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COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART 17

ENT: EMILY JANE GOODMAN

Index Number : 115551/2008

SCLAFANI, LAUREN

VS.

BROTHER JIMMY'S BBQ. INC.

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	PAPERS NUMBERED
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is denied for reasons

FILED

MAY 27 2010

COUNTY CLERK'S OFFICE

NEW YORK

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

Dated: 5/18/10

EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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LAUREN SCLAFANI,

Plaintiff,

-against-

BROTHER JIMMY'S BBQ, INC., BROTHER JIMMY'S NYC RESTAURANT HOLDINGS, LLC, BROTHER JIMMY'S FRANCHISING, LLC, JOSH LEBOWITZ, MICHAEL DAQUINO, KEVIN BULLA, BACARDI U.S.A., INC., BACARDI CORPORATION, BACARDI BOTTLING CORPORATION AND BACARDI IMPORTS, d/b/a BACARDI,

Defendants.

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Index No. 115551/08

EMILY JANE GOODMAN, J.S.C.:

In this personal injury action, plaintiff Lauren Sclafani alleges that, on March 29, 2008, she was severely burned at a Brother Jimmy's bar/restaurant, when a bartender poured Bacardi 151 rum (which is 151 proof or 75.5% alcohol) onto the surface of the bar and ignited it. Defendants Bacardi U.S.A., Inc., Bacardi Corporation, Bacardi Bottling Corporation, and Bacardi Imports n/k/a Bacardi U.S.A., Inc. (collectively, Bacardi) move, pursuant to CPLR 3211 (a) (7), to dismiss the complaint and the cross claims asserted against them, for failure to state a cause of action.

BACKGROUND

Plaintiff was allegedly injured at a Brother Jimmy's bar/restaurant located at 428 Amsterdam Avenue in Manhattan. The bar/restaurant was purportedly owned, operated, and managed by Brother Jimmy's BBQ, Inc., Brother Jimmy's NYC Restaurant Holdings, LLC,

Brother Jimmy's Franchising, LLC (hereinafter Brother Jimmy's). Defendants Josh Lebowitz, Michael Daquino, and Kevin Bulla were agents, servants, and/or employees of Brother Jimmy's. Bacardi manufactured, marketed, and distributed the Bacardi 151 rum and bottle that caused plaintiff's injury.

According to plaintiff, Brother Jimmy's had a custom and practice of engaging in pyrotechnic displays in which Bacardi 151 would be poured on the bar and lit on fire. Plaintiff alleges that, on the date of the accident, a bartender, Kevin Bulla, intentionally poured Bacardi 151 onto the surface of the bar, that the Bacardi 151 combusted and exploded, and that the flaming contents of the bottle shot out of the bottle and engulfed her in flames.

In opposition to the motion, plaintiff submits evidence that it is common knowledge, in the bartending industry and among the public, that Barcardi 151 is used for pyrotechnic displays. Plaintiff also submits evidence that at least on one occasion, at a bartending convention in Las Vegas, Bacardi promoted the pyrotechnic use of Barcardi 151. Thus, plaintiff alleges that Bacardi "knew or should have known, and it was foreseeable, that Bacardi 151 is and would be ignited and used in an inflammatory and/or incendiary capacity, including but not limited to flaming dishes, flaming drinks, and pyrotechnic displays" (Complaint, ¶ 45). Additionally, plaintiff alleges that Bacardi had "actual and constructive notice of the defective, hazardous, unreasonably dangerous and not reasonably safe nature of its product" (*id.*, ¶ 55). Plaintiff alleges that her accident was due to the "knowing, intentional, wanton, reckless, grossly negligent, and careless misconduct of [Bacardi], and their agents, servants and/or employees, in their design, distillation, manufacture, inspection, testing, bottling, sale, and distribution of Bacardi 151, including the subject Bacardi 151, with no fault or lack of care on [her] part" (*id.*, ¶

57). Plaintiff claims that "[Bacardi is] strictly liable in tort for the defective design, distillation, manufacture, testing, inspection, bottling, sale and distribution of the subject Bacardi 151, which defects caused the aforementioned occurrence and serious injures sustained by the plaintiff" (*id.*, ¶ 61).

