

<b>Stoeckel v Manocherian</b>
2010 NY Slip Op 30170(U)
January 25, 2010
Supreme Court, New York County
Docket Number: 103204/04
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54  
*Justice*

Index Number : 103204/2004

STOECKEL, JESSICA

vs  
MANOCHERIAN, FRAYDUN

Sequence Number : 010

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1  
2, 3

*Exhibits*

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is denied in accordance with the reversed decision/ order.*

**FILED**

JAN 27 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/25/10

J.S.C. JUSTICE SHIRLEY WERNER KORNREICH

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
JESSICA STOECKEL,

Plaintiff,

-against-

Index No. 103204/04  
(Motions 006 through 010)

FRAYDUN MANOCHERIAN, UNITED ENTERPRISES,  
a limited partnership, PAN AM EQUITIES, H. LIEBLICH  
and COMPANY, INC. and ROBERT FLANNENBAUM,

Defendants.

-----X  
H. LIEBLICH & COMPANY, INC. and ROBERT  
FLANNENBAUM,

Third-Party Plaintiffs,

-against-

Third-Party Index No.  
591073/04

H.B. SMITH, SMITH CAST IRON BOILERS,  
WESTCAST, INC., MESTEK, INC. and POWER  
FLAME, INC.,

Third-Party Defendants.

-----X  
FRAYDUN MANOCHERIAN, UNITED ENTERPRISES,  
a limited partnership, PAN AM EQUITIES,

Second Third-Party Plaintiffs,

-against-

Second-Third-Party Index No.  
590537/05

CONSOLIDATED EDISON COMPANY OF NEW  
YORK, INC., DRESSER, INC., DRESSER INDUSTRIES,  
INC., DRESSER EQUIPMENT GROUP, INC. and NEW  
YORK DRESSER,

Second Third-Party Defendants.

-----X  
AND RELATED ACTIONS (Index Nos. 112251/04,  
603694/04, Index No. 113021/05 and 100692/05)  
-----X

SHIRLEY WERNER KORNREICH, J.:

**FILED**  
JAN 27 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Motion sequence numbers 006, 007, 008, 009 and 010 are hereby consolidated for disposition.

On February 15, 2004, excessive amounts of carbon monoxide seeped from the boiler room at a building located at 535 Third Avenue in Manhattan into the apartments. Two residents died, two residents were taken to the hospital unconscious, and other residents were allegedly injured. In addition to this *Stoeckel* action, four other lawsuits were filed (*Polanco v United Enterprises*, Index No. 112251/04; *So v Pan Am Equities, Inc.*, Index No. 603694/04; *Karpo v Manocherian*, Index No. 100692/05; *Needleman v Untied Enterprises*, Index No. 113021/05). The parties were directed to file RJIs, and by a so-ordered stipulation dated September 15, 2005 and an order dated November 2, 2005, three of the actions were joined with *Stoeckel* for discovery and trial.<sup>1</sup> The *So* case has since been discontinued.

In motion sequence 006, defendants, the building's owner and management, Fraydun Manocherian, United Enterprises, a limited partnership, and Pan Am Equities (together, Pan Am) move, pursuant to 22 NYCRR 202.21 (e), to strike the actions from the trial calendar on the ground that all pre-trial discovery has not been completed and plaintiffs' Certificate of Readiness contains incorrect material facts concerning pre-trial discovery. In the alternative, Pan Am seeks an order, pursuant to CPLR 3126, precluding plaintiffs from offering any evidence as to damages and precluding Consolidated Edison Company of New York, Inc. (Con Edison) from offering any evidence at trial due to its failure to provide documents and its repeated failures to comply with the court's disclosure orders.

In motion sequences 007, 008 and 010, third-party defendants Dresser, Inc., Dresser

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<sup>1</sup>Despite the court's direction, the parties did not file RJIs. Nor was *Needleman* joined with the other cases.

Equipment Group, Inc. and New York Dresser (Dresser), the manufacturer of the building's gas meter, third-party defendant Power Flame, Inc. (Power Flame), the manufacturer of the building's gas burner, and third-party defendant The H.B. Smith Company, Inc. (H.B. Smith), the manufacturer of the building's boiler, each separately move, pursuant to CPLR 3212, for summary judgment dismissing all claims against them.

In motion sequence 009, Pan Am requests summary judgment against H. Lieblich & Company, Inc. and Robert Flannenbaum (together, Lieblich) on Pan Am's third-party claim for indemnity from Lieblich for its service, maintenance, and annual inspections of the burner/boiler equipment.

*I. Strike Note of Issue/Preclusion*

Pan Am argues that this case is not ready for trial because certain discovery has not been forthcoming from plaintiffs Yvette Karpo, Jessica Stoeckel and the Estate of Antonio Polanco, and from third-party defendant Con Edison. There is no basis to strike this action, which has already been delayed by the bankruptcy of H. Lieblich & Co., from the trial calendar as most of the requested discovery has now been provided.

An independent medical examination of plaintiff Yvette Karpo was held on March 5, 2009, and her counsel contends, without opposition from Pan Am, that all updated medical authorizations have been provided.

