COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS. SUPERIOR COURT
CIVIL ACTION NO. 97-0053

JAMES R. GAGNON, et ux,)
Plaintiffs)
)
v.)
)
MAGNAT MACHINERY, INC.,)
et al., Defendants)

MEMORANDUM IN SUPPORT OF FAIRVIEW'S
MOTION FOR SUMMARY JUDGMENT

A. Concise Statement of Facts (Super. Ct. R. 9A[b][5])

The Allegations

(1) In their complaint, the plaintiffs allege Fairview Machine & Tool Company negligently designed, manufactured, installed, repaired, serviced, outfitted, modified and equipped a winder machine which caused a roller suspended over the machine to fall and injure the plaintiff. Further, Fairview was negligent in failing to inspect the machine and failing to give necessary warnings to the plaintiff regarding the machine's latent dangers. See Complaint, ¶ 35. This same conduct gave rise to additional causes of action for breach of the warranty of merchantability and loss of consortium by the principal plaintiff's wife. See Complaint, ¶¶ 41-42, 46.

The Machine and the Accident

(2) Discovery has established that Fairview did not design, manufacture or install Laminator #2 at Laminated Papers, Inc., Holyoke, Massachusetts ("LPI"). Affidavit of Rebecca Jackson [Exhibit A].

(3) At the time of his accident, the plaintiff was working as a machine operator on Laminator #2. He had been working on that machine for approximately 7 weeks prior to his accident. See Plaintiff's deposition [Exhibit B], at 112.

(4) The plaintiff's accident occurred when the machine's "rider roll" fell on him. See Plaintiff's complaint, ¶8. Laminator #2 was an industrial machine which functioned to seal wax between two long rolls of paper. At one end of the machine, the yet to be laminated paper was unrolled from spools which were approximately three feet in diameter. This was the so-called "unwind" portion of the machine. In the middle of the machine the actual paper lamination operations took place, and at the "rewind" portion at the opposite end of the machine the finished product was rolled onto one horizontally positioned cardboard spool.

(5) The rider roll was located at the rewind end of the machine. It was essentially a long cylinder that served to keep pressure on the paper as it was rewound onto the finished roll of paper. Plaintiff's deposition [Exhibit B], at 29. The rider roll adjusted upward as the finished roll become larger and larger as more paper was wrapped onto it. The rider roll were fixed into a track on both its ends.

(6) Once the lamination of paper was completed, the rider roll was lifted away vertically and out of the way so the finished product can be taken away. Adams deposition [Exhibit C], at 15. According to procedure, the operator raised the roll by manually pushing on an "up" button until the rider roller has been raised above several feet over head height. Id.; Plaintiff's deposition [Exhibit B], at 34-35.

The Defeated and Unused Safety Devices

(7) After it was manually raised, the rider roll was held suspended above the machine at approximately 10-12 feet by an electrically powered clutch assisted by counterweights. If for some reason the clutch lost power, the rider roll would fall, so two safety devices were installed to prevent the roll from falling if the machine were to be de-energized.

(8) First, the machine had a "safety bar" or which held the rider roll in the raised position. This device consisted of a spring loaded steel rod on one of the ends of the rider roller. Adams deposition [Exhibit C] at 29. After the rider roller passed this latch on the way up, the spring-loaded rod would protrude into the track. When the bar jutted into the track, the roller could not fall. Usual operating procedure required the operator to manually pulled back the spring with one hand, and pressing the rider roll hoist with the other hand. Id., at 15-16. Unless the spring was pulled back out of the track, the rider roller would become jammed in its'

track and would not descend any further. Id., at 16, 115-116. At the time of the plaintiff's accident, the spring was wired back with a coat hanger. Id., at 97 .

(9) Second, the Laminator #2 had two "safety chains" which hooked underneath the raised rider roller on both ends to retain it if it suddenly fell. The plaintiff acknowledges that he set only one of the chains at the time of the accident. When the machine was energized, a clutch and the rider roll counterweights would hold the rider roll up, and it would not come down unless the machine lost power.

(10) About 1990, safety chains installed to hold the rider roller in place in the event it began to fall unexpectedly. Adams deposition [Exhibit C], at 15-17. The chains were installed by a LPI maintenance employee, Dan Sullivan. Sullivan told the plaintiff "to use the chains to hold up the roller" when changing paper "in case the electrical goes out, surge or anything." Plaintiff's deposition [Exhibit B], at 295. Sullivan showed the plaintiff how to affix the chains, and said they should be used every time. Id., at 296. Sullivan showed him to put *both* safety chains on. Id., at 312.

