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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 4

CATHERINE FAHY, etc., et al.	X	INDEX NO. 22702/96
- against -		BY: LaTORELLA, JR., J.
SEARS, ROEBUCK AND CO., et al.	X	DATED:

Defendant Sears, Roebuck & Co., Inc. and defendant Whirlpool Corporation have moved for summary judgment dismissing the complaint against them or alternatively for partial summary judgment dismissing claims made on behalf of John James Fahy and Meaghan Fahy for certain emotional damages.

On April 25, 1996, a fire occurred at the Fahy family residence located at 105 Beach 221st Street, Breezy Point, Queens, New York. Three separate actions resulted from the fire, and the actions were consolidated by this court's order dated December 17, 1997. The plaintiffs seek damages for the wrongful death of John W. Fahy (age 51) and for the wrongful death of his son, James Fahy (age 6) and damages for personal injuries allegedly sustained by John James Fahy (age 11) and Meaghan Anne Fahy (age 9).

The plaintiffs allege that a defective dishwasher, a model from a new production line called "The New Generation Dishwasher," designed and manufactured by defendant Whirlpool sometime after August 30, 1994 and sold by defendant Sears to the late Margaret Fahy on October 19, 1994, caused the fire. Whirlpool first began to receive reports of overheating and/or fires in

New Generation Dishwashers around 1992. Shortly after the fire in the Fahy residence, the United States Consumer Product Safety Commission announced the voluntary recall of approximately 500,000 Whirlpool and Kenmore brand dishwashers manufactured in 1991 and 1992 because: "Wiring in the door latch may overheat and catch fire." However, the defendants allege that the particular dishwasher model owned by the Fahy's does not have a history of defects that could have caused a fire. The dishwasher was installed in the kitchen of the family home, which also had a stove in it. However, there is evidence in the record that the stove had not been used for cooking on the night of the fire and that a neighbor, Kathleen Fitzpatrick, had brought over dinner to the family that night. Meaghan Anne Fahy, an infant, testified at her deposition that for a "long time" before the date of the fire, the family had experienced problems with the dishwasher because it "would get stuck in the rinse cycle." Meaghan testified that the dishwasher was on when she went to bed at about 9:30 P.M. The fire began in the evening hours of April 25, 1996. Investigators from the New York City Fire Department were of the opinion that the fire started in the Fahy dishwasher and that the cause was probably an electrical malfunction.

Marvin J. McDowell, a Whirlpool engineer and its Manager of Product Safety, examined the dishwasher after the fire and concluded that there was no evidence of a defect in the dishwasher that could have caused a fire. John R. Lloyd, a fire expert retained by the defendants, performed an investigation at the Fahy

residence and concluded that the fire began in the kitchen at the right front burner of the gas range. On the other hand, the plaintiffs rely on the affidavit of Prentice Cushing, an electrical engineer who has allegedly assisted in the investigation of over 500 fires, most of which arose from electrical causes. Cushing, who inspected the Fahy home and dishwasher, opines that "within a reasonable degree of engineering certainty,* * *this fire started with the Fahy dishwasher due to the failure of one or more defective electrical components in the upper portion of the dishwasher which were defective as designed, manufactured and sold by defendants." According to Cushing, "the door switches were inadequate to sustain the capacity of the electrical current supplying the subject dishwasher under the intended operating conditions. During operation, repeated openings of the dishwasher door cause breaking of the electrical main supply circuit which, owing to the heavy and partially inductive load, would in turn cause repeated arcs at the switch contacts, resulting in destruction of the switch contacts, thereby creating a fire hazard." Cushing also found other specific design defects which in his opinion created a fire hazard.

That branch of the defendants' motion which is for summary judgment dismissing the complaint in its entirety is denied. The opponent of a motion for summary judgment has the burden of producing evidence sufficient to show that there is an issue of fact which must be tried. (See, Alvarez v Prospect Hospital, 68 NY2d 320.) In the case at bar, the plaintiffs easily

carried this burden. There is no merit in the defendants' contentions that "there is simply no evidence that the dishwasher at issue was defective* * *" and that the "[p]laintiffs have not, and cannot, identify any failure mechanism inside the dishwasher." The plaintiffs' expert, Prentice Cushing, examined the dishwasher and allegedly found several specific design defects which could have caused the fire. In any event, the plaintiffs are not required in a strict products liability case to prove that there was a specific defect that caused the accident. (See, Halloran v Virginia Chemical, 41 NY2d 386.) "It is established law that a products liability case can be proven absent evidence of any particular defect by presenting circumstantial evidence excluding all causes of the accident not attributable to defendant, thereby giving rise to an inference that the accident could only have occurred due to some defect in the product* * *." (Graham v Walter S. Pratt & Sons, Inc., 271 AD2d 854; see, Peerless Insurance Co. v Ford Motor Co., 246 AD2d 949.) In the case at bar, the plaintiffs have submitted sufficient evidence to create an issue of fact concerning whether the fire could only have originated from the dishwasher. There is, for example, testimony in the record that the range was not used for cooking on the night of the fire and that the dishwasher had malfunctioned in the past. Moreover, this court cannot determine on the basis of conflicting affidavits of experts whether the fire could have started from the range and could not have started from the dishwasher. (See, Joseph v Brodman, 220 AD2d 331; Celentano v St. Luke's Roosevelt Hospital

Medical Center, 170 AD2d 198.) The conflicting affidavits of the experts have created issues of fact and credibility which are inappropriate for summary judgment treatment. (See, Dayan v Yurkowski, 238 AD2d 541; T&L Redemption Center Corp. v Phoenix Beverages, Inc., 238 AD2d 504; First New York Realty Co., Inc. v DeSetto, 237 AD2d 219.)

That branch of the defendants' motion which is for partial summary judgment dismissing claims made on behalf of John James Fahy and Meaghan Fahy for certain emotional damages is denied. The plaintiffs assert claims for "zone of danger" emotional damages allegedly sustained by John J. Fahy and Meaghan Fahy resulting from the injuries to other family members. (See, Bovsun v Sanperi, 61 NY2d 219.) The plaintiffs have submitted evidence sufficient to create an issue of fact concerning whether John J. Fahy and Meaghan Fahy were contemporaneously aware of the peril to their six year old brother, James.

Settle order.

J.S.C.