Specifically, plaintiff alleges that:

> At the time of the design, distillation, manufacture, bottling and sale of the subject Bacardi, the product was defective, hazardous, unreasonably dangerous and not [a] reasonably safe product for multiple reasons, including but not limited to that: it was a highly flammable, incendiary, volatile, and explosive alcoholic beverage; it was capable of emitting a high volume of combustible and explosive vapor; the dangers from its highly flammable, incendiary, volatile, and explosive nature outweighed its utility; the flame arrester attached to the bottle was removable; there existed safer and feasible alternative designs to the beverage, the bottle, and the flame arrester; and, the beverage, the bottle, and the removable flame arrester were capable of combining, when met with a source of ignition, to create a "flamethrower effect," in which Bacardi 151 could combust, explode and the flaming contents be expelled from the mouth of the bottle

(*id.*, ¶ 54).

Brother Jimmy's answer asserts three cross claims against Bacardi: (1) contribution; (2) contractual indemnification; and (3) common-law indemnification.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord [plaintiff] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Nonetheless, "allegations consisting of bare legal conclusions, as well as factual claims that are inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration" (*Kaisman v Hernandez*, 61 AD3d

565, 566 [1st Dept 2009]; *see also Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999], citing *Gertler v Goodgold*, 107 AD2d 481, 485 [1st Dept], *affd* 66 NY2d 946 [1985]). Where extrinsic evidence is submitted in connection with the motion, the "criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). This entails an inquiry into whether or not a material fact as claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*see id.* ["(w)hen evidentiary material is considered, . . . unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, . . . dismissal should not eventuate"]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000] ["(t)he motion should be granted where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted"] [internal quotation marks and citation omitted]).

Design Defect

Bacardi contends that Bacardi 151 is a reasonably safe product as a matter of law. Bacardi first argues that the flammability of rum (or other liquors) is not considered a defect under New York law. Bacardi next argues that it cannot be liable for Brother Jimmy's removal of the flame arrester on the bottle of rum. Finally, Bacardi argues that it cannot be liable because the Bacardi 151 was not being used for its normal purpose, i.e., consumption.

Plaintiff counters that Bacardi 151 is defective and not reasonably safe because it is highly flammable and explosive, the risks clearly outweigh its utility, and there exists a feasible alternative design (a lower proof rum). Plaintiff further argues that the Bacardi 151 product was defective and not reasonably safe based upon the fact that the flame arrester attached to the bottle

was easily removable. According to plaintiff, the pyrotechnic use of Bacardi 151 was a foreseeable use of the product.[1]

To state a cause of action for defective design, the plaintiff must allege that the product was "not reasonably safe" as designed, and that the defective design was a substantial factor in causing the plaintiff's injury (*see Adams v Genie Indus., Inc.*, – NY3d –, 2010 NY Slip Op 04022, *4 [2010]; *see also Rose v Brown & Williamson Tobacco Corp.*, 53 AD3d 80, 82 [1st Dept], *affd sub nom. Adamo v Brown & Williamson Tobacco Corp.*, 11 NY3d 545 [2008], *rearg denied* 12 NY3d 769 [2009], *cert denied* 130 S Ct 197 [2009]).[2] The New York standard for determining a design defect involves a risk/utility analysis and requires an assessment of whether "if the design defect were known at the time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed

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[1]In response to Bacardi's motion, plaintiff represents that she is not seeking to recover on failure to warn/inadequate warning theories (Plaintiff's Mem. of Law in Opposition, at 57). The court, however, notes that the warnings on Bacardi 151 bottles state: "Do not use this product for flaming dishes or drinks," "All 151 proof rum may flare up and continue to burn when ignited, possibly with an invisible flame," "Do not pour directly from bottle near the flame or intense heat," "Do not remove or puncture the flame arrester in top of the bottle," and "Removing the flame arrester may cause the content of the bottle to become ignited and intense flaming will occur" (Gutchess Aff., Exhs. D, E).

