At an IAS Term, Part 7, 22 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of January, 2005

P R E S E N T:

HON. MARTIN SOLOMON,
Justice.

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CATHERINE HANLY, as Administratrix of the Goods, Chattels and Credits of MICHAEL HANLY, deceased,

Plaintiff,

- against -

QUAKER CHEMICAL COMPANY, INC., JOHN GAMUZZA, ZINA GAMUZZA and THE CITY OF NEW YORK,

Defendants.

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Index No. 43768/97

The following papers numbered 1 to 11 read on this motion:

| | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 1-6 |
| Opposing Affidavits (Affirmations) | 7 |
| Reply Affidavits (Affirmations) | 8-11 |
| Affidavit (Affirmation) | |
| Other Papers | |

Upon the foregoing papers, defendants Quaker Chemical Company, Inc. (Quaker), Zina Gamuzza (Gamuzza),[1] and The City of New York (the City) separately move pursuant

[1] The parties stipulated to release John Gamuzza, deceased, as a defendant in the action. Gamuzza and Quaker also move to dismiss all cross claims asserted against them.

to CPLR 3212 to dismiss the complaint of plaintiff Catherine Hanly, as Administratrix of the Goods, Chattels and Credits of Michael Hanly, Deceased.

On November 12, 1996, while collecting garbage as a New York City sanitation worker, plaintiff's decedent died after inhaling and being sprayed in the face, chest and hands with hydrofluoric acid 70% emanating from a one-gallon container which had apparently become trapped under the blade of the hopper of his garbage truck.

Plaintiff thereafter commenced the instant wrongful death action against the City, decedent's employer; Quaker, distributer of the subject acid container; and Zina and John Gamuzza, owners of the apartment building near the site of the accident, alleging, *inter alia*, negligence, breach of warranty, and strict products liability.

*Quaker's Motion for Summary Judgment*

In her verified complaint and verified bill of particulars, plaintiff alleges, among other things, that Quaker was negligent in the design, manufacture, assembly, packaging, inspection, testing, mixing, labeling and distribution of the one-gallon container of 70% hydrofluoric acid; in designing and manufacturing an inherently dangerous product; in failing to properly warn of the product's hazardous nature; in designing, manufacturing and distributing a container without proper instructions for disposal; and in violating United States Code Title 15 (Federal Hazardous Substances Act [15 U.S.C. 1261 et. seq. (FHSA)]). The complaint and bill of particulars also allege that Quaker breached its express and implied warranties that the acid and container were fit for their intended uses, in knowingly placing

an inherently dangerous and defective product on the market; and with respect to the implied warranty only, in selling the product without adequate disposal instructions. Incorporating the foregoing allegations, plaintiff also alleged that Quaker was strictly liable in tort for the defective condition of the product, asserting that the risk of injury therefrom outweighed its utility.

In support of its motion, Quaker annexes, *inter alia*, discovery responses, including accident investigation reports of the New York City Police Department and the Department of Sanitation (DOS), and the deposition testimony of Catherine Hanly, Thomas Giammarino, Mr. Hanly's coworker, and Vincent Caruso, a DOS Safety and Training Division supervisor.

Mr. Giammarino testified that just prior to the incident, he and Mr. Hanly were at their last collection of the day, in the vicinity of New Utrecht Avenue and 84th Street in Brooklyn. Mr. Hanly was bringing his last two cans of garbage toward the truck while Mr. Giammarino went to retrieve his last two garbage cans. Mr. Giammarino heard a loud noise like a "big pop." When he turned around, he saw Mr. Hanly standing behind the truck on the driver's side near an orange-colored step, shaking as if in shock. Although Mr. Giammarino said Mr. Hanly had "cycled" or compressed the garbage into the truck to fit in his last two cans of garbage,[2] he testified that he did not see Mr. Hanly do so because his back was turned to him.

