

**State Farm Fire & Casualty Co. v Watts Water
Technologies**

2008 NY Slip Op 33469(U)

December 18, 2008

Supreme Court, Nassau County

Docket Number: 007752/06

Judge: Daniel Martin

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**SHORT FORM ORDER
SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice**

**STATE FARM FIRE & CASUALTY COMPANY
a/s/o IRA CHECKLA.**

Plaintiff.

- against -

WATTS WATER TECHNOLOGIES.

Defendant.

**WATTS WATER TECHNOLOGIES, INC. Shown
here as WATTS WATER TECHNOLOGIES.**

Third-Party Plaintiff.

- against -

ZILMET.

Third-Party Defendant.

**TRIAL/IAS, PART 31
NASSAU COUNTY**

**Sequence No.: 005
Index No.: 007752/06
XXX**

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, defendant Watts Water Technologies, Inc.'s (hereinafter "Watts") motion for summary judgment dismissing the complaint herein is granted.

The instant matter is a subrogation action in which plaintiff alleges that its insured, Ira Checkla, suffered \$38,390.55 in damages arising out of water damage which occurred in his basement on March 26, 2005. Plaintiff alleges that the water damage was caused by the failure of the diaphragm in the expansion tank in Mr. Checkla's heating system which plaintiff alleges resulted in over pressure in the system. Plaintiff maintains causes of action against Watts for 1) negligently designing, manufacturing, building, etc. the pressurized tank under the theory of res

ipsa loquitur; 2) breach of the warranty of merchantability; 3) negligent design, manufacture, review and approval of design, sale distribution, furnishing, installation, testing, inspection, maintenance and/or repair of the pressurized tank; and 4) products liability.

Defendant moves for summary judgment dismissing the complaint. In moving for summary judgment defendant must demonstrate that there are no issues of fact which preclude summary judgment in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). Any party opposing the motion must demonstrate a triable issue of fact through admissible evidence. *Id.*

In support of the motion Watts first relies upon the deposition transcript of plaintiff's subrogor, Mr. Checkla wherein he testified:

1) in 2002-2003 he had a new home heating system installed in his home which consisted of a boiler and hot water distribution;

2) he believes that the heating system and expansion tank, model ET30 which was manufactured by defendant Watts was installed by a plumber, non-party John Moshouris;

3) he did not select or purchase the equipment to be installed in the heating system, same was done by contractors;

4) he did not know that an expansion tank was being installed in the heating system, did not know what it was for, who manufactured and distributed it and was not aware that one had been installed in his home;

5) he had never heard of Watts and had no idea of what Watts did;

6) he did not read the boiler manual or the manual for the tank;

7) he never read any tags or labels affixed to the boiler or expansion tank;

8) neither he nor any one knows of did any maintenance to the equipment;

9) the dwelling did not have a floor drain in the area where the boiler and tank were located;

10) the only floor drain in the basement was in the closet which was "as far away as you can get" from the boiler;

11) he did not know where the relief valve was or what it was for;

12) while on vacation he was informed on March 26, 2005 that the level of water in the basement reached to approximately one foot in depth;

13) a plumber, John Moshouris, made repairs to the plumbing system including the replacement of the tank "and various plumbing connections";

(See, deposition transcript of John Checkla, pp. 8-9, 11-14, 15, 17-19, 23, 25, 27-28, 39, 57-58, 93-95).

Plaintiff's expert report concluded that the diaphragm in the expansion tank which separated the air in the expansion tank from the water in the boiler failed when the water expanded resulting in a compression of the captive air in the boiler. As a result of the failure of the diaphragm air escaped, the pressure in the heating system increased and the relief valve therein, acting properly, discharged the water in the system. The expert further concludes that such an expansion tank should operate without incident for five years but the one at issue herein only functioned for two years.

