

PRESENT:

0108844/2002

LOMBARDI, JOSEPH
VS
EUROMARKET DESIGNS

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

8/3/04

52

SEQ 4

SUMMARY JUDGMENT

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

} 1-7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

OCT 27 2004

Dated: _____

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

J.S.C.

EXHIBIT B

EXHIBIT C

FOR THE FOLLOWING REASONS:

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY I.A.S. PART 8

-----X
JOSEPH LOMBARDI,

Plaintiff,

-against-

Index No. 108844/02
Mot. Seq. No. 004

EUROMARKET DESIGNS, INC. d/b/a CRATE
& BARREL a/k/a CRATE and BARREL and APPLE
MANUFACTURING CO.,

Defendants.

-----X
EUROMARKET DESIGNS, INC. d/b/a CRATE
& BARREL a/k/a CRATE and BARREL,

Third-Party Plaintiff,

-against-

APPLE MANUFACTURING,

Third-Party Defendant.

-----X
APPLE MANUFACTURING,

Second Third-Party Plaintiff,

-against-

SANG THANA,

Second Third-Party Defendant.
-----X

DIANE A. LEBEDEFF, J.:

Defendant/third-party defendant Apple Furniture, sued herein as Apple Manufacturing Co. ("Apple"), moves for summary judgment dismissing the complaint, the third-party complaint and all cross claims. Defendant/third-party plaintiff Euromarket Designs, Inc., doing business as Crate & Barrel ("Crate & Barrel"), by cross-motion, joins in Apple's motion for summary judgment dismissing the complaint and cross claims and, alternatively, seeks a conditional judgment against Apple.

Facts

Plaintiff Joseph Lombardi alleges that the tip of his right ring finger was "partially amputated" while he was disassembling a two-tier folding bookshelf bought from Crate & Barrel and designed by defendant Apple. When stacked, the units were connected by a metal piece referred to as a flange. Plaintiff testified he had acquired the unit about five years before the accident, and he and his wife had used it many times. On the day of the accident, after a trade show, he unscrewed the flanges from the upper unit to take it down, and took hold of the back legs of the top unit to lift it out of the grooves (Lombardi dep., pp. 47-50). As he lifted the top unit a few inches, it wobbled and tilted toward him, causing him to push it away with his left hand. It appears the top unit then fell down, catching his right ring finger between the right leg and the metal flange that was still connected to the bottom unit (*id.*, pp. 178-184). Plaintiff testified he did not take any particular precautions in disassembling the units because "it was elementary to disassemble" (*id.*, p. 186). In this action, he alleges the bookshelf was negligently designed

in that the hardware used to attach the stacked units to each other acted as a "guillotine," which sliced off his finger, and that defendants failed to warn of the danger of unstacking the bookshelves without first removing the hardware, or of a person stacking or unstacking the bookshelf units alone.

The owner of defendant Apple, a small company that purchases and sells decorative accessory products from overseas, testified that the basic design of the folding shelf has been around for about fifty years (motion exhibit P, Gregg Levesque deposition, pp. 7-9, 13-14). About fifteen years ago, working with a cabinetmaker, he adapted a Yugoslavian-designed folding bookshelf into a higher quality unit, by using solid wood rather than veneer, rounding edges, and using a bracket on the back to provide greater stability (*id.*, pp. 14-18). The exact unit involved in plaintiff's injury has been sold for seven years through several retailers worldwide, including Home Depot, which did its own quality control review of the bookcase and the manufacturing process (*id.*, at 28-30). Mr. Levesque testified that about 500,000 units, or approximately 350,000 units of the same design as plaintiff's, have been sold, and he has never received any complaints and is not aware of any other injuries (*id.*, at 35, 50-51). Crate and Barrel, which sold in the range of 13-20,000 units per year from 1998 through 2001, also had no record of any complaints concerning the stacking of the bookshelf units, of any accidents involving them, or of any recalls of the units (motion, exhibit Q, LaDew deposition I, pp. 39-41, 44-45; deposition II, p. 23).

In opposition, plaintiff submits the affidavit of an engineer, who states that the hardware acted as a "guillotine" and was unnecessary to connect the stacking shelves

(opposition, exhibit A). He opines that the dowel-and-plug method used by other makers of stacking shelves is preferable. He further states that the warnings should have indicated that all hardware must be removed before unstacking the units and that two people are needed for the task because the 25 pound bookcase is "quite heavy."