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[2] According to Mr. Giammarino, cycling is performed when the hopper is full of garbage in order to create room in the hopper for more garbage. Two levers or handles on either side of the garbage truck operate the hopper. One handle raises or opens the hopper and the other handle causes a blade to descend in the hopper area to crush and sweep the garbage into the body of the garbage truck. Workers only needed to use the levers on one side of the truck to cycle the garbage. Both hands were needed to operate the hopper.

Mr. Giammarino brought Mr. Hanly across the street to an ambulance service for treatment. The Fire Department arrived and hosed Mr. Hanly with a solvent. Mr. Hanly was taken to the hospital and died later that day from hydrofluoric acid poisoning due to splash burns of the face and inhalation of hydrofluoric acid. Mr. Giammarino did not know where the acid that sprayed Mr. Hanly had come from, and did not know if it had come from the garbage from his last pickup. He also testified that most of the garbage he and Mr. Hanly collected that day was in black trash bags, that just prior to the accident, he did not remember whether there was any unprocessed trash in the hopper of the truck (the receptacle in the truck where the garbage was placed), and that the truck was full of garbage.

After the incident, the Fire Department recovered from the blade of the garbage truck a one-gallon plastic container containing hydrofluoric acid, which bore a Quaker Chemical label.

Mr. Caruso investigated and prepared a fact-finding report on Mr. Hanly's accident. He testified that neither he nor anyone else had made a determination as to where the acid that sprayed Mr. Hanly had come from; that to his knowledge, no one had been charged with the disposal of the acid that sprayed Mr. Hanly; and that at the time of the incident, he believed disposal of the acid was legal because it could have been purchased over-the-counter.

Based upon the foregoing, Quaker asserts that a cause of action cannot be established against it on any theory of liability. Specifically, Quaker argues that in the absence of any evidence that it disposed of the acid container - claimed by plaintiff to be the precipitating cause of the accident - plaintiff cannot establish that it was negligent. Quaker also contends that there is no evidence that it was negligent in either failing to provide or in providing inadequate warnings or instructions regarding disposal of the acid. Similarly, with respect to plaintiff's other claims of negligence, including designing, packaging, inspection, testing, mixing, distributing and selling the product, Quaker maintains that plaintiff has failed to produce evidence establishing that it was negligent or how such negligence contributed to Mr. Hanly's death. Quaker also contends that plaintiff has not established her breach of warranty claims. Finally, Quaker argues that plaintiff's claims predicated upon failure to warn or inadequate labeling, including plaintiff's claims of negligence, breach of warranty, and strict products liability, are preempted by the FHSA. In the alternative, Quaker contends that the label on the acid container it distributed complied with relevant Federally-mandated requirements under the FHSA.

In opposition, plaintiff argues that her claims of inadequate warning are not preempted because they are premised on Quaker's failure to comply with the FHSA. Plaintiff also contends that Quaker failed to establish that the label on the acid container provided adequate warnings and instructions for disposal as required under the FSHA.

In reply, Quaker argues that plaintiff has failed to raise an issue of fact with respect to any theory of liability alleged, and thus has failed to rebut its position that it did not contribute to Mr. Hanly's death. Specifically, Quaker contends that plaintiff did not establish who disposed of the acid container, how or why it was disposed of, or how its disposal resulted from its conduct. Quaker also argues that even were the court to find an issue of fact regarding its conduct, plaintiff cannot establish that such conduct was the proximate cause of the accident. In addition, Quaker asserts that since plaintiff has failed to address any of her nonlabeling claims, they must be dismissed.

The FHSA, and its correlative regulations, creates labeling requirements which preempt any claim of failure to warn or inadequate labeling (*Sabbatino v Rosin & Sons Hardware & Paint, Inc.*, 253 AD2d 417, 419-420 [1998], *lv denied* 93 NY2d 81 [1999]). Thus, to the extent plaintiff's causes of action are predicated upon common law theories of failure to warn and inadequate labeling, they are preempted by the FHSA and are dismissed (*Wallace v Parks* Corp., 212 AD2d 132, 136-137 [1995] ["The prevailing rule today is that a plaintiff's claims are preempted only 'to the extent that (they) require a showing that defendants' labeling and packaging should have included additional, different, or alternatively stated warnings from those required (in this case) under FIFRA,"[3]noting that the same principles apply under the FHSA]; *see also Lopez v Hernandez*, 253 AD2d 414 [1998]).