Defendant also annexes the affidavit of John McCabe who at the time of the incident served as Watts' technical services manager. In his affidavit Mr. McCabe avers that the ET30 expansion tank at issue was purchased by Watts from its manufacturer, third-party defendant Zilmet. Watts, avers Mr. McCabe, did not design, manufacture, build, assemble, fabricate, inspect, test or package the expansion tank and had no role in its design, etc. Mr. McCabe further asserts that Watts requested that Zilmet "manufacture the tanks with a size and shape of fitting that was compatible with U.S. plumbing fixtures." Zilmet printed labels and affixed them to the tanks and inserted instructions with the tanks in their packaging based upon suggested artwork provided by Watts prior to shipping the tanks to this country. The tanks were received by Watts as finished products already packaged for re-sale and were sold by Watts as received from Zilmet to wholesalers, retailers and plumbing distributors.

The instructions to which Mr. McCabe referred provide that:

- 1) if the system pressure is too high the expansion tank should be checked to see if it has lost its air charge and the tank should be checked for a faulty fill valve operation;
- 2) if the pressure relief valve drips water a) the system pressure should be checked, and if the pressure is too high; b) the relief valve should be flushed if it continues to drip by raising the level several times and if the drip continues, replace the relief valve;
- 3) as the relief valve will discharge hot water, in order to avoid injury and water damage "a proper drain line, connected to the relief valve outlet and run to a safe place of disposal must be installed";
- 4) Watts provides a limited warranty against product defects in material and workmanship for a period of one year from the date of original shipment and in the event of a defect the company will replace or repair the product free of charge, such being the exclusive remedy for a breach of warranty (same also disavows responsibility for damages including costs resulting from labor, delays, vandalism, negligence, fouling caused by foreign material, damage from adverse water conditions, chemicals or any other circumstances over which Watts has no control).

Watts also annexes the affidavit of its expert witness, Michael Mullavey a design engineer employed by Watts. Mr. Mullavey avers that he reviewed the pleadings, the State Farm Claim file including the expert report contained therein, responses to interrogatories, the deposition transcripts herein, the manuals which apply to Mr. Checkla's boiler, documents produced by Watts to plaintiff and/or Zilmet and documents obtained from the Town of Oyster Bay. He notes that there are two water heating systems in Mr. Checkla's basement, one for potable water and one for heating. More importantly, Mr. Mullavey avers that:

- 1) in the case of a failed diaphragm on an expansion tank such as the instant one a small volume of water will flow from the pressure safety valve periodically during the heating cycle of water until the seeping water causes the pressure in the system to drop to 20 psi at which time the safety valve should close and this cycle will continue until the water has stopped heating;
- 2) if the pressure relief valve is operating properly in no case should the system pressure drop below the heating system's minimum operating pressure of 15 psi which would result in the boiler allowing more water into the system;

3) the failure of the diaphragm on an ET30 tank alone would only result in 1.4 gallons of water to seep slowly out of the heating system through the safety valve at periodic intervals and would not result in a constant flow of water;

4) if the tank is the only failed component, the safety valve would close when the heating system's pressure was reduced to 20 psi and water would not begin to seep again until the system reached the maximum temperature of 180 degrees f;

5) based upon the amount of water described in State Farm's report in the Checkla basement, a failed expansion tank would have to be accompanied by a failed boiler fill valve and/or failed safety relief valve;

6) there is no evidence that the boiler fill valve and/or pressure safety valves were examined and whether these components were replaced;

7) the failure to have a proper discharge line on the safety relief valve would have resulted in the water's disposal in a safe place and such failure is a violation of the boiler's manufacturer's instructions and the International Plumbing Code;

8) there was no safe place for disposal from the discharge line in the basement and the installing plumber should have made sure that the draining provisions were made; and

9) had a discharge line running to a safe disposal area been installed on the safety release valve it would have prevented the discharged water from accumulating and prevented the property damage.

Watts first asserts that it is entitled to summary judgment dismissing the claim for breach of warranty on the basis that Checkla did not rely upon any warranty from Watts regarding the tank. This claim should also be dismissed, claims Watts, on the grounds that any defect in the tank did not show itself until after the expiration of the express warranty period. Lastly, Watts contends that this cause of action should be dismissed because no privity existed between plaintiff's subrogor and Watts.