With respect to plaintiff Jessica Stoeckel, Pan Am contends that she is in violation of the court's December 18, 2008 order in failing to provide "*Arons*" authorizations<sup>2</sup> for all treating physicians within 30 days of that order. Her counsel's objection on the ground that the request is

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<sup>2</sup>Referring to the Court of Appeals decision in *Arons v Jutkowitz*, 9 NY3d 393 (2007).

premature is rejected for two reasons. First, the time for argument as to the propriety of this court's order was at the conference on December 18th, not in opposition to a motion to compel compliance with that order. Second, counsel misunderstands the purpose of *Arons*'s authorizations, which is to conduct informal discovery. The court ordered that they be provided prior to the filing of the note of issue; since that event "denotes the completion of discovery, not the occasion to launch another phase of it." *Arons v Jutkowitz*, 9 NY3d at 411. Accordingly, plaintiff Stoeckel shall be precluded from offering any evidence as to her medical condition if HIPA-compliant authorizations for *all* of her treating physicians are not furnished to all parties within 10 days of service of the decision with notice of entry.

The Estate of Antonio Polanco has not submitted any opposition to Pan Am's motion, in which Pan Am contends that the Estate failed to supply a supplemental bill of particulars enumerating: the alleged statutes and ordinances violated by Pan Am and "other pecuniary damages sustained by decedent's family members," as alleged in this plaintiff's bill of particulars; failed to furnish supporting documentation for the pecuniary damages claimed; and failed to furnish any employment authorizations for the decedent per the court's December 18, 2008 order. Accordingly, this plaintiff shall be precluded from offering any evidence at trial regarding any statutes and ordinances violated by Pan Am and any pecuniary damages sustained by family members of the decedent, Joaquin Polanco, other than the \$2,514.00 in funeral expenses claimed, unless a supplemental bill of particulars and supporting documentation is furnished within 10 days of service of this decision with notice of entry. Since the Estate is not claiming any loss of earnings (*see* Polanco Verified Bill of Particulars dated September 15, 2005, ¶ 23), there is no need for a preclusion order with respect to the failure to supply employment authorizations.

Finally, Pan Am's request for a preclusion order against Con Edison is denied, since they provided the requested documents on March 3, 2009, and no complaint had been made regarding the sufficiency of this production.

## *II. Dresser Defendants' Motion for Summary Judgment*

Dresser manufactured the gas meter installed at the building by Con Edison. Natural gas was supplied to the building's burner through the Dresser gas meter installed on the outside of the building. The meter measures the amount of fuel passing through the pipe to the burner, which requires both air and fuel to create combustion. Dresser has been sued by Pan Am for contribution and indemnification and other defendants have asserted cross claims, but Dresser is no longer a direct defendant in any of the actions.

Dresser contends that it is entitled to summary judgment because there is no evidence that its gas meter malfunctioned or was defectively designed. Dresser relies heavily on a February 20, 2004 report issued by William McGivney, the Deputy Chief for the Boiler Division of the New York City Department of Buildings (DOB). The report found that "several factors," none of which involved the gas meter, were the cause of the carbon monoxide spillage (McGivney Dep. at 65; Greenberg 1/20/09 Aff., Ex. J). McGivney concluded:

- High levels of carbon monoxide produced from incomplete combustion cause [sic] by the air shutter being closed on the gas burner.
- The gas regulator was adjusted to the full open position for the gas flow to the burner. This incomplete mixture is what produced the carbon monoxide.
- The clean out door on the chimney base was missing, which caused the chimney to produce incomplete draft and not allow the flu gases to safely exit the boiler.
- The fresh air ventilation louver was 95% blocked by sheet rock material, which caused insufficient fresh air for combustion to the boiler.
- The means of the carbon monoxide travel from the boiler room was due to holes in the ceiling directly above the boiler, and holes in the wall. This allowed the carbon monoxide to travel up to the apartments, mostly in the "B" line of the building. These holes were passageways for steam pipes and water lines and

should have been sealed.

(Greenberg 1/20/09 Aff., Ex. J at 3-4). McGivney also testified at his deposition that there was a problem with the gasket rope seal on the boiler, which is an item that needs to be maintained and should be visually checked on the annual "Local Law" inspections. In addition, he found spillage on February 15, 2004 (McGivney Dep. at 96-97, 127). A DOB "Notice of Violation and Hearing" issued on the day of the incident states: "when boiler is put into operation carbon monoxide escaping from all sides of the boiler" (Gomes Affirm., Ex. T).

Only Pan Am opposes Dresser's motion for summary judgment. Pan Am theorizes that the building's gas meter malfunctioned due to improper maintenance by Con Edison, causing a restriction of gas flow through the meter, and that this fuel-lean situation caused the production of excessive carbon monoxide production and was a substantial factor in causing injuries and deaths at the building on February 15, 2004. Pan Am argues that they have raised factual issues as to a defect in the gas meter's design and Dresser's failure to warn that lack of maintenance of the meter could cause a fuel-lean situation and production of excessive amounts of carbon monoxide.

