

Our File No.: 115409-01/LDL/djd

AFFIRMATION IN OPPOSITION



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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF GREENE

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THOMAS ALFELD and BETHANY ALFELD,

Plaintiffs,

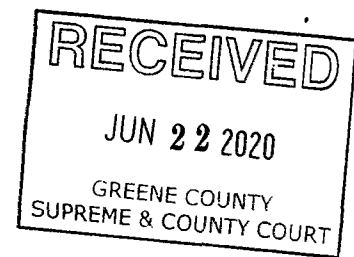
-against-

APEX TOOL GROUP, LLC and HOME DEPOT
U.S.A., INC.,

Defendants.
-----x

Index No.: 18-0008

AFFIRMATION
IN OPPOSITION



LAWRENCE D. LISSAUER, an attorney duly licensed to practice law in the State of New York, affirms the following under penalties of perjury:

I am a partner with the law firm of FINKELSTEIN & PARTNERS, LLP, attorneys for the plaintiffs in the above entitled action, and in such capacity, I am fully familiar with the facts and proceedings had herein through a file maintained by this office.

I submit this affirmation in opposition to the defendants' motion for summary judgment. APEX Tool Group LLC (hereinafter APEX) and Home Depot USA, Inc. (hereinafter HOME DEPOT) have moved to dismiss all of plaintiff's claims. The plaintiff claims that triable issues of fact exist on all claims such that summary judgment should be denied.

This lawsuit arises from a product liability occurrence of January 9th 2017. On that day the plaintiff was working as a self-employed Carpenter. A few weeks earlier he had purchased from the Home Depot, a flush cutting needle nose pliers set. It is uncontroverted that this set was part of Crescent tools and manufactured through Apex Tool group. The plaintiff was using these pliers for the first time on the day of his incident.

At the time of this occurrence the plaintiff was working on a staircase in a customer's home on Crystal Point Rd in Cairo NY. The plaintiff was ready to leave for the day when he observed some pin nails sticking up and protruding out of the staircase. The plaintiff later learned that these were Hitachi 23-gauge headless pins that were 1 ¼ inches long. He used the needle nose pliers wire cutter to cut portions of the nail that were protruding, in order to make them flush with the staircase surface. The proof has indicated that the plaintiff was not using protective eyewear at the time this incident occurred. As the plaintiff was cutting a nail one of the two blades on the pliers broke off. One of the blades flew off entering into the plaintiff's eye. The plaintiff was using the wire cutter in a foreseeable manner and for a foreseeable use at the time it failed.

It is argued that divergent expert opinions require

a denial of summary judgment and the case being submitted to a finder of fact. The law in this regard will be discussed in the accompanying memorandum of law.

The plaintiff commenced this action by the service of a Summons and Complaint on or about January 2, 2018. The Summons and Complaint were annexed as Exhibit A to the moving papers and incorporated by reference herein.

The defendant APEX joined issue on or about February 6, 2018. This answer was annexed to the moving papers as Exhibit B and incorporated by reference.

The Home Depot served its answer on or about March 16, 2018. This was annexed to the moving papers as Exhibit C and incorporated by reference herein.

Apex served a demand for interrogatories which was responded to by the plaintiff. The demand and response were annexed as Exhibit D to the moving papers and incorporated by reference.

Defense counsel, in paragraph 8 of his affidavit, asserts that "on the date of the incident, the plaintiff, THOMAS ALFED, was working on a staircase in a customer's house. The incident occurred as the plaintiff was operating the aforesaid tool, attempting to cut a pin nail. The tool's blade broke off and struck the plaintiff in the eye, thereby causing the plaintiff

to sustain severe and serious injuries." See Exhibit D, ¶84. The plaintiff acknowledges this representation. The plaintiff further acknowledges that he was not wearing eye protection at the specific time of the alleged incident as per paragraph 99 of the interrogatory response.

Per interrogatory response, paragraph 109, the claimed negligence and strict liability claims were premised upon the allegations and theories as follows: "The defendants negligently, wantonly, recklessly and carelessly designed, manufactured, fabricated, produced, sold, distributed and placed into the stream of commerce the aforesaid flush-cutting needle-nose plier tool, and its component parts, which was hazardous, defective and/or not reasonably safe; provided pliers whose blades were prone to break and become dislodged, thereby posing a risk that the blades would break and strike the user of the tool; provided pliers whose blades were not adequately attached to the tool so that the blades could become dislodged during use; provided pliers composed of weak, cracked, and otherwise defective material so that the blades could become dislodged during use; and provided a defective tool." These are the claims but the identity of the tool as to name is discussed below and in the affidavit of plaintiff's expert.

More specifically, as to APEX Tool Group LLC, the claims

are as follows: "That the defendant, APEX TOOL GROUP, LLC, its agents, servants and/or employees were negligent, wanton, reckless and careless in designing, manufacturing, fabricating, producing, selling, distributing and placing into the stream of commerce the aforesaid flush-cutting needle-nose plier tool, and its component parts, which was hazardous, defective and/or not reasonably safe; in providing pliers whose blades were prone to break and become dislodged, thereby posing a risk that the blades would break and strike the user of the tool; in providing pliers whose blades were not adequately attached to the tool so that the blades could become dislodged during use; in providing pliers composed of weak, cracked, and otherwise defective material so that the blades could become dislodged during use; and in providing a defective tool." See interrogatory response 111. These are the claims but the identity of the tool as to name is discussed below and in the affidavit of plaintiff's expert.

As to Home Depot, the claims were as follows: "That the defendant, HOME DEPOT U.S.A., INC., its agents, servants and/or employees were negligent, wanton, reckless and careless in, among other things, designing, manufacturing, fabricating, producing, selling, distributing and placing into the stream of commerce the aforesaid flush-cutting needle-nose plier tool, and

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