In order to maintain a cause of action for breach of an express warranty of merchantability, plaintiff must demonstrate that an affirmation of fact, description or sample was made by or provided by the defendant as part of the bargain for the sale of the item and that same induced the plaintiff into purchasing same. See, Schimmenti v. Ply Gem Industries, Inc., 156 A.D.2d 658 (2nd Dep't 1989). Further, an implied warranty of merchantability will not lie where the product is sold to a remote purchaser who is not in privity with the manufacturer and the purchaser suffers property damage only. See, Pronti v. DML of Elmira, Inc., 103 A.D.2d 916 (3rd Dep't 1984). See, also, Donahue v. Ferlito, Vultaggio & Sons, 13 A.D.3d 77 (1st Dep't 2004).

Defendant Watts has demonstrated that as there was no privity between Mr. Checkla and Watts, and that as a result Mr. Checkla could not have relied upon a representation by Watts. Accordingly, the court finds that defendant Checkla has made a prima facie demonstration of entitlement to summary judgment dismissing the cause of action for breach of the warranty of merchantability. The burden now shifts to plaintiff to demonstrate a triable issue of fact which precludes summary judgment on this branch of Watts' motion. Zuckerman v. City of New York, supra.

As plaintiff offers no opposition to this branch of Watts' motion, the court grants Watts

summary judgment dismissing the second cause of action for breach of the warranty of merchantability.

Defendant Watts also moves to dismiss plaintiff's claim which is based upon the doctrine of *res ipsa loquitur* on the grounds that the tank was not in the exclusive control of Watts. In order for the doctrine of *res ipsa loquitur* to apply plaintiff must prove 1) the event ordinarily does not occur in the absence of negligence; 2) it must be caused by an instrumentality which is exclusively in defendant's control; 3) there must be no voluntary action or contribution to the accident's happening on plaintiff's part. See, Bonarchuk v. State of New York, 49 A.D.3d 581 (2nd Dep't 2008). Where, as here, defendant Watts demonstrates that the allegedly defective product was not in its exclusive control, it has met its burden of demonstrating entitlement to summary judgment dismissing a claim based upon *res ipsa loquitur*. See, Patrick v. Bally's Total Fitness, Inc., 292 A.D.2d 433 (2nd Dep't 2002).

Plaintiff fails to oppose this branch of Watts' motion. Accordingly, the motion is granted to the extent that the first cause of action is dismissed.

With regard to plaintiff's claim for negligent design, manufacture, sale, distribution, installation, and/or supervision of the installation, testing, inspection, maintenance and/or repair of the pressurized expansion tank Watts takes the following positions: 1) Watts did not design, manufacture, build, assemble, test, install, service maintain or supervise any of these activities relative to the tank; 2) there is no proof herein that Watts failed to exercise reasonable care in the sale and distribution of the tanks; 3) the facts herein demonstrate that there was no manufacturing defect in the tank; 4) there is no proof herein that the warning and instructions were inadequate and the proximate cause of the injuries; and 5) plaintiff is unable to demonstrate proximate cause.

In order to maintain a cause of action based upon negligence, plaintiff must demonstrate that defendant owed the plaintiff a duty and that defendant breached that duty by the failure to use reasonable care. See, Becker v. Schwartz, 46 N.Y.2d 401 (1978); Bello v. Transit Authority of New York City, 12 A.D.3d 58 (2nd Dep't 2004). Plaintiff asserts in part in its cause of action for negligence that Watts breached its duty relative to the design, manufacture, installation, testing, inspection, maintenance and repair of the tank. As set forth in Mr. McCabe's affidavit, however, Watts did not design, manufacture, install, test, inspect maintain or repair the tank, but that third-party defendant Zilmet did. Nowhere does plaintiff raise an issue of fact as to whether defendant undertook to do these things and therefore owed a duty to its subrogor to do them with reasonable care.

With regard to the allegation of the negligent sale and distribution of the tank, Watts contends that plaintiff herein offers nothing as to what a reasonable seller of such a product would have done with the knowledge about the product that Watts had. Plaintiff does not at all address this position in its opposition papers.

Thus, the court grants defendant Watts summary judgment and the third cause of action is dismissed.

In its fourth cause of action for strict products liability, plaintiff alleges that “defendant Watts, in the sale and distribution of said pressurized expansion tank, placed upon the market a product in a defective and unreasonably dangerous condition, which was not fit for its intended use.” In support of its motion for summary judgment dismissing the fourth cause of action Watts points to Mr. Mullavey’s affidavit where he set forth how the failure of the tank’s diaphragm on its own without a failure on the part of the boiler fill valve and/or safety relief valve would not have resulted in an accumulation of the amount of water that occurred here.