Pan Am's theory of defective design is based on the opinion of their expert witness, Yevsey Lenchner, P.E. He contends that Dresser was aware, back in the early 1970's when the meter was manufactured, that a rotary-type meter's internal impellers were vulnerable to sticking and failure. Lenchner opines that Dresser was aware that improper maintenance of the meter was likely to cause clogging of the meter's impellers, with particulate matter causing increased resistance in rotation, that these specific impeller failures were likely to cause the restriction of gas flow through the meter, and that this fuel-lean situation can cause the production of excessive carbon monoxide. Lenchner contends that an alternative design was then available, namely a

diaphragm meter, which does not utilize impellers and did not require any maintenance. A product is defectively designed if it is "not reasonably safe." *Denny v Ford Motor Co.*, 87 NY2d 248, 257 (1995); *see also Cover v Cohen*, 61 NY2d 261, 270 (1984). "To establish a prima facie case in a strict products liability action predicated on a design defect, a plaintiff must show that the manufacturer marketed a product which was not reasonably safe in its design, that it was feasible to design the product in a safer manner, and that the defective design was a substantial factor in causing the plaintiff's injury." *Gonzalez v Delta Intl. Mach. Corp.*, 307 AD2d 1020, 1021 (2d Dept 2003); *see also Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 (1983); *Rose v Brown & Williamson Tobacco Corp.*, 53 AD3d 80, 82 (1st Dept), *affd* 11 NY3d 545 (2008), *cert denied Adamo v Brown & Williamson Tobacco Corp.*, \_\_\_ US \_\_\_, 130 S Ct 197 (2009).

As an initial matter, Dresser contends that Pan Am's theory that too little gas can create excess carbon monoxide is scientifically unsound. However, according to the affidavit by Power Flame's expert, Leonard Wharton, Ph.D., P.E., excessive levels of carbon monoxide can be produced in both a fuel-rich and a fuel-lean situation. Power Flame's deposition witness, Mark Wehmeier, testified that carbon monoxide is created when there is either "too much fuel for the air or too much air for the fuel" (Wehmeier Dep. at 66). H.B. Smith's witness, Thomas Neill, agreed that a fuel-lean situation can cause excess carbon monoxide (Neill Dep. at 49). And, according to a publication of The American Society of Heating, Refrigerating and Air-Conditioning Engineers, incomplete combustion "occurs when a fuel element is not completely oxidized during combustion," that "[c]onditions that promote incomplete combustion include (1) insufficient air and fuel mixing (causing fuel-rich and fuel-lean zones);" and that "[i]ncomplete combustion uses fuels inefficiently, can be hazardous because of carbon monoxide production (emphasis added)" (Gomes 3/2/09 Aff., Ex. C [3]). Thus, the court assumes, for

purposes of this motion, that too little gas relative to the amount of air in a burner can cause excess carbon monoxide production.

Dresser further contends that there is no evidence that the Dresser rotary gas meter either was not functioning properly on February 15, 2004, the day of the incident, or was a substantial factor in causing the plaintiffs' injuries. Dresser relies on testimony of Con Edison and DOB personnel, who were on site on February 15-18, 2004. John Cagney, a Con Edison employee, testified that there were no complaints or issues with the meter prior to the incident or even prior to September 21, 2004 (Cagney Dep. at 86-87). William McGivney of the DOB testified that the gas boiler was started up on February 15 and 18, 2004, and that, in both instances, sufficient gas was reaching the boiler in order for it to fire up (McGivney Dep. at 115-116; *see also* Cagney Dep. at 90-91). McGivney testified that he visually checked the meter and it appeared to be in normal operation; no one else at the time in February 2004 said otherwise; and he has no reason to believe that the gas meter was the cause of the accident (McGivney Dep. at 117). Other Con Edison workers on site did not observe or recall any information that the Dresser meter had malfunctioned in any way (*see* Selja Dep. at 78; Kosalinski Dep. at 97-98). There is also evidence that testing done on February 18, 2004 showed that changes to the burner and boiler room, without any changes to the meter, quickly caused the production of carbon monoxide to come down to safe levels and that the gas burner fired up with no problem at four different times (Cagney Dep. at 61-62; Greenberg 1/20/09 Aff., Ex. J; McGivney Dep. at 53-57).

Pan Am, however, points to the facts that: the burner/boiler system was still producing toxic levels of carbon monoxide when tested on September 20, 2004 (*see* Smith 4/1/09 Aff. ¶ 15; Cagney Dep. at 90-91); the gas meter was not functioning on September 21, 2004; the burner had a low flame during the September 2004 testing; the gas pressure was measured and found to

be exceptionally low; and testing of the gas meter itself showed that the oil in the meter was dirty, and that there was a build-up of dirt and debris at the impeller's junctions (Lenchner 3/2/09 Aff., ¶¶ 9-10). Dresser's expert, Michael J. Clemens, P.E., blames the sticking of the meter's impellers during the September testing, on the fact that the meter had been taken out of service for seven months (Clemens 1/15/09 Aff., ¶¶ 7-8). Pan Am cannot rely on belated testing of a meter, not kept in its original condition, to support its argument.

