SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2213-15T4

ARJAN LEKA,

Plaintiff-Appellant,

v.

HEALTH QUEST FITNESS, HEALTHQUEST OF CENTRAL JERSEY, LLC, and COULTER VENTURES, LLC,

Defendants-Respondents,

and

RAE CROWTHER HOLDINGS, LLC,

Defendant.

Argued October 11, 2017 – Decided October 26, 2017

Before Judges Hoffman, Gilson and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Hunterdon County, Docket No. L-0016-13.

Kathleen Cehelsky argued the cause for appellant (Law Office of James C. DeZao, PA, attorneys; James C. DeZao, on the briefs).

Timothy E. Haggerty argued the cause for respondent Health Quest Fitness and HealthQuest of Central Jersey, LLC (Law

Offices of Stephen E. Gertler, PC, attorneys; Kenneth A. Seltzer, on the brief).

David S. Osterman argued the cause for respondent Coulter Ventures, LLC (Goldberg Segalla, LLP, attorneys; Mr. Osterman and Leah A. Brndjar, on the brief).

PER CURIAM

Plaintiff Arjan Leka commenced this suit against defendants HealthQuest of Central Jersey, LLC (HealthQuest) and Coulter Ventures d/b/a Rogue Fitness (Coulter) alleging he sustained injuries on June 9, 2012, in an accident involving a hack squat machine at HealthQuest's fitness facility. Plaintiff also alleged HealthQuest wrongfully appropriated his likeness for commercial gain without his knowledge or consent.

Plaintiff now appeals from April 28, 2015 and September 18, 2015 orders granting summary judgment in favor of defendants, and an August 20, 2015 order denying plaintiff's motion for reconsideration. For the reasons that follow, we affirm.

I.

The following facts are derived from evidence the parties submitted in support of, and in opposition to, summary judgment, viewed in a light most favorable to plaintiff, the non-moving party. Polzo v. Cty. of Essex, 209 N.J. 51, 56-57 n.1 (2012)

(citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995)).

Around the time of the accident, HealthQuest employed plaintiff as a personal trainer; plaintiff was also a weight-lifter and body-builder. On June 9, 2012, during his off-hours, plaintiff was lifting weights at HealthQuest's facility. He placed an estimated six to seven hundred pounds of evenly distributed weight on a hack squat machine. After performing at least two repetitions, plaintiff "went to push up [when] the machine dropped and crushed [him] under it." He suffered serious injuries, which have significantly impacted his lifestyle and career.

In this action, plaintiff argues his injuries resulted from the hack squat machine's defective design. He asserts causes of action sounding in products liability and negligence. Plaintiff also contends HealthQuest wrongfully appropriated his likeness for commercial gain. Specifically, he alleges a baseball academy distributed a promotional email that included a photograph of him teaching a class at the HealthQuest facility.

Regarding the products liability and negligence claims, plaintiff contends HealthQuest allowed the hack squat machine to remain in the stream of commerce despite known risks. He also argues that Coulter, an Ohio-based sporting and recreational

equipment retailer, markets and sells the product as successor to Nebula Fitness, LLC (Nebula), the subject machine's manufacturer.

In support of these claims, plaintiff furnished expert reports from Harry Ehrlich, an industrial engineer, and Dr. Gordon Schmidt, a kinesiology specialist. Ehrlich determined the machine in question lacks lower safety stops[1] and product warnings and safety instructions. Schmidt stated that the machine's lacking lower stops "deprived [plaintiff] of the protection provided in other comparable hack squat machines." He further opined "HealthQuest's failure to provide a safe hack squat machine created an unreasonably dangerous condition that [caused plaintiff's] injury."

HealthQuest filed a motion for summary judgment and a motion to bar the Ehrlich and Schmidt reports. First, HealthQuest argued it did not place the hack squat machine into the stream of commerce, and therefore, as a matter of law it cannot be held liable under the New Jersey Product Liability Act. N.J.S.A. 2A:58C-1 to -11. Furthermore, it alleged the experts' conclusions constituted net opinions.

[1] Ehrlich states that lower safety stops would "limit the range of downward motion such that the sled [would] be prevented [from] moving beyond the user's intended range of motion, allowing the user to exit the machine without the need to raise the weights."

The trial court granted HealthQuest's summary judgment motion. In its written opinion, the court found HealthQuest never manufactured, distributed, or sold the hack squat machine, to wit: HealthQuest never placed the machine into the stream of commerce. Regarding plaintiff's negligence claim, the court found plaintiff failed to submit any proof that HealthQuest had notice of the machine's defective design. It asserted that plaintiff's proffered evidence — that he heard the machine injured another employee in 2008 — was inadmissible hearsay as defined by N.J.R.E. 801(c). Finally, the court dismissed plaintiff's appropriation of likeness claim because he failed to submit any supporting evidence.