(11) The rider roller was supposed to stay in position, but the plaintiff had seen it fall unexpectedly about 2-3 times before his accident, and he had heard about it falling another half dozen or so times. Plaintiff's deposition [Exhibit B], at 234-235.

(12) The plaintiff does not have any knowledge why the rider roll fell, or if there was a power surge or power outage. Id. He heard a "pop" before the rider roll fell, which he believes was the clutch of the rider roll's up-down mechanism. Id., at 182-183. He does not have any information or reason to believe the clutch or the switch failed or malfunctioned. Id., 199-200.

(13) The fact the rider roll was apt to descend suddenly was a known danger. Prior to the accident, the plaintiff had first hand knowledge of two or three rider roll falls, and had heard second hand of the rider roll falling on another half dozen occasions. Plaintiff's deposition [Exhibit B], at 310-311. The danger posed by the rider roll falling was something the plaintiff brought up with the owner of Laminated Papers before the accident. In response, the owner had safety chains installed. Id., at 311.

(14) Prior to his accident, the plaintiff knew the rider roller and the rewind section of the machine were a threat to safety. Id., at 310-311.

Involvement of Fairview

(15) The plaintiff had no recollection of what particular work Fairview's employees performed on Laminator #2 before the accident.[1] The plaintiff could not

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[1] The plaintiff testified that Fairview was his employer's machine maintenance vendor at the time of his accident, but could not recall particularly what if any repairs or maintenance the Fairview did on Laminator #2. Question: *"What kind of things can you remember the people from Fairview doing on Laminator #2 up until the time of your accident?"* Answer: *"I can't recall, but I know who it was."* Id., at 300. Question: *"Did Ernie VanDyke or anybody else from Fairview do any work on the clutch that's involved in*

substantiate his allegation that the conduct of Fairview caused or contributed to cause his accident.[2]

(16) Fairview did repair work on Laminator #2 on an as-needed basis pursuant to specific requests of LPI's president, Bernard Adams. Mr. Adams characterized "maintenance" to refer to taking out an old part and replacing it with a new identical part. Id., at 52-53, 88-89.

(17) In August 1993, five months before the plaintiff's accident, Fairview replaced bolts, which had become worn from vibration, in the rider roller slides. Adams deposition [Exhibit C], at 48-49. Three and one-half months before the plaintiff's accident, on October 1, 1993, Fairview installed new drive chains and new sprockets in the place of ones which had become worn. The drive chains bring the rider roller up and down. Id., at 88. Fairview also balanced the rider roller. Adams, deposition [Exhibit C], at 50-51, 53. Approximately six weeks before the plaintiff's accident, Fairview put in new bed roll bearings (and engaged in related work to get to them) on the rewinder portion. Id., at 49.

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hoisting the rider roll?" Answer: *"Not that I am aware of, no. I don't recall."* Id., at 313.

[2] Question: *"Is it your belief that anything or anybody from Fairview did cause or [contributed to the] cause of your accident?"* Answer: *"None. I don't know."* Id., at 301. Question: *"Are you aware of anything that anyone employed by Fairview did that may have caused your injury?"* Answer: *"I have no idea."* Id., at 314.

(18) The services provided by Fairview were rendered pursuant to Mr. Adams' specific request. He would call Fairview's president and orally order products and services. LaFlamme deposition [Exhibit D], at 14-15, 16, 19.

(19) The plaintiff has not identified any expert witness who might testify that any conduct attributable to Fairview was negligent or caused the accident which befell the plaintiff.

B. Argument and Authority

1. *NO RATIONAL FACTFINDER COULD CONCLUDE THAT FAIRVIEW'S NEGLIGENCE CAUSED THE PLAINTIFF'S INJURY*

Summary judgment is appropriate in a products liability case where, unmet by countervailing materials, the defendant demonstrates that the plaintiff has no reasonable expectation of proving an essential element of his case. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

The duty owed by repairers is dependent on exactly what the repairer was contracted to do. Bulpett v. Dodge Associates, Inc., 5 Mass. App. Ct. 593, 598 (1977) and cases cited therein. In this case, LPI and Fairview did not have a maintenance agreement. Fairview was hired to perform specific tasks when requested to do so by LPI's president, Mr. Adams. There is no evidence that Fairview ever agreed to assume an overarching responsibility to maintain LPI's machinery.