Legal Discussion

To establish a *prima facie* case in a strict products liability action predicated on a design defect, a plaintiff must show that (1) the manufacturer marketed a product which was not reasonably safe in its design, (2) it was feasible to design the product in a safer manner, and (3) the defective design was a substantial factor in causing the plaintiff's injury (*Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102 [1983]).

Defendants argues that there is simply no evidence that the stacking shelves, as marketed, were not reasonably safe. There are several factors to be weighed in determining whether a product is reasonably safe, including "the magnitude and seriousness of the danger in using the product, the product's utility to the public and the individual user, the technological and economic feasibility of a safer design and the plaintiff's awareness of the danger and ability to have avoided injury by careful use of the product" (*Fallon v. Clifford B. Hannay & Son, Inc.*, 153 A.D.2d 95 [3d Dept. 1989], citing *Voss v. Black & Decker Mfg. Co.*, *supra*, 59 N.Y.2d at 109).

Upon consideration of these factors, the court concludes that plaintiff has failed to raise an issue of fact on the basic issue of the reasonable safety of the stacking shelf units using metal bracket connectors. Any danger posed by the hardware flange used to connect

the shelving units is insubstantial, the condition of the shelves was exactly as contemplated by the consumer, and the risk of finger amputation or other injury was remote (*see Fallon v. Clifford B. Hannay & Son, Inc., supra*, 153 A.D.2d at 98, power reel sold without guide master "was exactly in the condition contemplated by the consumer at the time of purchase," and risk of accident experienced by plaintiff was "remote" and "magnitude of danger factor in the risk-utility test was insubstantial"). The record shows that the moderately-priced, simple folding shelves were useful to consumers.

Evidence that there is another way to stack shelves provides no basis for concluding that one method is any better or safer than the other (*see Scarangella v. Thomas Built Buses, Inc.*, 93 N.Y.2d 655 [1999], fact that optional safety feature of back-up alarm was not made a standard feature on bus did not render design of bus defective). Just as reasonable people may differ on the best way to tie their shoelaces to avoid a tripping incident, reasonable furniture makers may differ on the best way to stack shelving units securely. The single incident of injury to plaintiff does not provide a basis for finding the folding wooden shelves used by plaintiff were defectively designed.

Nor does the expert affidavit submitted by plaintiff raise an issue of fact. The expert's ultimate assertions are unsupported by any evidentiary foundation or reference to industry standards (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y.2d 525, 532 [1991]; *see Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 544 [2002]; *Timmins v. Tishman Const. Corp.*, 9 A.D.3d 62 [1st Dept. 2004], engineer's conclusory opinion that cantilevered gate was dangerous lacked probative value). The opinion, based on examination of the

bookshelves and a conversation with plaintiff,¹ has little or no probative value and provides no information concerning the safety record of the alternative dowel-and-plug stacking method.

As for the failure to warn allegations, plaintiff fails to show that there was any danger which required a warning, given the simple procedure and the knowledge of the average consumer. "[T]here is no liability for failure to warn where such risks and dangers are so obvious that they can ordinarily be appreciated by any consumer to the same extent that a formal warning would provide, or where they can be recognized simply as a matter of common sense" (*Bazerman v. Gardall Safe Corp.*, 203 A.D.2d 56 [1st Dept. 1994]), dismissing claim brought by consumer whose hand was crushed by safe that fell over as he was trying to install it, because there was no duty to warn consumer of risk of turning heavy safe "upside down on his own"; *Alessandrini v. Weyerhaeuser Co.*, 207 A.D.2d 996 [4th Dept. 1994], defendants had no duty to warn of "readily discernible" danger of lifting box containing heavy chairs by holes cut from its sides; *Fallon v. Clifford B. Hannay & Son, Inc.*, *supra*, 153 A.D.2d at 100, the "danger of injury was insubstantial and, to whatever degree there was such a risk, it was an obvious one, likely to be appreciated by the user to the same extent as any warning of it would have provided"; *see Smith v. Stark*,

1

The expert does not indicate whether he was informed that plaintiff attempted to disassemble the stacking units, while standing behind them and lifting the top unit by holding onto its two rear legs. This fact may have been relevant to the expert's assessment, since common sense would suggest that lifting the upper unit by its legs – rather than holding on to its middle near the center of gravity – may have contributed to the accident by allowing the shelf to tilt towards plaintiff.