Nor does the testimony of Thomas Neill, H.B. Smith's deposition witness, support Pan Am's theory against Dresser. Mr. Neill testified that the incident occurred because of inadequate fuel supply to the burner, causing the burner to operate in a fuel-lean mode with too much air (Neill Dep. at 49). The court, however, notes that this testimony, again, is based solely on Mr. Neill's viewing of a video taken during the September 2004 testing and that his visual inspection of the building's heating system took place on December 7, 2004 (Neill Dep. at 66, 69), at a time when the gas meter at issue had been replaced and the heating system was not functioning (*id.* at 28, 42, 60, 90, 94). Further, Pan Am supports its theory of an excessive draw on the gas supply with a memorandum written by Bruce M. Lieblich on February 16, 2004, a day after the incident. Mr Lieblich states that Lieblich's last service call to the building was on January 25, 2004 and that his serviceman, Roger Del Vecchio, found that "[t]here was a problem with keeping the burner on line and we found excessive draw on the gas supply" (Kalman 1/30/09 Aff., Ex. EE). A memorandum written after the incident by an interested party, perhaps trying to deflect blame, is of little if any value. Thus, the opinion of Power Flame's expert, Lennard Wharton, Ph.D., P.E., that this implies "that the gas pressure was lower than it should be" (Wharton 1/29/09 Aff., ¶ 26), is not supportive of Pan Am's argument. The testimony that the burner was not operating on January 10, 2004 and speculation that this could have been because the burner was "burning

too lean” (Del Vecchio Dep. at 38-39, 42), as well as the hearsay testimony of Cagney that a Lieblich employee, Jiusto Tuzzolino, believed that the incident was caused by the gas meter not supplying enough gas and causing the burner to produce [carbon monoxide]” (Cagney Dep. at 97) are sufficient to create an issue of fact regarding Dresser’s liability.

Moreover, Pan Am fails to raise a triable issue of fact on its defective design theory. Even assuming that the gas meter did malfunction on January 15, 2004 and that the resulting low gas pressure caused the production of excessive amounts of carbon monoxide, the only design defect that Pan Am’s expert raises is that the rotary meter requires periodic maintenance in order to function properly, and that Dresser was or should have been aware that its end user -- Con Edison -- would not perform any inspections or maintenance on the meter. Pan Am, thus, argues that Dresser should have been aware that a diaphragm meter was more appropriate for use in Manhattan by Con Edison, because they last more than 25 years without any need for maintenance and do not utilize any parts requiring the replenishment of oil.

Lenchner’s theory fails to establish a *prima facie* case of design defect, however, because there is no evidence of any previous carbon monoxide accidents attributable to rotary-type meters in Manhattan or anywhere else in the country, even though they have been in use for half a century and remain widely in use today (Whittemore 1/6/09 Aff., ¶¶ 2, 5, 6; Clemens 1/15/09 Aff. ¶ 9; Cagney Dep. at 54). There is simply no evidence that Dresser was or could not have been on notice prior to 1974, the latest date the meter was manufactured, that sophisticated purchasers such as Con Edison would not follow the manufacturer’s written recommendation that the meter’s oil be periodically checked and changed every three to five years (Whittemore 1/6/09 Aff., ¶ 3 & Ex. N at 8). Where an expert’s ultimate assertions are speculative or unsupported by any evidentiary foundation, the opinion has no probative force and is insufficient

to withstand summary judgment. *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 (2002); *Chow v Reckitt & Colman, Inc.*, \_\_\_ AD3d \_\_\_, 2010 WL 10361 at \*2 (1st Dept 2010); *Parris v Port of New York Auth.*, 47 AD3d 460, 461 (1st Dept 2008). Consequently, Pan Am fails to raise a triable issue of fact that Dresser was or should have been aware that rotary meters posed a substantial likelihood of harm. Nor does Lenchner refute Dresser's evidence that the diaphragm meter is "considerably less accurate in commercial gas measurement applications" (Whittemore 1/6/09 Aff. ¶ 6). As a result, there is no evidence that the diaphragm meter was a functional alternative to the rotary meter. *See Denny v Ford Motor Co.*, 87 NY2d at 257.

On its failure to warn theory, Pan Am contends that Dresser's failure to warn Con Edison that lack of maintenance could cause the impellers to restrict gas flow and, thereby, cause excessive carbon monoxide production from incomplete combustion, was a substantial factor in causing the plaintiffs' injuries. However, "[w]here the person who would benefit from a warning is already aware of the specific hazard, the manufacturer cannot be held liable for failing to warn of that known hazard." *Steuhl v Home Therapy Equip., Inc.*, 51 AD3d 1101, 1103 (3d Dept 2008). "It is the plaintiff's burden to prove that defendant's failure to warn was a proximate cause of his injury, and this burden includes adducing proof that the user of a product would have read and heeded a warning had one been given (citations omitted)." *Sosna v American Home Prod.*, 298 AD2d 158 (1st Dept 2002).

It is undisputed: that the Dresser rotary meter was accompanied by a tag that says to add oil (Whittemore Dep. at 38) and a manual recommending that the oil level be checked and changed every three to five years (*id.*, at 48-49; Whittemore 1/6/09 Aff., ¶ 3 & Ex. N at 8); that Con Edison employees knew that some meters require oil to work properly (Cagney Dep. at 48-49, 64); but that Con Edison performed no inspections or maintenance on the subject meter in the

25+ years it was installed at the building (Cagney Dep. at 49, 62; Whittemore 1/6/09 Aff. ¶ 2; Gomes 3/2/09 Affirm., Ex. G). There is simply no evidence that any additional warnings in Dresser's manual or tags accompanying the meter would have caused Con Edison to act any differently with respect to the maintenance or lack of maintenance of its gas meters.