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[3] Federal Insecticide, Fungicide, and Rodenticide Act.

On the other hand, plaintiff's causes of action are not solely predicated upon a failure to warn theory. They also allege defective design, claims for negligent testing, manufacturing and distributing, and nonlabeling claims for breach of express and implied warranty. Thus, these nonlabeling claims for negligence, breach of warranty, and strict products liability are not preempted (*Sabbitino*, 212 AD2d at 137-139). In addition, plaintiff is not precluded from alleging that the label on the acid container failed to comply with the FHSA (*Sabbatino*, 253 AD2d at 419). "Such a claim is valid 'so long as a plaintiff charges a manufacturer with violations of FHSA-mandated labeling requirements and does not seek more stringent labeling requirements'" (*Wallace*, 212 AD2d at 140-141, quoting *Moss v Parks Corp.*, 985 F2d 736, 740-741 [4th Cir. Va. 1993], *cert denied* 509 US 906 [1993]).

Despite the foregoing analysis, these causes of action must nevertheless be dismissed. First, the acid and its container were not used in a manner which would nevertheless implicate plaintiff's causes of action for strict products liability and breach of warranty. "[U]nder the doctrine of strict products liability,

> the manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages; provided: (1) that at the time of the occurrence the product is being used * * * for the purpose and in the manner normally intended, (2) that if the person injured or damaged is himself the user of the product he would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages" (*Codling v Paglia*, 32 NY2d 330, 432 [1973]).

A product may be defective as a result of a mistake in the manufacturing process, an improper design, or inadequate warnings relating to the product (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 [1983]; *Carbone by Carbone v Alagna*, 239 AD2d 454, 455 [1997]). Under a breach of implied warranty claim, "recovery may be had upon a showing that the product was not minimally safe for its expected purpose. . ." (*Denny v Ford Motor Co.*, 87 NY2d 248, 258 [1995]). Here, Quaker has established that the acid and its container were not being used for the purpose and in the manner normally intended and were not being used for their expected purpose inasmuch as they were not being used at all. Further, "[t]o support [a] . . . cause of action sounding in the breach of an express warranty, [it must be shown] that there was an 'affirmation of fact or promise by the seller, the natural tendency of which [was] to induce the buyer to purchase' and that the warranty was relied upon"(*Schimmenti v Ply Gem Industries, Inc.*, 156 AD2d 658, 659 [1989], quoting *Friedman v Medtronic, Inc.* 42 AD2d 185, 190 [1973]). Here, the purchaser is unknown and it cannot be determined whether any express warranty was relied upon.

Second, the claim that Quaker's conduct resulted in the death of Mr. Hanly involves speculation on the issue of proximate cause.

> "It is well established that the mere happening of an accident creates no presumption of liability. Liability attaches only if the defendant breaches a legal duty to the plaintiff which breach is a substantial cause of the events which produced the injury. An unforeseeable, superceding event will absolve the defendants of liability. An intervening act is deemed a superceding cause of the injury so as to relieve the defendants of liability if it is of such an extraordinary nature or so attenuates defendants'

> negligence from the ultimate injury that responsibility may not reasonably be attributed to the defendants" (*Perez v New York Tel. Co.*, 161 AD2d 191 [1990] [internal citations omitted]).

