

Cleary v Reliance Fuel Associates, Inc.

2003 NY Slip Op 30042(U)

April 29, 2003

Supreme Court, Suffolk County

Docket Number: 0004546/4546

Judge: William L. Underwood

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**SUPREME COURT - STATE OF NEW YORK
L.A.S. TERM. PART XIV - SUFFOLK COUNTY**

PRESENT:

Hon. WILLIAM L. UNDERWOOD. JR.

NIKI MARIE CLEARY, an infant under the age of **14**, by **her** father and natural guardian, DANIEL G. CLEARY, and DANIEL G. CLEARY, individually,

Plaintiff(s),

-against-

RELIANCE FUEL OIL ASSOCIATES, INC., BOCK WATER HEATERS, INC., HONEYWELL, INC., NICHOLAS CERULLI and ANN MARIE CERULLI,

Defendant(s).

**ORIG. RETURN DATE!: 10/29/02
FINAL RETURN DATE: 02/05/03**

**MTN. SEQ. # 004-MOT D
005-MOT D
006-MOT D**

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Upon the following papers numbered 1 to 88 read on this motion for summary judgment
Notice of Motion/Order to Show Cause and supporting papers 1-3 · Notice of Cross Motion and supporting papers 4-17;
18-31 ; Answering Affidavits and supporting papers 32-33; 34-54; 55-72; Replying Affidavits and supporting papers 73-81;
82-86; 87 Other 88 ; ~~(and after hearing counsel in support of and opposed to the motion)~~ it is,

ORDERED that defendant Bock Water Heaters, Inc.'s motion for summary judgment is granted under the circumstances presented herein. (CPLR **3212**). It is further

ORDERED that the defendant Honeywell Inc.'s motion for summary judgment is granted under the circumstances presented herein. (CPLR **3212**). It is further

ORDERED that the plaintiffs cross motion to proceed to full trial is granted. It is further

ORDERED that the plaintiffs cross motion to strike defendant Reliance Fuel Oil Associates, Inc.'s answer for its loss of documents relating to its purchase of the Bock hot water heater and the immersion well that was installed in that heater at the time of the subject incident is denied. (CPLR **3126**).

This is an action for personal injuries sounding in negligence and products liability. On February 4, 1996, 2 year infant plaintiff Niki Marie Cleary climbed into the bathroom sink in the home of her maternal grandparents, defendants Nicholas and Ann Marie Cerulli, turned on the hot tap water and as a result, suffered second and third degree burns. Prior thereto, in or about March, 1993, defendant Reliance Fuel Oil Associates, Inc. ("Reliance") sold a Bock **32E** hot water heater to the Cerullis and installed it at their home. Incorporated

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therein was a Honeywell L41A aquastat and immersion well.

By way of their complaint, the plaintiffs aver a cause of action based in products liability upon the theories of strict liability, negligence, breach of implied warranties and failure to warn. The plaintiffs have further asserted a claim for negligent installation, service, repair and/or maintenance of the subject hot water heater. Defendants Bock Water Heaters, Inc. ("Bock") and Honeywell, Inc. ("Honeywell") have each moved under separate Notice of Motion for summary judgment.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 [1986]).

It is undisputed, that based upon the evidence proffered in support of the within

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motions, defendant Reliance installed and maintained the subject water heater. As such, defendants Bock and Honeywell's motions for summary judgment as to the causes of an action sounding in negligence based upon the installation, service, repair or maintenance of the water heater is granted.

The plaintiffs by way of their complaint have further alleged a products liability claim as to both the defendant Bock's water heater and defendant Honeywell's aquastat and immersion well.

"In strict products liability, a manufacturer, wholesaler, distributor, or retailer who sells a product in a defective condition is liable for injury which results from the use of the product 'regardless of privity, foreseeability or the exercise of due care' (*Gebo v Black Clawson Co.*, 92 NY2d 387,392, [*305] 681 N.Y.S.2d 221, 703 N.E.2d 1234; see, *Sukljian v Charles Ross & Son Co.*, 69 NY2d 89, 94-95, 511 N.Y.S.2d 821,503 N.E.2d 1358; *Nichols v Agway, Inc.*, 280 AD2d 889,720 N.Y.S.2d 691; *Bielicki v T.J. Bentey, Inc.*, 248 AD2d 657, 659-660,670 N.Y.S.2d 585; *Mead v Warner Pruyn Div., Finch Pruyn Sales*, 57 AD2d 340, 394 N.Y.S.2d 483). The plaintiff need only prove that the product was defective as a result of either a manufacturing flaw, improper design, or a failure to provide adequate warnings regarding the use of the product (see, *Sukljian v Charles Ross & Sons Co.*, *supra*; *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 106-107, 463 N.Y.S.2d 398, 450 N.E.2d 204; *Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 478-479, 426 N.Y.S.2d

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717,403 N.E.2d 440), and that the defect was a substantial factor in bringing about the injury (see *Codling v Paglia*, 32 NY2d 330, 345 N.Y.S.2d 461, 298 N.E.2d 622).” (*Godoy v Abamaster of Miami, Inc.*, 754 N.Y.S.2d 301, 304-305 [2nd Dept 20031]). However, it is well settled that when an action is asserted in strict products liability based on a manufacturing defect which is based entirely upon circumstantial evidence, it may be inferred that the product was defective when it left the manufacturer’s control only if the plaintiff excluded all causes of the accident not attributable to the manufacturer. (see *Nichols v. Agway, Inc. supra*).