For the foregoing reasons, summary judgment dismissing all third-party and cross claims against Dresser is granted.

### *III. Power Flame's Motion for Summary Judgment*

Third-party defendant Power Flame is the manufacturer of a Model C gas-fired burner that was manufactured in 1986, and installed in the building in 1987 (Wehmeier Dep. at 23). Power Flame has been sued by Lieblich for contribution and indemnification, and other parties have asserted cross claims. Lieblich and Pan Am are the only parties that are actively claiming that the Power Flame burner contributed to the carbon monoxide poisoning incident. They oppose Power Flame's summary judgment motion.

Power Flame contends that: it is entitled to summary judgment, because its gas burner was a state of the art burner when it was manufactured in 1986, the year before it was installed in the building; the burner exceeded every burner standard inclusive of the Underwriters Laboratory (UL) standards for burners; and the burner was maintained by Lieblich for six years prior to the February 15, 2004 incident without complaints. While Power Flame concedes that the DOB found one of the burner's air supply dampers in a semi-closed state; Power Flame's expert, Lennard Wharton, Ph.D., P.E., opines that the air damper did not fail on its own, rather a Lieblich service technician adjusted the air damper to a position that reduced the air supply in the Power Flame burner approximately three weeks before the date of the incident (*see* Wharton 1/29/09 Aff., ¶¶ 25-26). It argues, no design defect claim exists here, allegedly because there is no

reasonably safer alternative burner design that would have prevented the incident. Lastly, because co-defendants Pan Am and Liebllich failed to properly maintain the burner in accordance with Power Flame's manuals and Liebllich's own protocol and one of these parties allegedly modified the fuel-to-air ratio of the burner after it left Power Flame's control, Power Flame contends that any additional warnings would have been superfluous.

Liebllich's theory of liability, per its expert Rick Smith, P.E., is that the Power Flame burner was defective in two ways. First, he contends that the thumbscrews that secured the burner's air dampers in place spontaneously slipped, shifted or moved along the metal casing of the burner due to vibrations caused by the heating system's fan and motors, causing the air dampers to close and alter the fuel-to-air ratio in the burner, resulting in excessive carbon monoxide production (Smith 4/1/09 Aff., ¶¶17-18). Smith attributes this to the fact that the bottom of the metal thumbscrews are designed to lie on the burner's sheet metal housing without any mechanism to prevent slippage (*id.*, ¶ 20). Since starving the burner of air can lead to potentially catastrophic results, Smith claims that the ability to safeguard against a full closure of the air dampers is of paramount importance for a burner manufacturer and that the air dampers on a burner should be designed to fail safe in a partially open or fully open position (*id.*, ¶ 22). Smith contends that the air damper integrated into the Power Flame burner violated UL standard 795, which provides that an adjustable part shall be provided with a locking device (*id.*, ¶ 30). He further contends that several alternative methods involving carriage bolts, lock nuts, and/or stop screws could have easily and economically been implemented to secure the air dampers, thus allowing it to fail in a safe and open position (*id.*, ¶ 26). The second way in which Smith contends that the Power Flame Burner was defective is that the air flow switch, which senses the presence or absence of air flow, did not engage and completely shut down the burner (*id.*, ¶ 23).

In reply, Power Flame challenges the affidavit of Rick Smith as speculative and unsupported by any evidence in admissible form, because he conceded at his deposition that he did not perform certain tests or make certain observations and factual findings that would support his theory about the burner's thumbscrews. Power Flame submits an affidavit from Mark Wehmeier, Vice President of Engineering for Power Flame, in which he challenges whether Smith's proposed alternative design is any safer since too much air entering the burner can also produce excessive carbon monoxide. Power Flame also contends that Smith's defective air flow switch theory is based on an improper understanding of the function of the air flow switch, relying on the deposition testimony of Mark Wehmeier.

While Power Flame argues that Rick Smith's affidavit is speculative and not supported by any evidence in admissible form, Smith, in fact, bases his opinion on the fact that, as observed by DOB's William McGivney, the air shutter damper was in an "almost closed" position when McGivney inspected the burner as part of his investigation on February 15-18, 2004 as to the cause of the incident (McGivney Dep. at 58). In addition, McGivney confirmed that the air damper was again found in a closed position on the first day of testing during September 2004 (*id.*, at 66). Rick Smith was one of the people who observed the testing of the building's heating system performed on September 20-24, 2004 (Smith 4/1/09 Aff., ¶ 34). Smith contends that, after a technician cleaned and made adjustments to the boiler and burner, including adjusting the air damper from a closed or semi-closed position to a position that allowed for more air intake, the boiler and burner were turned on, and only trace amounts of carbon monoxide were produced (*id.*, ¶ 34). Even though no further adjustments were made to the air damper during the remainder of the testing, Smith claims that, four days later, he observed the air damper had closed approximately one-half inch, which allegedly is documented in photographs taken on

September 24, 2004 (*id.*, ¶¶ 36-37 & Ex. 5). In sum, Smith's opinion is based on documentary and testimonial evidence by persons on site on the day of the incident, as well as his own alleged personal observations of tests performed on the equipment.

Power Flame raises other problems with Smith's theories, such as his alleged failure to measure the amount of fan vibration or the tightness of the thumbscrews against the burner's housing. However, these criticisms merely present questions of credibility for a jury on the issue of causation and defective design. *Napier v Safeguard Chem. Corp.*, 224 AD2d 310 (1st Dept 1996); *Wecht v Dial Chevrolet Inc.*, 173 AD2d 328, 329 (1st Dept), *lv denied* 78 NY2d 862 (1991).

Pan Am argues a different theory of liability against Power Flame. Again, relying on the affidavit of its expert, Yevsey Lenchner, P.E., Pan Am contends that the Power Flame burner was defectively designed, because it was not equipped with an optional low-pressure cut-off switch which would have prevented the burner from operating in a fuel-lean zone (Lenchner 3/2/09 Aff., ¶¶ 20-21, 25).

As an initial matter, Pan Am's opposition to the motions of both Power Flame and H.B. Smith for summary judgment should not even be considered by this court, because Pan Am never asserted any claims against these parties, never provided any expert disclosure pursuant to CPLR 3101 (d), and has raised its design defect theory for the first time after depositions have been conducted and in opposition to the manufacturers' motions for summary judgment. *Perez v Cassone Leasing Inc.*, 40 AD3d 946 (2d Dept 2007) (court should have rejected assertion of an unpleaded cause of action sounding in strict products liability based upon design defect that was raised for first time more than four years after action was commenced and nearly five years after accident occurred in response to summary judgment motion).

Nonetheless, even were the court to consider the Lenchner affidavit, it would be to no avail. He concedes that the law did not mandate that the Power Flame burner be equipped with the low pressure cut-off switch, and, therefore, the switch is offered by Power Flame as an optional feature (Lenchner Aff., ¶ 20). It is undisputed that H.B. Smith, clearly a sophisticated purchaser, declined to purchase the optional switch. Pursuant to *Scarangella v Thomas Built Buses, Inc.* (93 NY2d 655 [1999]), and *Biss v Tenneco, Inc.* (64 AD2d 204 [4th Dept 1978], *lv denied* 46 NY2d 711 [1979]), Power Flame cannot be liable for the decision of a sophisticated purchaser to decline an optional safety feature that is not required by law.

Power Flame's final argument in support of pre-trial dismissal of Lieblich's claims for indemnity and contribution is based on a spoliation of evidence theory. Power Flame contends that Lieblich spoliated a key piece of evidence, namely the original version of the Lieblich work ticket prepared by its technician, Roger Del Vecchio, after his January 23, 2004 service call to the building. Lieblich, in response, argues that the work ticket is just one piece of evidence amongst the thousands of pages of documents exchanged, that it produced for deposition the author of the ticket, Roger Del Vecchio, and that Power Flame's spoliation is not about the absence of a key piece of evidence, but rather a credibility issue since Del Vecchio could not confirm some of the writing on the ticket due to the poor quality of the photocopy produced.

Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence before an adversary has had an opportunity to inspect them. *Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 (1st Dept 1997). One such sanction is the dismissal of the action (*Mudge, Rose, Guthrie, Alexander & Ferdon v Penguin Air Conditioning Corp.*, 221 AD2d 243 [1st Dept 1995]), but this is an "extreme sanction" (*Positive Influence Fashions, Inc. v Seneca Ins. Co.*, 43 AD3d 796, 797 [1st Dept

2007]). It is Power Flame's burden to prove that the missing evidence is crucial or key and that its spoliation has deprived Power Flame of the ability to establish a defense. *Zeolla v Kimche*, 52 AD3d 277 (1st Dept 2008); *430 Park Ave. Co. v Bank of Montreal*, 9 AD3d 320, 321 (1st Dept 2004); *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41 (2d Dept 1998); *Kirkland v New York City Hous. Auth.*, 236 AD2d at 173. Where there is adequate documentation of the evidence, such as reports, photographs and testimony from persons who inspected the missing evidence, dismissal of a party's pleading is not an appropriate sanction. *Marro v St. Vincent's Hosp. and Med. Ctr. of New York*, 294 AD2d 341 (2d Dept 2002).

In this case, dismissal of Lieblich's claims against Power Flame is not warranted based on the non-production of the original Lieblich work ticket. Power Flame itself contends that the photocopy of the document that has been produced shows that Del Vecchio adjusted the air shutters on the burner on January 23, 2004, three weeks before the incident (*see* Kalman 1/30/09 Affirm., Ex. V). Additionally, Del Vecchio was made available to be deposed. H.B. Smith also argues that the copy of the work ticket "succinctly states" that Del Vecchio "adjusted air shutters" (Stasz 2/13/09 Affirm., ¶ 45). No evidence has been presented regarding Lieblich's document retention policies; it has not been shown that the original work ticket was deliberately destroyed. Most importantly, the original Lieblich work ticket from January 23, 2004 is merely one piece of evidence, among many others, probative of who is legally responsible for this incident. For these reasons, the motion of Power Flame for summary judgment is denied.

#### *IV. Pan Am's Motion Seeking Indemnity from Lieblich*

Pan Am moves for summary judgment against Lieblich on its claim for common law indemnification to the extent that Pan Am faces vicarious liability for Lieblich's negligence. Relying on *Mas v Two Bridges Assoc.* (75 NY2d 680 [1990]), and *Rogers v Dorchester Assoc.*

(32 NY2d 553 [1973]), Pan Am argues that, as between an owner and one voluntarily undertaking full responsibility for service and maintenance, the party assuming the contractual duty is liable for the full amount of the damages faced by the owner by operation of law.

