[* 1]

SHORT FORM ORDER

INDEX No. 13-1690
CAL. No. 15-01318OT

ORIGINAL WHEN SIGNED

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

HON. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 8-18-15
ADJ. DATE 11-10-15
Mot. Seq. #001- MD

----------X

JOSEPH D. PIRRECA an infant by his father and Natural Guardian, JOSEPH J. PIRRECA,

Plaintiff,

- against -

RAZOR USA, LLC,

Defendant.

----------X

MARTIN SILVER, ESQ.
Attorney for Plaintiff
330 Motor Parkway, Suite 201
Hauppauge, New York 11788

MORGAN MELHUISH ABRUTNY
Attorney for Defendant
39 Broadway, 35th Floor
New York, New York 10006

Upon the following papers numbered 1 to 28 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 22-25; Replying Affidavits and supporting papers 26-28; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant, Razor USA, LLC, for summary judgment in its favor dismissing the complaint is denied.

This is an action for personal injuries sustained by the infant plaintiff, Joseph D. Pirreca, on May 6, 2012, when he fell while using a Razor scooter on Apricot Street in Mount Sinai, County of Suffolk. It is alleged that the defendant was negligent in the design, manufacture and testing of the product. The complaint also alleges defendant is liable for failure to give clear, visible and explicit instructions and warnings, as well as for breach of warranty. Plaintiff Joseph J. Pirrreca's cause of action seeks damages for loss of services.

Defendant Razor USA, LLC ("Razor") now moves for summary judgment dismissing the complaint. In support of the motion, it submits, *inter alia*, a copy of the pleadings, the deposition transcripts of the infant plaintiff, Joseph J. Pirrreca, Michael Hagenberger, and Russell Magnussen, a

copy of a Razor Pro Series Scooters owners manual, and the affidavit of William Meyer, P.E., dated July 21, 2015. In opposition, plaintiffs submit their attorney's affirmation, copies of two photographs, the deposition transcript of Robert Arthur Bradley, and the affidavit of Kim Pirreca, dated September, 2015.

Infant plaintiff, Joseph D. Pirreca, testified that a new scooter was purchased for him on April 12, 2012. It was a "high end" scooter that was meant to do more tricks than his prior scooter. He testified that he rode the new scooter two to five times prior to his accident on May 6, 2012. He could not remember if an owner's or operator's manual came with the scooter. He testified that his two friends, Michael Hagenberger and Russell Magnussen, were with him on the day of the accident. He testified that the accident occurred in a driveway, but he did not know whose driveway it was. He went off what he described as a ramp, but the scooter hit a "lip". He fell when he lost control, and the scooter hit the street. According to infant plaintiff, one handlebar hit the ground, and the other was sticking up. His face hit the handlebar that was sticking up. He testified that never saw any part of the grip worn off or fall off prior to his accident. His head did not hit the rubber grip but the piece at the end of the handlebar, which was metal. He testified that the handlebar grips came with a little hole at the end, "[i]ts like manufactured, like how it comes." He further testified that it was all one grip.

Joseph John Pirreca testified that he is the father of the infant plaintiff. He testified that his wife and the infant plaintiff went to pick up the subject scooter which is the subject of this action several weeks prior to the accident. The infant plaintiff had several scooters prior to this one. He testified that his son had no prior accidents involving a scooter. When they arrived home with the scooter, it was not in a box and he never saw an owner's manual for the scooter. His son never complained to him about the handlebars or about exposed metal on them prior to the accident. He testified that when he looked at the scooter after the accident the scooter grip appeared worn.

Michael Hagenberger testified that on April 12, 2012, he was with his friends, the infant plaintiff, and Russell Magnussen, when the accident occurred. The accident occurred on the side of Apricot Street, but he did not see it happen. He heard a crash behind him, looked and saw the infant plaintiff on the ground, his scooter next to him, and he was bleeding around the eye. He testified that prior to the accident he had seen infant plaintiff use the scooter, but he never saw him fall using it and never saw it banged up at all. He also never heard the infant plaintiff complain about the handgrips on his scooter.

Russell Magnussen testified that on April 12, 2012, he was with his friends, the infant plaintiff and Michael Hagenberger, when the accident occurred. He had seen the infant plaintiff use his scooter prior to the accident, but had never seen him get in an accident or hurt himself using the scooter. He never heard the infant plaintiff complain about the grips on his scooter and could not recall if there was anything wrong with the grips prior to the accident. He did not see the accident, he just saw the infant plaintiff bleeding on the ground. He testified that he looked at the scooter on the ground, and saw that the side of one grip was broken and had slid down toward the middle of the handlebars, exposing about an inch of metal.

