

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19  
Justice

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JAMILLAH K. RASHEED-WATERS, et al.,	x	Index Number <u>24097</u>	2004
Plaintiffs,		Motion Date <u>May 30,</u>	2007
- against -		Motion Cal. Number <u>31</u>	
KAWASAKI RAIL CAR, INC., et al.,		Motion Seq. No. <u>1</u>	
Defendants.	x		
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The following papers numbered 1 to 17 read on this motion by Kawasaki Rail Car, Inc. (KRC), for summary judgment in its favor pursuant to CPLR 3212, and cross motion by plaintiffs for summary judgment in their favor.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	1-4
Notice of Cross Motion - Affidavits - Exhibits...	5-8
Answering Affidavits - Exhibits .....	9-11
Reply Affidavits .....	12-17

Upon the foregoing papers it is ordered that the motion is granted and the cross motion is denied.

Plaintiffs commenced this personal injury action against KRC alleging negligence, breach of warranty, strict products liability and loss of consortium. The action is based upon a fall by plaintiff Jamillah K. Rasheed-Waters as she attempted to board a subway car to perform an inspection of certain components of the car which were (allegedly) defectively designed. KRC moves to dismiss on the ground that the claims are barred by the contract specifications defense, which bars a liability finding against a manufacturer when the product was designed in accordance with design specifications provided by the owner of the equipment. In this case, the product was designed by the New York City Transit Authority (NYCTA).

When a product is manufactured in accordance with plans and specifications provided by the purchaser, the manufacturer is not liable for an injury caused by an alleged design defect in the product, unless the specifications are so patently defective that a manufacturer of ordinary prudence would be placed on notice that the product is dangerous and likely to cause injury (see Houlihan v Morrison Knudsen Corp., 2 AD3d 493 [2003]; Santana v Seagrave Fire Apparatus Corp., 305 AD2d 395 [2003]; Beckles v General Elec. Corp., 248 AD2d 575 [1998]). Here, KRC established its prima facie entitlement to summary judgment dismissing the cause of action sounding in strict products liability by demonstrating that, pursuant to a contract with the NYCTA, KRC manufactured the subway car in question according to the instructions and specifications of the NYCTA. To establish this fact, KRC submitted the examination before trial testimony of Gene Sansone, an assistant chief mechanical officer who provides car equipment engineering and technical support for the Department of Subways. Sansone testified that he was involved in the process by which KRC was selected by the NYCTA to design the subject subway car; that on or about December 22, 1998, KRC entered into a contract with the Metropolitan Transportation Authority, acting by the NYCTA, to perform certain work, labor and or services in connection with the construction of rapid transit passenger cars, model number R-143A, for the New York City Transit System. The subject model subway car went into use in the subway system in December 2001.

KRC also submitted a transcript of the injured plaintiff's deposition testimony. According to this plaintiff, the accident occurred as follows: she started her shift around 11 P.M. on April 18, 2003; after changing into her gear, she proceeded to board the subject subway car where she had been assigned to work with certain KRC vendors; when she climbed, she put her right foot on the rail on the right side, put her left foot into the rung and, at the same time, grabbed the left horizontal bar; when she reached for the right vertical grab bar, she put her right foot on the anti-climber which was wet from the previous night's rain, she skidded on the anti-climber, dangling for a short period of time and then she fell backwards into the pit; she fell approximately 12 to 15 feet to the ground; the anti-climber was gritty; in 2001 or 2002 she had received instructions as to the method for boarding the train which was to climb from the ground up onto the cars and then "climb from the ground up, using the right foot on the first rung, next foot on the next rung; with the right foot on the anti climber and swing your body into the car"; plaintiff recalls a KRC vendor also instructing her to use the "right foot first, left foot and swing your body into the car holding onto the grab bars." Finally, plaintiff, who is 5'5" tall and weighs approximately 260 pounds, explained that she was unable to comply with these

instructions, purportedly because the first rung of the ladder was three or four feet high from the ground and she could not reach it; as a result, she explained that she stood on the running rail (which was seven to eight inches above the ground) and brought her left foot onto the first rung of the ladder holding onto the grab bar; she then brought her right foot onto the next rung of the ladder and "hoisted" a right foot onto the anti-climber.

Select sections of the contract were submitted indicating that the contract required that KRC manufacture the subject subway car in strict conformity with the NYCTA's specifications. The specifications include the design parameters, performance requirements, and testing requirements for the manufacture of the components that plaintiffs claim were defective namely, the ladder, steps, anti-climber, bonnet and or grab handles of the R-143A cars. The contract further provides that the NYCTA was to approve any and all changes in the design or manufacture of the subject cars; that KRC was not authorized to deviate from the specifications unless authorized by the NYCTA in writing; and that, in the event of a disagreement between KRC and the NYCTA with respect to a change order, the NYCTA had the final say and was authorized to issue a directive to perform work.

KRC's witness, Yoichiro Araki, the project manager for the subject car, testified that the car was designed in conformity with NYCTA's specifications; that NYCTA created a mock-up or model of the subject subway car, which included the exterior components, based on the specifications, and that KRC was told by the NYCTA to study the mock-up that NYCTA had made. Furthermore, the evidence obtained during discovery revealed that the NYCTA retained full and "final responsibility" for the design of the subject subway car.

Altogether the evidence presented by KRC indicates that KRC was not ultimately responsible for the design of the subway car, but that NYCTA (a non-party), had the "final responsibility" for the design, including any and all modifications to the design of the subway car in question. Indeed, there is no evidence in the record that KRC did not diligently comply with the specifications furnished to it by NYCTA. Therefore, the branches of the motion which seeks to dismiss the causes of action sounding in negligence and strict products liability, are granted.

Similarly, KRC is entitled to summary judgment on the issues of implied warranty. Since KRC, the sellers, built the subway car according to the exact specifications of NYCTA, the buyer, no warranty of fitness for a particular purpose arose (see Millens & Sons v Vladich, 28 AD2d 1045 [1967], affd 23 NY2d 998 [1969]). Further, to the extent that the alleged breach of the warranty of

merchantability relates to the design of the conveyors, and since the buyer was responsible for that design, no warranty of merchantability arose (cf. Icelandic Airlines v Canadair, Ltd., 104 Misc 2d 239 [1980]).

In opposition, plaintiffs failed to meet their burden by establishing that the product "was not reasonably safe and that it was feasible to design the product in a safer manner" (Banks v Makita, U.S.A., 226 AD2d 659 [1996], lv denied 89 NY2d 805 [1996]; see Voss v Black & Decker Mfg. Co., 59 NY2d 102 [1983]). Plaintiffs' expert, a former car inspector, is qualified to offer an opinion that the subway car was not reasonably safe for employees to board easily because of the height of the climbing step, position of the grab handles, anti-climber, and threshold plate. However, since he did not establish that he had qualifications, experience, or personal knowledge in the design, manufacture, or use of subway cars, he was not qualified to offer an opinion as to whether there were safer alternative designs for the subway car at issue (see Geddes v Crown Equip. Corp., 273 AD2d 904 [2000]; Merritt v Raven Co., 271 AD2d 859 [2000]; see also Cervone v Tuzzolo, 291 AD2d 426 [2002]; Fallon v Clifford B. Hannay & Son, 153 AD2d 95 [1989]). Moreover, plaintiffs' expert based his opinion largely on safety standards, not manufacturing standards (see Merritt v Raven Co., supra). Thus, plaintiffs failed to raise a triable issue of fact on the negligence and strict products liability causes of action insofar as they are predicated on design defect (see Liz v William Zinsser & Co., 253 AD2d 413 [1998]).

#### Cross Motion

Plaintiffs' cross motion for summary judgment in their favor is denied. Plaintiffs' proof, consisting of their attorney's affirmation, which is based upon unsubstantiated hypotheses and suppositions, is insufficient to establish their prima facie entitlement to judgment as a matter of law (see Marietta v Scelzo, 29 AD3d 539 [2006]; Hoffman v Eastern Long Is. Transp. Enter., 266 AD2d 509 [1999]).

Moreover, the affidavit of KRC's expert, Yoichiro Araki, raises issues of fact. Specifically, Mr. Araki indicates that: the subway car was reasonably safe as originally designed based upon the manufacture and testing conducted by KRC; that the design of the subway car was approved by NYCTA's independent consulting engineer; that the anti-climber was deep enough to provide safe footing; that the horizontal handle was not too high for the safe and reasonable use by NYCTA employees; and that the climbing steps were reasonably safe as originally designed given the placement

bars and the width of the threshold plate. Consequently, the motion by defendant Kawasaki Rail Car, Inc., for summary judgment in its favor pursuant to CPLR 3212, is granted and the complaint hereby is dismissed as against it, and the cross motion by plaintiffs for summary judgment in their favor is denied.

Dated: September 18, 2007

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J.S.C.