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Featured Articles

New York Places Burden On Design Defect Defendant To Show The Infeasibility Of An Alternative Design On Summary Judgment

by Paul V. Majkowski

In *Chow v. Reckitt & Colman, Inc.*, No. 81, 2011 N.Y. LEXIS 754 (N.Y. May 10, 2011), *rev'g* 69 A.D.2d 413 (N.Y. App. Div. First Dep't 2010), the New York Court of Appeals held that in moving for summary judgment to dismiss a design defect claim based on the inherently known danger of a product, "a defendant must demonstrate that its product is reasonably safe for its intended use; that is, the utility of the product outweighs its inherent danger." *Id.* at **2. This burden includes demonstrating "through expert testimony that it was not feasible to design a safer, similarly effective and reasonably priced alternative product." *Id.* at **8. The product at issue in this case was a drain cleaner composed of 100% sodium hydroxide, *i.e.*, lye; the plaintiff suffered serious burns and loss of eyesight when the material splashed back onto his face. The result is seemingly anomalous insofar as the plaintiff has the burden to establish the purported design defect, and the plaintiff's expert's affidavit in opposition to summary judgment was deficient.

As described in a concurring opinion by Court of Appeals Judge Robert S. Smith, however, this result is the effect of the governing summary judgment standard under New York law. The New York rule on summary judgment places the burden on the movant to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" and requires the denial of the motion where this prima facie showing is not made "regardless of the sufficiency of the opposing papers." *Id.* at **10-11 (Smith, J., concurring) (quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)). Justice Smith notes that a different result would likely obtain under the federal courts' *Celotex* rule under which the moving party's burden to show the absence of a material issue of fact on matters for which the non-moving party has the burden of proof may be satisfied by "pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party's case." Id. at **11-12 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). (Notably, Judge Smith does not urge adoption of the *Celotex* rule, but merely "alerts" future design defect movants as to their burden.)

Apart from the cautionary reminder regarding New York summary judgment practice, this decision raises some important issues and implications. First, despite Judge Smith's remark that the defendant's evidentiary showing might not be "hard to meet." *id.* at **11, it is not difficult to imagine a summary judgment motion becoming extremely complex (and voluminous), for example, in a case involving an allegedly toxic product for which the showing might require testimony of multiple scientific experts. As a rule of thumb, the more complex the motion for summary judgment, the less likely it is to be granted. Second, in a similar vein, the introduction of such expert testimony inevitably gives rise to the probability of denial of a motion based on competing expert testimony. Third, the types of proofs required seem likely to encompass reliance on governmental or regulatory standards, which create the possibility of bad precedent by the endorsement of such standards by defendants. This can be a double-edged sword, as while the governmental approval of a product might show its safety, reliance might endorse unhelpful governmental regulatory standards that are predicated on risk assessments that do not equate to a finding of legal causation. Fourth, one of the takeaways from this ruling rearticulating the summary judgment standard under New York law and its distinction from the federal standard is the importance for a defendant to consider any options for removal to federal court of a product liability action commenced in New York State court.

Factual Background

The claims in the *Chow* case arise from t he plaintiff's use of a drain cleaning product sold as "Lewis Red Devil Lye." *Chow*, 2011 N.Y. LEXIS 754, **1. Plaintiff was injured while using the product during his employment at a Manhattan restaurant to treat a clogged floor drain. Although he was unable to read English, he was aware of the proper procedure for handling and using the product by having observed others do so. The container provided the direction to spoon one tablespoon of the crystals into the clogged drain and then to wait for 30 minutes to check if the drain is clear, which can be done by "adding several cups of COLD water." The packaging also advised the user to use protective eyewear and rubber gloves, and warnings to "NEVER POUR LYE DIRECTLY FROM CONTAINER INTO DRAIN" and to use a plastic spoon to dispense the liquids and to avoid aluminum utensils. On the occasion at issue, plaintiff placed three spoonfuls of the product into an aluminum container and added about three cups of cold water to the container. Plaintiff poured the solution down the floor drain from waist height, and immediately after his doing so, the solution "splashed back out of the drain and onto [his] face," causing serious burns and damage (loss of sight) to his left eye. *Id.* at **2-4.

Procedural History

Plaintiff, and his wife, brought an action sounding in product liability. The trial court granted defendants' motion for summary judgment on all claims, encompassing both the design defect and failure to warn theories asserted by plaintiff. On the issue of design defect, defendants did not rely upon expert testimony, but rather on an

attorney's affirmation asserting that the product is inherently dangerous and its dangers were well known. In opposition, plaintiff submitted the affidavit of a chemist and chemical engineer, who opined that the Red Devil Lye had a propensity to cause splashback and that there were safer alternatives to the product.