While plaintiff has alleged that the precipitating cause of Mr. Hanly's death was the improper disposal of the acid container, Quaker has demonstrated that there is no evidence that the improper disposal was due to its own conduct. As such, Quaker has shown that plaintiff's claims premised upon strict products liability, breach of warranty, and negligence simply do not apply to the facts of this case. Stated otherwise, Quaker has demonstrated that a breach of these legal duties was not the proximate cause of Mr. Hanly's death. In this regard, any negligence in failing to properly test, package and distribute the acid container was not the proximate cause of Mr. Hanly's injuries. Similarly, assuming noncompliance with the FHSA, it cannot be said, absent speculation, that the lack of federally-mandated labeling was the cause of the improper disposal. In addition, even upon a showing that the acid and container were defective, or that there was a breach of the product's express or implied warranty, there is no evidence that such breaches resulted in Mr. Hanly's death. In sum, the disposal of the acid and container "so attenuate[d] [Quaker's] negligence from the ultimate injury" as to constitute an intervening, superceding event which severed the ties necessary for proximate causation (*Perez v New York Tel. Co.*, 161 AD2d at 191; *Schimmenti*, 156 AD2d at 659-660; *see e.g. Aldrich v Sampier*, 2 AD3d 1101 [2003]). In view of the foregoing, Quaker's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it is granted.

*City's Motion for Summary Judgment*

The verified complaint, verified bill of particulars and notice of claim allege that the City was negligent in training Mr. Hanly in the identification, avoidance and removal of hazardous commercial and/or industrial waste, in failing to provide Mr. Hanly with adequate equipment, i.e. protective clothing and a safe truck with a device to enclose the hopper of the truck, in failing to provide a safe place to work, and in failing to institute rules for the safe removal and disposal of commercial and industrial waste.

In support of its motion, the City argues that plaintiff cannot establish a prima facie case of negligence. Specifically, the City contends that there is no evidence of its alleged negligence, and that even were the court to find an issue of fact as to whether Mr. Hanly was inadequately trained or equipped, plaintiff cannot establish that any of its alleged negligence was the proximate cause of Mr. Hanly's death.

As to plaintiff's claim of negligent training, the City cites the deposition testimony of plaintiff, Mr. Giammarino, Mr. Hanly's coworker, Mr. Caruso, a DOS Safety and Training supervisor, and Saloman Lebovits, a DOS Training instructor. At a 50-h hearing, plaintiff testified that Mr. Hanly was hired by DOS in 1974, was temporarily laid off due to a fiscal crisis, was reinstated in 1977, and remained continuously employed by DOS until his death. Mr. Giammarino testified that he was hired by DOS in 1981 and was trained in the safe operation of the truck and the hopper, namely to stand on the side of the garbage truck when activating the hopper. Mr. Caruso testified that he was hired and trained by DOS in 1985.

He was trained to pick up a garbage can without hurting his back, to stand to the side of the truck while the hopper was in motion in order to avoid objects which might shoot out, and to keep civilians away from the back of the hopper when it was in motion. New sanitation workers were instructed to stand to the side of the truck when the hopper was activated and to be aware of traffic conditions. Saloman Lebovits testified that when he was hired in 1990, he received ten days of hands-on equipment training; he learned how to drive the truck, how to check the truck's condition before and after a trip, and how the truck and the hopper worked. He was trained not to stand in front of the hopper mechanism while the hopper cycled, but to stand curbside to avoid items from coming back and causing injury, and trained new sanitation workers to do the same. He provided written safety materials demonstrating this warning, and testified that DOS performed inspections to determine whether sanitation workers were following proper procedures.

With respect to plaintiff's claim that DOS failed to provide adequate safety equipment, the City cites the deposition testimony of Mr. Giammarino, who stated that he had worked on the same type of rear loader truck, but for different capacities, for the last 20 years, and that DOS only collected residential garbage. In addition, relying upon *McCormick v City of New York* (80 NY2d 808 [1992]), the City argues that DOS provided Mr. Hanly with "equipment that was safe and in good repair and suitable for its intended use." Finally, the City argues that the disposal of commercial grade hydrofluoric acid in residential garbage

constituted an intervening illegal act which severed any causal connection between its alleged negligence and decedent's injuries.