[2]Although Bacardi contends in its reply that the complaint fails to allege a cause of action for negligence, the complaint alleges that Bacardi "knew and should have known" that Bacardi 151 "was and is highly flammable, incendiary, dangerous, hazardous, volatile and explosive" (Complaint, ¶ 44). In addition, the complaint states that Bacardi had "actual and constructive notice of the defective, hazardous, unreasonably dangerous and not reasonably safe nature of its product" (*id.*, ¶ 55). Accordingly, plaintiff sufficiently pleads a cause of action for negligence (CPLR 3013; *see also Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964]). In any event, plaintiff's complaint alleges that Bacardi is strictly liable based on the defective design of Bacardi 151 (*id.*, ¶ 61), and there is very little difference between the analysis on a claim of defective design in strict products liability and negligent design (*see Blandin v Marathon Equip. Co.*, 9 AD3d 574, 576 [3d Dept 2004]).

in that manner" (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 108 [1983] [citation omitted]). This standard demands an inquiry into the following risk/utility factors:

> (1) the product's utility to the public as a whole, (2) its utility to the individual user, (3) the likelihood that the product will cause injury, (4) the availability of a safer design, (5) the possibility of designing and manufacturing the product so that it is safer but remains functional and reasonably priced, (6) the degree of awareness of the product's potential danger that can reasonably be attributed to the injured user, and (7) the manufacturer's ability to spread the cost of any safety-related design changes

(*Denny v Ford Motor Co.*, 87 NY 2d 248, 257 [1995], *rearg denied* 87 NY2d 969 [1996]). Thus, "[a] defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use; that is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce" (*Voss*, 59 NY2d at 107 [internal quotation marks and citation omitted]).

"This rule, however, is tempered by the realization that some products, for example knives, must by their very nature be dangerous in order to be functional" (*Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 479 [1980]). As stated by the court in *DeRosa v Remington Arms Co., Inc.* (509 F Supp 762, 769 [ED NY 1981]),

> Sadly it must be acknowledged that:
>
> [m]any products, however well-built or well-designed may cause injury or death. Guns may kill; knives may maim; liquor may cause alcoholism; but the mere fact of injury does not entitle the [person injured] to recover . . . there must be something wrong with the product, and if nothing is wrong with the product there will be no liability.

(citation omitted). "As a matter of law, a product's defect is related to its condition, not its intrinsic function" (*Forni v Ferguson*, 232 AD2d 176 [1st Dept 1996]). Therefore, since the

manufacture, sale, and ownership of guns have been legally permitted, courts have held that handguns and ammunition are not defective as a matter of law, absent a legally-cognizable defect in the condition of a gun or its parts (*id.*; *see also McCarthy v Olin Corp.*, 119 F3d 148, 155 [2d Cir 1997]). Moreover, the First Department has held that, even though lead pigment in lead-based interior paint is inherently dangerous to children, the manufacturer of lead paint pigments could not be held liable on a design-defect theory, because it did not have control over how much pigment was used in paint by a paint manufacturer or over whether the paint would peel due to deterioration and lack of proper maintenance by an owner (*Smith v 2328 Univ. Ave. Corp.*, 52 AD3d 216, 218 [1st Dept], *lv denied* 11 NY3d 708 [2008]).

Applying these principles, it cannot be said, as a matter of law on a motion to dismiss, that Bacardi 151 is reasonably safe and not defective based upon its flammability. While it is true that all alcohol is flammable, the issue is whether Bacardi 151 is "in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use [or reasonably foreseeable use]" (*Voss*, 59 NY2d at 107), or in this case, unreasonably flammable and explosive. In opposition to Bacardi's motion, plaintiff submits an affidavit from Elizabeth Trendowski, an instructor of flair bartending, who states that Bacardi 151 ignites easily at room temperature and is capable of maintaining a large and visible flame (Trendowski Aff., ¶ 3).[3] Trendowski states that lower proof liquors (including 80 to 100 proof

[3]Contrary to defendant's position, plaintiff may supplement the allegations of the complaint with affidavits and documentary evidence (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976] ["affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims"]). The court also notes that many of plaintiff's affidavits provide additional background as to the pyrotechnic use of Bacardi 151, rather than evidentiary support for plaintiff's claims. Moreover, Bacardi's request to strike these exhibits and documents, is misplaced because they do not qualify as a "pleading" (CPLR 3024 [b]).