In order to be entitled to damages under a theory of strict products liability, plaintiff must demonstrate that the product did not perform as intended and that it was defective when it left the manufacturer’s or seller’s control. See, Wesp v. Cal Zeiss, Inc., 11 A.D.3d 965 (4th Dep’t 2004); Henry v. General Motors Corp., 201 A.D.2d 949 (4th Dep’t 1994). In order to establish a *prima facie* case in strict products liability for design defects, the plaintiff must show that the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff’s injury.” Voss v. Black & Decker Manufacturing Co., 59 N.Y.2d 102, 107 (1983).

As set forth above, defendant’s expert witness has averred that even if the expansion tank did fail to operate properly, there would not have been the extent of water accumulation suffered by plaintiff’s subrogor. Thus, the court finds that defendant Watts has met its *prima facie* burden on this branch of its motion.

In opposition to this branch of the motion plaintiff annexes the affidavit of Robert W. Kane, a mechanical consultant and appraiser who specializes in the inspection of heating, refrigeration, air conditioning, ventilation and plumbing and electrical systems. In April, 2005 Mr. Kane inspected the premises and boiler system at Mr. Checkla’s home. In his affidavit Mr. Kane avers that:

- 1) the rubber diaphragm in the expansion tank failed, allowing air to escape which resulted in pressure in the heating system to increase until the relief valve discharged water for an extended period of time;
- 2) it is reasonable for an expansion tank to operate as designed for in excess of five years without failure and as the tank at issue herein failed within two years of its manufacture, the tank’s failure was caused by a product defect;
- 3) this specific heating system had a pressure reducing valve and a relief valve designed to discharge where the pressure in the system exceeds 30 psi;
- 4) it is impractical for the relief valves to be piped to a suitable drain as most homes do not have one, it cannot be piped outside due to freezing and a sump will not contain a considerable discharge of water;
- 5) it is common to pipe the discharge from the relief valve to a point approximately six inches from the floor where no suitable drain exists, said practice being accepted by the building departments in Nassau, Suffolk and New York counties;
- 6) while in some situations where an expansion tank fails and water pressure causes a relief valve to minimally leak, which will cease when the pressure within the heating system returns to a safe level, it does not occur in all situations;

7) in some situations water conditions and/or corrosion do not allow the valve to close resulting in water exiting the system at a rate not exceeding that allowed by the pressure reducing valve in which case the valve will remain open;

8) in his opinion the valve was replaced when the new expansion tank was installed at the Checkla home; and

9) in his opinion whether or not the valve was faulty is not an issue; if the expansion tank had not failed, the valve on the heating system would not have opened and the loss would not have occurred.

Generally, a plaintiff may prove a cause of action for products liability by circumstantial evidence. See, Speller v. Sears, Roebuck & Co., 100 N.Y.2d 38 (2003). Where, however, as here, defendant's expert is unable to personally inspect the product at issue and identifies other possible causes of the damage, plaintiff must oppose the motion by proving that the product did not perform as intended and exclude all other causes for the product's failure that are not attributable to defendant. See, Ramos v. Howard Industries, Inc., 10 N.Y.3d 218 (2008); Speller v. Sears, Roebuck & Co., supra. An expert's affidavit submitted in order to defeat the summary judgment motion must not be speculative. Id.

In the instant matter defendant's expert adequately identified possible reasons for the leakage other than the defective expansion tank. Mr. Kane's affidavit does not exclude those other potential causes of the damage and indeed even recognizes that in some cases Mr. Mullavey's description of what he believes caused the leakage sometimes happens. Mr. Kane also does not identify a specific defect in the product.

Thus, the court concludes that plaintiff has failed to raise a triable issue of fact on this branch of defendant's motion and the court grants defendant Watts summary judgment dismissing the fourth cause of action.

Based upon the foregoing it is hereby directed that the complaint is hereby dismissed in its entirety.

So Ordered.

Dated: December 18, 2008

Daniel Martin
A.J.S.C.
ENTERED

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NASSAU COUNTY
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