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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

RITA ROSELLE, as mother and natural guardian of HOLLY ROSELLE, an infant under the age of 14 years and RITA ROSELLE, individually,

Plaintiff(s),

-against-

ANV LANDSCAPING, INC. and SEA GULL LIGHTING PRODUCTS, INC.,

Defendant(s).

INDEX No. 5656/03

MOTION DATE: 11/9/05

MOTION SEQ. No. 1-MD
2-MG
3-MD

ANV LANDSCAPING, INC.,

Third-Party Plaintiff(s),

-against-

PASQUALE MARAIA d/b/a MARCO PAINTING,

Third-Party Defendant(s).

The following papers read on this motion:

Sea Gull Notice of Motion/Affirmation/Exhibits
Maraoa Notice of Cross Motion/Affirmation/Exhibits
ANV Notice of Cross Motion/Affirmation/Affidavit/Exhibits
Plaintiffs Affirmation in Opposition/Exhibits
ANV Affirmation in Opposition
Sea Gull Reply
Maraia Reply
ANV Reply

In this action plaintiffs seek damages to compensate for injuries sustained by HOLLY ROSELLE, a minor, allegedly due to the negligence of the defendants. Defendants SEA GULL LIGHTING, ANV LANDSCAPING, and third party defendant PASQUALE MARAIA d/b/a MARCO PAINTING all seek summary judgment dismissing the claims against them.

Plaintiffs allege that HOLLY ROSELLE was injured on May 3, 2001 while walking on her front lawn. They allege that her left leg came into contact with a broken light fixture designed and distributed by SEAGULL, which had a jagged edge and caused a severe laceration to her leg. Plaintiffs allege that this light fixture was broken by defendant landscaper, who left it on the lawn creating a dangerous condition.

As to the motion of PASQUALE MARAIA d/b/a MARCO PAINTING, good cause having been demonstrated, that motion seeking summary judgment dismissing all claims against this third party defendant, is Granted. There is no evidence in the record that this defendant was negligent or responsible for the accident. In the third party Complaint ANV claims that the third party defendant was responsible for the broken light, in causing it to break and allowing it to remain in a dangerous fashion. Discovery in this action has been completed. There is no evidence provided to support that claim. ANV argues, without a factual basis, that there may be such evidence as Mr. MARAIA parked his car next to the subject fixture and there were footprints indicating that he walked near it. This is not evidence that he broke the light. There is no testimony or evidence that he was working on the light or came into contact with it. There is no evidence that this defendant was negligent. Mere speculation does not raise a triable issue of fact to defeat an otherwise meritorious motion for summary judgment. CPLR § 3212.

Defendant ANV LANDSCAPING and SEA GULL also seek summary judgment. In their complaint plaintiffs allege that the landscaper, ANV broke the light and allowed it to remain in a dangerous condition. They also allege a product liability claim that SEA GULL was negligent in its design and manufacture of the light as it improper for use in the manner intended.

Plaintiffs allege that the subject light fixture had been installed, as part of a group, along the perimeter of the driveway. Plaintiff's father James Roselle testified that ANV was used as his landscaper at the time of the incident, and he had observed that the light fixtures were repeatedly broken when the landscapers mowed the lawn. He remembered five or six fixtures having been broken. (Seagull, Exh. D)

In support of its application SEA GULL argues that the plaintiffs cannot prove that SEA GULL was liable. It argues that the glass component of the lighting fixture was not manufactured by SEA GULL, but by another company based in Portugal. It also claims that the plaintiffs cannot show that the glass component or fixture were defectively designed.

SEA GULL offers the expert affidavit of Anthony Sementilli, an electrical engineer who states that in his professional opinion the impact points on the fixture were caused by a "weed whacker". He also opines that the glass portion of the fixture, made of borosilicate glass was heavily constructed and sturdy. He also states that he researched the use of such glass and found it was intended to resist "thermal Shock" and shattering, and that its use in such lawn lighting is the industry standard. (Motion, Sementilli aff.)

In opposing SEA GULL's motion, counsel for plaintiff argues that the plaintiff's father described the light product as a "piece of garbage" and complains that SEA GULL never recommended the use of longer posts which would bring the glass portion of the feature above the level of lawn equipment. He claims that the failure to do so raises a triable issue of fact whether SEA GULL was negligent.

Plaintiffs also provide an affidavit of Paul A. Ast, an engineer with American Standard Testing Bureau Inc., who states that there is a similar prior 1999 complaint regarding the light fixture. He states that he examined the suspect fixture and found it had been subjected to an "appreciable impact" which caused a stress crack around the glass. He opines that the design of this landscaping light fixture is poor as when broken, the jagged edges of glass remain on the post constituting a dangerous hazard. He states that this design is not that which is in general use, which does not use such breakable glass, and that in his opinion the design, materials of construction and fabrication of the subject light were defective and unfit to the purpose intended. He also opines that due to its design and manufacture and intended use, it is foreseeable that lawn mower machinery would come into contact with the lights, which could then easily fracture and cause this type of injury.

He also opines, with no expertise in the field, that a lawn maintenance contractor who broke such a fixture, should have reported it to the homeowner.

Counsel for the plaintiffs argue that the experts' affidavits provided in this case are sufficient to raise a triable issue of fact that the light fixture was the source of the glass which lacerated the infant's leg, and that the design and manufacture was defective. *Speller v. Sears Roebuck and Co., et al*, 100 NY2d 38 (2003).