Robert Arthur Hadley testified that he is Research and Development Manager for Razor. He testified that the scooter model which is the subject of this action was manufactured in China, that the manufacturer was instructed to make the scooter similar to the BMX bicycles at the time, and that Razor

uses a soft material for the grips similar to the material used for the grips on BMX bicycles. Razor tested the grips by giving samples to their BMX team riders to get feedback as to how they feel, their comfort and if they desired any changes. He testified that no testing was done as to the durability of the handlebar grips. He further testified, upon being shown post accident pictures, that he had never seen handlebar grips "completely cored" like they were on this scooter.

The affidavit of Kim Pirreca states that her son, Joseph, had other Razor scooters and the family sought to purchase an upgraded model that would offer better performance and durability. On April 12, 2012, she went with her son to Bike Discounters in Ronkonkoma, New York to buy the Razor scooter which is the subject of this litigation. The scooter was assembled by an employee of Bike Discounters before it was given to her. She never saw the box it was shipped in, and she did not receive the owner's manual or any other parts or packaging that may have come from the scooter. She also did not receive any verbal instructions or warnings with regard to the maintenance of the scooter. All she received from Bike Discounters was a receipt.

The affidavit of William Meyer, a professional engineer, states that he has inspected the subject Razor scooter, the pleadings, discovery responses, photographs, and deposition transcripts. He opines, to a reasonable degree of engineering certainty, that infant plaintiff's accident did not result from any defect or deficiency in the design or manufacture of the subject scooter, and that the handlebar grip designed and manufactured by and for Razor was suitable for its intended function and did not violate any applicable codes or standards. The hand grip end caps, as originally designed and manufactured, shielded the area, consistent with the requirements of this standard. Mr. Meyer further opines that his review of the evidence indicates that the end caps of the hand grips on the scooter deteriorated as a result of wear, and that his review of the evidence demonstrates that the wear was not normal but excessive. He states that a more durable hand grip would not eliminate the potential for an exposed end of the tubular steel handlebar, but would only delay its occurrence under excessive wear conditions. Mr. Meyer further opines that, being caused by excessive wear, the condition of a missing end cap on the hand grip would have been progressive in its development, which inherently provided notice to the end user. He concludes that as "evidenced in the multitude of changes to the scooter over time, Joseph Pirecca was capable of identifying worn parts and replacing them accordingly." Mr. Meyer further concludes that Joseph Pirecca "was capable of identifying and remediating a condition of worn end cap grips but chose not to do so."

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, *supra*; ***O'Neill v Fishkill***, *supra*).

Razor has failed to establish its prima facie entitlement to summary judgment herein. Generally, a person injured by an allegedly defective product may assert a claim against the manufacturer of a product based on negligence or strict products liability (*see* ***Voss v Black & Decker Mfg. Co.***, 59 NY2d 102, 463 NYS2d 398 [1983]). The injured party may claim that the product is defective either because there was a mistake in the manufacturing process, an improper design, or the manufacturer did not provide adequate warnings with regard to the use of the product (*see* ***Liriano v Hobart Corp.***, 92 NY2d 232, 677 NYS2d 764 [1998]; ***Voss v Black & Decker Mfg. Co.***, supra; ***Singh v Gemini Auto Lifts, Inc.***, 137 AD3d 1002, 27 NYS3d 637 [2d Dept 2016]).

In a strict products liability action against the manufacturer for a design defect, the plaintiff must show that the manufacturer breached its duty to market safe products when it marketed a product designed so that it is not reasonably safe and that the defective design was a substantial factor in causing the plaintiff's injury (***Voss v Black & Decker Mfg. Co.***, 59 NY2d 102, 463 NYS2d 398 [1983]. "A cause of action for negligent design additionally requires that the manufacturer acted unreasonably in designing its products." (***McArdle v Navistar Intern. Corp.***, 293 NY2d 931, 742 NYS2d 146 [3d Dept 2002], citing ***Voss v Black & Decker Mfg. Co.***, *supra*, 59 NY2d at 107). It is well settled that a manufacturer of defective products who places them into the stream of commerce may be held strictly liable for injuries caused by their products, regardless of privity, foreseeability or due care (*see* ***Sukljian v Charles Ross & Son Co., Inc.***, 69 NY2d 89, 94 [1986]; ***Codling v Paglia***, 32 NY2d 330,345 NYS2d 461[1973]; *see also* ***Amatulli v Delhi Constr. Corp.***, 77 NY2d 525, 569 NYS2d 337 [1991]). It is the manufacturer, and the manufacturer alone, "who can fairly be said to know and to understand when an article is suitably designed and safely made for its intended purpose" and who "has the practical opportunity, as well as a considerable incentive, to turn out useful, attractive, but safe products" (***Codling***, *supra*, 32 NY2d at 340–341).