Subsequently, plaintiff filed a motion for reconsideration arguing the court failed to "analyze whether a user of equipment at a gym is the equivalent to a person renting or leasing equipment and that HealthQuest was in the superior position to inspect, maintain[,] and warn of safety hazards to the equipment." The court denied plaintiff's motion, holding plaintiff failed to demonstrate HealthQuest was part of the chain of distribution, and his reliance on Cintrone v. Hertz Truck Leasing and Rental Services, 45 N.J. 434 (1965), was misplaced. Further, regarding plaintiff's appropriation of likeness claim, the court held his proffered evidence, a former HealthQuest employee's witness

statement, constituted an impermissible lay opinion on an expert matter.

In a separate motion, Coulter filed a motion for summary judgment arguing plaintiff failed to demonstrate it was a successor in interest. In a written opinion, the court granted Coulter's motion, holding that plaintiff failed to present evidence that Coulter continued to manufacture or market the hack squat machine.

II.

We review summary judgment rulings de novo, applying the same legal standard as the trial court. Townsend v. Pierre, 221 N.J. 36, 59 (2015) (citing Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014)). "Summary judgment must be granted if 'the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.'" Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013) (quoting R. 4:46-2(c)).

Thus, we consider whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Ibid. (quoting Brill, supra, 142 N.J. at 540). We accord

no deference to the trial judge's conclusions on issues of law and review issues of law de novo. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

A.

In support of his contention the trial court erred in granting summary judgment in favor of HealthQuest, plaintiff first argues the court failed to consider whether HealthQuest essentially leased the hack squat machine to its customers, thus qualifying it as a product seller under New Jersey's Product Liability Act (the Act). See N.J.S.A. 2A:58C-8.

N.J.S.A. 2A:58C-2 states:

> A manufacturer or seller of a product shall be liable in a product liability action only if the claimant proves by a preponderance of the evidence that the product causing the harm was not reasonably fit, suitable[,] or safe for its intended purpose because it: a. deviated from the design specifications, formulae, or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae, or b. failed to contain adequate warnings or instructions, or c. was designed in a defective manner.

The Act defines a "product seller" as:

> [A]ny person who, in the course of a business conducted for that purpose: sells; distributes; leases; installs; prepares or assembles a manufacturer's product according to the manufacturer's plan, intention, design, specifications or formulations; blends; packages; labels; markets; repairs; maintains

> or otherwise is involved in placing a product in the line of commerce.
>
> [N.J.S.A. 2A:58C-8]

In Cintrone, our Supreme Court imposed liability on a truck lessor for the injuries a lessee sustained due to its vehicle's apparent brake failure. Cintrone, supra, 45 N.J. at 452. Relying on Cintrone, plaintiff argues HealthQuest is a product seller because, in essence, it leases its heavy weight-lifting equipment to its members.

We reject this argument and instead agree with the trial court that the instant facts are more analogous to Dixon v. Four Seasons Bowling Alley, Inc., 176 N.J. Super. 540 (App. Div. 1980). In Dixon, we held a bowling alley was not strictly liable when a defective bowling ball injured a patron. Dixon, supra, 176 N.J. Super. at 547. In so holding, we focused on several critical factors, including "that furnishing the ball was a part of a larger service supplied by the owner, that there was no separate fee charged for use of the ball, and that the patron's possession of the ball was intended to be short term." Ranalli v. Edro Motel Corp., 298 N.J. Super. 621, 626 (1997) (citing Cintrone, supra, 45 N.J. at 547). Accordingly, we held the patron's use of the bowling ball in Dixon was incidental to her use of the defendant's premises. Ibid.

Similarly, plaintiff's use of the hack squat machine was incidental to his use of the HealthQuest facility. Plaintiff's contention that his hack squat use was not incidental lacks support. He provides no support for his assertion that "the average consumer" joins fitness centers "for the heavy equipment." Furthermore, plaintiff's attempt to differentiate "immovable, heavy [gym] equipment" from bowling balls puts form over substance.

HealthQuest did not manufacture, sell, or distribute the subject hack squat machine. Plaintiff's argument that HealthQuest became a product seller because it leases its equipment to members lacks merit. Accordingly, HealthQuest is not subject to liability under New Jersey's Product Liability Act, N.J.S.A. 2A:58C-1 to -11.

B.

Plaintiff also contends the trial court erred in dismissing his common law negligence claim. Namely, he argues the trial court incorrectly held he failed to produce admissible evidence demonstrating HealthQuest had notice of the hack squat machine's defective design.

Preliminarily, common law negligence requires notice and an opportunity to cure the defect before liability can be imposed. See Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 434 (1993); see

also Carter Lincoln Mercury, Inc. Leasing Div. v. EMAR Grp., Inc. 135 N.J. 182, 195-96 (1994). Furthermore, Rule 1:6-6 provides:

> If a motion is based on facts not appearing of record or not judicially noticeable, the court may hear it on affidavits made on personal knowledge, setting forth only facts [that] are admissible in evidence to which the affiant is competent to testify and which may have annexed thereto certified copies of all papers or parts thereof referred to therein.

Plaintiff's proffered evidence of prior notice consists of a former HealthQuest employee's hand-written witness statement describing an incident where a hack squat machine injured him in 2008. Notably, the former employee neither made the statement under oath or affirmation, nor did he include a certification subjecting himself to punishment in the event he willfully made false statements. See R. 1:4-4(b).

The former employee's indication that his statement "is true and correct to the best of [his] knowledge and belief" is inadequate to satisfy our court rules. Ibid.; see also Pascack Cmty. Bank v. Universal Funding, LLP, 419 N.J. Super. 279, 288 (App. Div. 2011) (holding the plaintiff's "certification had no evidentiary value" because it failed to conform to Rule 1:6-6 and 1:4-4(b)'s requirements.). Further, contrary to plaintiff's assertion, his experts' reports do not address the notice issue.

Additionally, as the trial court correctly determined, the former employee's statement "does not constitute admissible evidence because it is a lay opinion on a matter that requires expert testimony, namely[,] that the 2008 accident was caused by a defective machine." The trial court correctly ruled inadmissible plaintiff's proffered evidence of prior notice of the hack squat machine's alleged defect.

C.

Plaintiff further argues the trial court erred in granting Coulter's summary judgment motion because Coulter purchased assets from Nebula, thus subjecting Coulter to successor liability. We disagree.

The general rule is that "when a company sells its assets to another company, the acquiring company is not liable for the debts and liabilities of the selling company simply because it has succeeded to the ownership of the assets of the seller." Lefever v. K.P. Hovanian Enters. Inc., 160 N.J. 307, 310 (1999). However, the product-line exception to the general rule, adopted by our courts and other jurisdictions, provides that a corporation that continues to manufacture and market the same product line after purchasing a substantial part of the previous manufacturer's assets "may be exposed to strict liability in torts for defects in the predecessor's products." Ibid.

Our Supreme Court emphasized that courts should focus "on the successor's continuation of the actual manufacturing operation and not on commonality of ownership and management between the predecessor's and successor's corporate entities." Ramirez v. Amsted Indus., Inc., 86 N.J. 332, 347 (1981). Furthermore, "[p]laintiff bears the burden of establishing that a party is a successor corporation." Potwora v. Land Tool Co., Inc., 319 N.J. Super. 386, 406 (citing Ramirez, supra, 86 N.J. at 332), certif. denied, 161 N.J. 151 (1999).

Here, plaintiff merely established that Coulter purchased assets from Nebula. He fails, however, to put forth any evidence that Coulter continued to manufacture or market the hack squat machine. Accordingly, the product-line exception is inapplicable, and the trial court correctly held plaintiff did not carry his burden.

III.

Finally, plaintiff argues the trial court erred in dismissing his appropriation of likeness claim because it required him to produce evidence that is not required as a matter of law. Again, we disagree.

"One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his [or her] privacy." Restatement (Second) of Torts

§ 652C. Therefore, to establish a prima facie case for invasion of privacy by appropriation of likeness, a plaintiff must establish: 1) the defendant appropriated the plaintiff's likeness, 2) without the plaintiff's consent, 3) for the defendant's use or benefit, and 4) damages. See Faber v. Condecor, Inc., 195 N.J. Super. 81, 86-90 (App. Div.), certif. denied, 99 N.J. 178 (1984).

Notably, courts have consistently required plaintiffs to show that defendants received a commercial benefit through the unauthorized use of plaintiff's likeness. See McFarland v. Miller, 14 F.3d 912, 919 n.11 (3d Cir. 1994) ("In New Jersey, to sustain an action claiming misappropriation of the image of another, a commercial purpose must be present."). Furthermore, in Castro v. NYT Television, we held:

> [n]o one has the right to object merely because his [or her] name or his [or her] appearance is brought before the public, [because] neither is in any way a private matter and both are open to public conversation. It is only when the publicity is given for the purpose of appropriating to the defendant['s] benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded.
>
> [Castro v. NYT Television, 370 N.J. Super. 282, 297 (App. Div. 2004) (quoting Restatement (Second) of Torts § 652(c) comment d (1977)).]

Here, the sole support for plaintiff's claim is his statement that someone told him a baseball academy distributed promotional

materials that included a photograph of him training a client at the HealthQuest facility. Plaintiff fails to submit any proofs, including the email in question, to support his assertion, and the record is devoid of any evidence that HealthQuest used plaintiff's likeness to obtain commercial benefit. Because plaintiff failed to establish that HealthQuest used his image in a manner that furthered a commercial or trade purpose, or that his likeness was used in anything more than an incidental manner, we discern no basis to disturb the dismissal of this claim.

Affirmed.