On appeal, a divided Appellate Division, First Department, affirmed the grant of summary judgment, with two justices dissenting to the extent that summary judgment should have been denied as to plaintiff's design defect claim. The majority of the Appellate Division found that plaintiff's expert 's affidavit was "insufficient to raise a triable issue of fact because it [did] not set forth the foundation for his conclusion that his suggested alternatives are feasible." *Chow*, 69 A.D.2d at 415. As the majority critically observed of the expert's affidavit:

[He] also opines that a safer alternative to the product can be created by diluting it to a three to five percent sodium hydroxide composition. How he arrived at these percentages is unexplained. Also, without citing a basis for his opinion, Rosen simply concludes that his recommended dilution of the product would provide drain cleaning power strong enough to open clogged drains although it would take "somewhat longer to do the job." Similarly unsupported is Rosen's postulation that bottling lye in a water-based solution would not change its chemical composition or render it ineffective.

Id. The majority noted that "in considering the feasibility of a safer alternative design, 'it must be recognized that two differently designed products that . . . are generally similar in function, may nonetheless yield results so different in quality as to make it impossible to characterize the design of the safer product as a feasible alternative to the design of the more hazardous product.'" *Id.* (citations omitted).

The case proceeded to the Court of Appeals on an appeal of the design defect ruling (plaintiff did not further appeal the denial of the failure to warn claims).

Court of Appeals

The Court of Appeals reversed and reinstated the defective design claim, concluding that "in accordance with settled summary judgment and products liability principles, that a defendant moving for summary judgment in a defective design case must do more than state, in categorical language in an attorney's affirmation, that its product is inherently dangerous and that its dangers are well known. Rather, to be entitled to summary judgment in such a case, a defendant must demonstrate that its product is reasonably safe for its intended use; that is, the utility of the product outweighs its inherent danger." *Chow*, 2011 N.Y. Lexis 754, at **1-2.

Contrary to the Appellate Division's criticism of plaintiff's expert submission, the Court of Appeals concluded that it was defendants' submission on summary judgment that was insufficient:

In support of their motion here, however, defendants state only, in effect, that lye is

what it is, that everyone knows lye is dangerous, and that any variation in RDL's composition would, by necessity, result in a different product because such an altered product would not be 100% sodium hydroxide. While it is true that lye is dangerous and that this product is lye, a mere statement in an attorney's affirmation in support of a motion for summary judgment to that effect does not result in a shift of the burden to plaintiff to then explain how RDL could be made safer. At this stage, defendants cannot rely simply on the fact that their product is what they say it is and that everyone knows that lye is dangerous; that only begs the question at the heart of the merits of the defective design claim: knowing how dangerous lye is, was it reasonable for defendants to place it into the stream of commerce as a drain cleaning product for use by a layperson? Defendants offered no answer to this question, and thus, did not demonstrate their entitlement to judgment as a matter of law.

Id. at **5-6. Consequently, on a motion for summary judgment on a design defect claim, a defendant is required to demonstrate "through expert testimony that it was not feasible to design a safer, similarly effective and reasonably priced alternative product." *Id.* at **8.

In a concurring opinion, Judge Smith explained that the court's "decision is the result not of the merit of plaintiff's case, but of a feature of New York procedural law," and, indeed, "[i]f a record identical to the present one were developed at trial, plaintiff would fail to meet his burden of proof and the court would be required to direct a verdict for defendants." *Id.* at **9-10 (Smith, J., concurring). Yet, as discussed above, under the New York summary judgment standard, "the inadequacy of plaintiff's expert's affidavit is irrelevant." *Id.* at **11.

Conclusions

Initially, New York practitioners, and those in other jurisdictions applying similar summary judgment standards, need to be mindful of this required proof in moving for summary judgment. But, in addition to the practical guidance, the *Chow* decision raises a number of significant issues and implications, some of which might affect overall case strategy and whether a defendant is best served by moving for summary judgment. A summary judgment motion to dismiss a design defect claim could become exceedingly complex and voluminous, for example, in a case involving an allegedly toxic product for which the showing might require testimony of multiple scientific experts. Such complex motions face a good possibility of not being granted, particularly where they involve competing expert testimony then offered by plaintiffs. Another potential downside is that a defendant's proof might encompass reliance on governmental or regulatory standards, which can be a double-edged sword. Governmental approval of a product might show its reasonable safety, but introducing governmental regulatory standards that are predicated on risk assessments and are not the equivalent of legal causation can be problematic. Finally, the unhelpful difference of New York summary judgment standard from the federal standard reinforces the importance for a defendant to consider any options for removal to federal court of a product liability action commenced in New York State court.

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