A successful cause of action for defective design exists where a plaintiff is able to establish "that the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury" (*see* ***Fisher v Multiquip, Inc.***, 96 AD3d 1190, 949 NYS2d 214 [3d Dept 2012]; ***Steuhl v Home Therapy Equip., Inc.***, 51 AD3d 1101, 857 NYS2d 335 [3d Dept 2008]). To demonstrate a product was not "reasonably safe," the injured party must demonstrate both that there was a substantial likelihood of harm and that "it was feasible to design the product in a safer manner" (***Voss v Black & Decker Mfg. Co.***, *supra*, 59 NY2d at 108). In considering whether a product's design was defective, a court must consider: (1) the product's utility to the public as a whole, (2) its utility to the individual user, (3) the likelihood that the product will cause injury, (4) availability of a safer design, (5) the possibility of designing and manufacturing the product so that it is safer but remains functional and reasonably priced, (6) the degree of awareness of the product's potential danger that can reasonably be attributed to the injured user, and (7) the manufacturer's ability to spread the cost of any safety-related design changes (***Denny v Ford Motor Co.*** 87 NY2d 248, 639 NYS2d 250, 257 [1995]; *see* ***Fitzpatrick v Currie***, 52 AD3d 1089, 861 NYS2d 431 [3d Dept 2008]; ***Wengenroth v Formula Equipment Leasing, Inc.***, 11 AD3d 677, 784 NYS2d 123 [2d Dept 2004]).

Razor's expert alleges that the handgrips on the subject scooter were deteriorated due to excessive wear and that provision of a more durable grip would only have delayed the occurrence of exposed metal at the end of the handlebar under such conditions. However, the record shows that the infant plaintiff only possessed the scooter for approximately 24 days prior to the accident and only used the scooter two to five times in that period. The expert further alleges that as "evidenced by a multitude of changes to the scooter over time", the infant plaintiff was capable of identifying worn parts and replacing them accordingly. The record, however, is bereft of any facts setting forth the "multitude of changes" which occurred over the 24 days upon which the expert allegedly bases his opinion. The expert also refers to a missing end cap on the hand grip. The record establishes that, according to the testimony of the infant plaintiff the handgrips were all one piece, with a small circular hole at the end. Russell Magnussen, who observed the scooter immediately after the accident, testified that he looked at the scooter on the ground and saw that the side of one grip was broken and had slid down toward the middle of the handlebars, exposing about an inch of metal. In addition Razor's witness, Robert Arthur Hadley, testified that he had never seen handlebar grips "completely cored," with the metal of the handlebar pushed through the ends of the handlebar grips, like they were on this scooter. The testimony of these witnesses establishes that there was no missing end cap, as alleged by the expert. The Court of Appeals has stated that "opinion evidence must be based on facts in the record or personally known to the witness" (***Cassano v Hagstrom***, 5 NY2d 643, 646, 187 NYS2d 1[1959]; *see* ***Abrams v Bute***, 138 AD3d 179, 27 NYS3d 58 [2d Dept 2016]; ***Espinal v Jamaica Hosp. Med. Ctr.***, 71 AD3d 723, 724, 896 NYS2d 429 [2d Dept 2010]). Mr. Meyer's affidavit, therefore, is speculative, conclusory, and not based on facts in the record (*see* ***Delgado v New York City Housing Authority***, 51 AD3d 570, 858 NYS2d 163 [1st Dept 2008]; *see also* ***Castillo v Wil-Cor Realty Co., Inc.***, 109 AD3d 863, 972 NYS2d 578 [2d Dept 2013]). As such, it is clearly insufficient to establish Razor's entitlement to summary judgment.

Furthermore, Razor's witness, Robert Arthur Hadley, testified that no testing was done as to the durability of the handlebar grips. This testimony, combined with the fact that the infant plaintiff possessed the scooter for only 24 days and only used it two to five times, raises an issue of fact as to whether the scooter was defectively designed and whether such defective design was responsible for the infant plaintiff's injuries (*see* ***Fisher v Multiquip, Inc.***, *supra*).

In light of the foregoing, Razor's motion for summary judgment is denied.

Dated: JUL 18 2016

A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION