial factor in causing the injury; a product may be defective when it contains a manufacturing flaw, is defectively designed or is not accompanied by adequate warnings for the use of the product (*Speller v Sears, Roebuck & Co.*, 100 NY2d 38).

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 (*Donovan v All-Weld Products Corp.*, 38 AD3d 227).

A defendant manufacturer is liable if the plaintiff can establish that the duty to warn was breached and that the failure to warn was a substantial or proximate cause of the injury (*Howard v Poseiden Pools, Inc.*, 133 Misc2d 874). Whether warnings were needed or adequate to deter potential misuse and whether the failure to warn was a substantial cause of the injury is ordinarily a question for the jury (*Howard v Poseiden Pools, Inc., supra; see Schiller v National Presto Industries, Inc.*, 225 AD2d 1053).

A manufacturer is not responsible for injuries resulting from substantial alterations to or modifications of a product by a third-party that render a safe product defective or otherwise unsafe (*Amatulli v Delhi Construction Corp., supra; Robinson v Reed Prentice Div. of Package Mach. Co.*, 49 NY2d 471; *Pichardo v C.S. Brown Co., Inc.*, 35 AD3d 303).

Thus, a manufacturer may not be liable for damages, either on a strict products liability or negligence cause of action where, after the product leaves the possession and control of the manufacturer there is a substantial modification which substantially alters the product and is the proximate cause of the plaintiff's injuries (*Robinson v Reed-Prentice Div. of Package Machinery, Co., supra*).

As to Carrier's allegations that prior service of the fryer could negate its responsibility, there is no indication that the prior service of the countertop fryer caused the unit to malfunction. Pietropaolo's April 24, 2006 report (Exhibit A, pg. 2, last full paragraph annexed to Associated's affirmation in opposition) discounts the prior servicing caused the unit to be the cause of the subject fire. At the very least, there is an issue of fact on this issue.

Carrier contends Associated offers only general language of its allegations of the defective countertop fryer with nothing "specific" set forth in Associated's interrogatories and only conclusory allegations by Associated's expert, Pietropaolo. For the most part, the court must disagree.

In Associated's response to Carrier's first set of interrogatories, it notes the April 24, 2006 report of Pietropaolo attached thereto as Exhibit B (the same report is annexed as Exhibit A to Associated's affirmation in opposition following Pietropaolo's affidavit). The April 24, 2006 report, from an objective point of view, is very specific as are Pietropaolo's allegations therein.

Where a claim of liability is based upon a manufacturer's failure to warn, summary judgment will generally not lie (*Lugo by Lopez v LJN Toys, Ltd.*, 146 AD2d 168). The warning on the fryer

as to electrical connections indicated use a of grounded three-prong plug and plugged into a grounded outlet (see Exhibit F, pg. 17 annexed to Carrier's motion; Exhibit G annexed to Carrier's motion). The fryer was connected to a light duty ungrounded two prong plug (p. 29). The three-pronged plug was to prevent shock hazard. Pietropaolo's testing revealed the unit's cord itself failed and the fire was not caused by an improper extension cord.

Whether the evidence of the plaintiff is sufficient to make out a *prima facie* case against a defendant involves sufficiency so as to authorize submission of the case to a jury (*Markel v Spencer*, 5 AD2d 400; *see also Swensson v New York Albany Despatch Co.*, 309 NY 497).

Also, the plaintiff in a manufacturing defect claim is not required to prove any specific defect, and a plaintiff's reliance on circumstantial evidence of a defect does not relieve the manufacturer of its initial burden, as the movant for summary judgment seeking dismissal to establish that the manufactured item was not defective as a matter of law (*see Schlanger v Doe*, 53 AD3d 827).

In support of a motion for summary judgment, the movant, here Carrier, has the burden of establishing *prima facie* entitlement to judgment as a matter of law by offering sufficient evidence to eliminate any triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557; *Quinn v Nyack Hospital*, 286 AD2d 675). Carrier has failed to show that the fryer was not negligently manufactured, and it has not met its burden.

The credibility of witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which rejected, the truthfulness and accuracy of the testimony, whether contradictory or not, are issues for the trier of the facts (*Lelekakis v Kamamis*, 41 AD3d 662; *Pedone v B & B Equipment Co., Inc.*, 239 AD2d 397).

Summary judgment is not appropriate when the parties present experts with conflicting opinions; such credibility issues are properly left to the trier of fact for resolution (*Roca v Perel*, 51 AD3d 757; *Barbuto v Winthrop University Hospital*, 305 AD2d 623).

Here, there are issues of fact as to design defects since an expert affidavit and deposition have been submitted that offer conflicting opinions on whether or not there were defects in the fryer when it left the factory. (*see Robinson v Reed-Prentice Div. of Package Machinery Co.*, 49 NY2d 471).

Summary judgment is seldom appropriate in a negligence action (*Vanderwater v Sears*, 277 AD2d 1056). That is the case herein.

This constitutes the decision and order of this Court.

ENTER

DATED: February 23, 2009

HON. ARTHUR M. DIAMOND
J. S.C.

ENTERED

FEB 26 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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