Pan Am bases its indemnity claim on the following undisputed facts: that Lieblich served as the maintenance company servicing the burner/boiler system at the building since October 1997 (Lieblich 1/27/05 Interrog. Responses, at pp. 4, 8) and performed all annual "Local Law" inspections of the burner/boiler system during that time (Gomes 2/16/09 Affirm., Ex. O); that the building's superintendent, Richard Zafra, would call Lieblich whenever there were problems with the system (Zafra Dep. at 48, 81-82); that Zafra never attempted to work on or do repairs to the system himself, but instead called Lieblich (*id.*, 65, 81-82, 92); that Lieblich was called for service and performed maintenance to the system on a number of occasions in the months preceding the incident, the three most recent of which were on January 10, 23 and 25, 2004 (Lieblich 1/27/05 Interrog. Responses, at pp. 8-9); that two Local Law inspections of the boiler were performed in November and December of 2003 by an unlicensed Lieblich serviceman, and, on both occasions, the system passed inspection and no violations or safety issues were found and brought to Pan Am's attention (Gomes 2/16/09 Affirm., Ex. Q); and that the Lieblich serviceman who responded to the January 2004 service calls merely got the burner running and never diagnosed why the burner was not functioning (Del Vecchio Dep. at 43-44, 64). Pan Am contends that, despite all of these service visits and inspections, Lieblich employees did not note any safety issues with the boiler room ceiling, the chimney or the boiler sections. It further argues that a mere two weeks after Lieblich's last servicing of the burner/boiler system, it was producing toxic levels of carbon monoxide, such that the DOB determined that the system was operating in a hazardous condition for several reasons and shut it down completely (Gomes

2/16/09 Affirm., Ex. T).

A party is not entitled to common-law indemnification if the moving party is not free from any negligence. *Trump Village Section 3, Inc. v N.Y. State Hous. Fin. Agency*, 307 AD2d 891, 895 (1st Dept 2003); *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 451 (1st Dept 1985). Summary judgment is not warranted in Pan Am's favor, since there are questions of fact concerning its own degree of fault for this incident. Despite all of the investigations, testing and discovery undertaken in these actions, there are still triable issues of fact. The following remains in dispute: why excessive carbon monoxide was produced on February 15, 2004 and whether it was from a fuel-rich or fuel-lean situation; who, if anyone, adjusted the air dampers on the burner to a closed position; who may have removed the chimney clean out door and when this happened; who placed a piece of sheet rock over the fresh air ventilation louver; and why no one from Pan Am or Lieblich noted holes in the ceiling directly above the boiler and holes in the wall.

Lieblich contends that there is an issue of fact as to whether, during the 21-day period between its last service call and the carbon monoxide incident, Richard Zafra, the building's superintendent, performed service and maintenance activities to the burner/boiler system or the boiler room itself. Lieblich supports its contention with the following evidence. The only persons with access to the locked boiler room was Zafra, his assistant and one commercial tenant (Zafra Dep. at 35-36). More specifically, Zafra admitted that he inspected and maintained the boiler system on a daily basis, checking the water level of the boiler and pilot light (*id.*, at 52-53, 56). Zafra further testified that if the boiler system was not working properly, he would attempt to restart it and would then call Lieblich if his efforts were unsuccessful (Zafra Dep. at 82-83; *see also* Del Vecchio Dep. at 74 [building's "Super reset" the boiler on January 25, 2004]). The last

time any of Lieblich's employees were at the building was January 25, 2004. The Lieblich serviceman, Roger Del Vecchio, who performed the service call, testified that he did not observe the open air louver in the boiler room blocked by a piece of sheet rock and that he did not adjust the air shutter damper on the burner (Del Vecchio Dep. at 89-90). According to Pan Am's expert, Rick Smith, P.E., if Del Vecchio had adjusted the air shutter damper to a "substantially closed" position on January 25, 2004, it would have resulted in the immediate production of dangerous levels of carbon monoxide and there would not have been a lag time of 21 days (Smith Aff., ¶¶ 41-43). There is no evidence that Lieblich removed the chimney clean-out door and points out the chimney stack is located outside the building (Zafra Dep. at 73, 161-162).

Lieblich also contends that there is an issue of fact as to whether Pan Am entered into a Full Service Burner Agreement with Lieblich for the Building or whether Lieblich serviced the burner/boiler system on a "call-by-call" basis. Lieblich argues that, in the absence of evidence of a routine or systematic maintenance contract between an independent repairer/contractor and the building owner, the contractor does not owe any duty to inspect or warn the owner of any purported defect in its equipment, citing such cases as *Jennings v 1704 Realty LLC* (39 AD3d 392 [1st Dept 2007]); *Kleinberg v City of New York* (27 AD3d 317 [1st Dept 2006]); *Daniels v Kromo Lenox Assoc.* (16 AD3d 111 [1st Dept 2005]); and *Giustino v Hollymatic Corp.* (202 AD2d 161 [1st Dept 1994]).