Upon review of the record before the Court, it is apparent that we cannot exclude all other possible causes of this accident. The plaintiffs have submitted the affidavit of Milton Korn, a professional engineer who examined the subject aquastat and conducted a number of tests based upon collected information and data as it related to the subject incident. He concluded that “excessively hot water is a foreseeable risk associated with the improper installation of a Honeywell aquastat’s probe with an immersion well.” The affidavit of the plaintiffs’ other expert, Jeffrey Ketchman, P.E., although highly critical of defendant Bock and defendant Honeywell’s installation instructions, concludes that the aquastat probe was not installed properly in that it was not fully extended all the way to the end of the immersion well. We have found no case law which would support a finding of a strict liability based

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upon speculation that the installation instructions are inadequate. Kevin Alphs, a mechanical engineer employed by defendant Boch, testified at his examination before trial that it was the responsibility of the installer, in the instant matter, defendant Reliance, to install both the aquastat and the immersion well. It is clear that based upon the circumstances presented herein that we cannot infer that either the boiler or the aquastat was defective upon leaving either manufacturers control and as such, their motions for summary judgment are granted.

The plaintiffs cross motion to proceed to full trial is granted. In support of the within cross motion, the plaintiffs have proffered the affirmation of Steven Shoen, M.D. a board certified plastic surgeon who had treated the infant plaintiffs burns. It is his opinion to a reasonable degree of medical certainty that less than two seconds of exposure to 150F water will cause a third degree burn and based upon the history provided, the infant plaintiff was exposed to the hot tap water for only a matter of seconds. It is clear that the nature and the extent of the infant plaintiffs burns are intertwined with the issue of the defendants' liability which requires the use of medical proof to show the causal connection between liability and injury. (*See, Shea v 5008 Broadway Assoc.* 292 A.D.2d 292 ,739 N.Y.S.2d 155 [1st Dept 20021]). Accordingly, the plaintiffs' cross motion for a full trial is granted.

The plaintiffs' further cross motion for an order striking defendant Reliance's answer for its loss of documents relating to its purchase of the Bock hot water heater and the immersion well that was installed in the heater at the time of the subject incident is denied.

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“It is well settled that ‘courts have discretion to impose sanctions under CPLR 3126 when a party intentionally, contumaciously or in bad faith fails to comply with a discovery order or destroys evidence prior to an adversary’s inspection’ (*Puccia v. Farley*, 261 A.D.2d 83, 85,699 N.Y.S.2d 576; *see*, 93 *Sage Realty Corp. v. Proskauer Rose*, 275 A.D.2d 11, 17-18, 713 N.Y.S.2d 155). Moreover, ‘courts have also upheld the imposition of such sanctions in cases where a litigant negligently disposes of crucial items of evidence involved in an accident before his or her adversary had an opportunity to inspect them’ (*Cummings v. Central Tractor Farm & Country*, 281 A.D.2d 792, 793, 722 N.Y.S.2d 285, *lv. dismissed* 96 N.Y.2d 896, 730 N.Y.S.2d 792, 756 N.E.2d 80, quoting *Abar v. Freightliner Corp.*, 208 A.D.2d 999, 1001, 617 N.Y.S.2d 209; *see*, *Puccia v. Farley*, *supra*, at 85, 699 N.Y.S.2d 576; *Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170, 173, 666 N.Y.S.2d 609).” (*Jones v. General Motors Corp.* 287 A.D.2d 757, 731 N.Y.S.2d 90, 92-93 [3rd Dept. 2001]).

However, in determining whether to impose sanctions for a party’s disposal or destruction of evidence, the Court must look to the extent the spoliation of evidence prejudiced the other party and whether striking the defendant’s answer will be necessary as a matter of elementary fairness. (*Hartford Fire Insurance Company v Regenerative Building Construction Inc.*, 271 A.D.2d 862, 706 N.Y.S.2d 236 [3rd Dept 2001]). Pursuant to the aforesaid standard and under the circumstances of the within matter, it is apparent that the sanction of striking its answer would be inherently unfair to defendant Reliance.

Defendant Reliance’s insurance carrier was informed by letter dated March 6, 1996,

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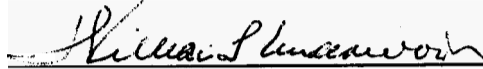
that the law ~~firm~~ of O'Hagen & Reilly had been retained by the parents of the infant plaintiff. Although a summons and complaint was not filed until February **24, 1998**, the plaintiffs and the defendant Reliance and its insurance carrier had been in contact since the subject incident. Prior thereto, on May **10, 1996** a site inspection of the heating system was conducted with representatives of defendant Reliance's insurer, Crawford & Company, defendant Reliance and plaintiffs' attorney William Pallas present. Subsequently, on May **17, 1996**, defendant Reliance replaced the aquastat on the heating system and the old aquastat was retained by the homeowners, defendants Nicholas and Ann Marie Cerulli. The plaintiffs had never indicated **any** interest in the preservation of the immersion well. During initial depositions of defendant Reliance employees Richard Spigonardo and James Green, the plaintiffs failed to raise any questions regarding it. Not until the litigation had substantially progressed, had counsel for the plaintiffs sought the immersion well's production. Under the circumstances presented herein, we do not find that the failure of defendant Reliance to produce either the immersion well or the purchase invoices of the Bock hot water heater sufficiently prejudices the plaintiffs to warrant the striking of its answer or precluding defendant Reliance from offering evidence regarding the immersion well or its condition at the time of its purchase. Accordingly, the plaintiffs' cross motion for sanctions is denied.

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Submit judgment.

So ordered.

Dated: April 29, 2003



HON. WILLIAM L. UNDERWOOD, JR.
J.S.C.

CHECK ONE: FINAL DISPOSITION

NON-FINAL DISPOSITION