In opposition, plaintiff argues that the City must satisfy its own burden in moving for summary judgment rather than pointing to gaps in her proof. She also contends that in an effort to show that Mr. Hanly violated safety training, the City erroneously states that Mr. Hanly was standing at the rear of the truck at the time of the incident despite Mr. Giammarino's testimony that he only saw Mr. Hanly at the rear of the truck *after* the incident. Plaintiff also argues that Mr. Giammarino's testimony that the operator of the hopper had to hold one of the handles on the side of the truck during the entire cycling process demonstrates that Mr. Hanly was splashed with the acid despite standing where he was trained to stand. In addition, plaintiff notes that although Mr. Giammarino testified that a worker could be sprayed with liquid while standing to the side of the truck, sanitation workers were not trained to handle hazardous materials in the trash.

As to her claim premised upon the City's failure to provide adequate safety equipment, plaintiff asserts that the City's reliance upon *McCormick* is misplaced since here, unlike in *McCormick*, no safety equipment was provided to Mr. Hanly. In addition, plaintiff maintains that despite the City's contention that the disposal of commercial grade hydrofluoric acid within a residential area was an intervening act severing causation, the City conceded that it had anticipated the risk of material being ejected from the hopper during cycling. Finally, plaintiff argues that while the City was aware that sanitation workers might

come in contact with hazardous chemicals, it failed to provide any personal protective equipment or truck guards in violation of federal OSHA regulations.

Review of the record reveals that the City provided Mr. Hanly with adequate training and equipment. DOS employees testified that they were trained, among other things, to remain on the side of the truck when activating the hopper mechanism, which was supported by DOS training materials. Plaintiff has failed to raise an issue of fact to rebut this showing. Plaintiff's inadequate training claim is essentially premised upon her contention that decedent was sprayed with acid despite having been properly positioned at the side of the garbage truck. However, this premise is entirely speculative. While Mr. Giammarino testified that Mr. Hanly activated the hopper, and that cycling required the operator to hold onto the handles on the side of the truck during the entire process, he did not witness decedent throw the garbage into the hopper, activate the hopper, or observe the spraying of the acid. Thus, there is no evidence that decedent activated the hopper in accordance with DOS training from the side of the truck or that decedent incorrectly operated the hopper from the rear of the truck.

As to plaintiff's claim of inadequate equipment, the City has shown that it provided equipment "that [was] reasonably safe and in good repair and suitable for its intended use" (*McCormack,* 80 NY2d 808, 810). But for slight modifications in capacity, the same type of garbage truck has been used for the last 20 years for residential waste collection only, and the trucks are equipped with levers on each side to ensure that workers could stand clear of

the hopper and out of the roadway while the hopper was cycling. Plaintiff has failed submit competent evidence demonstrating that the equipment provided decedent was inadequate or defectively designed, that the OSHA regulations she cites are applicable here, or that the protective devices such as screens or safety guards existed at the time of the incident or that they would have prevented Mr. Hanly's death. Moreover, as noted above, absent evidence as to the manner in which the incident occurred, plaintiff's claim that Mr. Hanly was not provided with adequate equipment is merely speculative.

The City has also shown that the record is devoid of any evidence that the alleged acts or omissions of DOS were the proximate cause of Mr. Hanly's death. "Although the absence of direct evidence of causation would not necessarily compel a grant of summary judgment in favor of defendant[], as proximate cause may be inferred from the facts and circumstances underlying the injury, the evidence must be sufficient to permit a finding based on logical inferences from the record and not upon speculation alone" (*Silva v Village Square of Penna, Inc.*, 251 AD2d at 944 [1998]). Here, Mr. Giammarino did not witness decedent place the garbage in the hopper, activate the hopper, or observe the incident itself. As such, even assuming that the City breached a duty, the evidence adduced on the City's motion, as well as the record as a whole, would establish "nothing more than a possibility" that Mr. Hanly's death was caused by the failure of DOS to provide adequate training or equipment (*Curran v Esposito*, 308 AD2d 428 [2003]; *Silva,* 251 AD2d at 944; *Leggio,* 294 AD2d at 543). "Under the circumstances, the trier of fact would be required to base a finding of proximate

cause upon nothing more than speculation" (*Curran*, 308 AD2d at 428; *Silva*, 251 AD2d at 944). Therefore, the City's motion to dismiss the complaint insofar as asserted against it is granted.