The mere happening of an accident is not proof of negligence. Abrahams v. Rice, 306 Mass. 24 (1940). The sole fact that the plaintiff was injured is insufficient to prove the defendant was negligent. In this case, the plaintiffs have not identified exactly what Fairview's employee did or failed to do which caused him to be injured. There is no explanation for the rider roll falling except a loss of power, and there is no evidence that Fairview had anything to do with a loss of power. There is no evidence that Fairview defeated the safety latch which would have prevented the rider roll from falling, or that any conduct attributable to Fairview caused the rider roll to fall. In fact, the plaintiff cannot recall Fairview's employee actually working on the mechanism at issue in this case. According to the plaintiff, the rider roll fell due to some electrical malfunction. Fairview did not do electrical work for LPI. Adams deposition [Exhibit B], at 106-107, 111-112.

Although a plaintiff need not show the exact cause of his accident or exclude all other possible causes, he must show there is a greater probability than not that the accident occurred from the defendant's negligence. Enrich v. Windmere Corp., 416 Mass. 83, 87 (1993), citing cases. If "on all the evidence it is just as reasonable to suppose that the cause is one for which no liability would attach as one for which the defendant is liable," then judgment must be entered for the defendant. O'Shaughnessy v. Besse, 7 Mass. App. Ct. 727, 729 (1979). A "mere possibility of an explanation [for an accident] predicated upon negligence is not enough to take the

issue to the jury." Artz v. Hurley, 334 Mass. 606, 609 (1956). In a products liability case, where the precise cause of an accident is left to conjecture then the product supplier is entitled to judgment as a matter of law. Maher v. General Motors Corp., 370 Mass. 231, 234 (1976).

Proof of causation "must be such as to make the defendant's causality 'appear more likely or probable in the sense that actual belief in its truth exists in the mind or minds of the tribunal notwithstanding any doubts that still linger there.'" Lynch v. Merrell-National Lab., 830 F.2d 1190, 1197 (1st Cir. 1997) (quoting Smith v. Rapid Transit, Inc., 317 Mass. 469 (1945)). "When the precise cause is left to conjecture and may be as reasonably attributed to a condition for which no liability attaches as to one for which it does, then [judgment as a matter of law should be ordered] against the plaintiff." Ryan v. Fall River Iron Works, Inc., 200 Mass. 188, 192 (1908).

Where, as here, there are several defendants, res ipsa loquitur is applicable only if it is possible to make the inference that the accident would not have occurred without the negligence of each defendant. Rafferty v. Hull Brewing Co., 350 Mass. 359, 362 (1966). The common experience of mankind does not suggest that this accident would not have occurred absent negligence on the part of Fairview, see Kourouvacilis v. General Motors Corp., 410 Mass. 706, 717 (1991), especially since

there is no proof that Fairview performed work on any mechanism which failed at the time of the plaintiff's accident.

If there is any other reasonable or probable cause of an accident besides the defendant's negligence, then res ipsa may not be implied. Wilson v. Colonial Air Transport, Inc., 278 Mass. 420, 425 (1932). See Dame v. Bay State Stevedoring Co., 2 Mass. App. Ct. 915 (1975) (where bale striking plaintiff could have come from a pile stacked by defendant's employee or from a forklift operated by a third person, judgment as a matter of law was required for defendant). For instance, in Mendum v. Mass. Bay Transp. Auth., 1 Mass. App. Ct. 873 (1974), the court upheld a directed verdict for an escalator repair and maintenance company and the escalator owner, holding the circumstances shown did not permit a finding the device's erratic behavior would not have happened except for the defendants' negligence. "The erratic behavior of the escalator suggests causes not shown to be within the exclusive control of the defendants as, for example, manipulation of its movement by unauthorized persons." Id.

Typically, expert opinion evidence is necessary to make out a plaintiff's prima facie case in a products liability action. This is such a case. The subject matter in this case is beyond the common knowledge of the average juror, and therefore expert testimony would be required to make out the plaintiff's case. See Triangle Dress, Inc. v. Bay State Service, Inc., 356 Mass. 440 (1969).

The plaintiff has not explained how whatever actionable conduct carried out by Fairview caused the rider roller to fall or the safety chain to fail to retain it. The pre-trial record is devoid of any direct evidence of the cause of the rider roller's fall. Nor has the plaintiff designated any expert witnesses who might testify the descent of the rider roller was attributable to some defect in materials or workmanship provided by Fairview. Nor is this case one in which a rational factfinder could infer causation under the operative facts and circumstances based on general knowledge.