While the evidence shows that the building was not included in the list of buildings contained in the Full Service Burner Agreement between Pan Am and Lieblich (Jackson Affirm., Ex. A), Pan Am is not seeking contractual indemnification and there is simply no evidence that any other maintenance company was called to service the burner/boiler system at the building from October 1997 through the date of the incident. More importantly, it is undisputed that

Lieblich performed annual Local Law inspections on the burner/boiler system and that these are safety inspections, which are supposed to be “an overall look at the boiler to make sure it’s properly functioning” (McGivney Dep. at 38-39). In each of the cases relied upon by Lieblich, the repair company did not have a duty to inspect the equipment for defects unrelated to problems it was summoned to correct. Clearly, Lieblich owed a duty to warn of any dangerous or defective conditions that it found during those inspections, and there are also triable issues of fact as to whether the actual work performed by Lieblich caused the production of excessive levels of carbon monoxide. Accordingly, the existence of triable issues of fact as to Pan Am’s own liability defeats summary judgment on its claim against Lieblich for common law indemnification.

*V. H.B. Smith’s Motion for Summary Judgment*

H.B. Smith has been sued by Lieblich for contribution and indemnification, and other defendants have asserted cross claims. H.B. Smith manufactured the building’s Series 28, 5 section, gas-fired boiler in 1986, and it was installed in the building in 1987 (Neill Dep. at 21-22). There is no dispute that the boiler was sold together with the Power Flame burner, and that the burner is a component part (*id.*, at 23-24). Lieblich’s sole theory of liability against H.B. Smith is that its boiler was defective due to a defective Power Flame burner attached to it.

H.B. Smith argues that it is entitled to summary judgment, because the proof adduced during discovery allegedly establishes that it was Lieblich’s and/or Pan Am’s failure to maintain the heating system that caused the carbon monoxide incident and that Lieblich has no proof that there was a manufacturing or design defect in either the burner or the boiler. However, for the reasons stated above, there are triable issues of fact as to why, in general, excessive carbon monoxide was produced on February 15, 2004 and, more specifically, whether a design defect in

the Power Flame burner contributed to the carbon monoxide build up. A manufacturer who incorporates into his product a component made by another is responsible for testing and inspecting that component. *MacPherson v Buick Motor Co.*, 217 NY 382, 394 (1916); *Markel v Spencer*, 5 AD2d 400, 409 (4th Dept 1958), *affd* 5 NY2d 958 (1959). Accordingly, it is hereby

ORDERED that the motion (seq. no. 006) of defendants Fraydun Manocherian, United Enterprises, a limited partnership, and Pan Am Equities, to strike the actions from the trial calendar and/or for an order of preclusion is granted only to the following extent:

--plaintiff Jessica Stoeckel shall be precluded from offering any evidence as to her medical condition if *Arons* authorizations for all treating physicians are not furnished to all parties within ten (10) days of service of a copy of this order with notice of entry on her counsel, and

--Antonio Polanco, Individually and as Administrator of the Estate of Joaquin Polanco, shall be precluded from offering any evidence at trial regarding any statutes and ordinances violated by Pan Am and any pecuniary damages sustained by family members of the decedent, Joaquin Polanco, other than the \$2,514.00 in funeral expenses claimed, unless a supplemental bill of particulars and supporting documentation is furnished within ten (10) days of service of a copy of this order with notice of entry on his counsel;

and the motion is denied in all other respects; and it is further

ORDERED that the summary judgment motion (seq. no. 007) of third-party defendants Dresser, Inc., Dresser Equipment Group, Inc. and New York Dresser, dismissing all claims against them is granted; and it is further

ORDERED that the motion (seq. no. 008) of third-party defendant Power Flame, Inc., for summary judgment dismissing all claims against it, is denied; and it is further

ORDERED that the motion (seq. no. 009) of defendants Fraydun Manocherian, United Enterprises, a limited partnership, and Pan Am Equities for summary judgment against H. Lieblich & Company, Inc. and Robert Flannenbaum on a claim for common law indemnification,

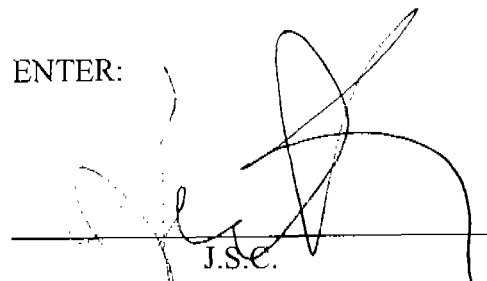
is denied; and it is further

ORDERED that the summary judgment motion (seq. no. 010) of third-party defendant H.B. Smith, Smith Cast Iron Boilers, dismissing all claims against it is denied; and it is further

ORDERED that all remaining parties in *Stoeckel v Manocherian*, Index No. 103204/04; *Polanco v United Enterprises*, Index No. 112251/04; *Karpo v Manocherian*, Index No. 100692/05; and *Needleman v Untied Enterprises*, Index No. 113021/05), appear in Part 54, rm. 228, 60 Centre St., New York, NY, at 11:30 a.m. on February 10, 2010.

Dated: January 25, 2010

ENTER:



JUSTICE SHIRLEY WERNER KORNREICH

**FILED**  
JAN 27 2010  
NEW YORK  
COUNTY CLERK'S OFFICE