67 N.Y.2d 693, 694 [1986]; Prosser & Keeton, Torts § 96[a], at 686-687 [5th ed]).

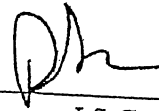
Conclusion

For the foregoing reasons, defendants' motion for summary judgment dismissing the complaint, third-party complaint and all cross-claims is granted.

No sooner than five days after service of a copy of this order with notice of entry and a proposed judgment upon plaintiff, the clerk shall enter judgment accordingly upon the presentation of appropriate papers.

This decision constitutes the order of the court.

Dated: October 27, 2004



J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: DIANE A. LEBEDEFF

PART 8

0108844/2002

LOMBARDI, JOSEPH
vs
EUROMARKET DESIGNS

SEQ 5

REARGUMENT/RECONSIDERATION

DEX NO. _____

OTION DATE 1/7/05

OTION SEQ. NO. _____

OTION CAL. NO. 78

The _____ based on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Plaintiff moves for reargument and renewal of defendants' summary judgment motion (CPLR 2221).

As to reargument, which "is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (*Foley v. Roche*, 68 A.D.2d 558, 567 [1st Dept. 1979]), plaintiff has not shown any facts were overlooked or any principle of law misapplied. Plaintiff asserts that defendants failed to meet their initial burden because they submitted no evidence, relying only on "self-serving" testimony of defendant Apple's principal, and of a witness for defendant Euromarket, and did not submit an expert affidavit on the safety of the stacking shelf design. In this design defect and failure to warn case, defendants met their initial burden by demonstrating that thousands of units had been sold and that plaintiff's was the only reported injury. Thus, following extensive discovery, there was no evidence that the design of the stacking book shelf had presented any danger, or that the shelves present any non-obvious danger that required a warning.

Plaintiff also argues that the court should not have disregarded plaintiff's expert affidavit on the ground that it does not refer to industry standards, because no such standards exist. The expert affidavit had no probative value because it lacked any

Dated: _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST Reference

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

RECEIVED
MAR 16 2005
IAS MOTION
SUPPORT OFFICE

Handwritten signature/initials

foundation whatsoever for the conclusions concerning design defect and failure to warn. Such conclusory expert affidavits are insufficient to raise a triable issue of fact in a design defect or failure to warn case (in addition to cases previously cited, *see, Martinez v. Roberts Consolidated Industries, Inc.*, 299 A.D.2d 399, 400 [2d Dept. 2002], “expert’s opinion was not supported by any foundational facts such as actual testing of the [carpet-cutting] knife, a deviation from industry standards, statistics showing frequency of injury resulting from the design of the knife, or consumer complaints” and therefore “was insufficient to raise a triable issue of fact that the knife was not reasonably safe in its design”; *Cervone v. Tuzzolo*, 291 A.D.2d 426, 427 [2d Dept. 2002], judgment was properly granted defendant at close of plaintiff’s case alleging dinette table was defectively designed, because testimony of plaintiff’s expert “was unsupported by foundational facts such as a deviation from industry standards or statistics showing the frequency of injuries caused by such a design”; *Warlikowski v. Burger King Corp.*, 9 A.D.3d 360, 362 [2d Dept. 2004], opinion of “plaintiff’s engineering expert was speculative and lacked sufficient probative value to defeat summary judgment” on design defect and failure to warn claims). The showing that an alternate design was available, without any showing concerning the safety record of the alternate, is likewise insufficient to raise an issue of fact as to design defect.

As for the branch of the motion seeking renewal, a motion to renew generally “must be based upon additional material facts which existed at the time the prior motion was made but were not known to the party seeking leave to renew and therefore not made known to the court” (*Silverman v. Leucadia, Inc.*, 159 A.D.2d 254, 255 [1st Dept. 1990]). No such facts are submitted.

Accordingly, the motion for reargument and/or renewal is denied.

This decision constitutes the order of the court.

Dated: March 15, 2005

FILED

MAR 18 2005

NEW YORK
COUNTY CLERK'S OFFICE



J.S.C.