Summary judgment is appropriately entered in products liability cases where a plaintiff cannot explain what caused his accident or how the defendant's conduct had anything to do with it. Morillo v. Clippard Instrument Labs, Inc., 27 Mass. App. Ct. 1112 (1989). This is just such a case. Similarly, in Barry v. Stop & Shop, 24 Mass. App. Ct. 224, 229 (1987), the plaintiff could not recall exactly what she was doing with her hands right before one of them came into contact with a moving rotary lawnmower blade. Judgment was entered as a matter of law because plaintiff's evidence left unexplained the precise happening of the accident, and more particularly, because there was no showing of proximate cause between the alleged product defect and her injury.

Likewise, in Corsetti v. The Stone Co., 396 Mass. 1, 24 (1986), judgment as a matter of law was appropriately entered where there was no evidence from which

the jury reasonably could have inferred that the negligence of a scaffold supplier had anything to do a plaintiff's injury that occurred when a side bracket broke.

A duty of to warn may be imposed when a party assumes some affirmative undertaking. For instance, a repairer may owe a duty to warn of defects that a particular repair would routinely uncover, unless such defects were an open an obvious danger. See Ramcharran v. Carraro Graphic Equip., Inc., 823 F.Supp. 63, 65-66 (D. Mass. 1993) ("[A]ny duty apart from a duty imposed by contract would have to be based on either negligence in making the repairs or warn of dangers which [the repairer] would have discovered as a routine matter in making specific repairs it undertook to make. Even beyond that, there would be no duty to warn of dangers of which the plaintiff and his employer would have been aware.").

Applying the holding of Ramcharran, there is no basis for liability on the part of Fairview for the plaintiff's injury. As stated above, there was no agreement in which Fairview undertook to inspect or maintain LPI's machinery. There is no evidence Fairview was negligent in making any of the repairs it carried out under Mr. Adams' direction. Further, there is no evidence that Fairview failed to uncover and warn of open and obvious dangers but which were unknown to the plaintiff and LPI.

"The duty to warn . . . does not attach where the danger presented is obvious, or where the plaintiff appreciated the danger substantially to the same

extent as a warning would have provided." Carey v. Lynn Ladder and Scaffolding Co., Inc., 427 Mass. 1003, 1004 (1998), citations omitted. This is because no warning is needed to neutralize a hazard that is obvious or known to a plaintiff. Bavuso v. Caterpillar Industrial, Inc., 408 Mass. 694 (1990). See Colter v. Barber-Greene Co., 403 Mass. 50, 59 (1988) ("[W]here the danger presented by a given product is obvious, no duty to warn may be required because a warning will not reduce the likelihood of injury."). In such cases, any failure to warn of known or obvious dangers cannot be considered the proximate cause of a plaintiff's injury as a matter of law. Id.

2. *SINCE THERE WAS NO SALE OF GOODS BY FAIRVIEW, THE PLAINTIFFS' BREACH OF WARRANTY CLAIM MUST FAIL AS A MATTER OF LAW*

The essential elements of a breach of implied warranty products liability claim are the sale of goods by the defendant, see Mason v. General Motors Corp., 397 Mass. 183, 187-188 (1986), that at the time the goods were sold they were defective in a way that made them unfit for the ordinary purposes for which they were made, and that as a proximate result the plaintiff was injured.

There is no direct or circumstantial evidence of a sale of goods by the defendant, Fairview, which are connected to his accident. In order to maintain a breach of warranty claim, "there must have been a transaction involving the sale of goods. If the heart of the contract or transaction is the rendition of services, then

the UCC does not apply." Ramcharran v. Carraro Graphic Equipment, Inc., 823 F.Supp. 63, 67 (D.Mass. 1993). "Massachusetts law is unwavering that only a seller of goods can be liable under a warranty theory." Vilpic v. Pottery By Andy, Inc., No. 95-30203-MAP, slip op. at 12 (D.Mass. Dec. 22, 1997).

The facts in the pre-trial record do not permit a rational inference that there was a sale of goods by Fairview.

C. Conclusion

For all the foregoing reasons, the defendant Fairview Machine & Tool Company respectfully requests the court to enter summary judgment in its favor.

FAIRVIEW MACHINE & TOOL COMPANY, Defendant

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