*Gamuzza's Motion for Summary Judgment*

The verified complaint alleges that Ms. Gamuzza, owner of the apartment building near where the incident occurred, and her agents, were negligent in "placing the hydrofluoric acid on the public street for garbage collection." The verified bill of particulars allege, among other things, that Ms. Gamuzza was negligent in the ownership, maintenance, and operation of the premises, in failing to properly dispose of the hazardous acid in a safe manner, in allowing the acid to remain in a dangerous, unsafe and hazardous condition, in failing to warn persons such as Mr. Hanly of the presence of the container, in failing to properly supervise and train her employees, and in purchasing and using a hazardous chemical that was unnecessarily lethal.

In support of her motion, Ms. Gamuzza argues that plaintiff has failed to raise an issue of fact that the acid container emanated from her building. To demonstrate that plaintiff's arguments are speculative, she relies upon her deposition testimony and the deposition testimony of her managing agent, Sam Kirolos, and Mr. Giammarino, Mr. Hanly's coworker.

In opposition, plaintiff asserts that as the moving party, Ms. Gamuzza cannot meet her burden of demonstrating a prima facie case by noting alleged gaps in her opponent's proof. She also maintains that Mr. Giammarino's sworn affidavit, the testimony of Mr. Kirolos, and

the investigation report of the Police Department raise a question of fact as to whether the acid container originated from Ms. Gamuzza's apartment building.

Ms. Gamuzza testified that she owned the four-story apartment building located at 1745 84th Street and that she paid Sam Kirolos, the "managing agent" who lived there, to perform all tasks related to that building, including taking out the garbage. Sometime before Mr. Hanly's accident, Mr. Kirolos had performed cleaning and pointing on the building because it was dirty.

Mr. Kirolos testified at his deposition that he lived at the apartment building located at 1745 84th Street in November, 1996. His duties including taking out the garbage, which only he performed, and making repairs to the apartments. He had cleaned the bricks on two sides of the apartment building in the spring and summer of 1994 using "muraic" acid, which came in a one-gallon plastic container. He used all the acid until it had run out and threw the acid containers out in recycling cans, which were put on the curb for sanitation works to remove. It is worth noting that, crediting this testimony, it shows an improper disposal of the empty containers in a manner consistent with the facts alleged by plaintiff.

The court finds that the evidence submitted by plaintiff in opposition to Ms. Gamuzza's prima facie showing raises issues of fact as to whether the acid had come from the Gamuzza apartment building. The sworn affidavit of Mr. Giammarino states that on the day of the accident, he was employed by DOS, that he was Mr. Hanly's partner, and that to the best of his knowledge, the deadly acid came from the building located at 1745 84th

Street. The fact that there are discrepancies between the affidavit and the deposition testimony only raises issues of fact for a jury to resolve. Further, that part of the police investigation report upon which plaintiff relies, indicating that Mr. Hanly and Mr. Giammarino were servicing their last stop adjacent to 8160 New Utrecht Avenue, *"with refuse originating from an apartment building at 1745 84th Avenue*", raises a question as to whether the acid container came from that refuse (emphasis added). Finally, Mr. Caruso testifying that hydrofluoric acid 70% is used to wash the exterior of brick buildings, one of the very limited uses for this substance, in combination with the reasonably proximate cleaning of the bricks of 1745 84th Avenue provides circumstances from which the jury could reasonably infer that the acid in question was used on the Gamuzza building.

In sum, the motions of Quaker and the City of New York are granted and the complaint is dismissed as against Quaker and the City of New York. The motion of Zima Gamuzza is denied.

The foregoing constitutes the decision, order and judgment of the court.

ENTER,

J. S. C.

Hon. Martin M. Solomon S.C.J