As to a claim of strict liability, a manufacturer who sells a defective product is liable for any injury that results from the product if it is being used for its intended use or a reasonably foreseeable purpose. A product is defective if it is not reasonably safe. *Voss v. Black & Decker Mfg. Co.*, 59 NY2d 102 (1983). To defeat summary judgment dismissing such a cause of action, a plaintiff must offer proof that the product was defective and that the defect was a substantial fact in producing the plaintiff's injury. Such a defect may consist of: (1) a design defect; (2) a manufacturing defect; or (3) the absence or inadequacy of warnings for the use of the product. In this action the plaintiffs have identified design or manufacturing defects in the light fixtures.

A claim of design defect, as here, must assert that an entire model line or feature of all identical models is defective. *Voss, supra.* A design defect theory is premised on facts demonstrating that the defect alleged was designed to be there, that the manufacturer sold a line of products designed in such a manner to render them all unsafe. *Micallef v. Miehle Co.*, 39 NY2d 376 (1976). Again, there is such evidence presented here. The plaintiff has offered expert testimony supporting the claim of such a design defect.

Plaintiff must establish that the product did not perform as intended and that the product was defective when it left the manufacturer's control. *Rosado v. Proctor & Schwartz*, 66 NY2d 21 (1985). There is such evidence here. Plaintiff's expert has stated that the fixture revealed evidence that it was poorly designed for the intended use. The plaintiff has set forth evidence demonstrating that the lights failed to perform as intended, and also that the lacerations to the child's legs occurred due to the defect. *Halloran v. Virginia Chems.,* 41 NY2d 386 (1977).

The reports of plaintiff's expert defeats the defendant SEA GULL's motion for summary judgment. The expert states with sufficient degree of appropriate engineering certainty that the light fixture was defectively designed and manufactured. There is a foundation in the record of facts sufficient to defeat a motion for summary judgment. *Aghabi v. Sebro*, 256 AD2d 287 (2nd Dept. 1998); *Tower Insurance Co. of New York v. M.B.G., Inc.*, 288 AD2d 69 (1st Dept. 2001); *Easy Shopping Corp. v. Sneakers Center and Sports, Inc.*, 303 AD2d 361 (2nd Dept 2003). Plaintiff's expert has raised an issue of fact as to whether the glass globe and light fixture, in breaking so easily and into jagged fragments, did not perform as intended.

He also stated with a degree of engineering certainty that the glass in the fixture was defective and that it should not have been used in a light fixture so close to the ground, likely to come into contact with landscaping equipment. The Court rejects defendant's assertion that the plaintiffs have failed to offer any proof or evidence that they could establish that the accident was caused or contributed to by the design and manufacture of the light fixture.

As to ANV's application for summary judgment, plaintiffs oppose contending that the movant has failed to demonstrated that there is no triable issue of fact. At their depositions plaintiff RITA ROSELLE and her husband both testified that she and her husband had conversations with the owner of ANV, Nick Abbatiello about the recurrence of broken lights. She testified that Mr. Abbatiello told her that he would pay for any broken lights, and she testified that she told him that she wanted to be told when it was broken. She also testified that she checked the lights weekly, after the landscapers finished their work. Mr. Roselle testified that the fixtures would break every time the lawn was mowed and that each time the lawn was mowed he noticed five or six fixtures were broken.

Counsel notes the deposition testimony of Nick Abbatiello, who testified that he did not recall these conversations. He also testified that he had seen a broken fixture at the Roselles prior to the accident. He testified Mrs. ROSELLE showed it to him.

Counsel for plaintiff argues that there is a question of fact whether ANV was responsible for the broken light fixture being left in the lawn and a question of whether that was negligent on its part.

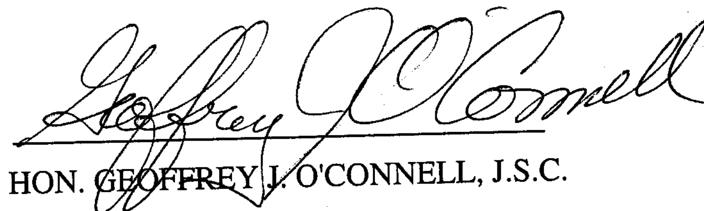
ANV argues that there is no direct evidence that any of its employees broke the light fixture or left it in a dangerous condition. Mr. Abbatiello testified that his only conversation with Mr. Roselle entailed the workers being careful around the lights in general and that the Roselles never told him that he was breaking the lights. But he testified Mrs. ROSELLE told him his workers did. (Cross Motion, Exh. F)

The Court agrees with the plaintiff that under the circumstances, largely in reliance on the testimony of Mr. Roselle, there is enough evidence to defeat ANV's motion for summary judgment. The credibility of the Roselles is not at issue here. The opposition has made a showing of sufficient facts from which the negligence of this defendant and causation of the accident due to that negligence may be reasonably inferred without speculation. *Babino v. City of New York*, 234 AD2d 241 (2nd Dept 1996). While ANV argues that the plaintiff's expert opposing the application is insufficient, no such expert testimony is necessary to defeat summary judgment for this defendant, as unlike SEA GULL, the theory is negligence, not product liability.

Based on the evidence presented, the motions of both ANV and SEA GULL are Denied. The Court finds that the plaintiffs have offered sufficient evidence to raise a triable issue of fact as to whether either or both of these defendants were negligent and as to whether their respective negligence caused or contributed to the minor's injuries. CPLR § 3212.

It is, SO ORDERED.

Dated: Feb 3, 2006



HON. GEOFFREY J. O'CONNELL, J.S.C.

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