liquors) are not as conducive to pyrotechnic displays (*id.*). Unlike the firearms in *McCarthy* and *Forni*, it appears, at least for purposes of this motion, that there is a feasible alternative design – a rum that is lower in proof. Plaintiff submits evidence indicating that it is common knowledge in the liquor and bartending industries that Bacardi 151 is used for pyrotechnic purposes, and that it causes injury as a result (Trendowski Aff., ¶¶ 3-4; Leikind Aff., ¶ 3). In fact, according to Trendowski, Bacardi 151 actively promoted the pyrotechnic use of Bacardi 151 at a bartending convention in Las Vegas in 2003 (Trendowski Aff., ¶ 5). Moreover, it cannot be seriously contested that Bacardi 151's function is not to burn or maim (*cf. Forni*, 232 AD2d at 176).

The Court of Appeals decision in *Adamo v Brown & Williamson Tobacco Corp.* (11 NY3d 545 [2008]) is instructive as to the function of a product such as alcohol. In that case, the plaintiff alleged that regular cigarettes were negligently designed, and that the cigarette manufacturer could have and should have sold only light cigarettes, which are safer than regular cigarettes. After a jury trial, the Court held that the plaintiff could not prevail because the plaintiff did not prove that light cigarettes were as acceptable to consumers as regular cigarettes:

> Here, plaintiffs presented evidence from which a jury could find that light cigarettes – cigarettes containing significantly lower levels of tar and nicotine – are "safer" than regular cigarettes, but they did not show that cigarettes from which much of the tar and nicotine has been removed remain "functional." The function of a cigarette is to give pleasure to a smoker; plaintiffs have identified no other function. Plaintiffs made no attempt to prove that smokers find light cigarettes as satisfying as regular cigarettes – indeed, it is virtually uncontested that they do not. Both regular and light cigarettes are available on the market, and the enhanced dangers that come from smoking regular cigarettes are well known, but large numbers of consumers continue to prefer regular cigarettes.
>
> It is not necessary in every product liability case that the plaintiff show the safer product is as acceptable to consumers as the one the defendant sold; but such a showing is necessary where, as here, satisfying the consumer is the only function the product has. A cigarette is a different kind of product from the circular saw in *Voss*,

> whose function was to cut wood, or the molding machine in *Robinson v Reed-Prentice Div. of Package Mach. Co.* (49 NY2d 471 [1980]), whose function was to melt and form plastic.

(11 NY3d at 550-551). In *Felix v Azko Nobel Coatings* (262 AD2d 447, 448-449 [2d Dept 1999]), cited by the *Adamo* Court, the plaintiff alleged that a quick-drying solvent-based lacquer sealer was defectively designed because it was highly flammable, and that it should have been water-based. The Second Department held that the manufacturer was entitled to summary judgment where the evidence showed that the volatile solvent was critical to the solvent's performance, and there was no evidence that water-based sealers could match solvent-based lacquers with respect to the appearance of the finish, its hardness, its scratch-resistant properties, price, or drying time (*id.*). Therefore, whether consumers would find a lower proof rum as acceptable as 151 proof rum is an issue for summary judgment after discovery or the trial. Accordingly, the court concludes that plaintiff has causes of action against Bacardi in strict products liability and negligence (*see Guggenheimer*, 43 NY2d at 275).

The court, thus, turns to whether the flame arrester was defectively designed, and whether Bacardi may be held liable for Brother Jimmy's removal of the flame arrester. A manufacturer cannot be held liable if the product has been "substantially altered" after the product leaves the possession and control of the manufacturer (*Sage v Fairchild-Swearingen Corp.*, 70 NY2d 579, 586 [1987]; *Robinson*, 49 NY2d at 479; *Birriel v F.L. Smithe Mach. Co., Inc.*, 23 AD3d 205 [1st Dept 2005]). "Material alterations at the hands of a third party which work a substantial change in the condition in which the product was sold by destroying the functional utility of a key safety feature, however foreseeable that modification may have been, are not within the ambit of a manufacturer's responsibility" (*Robinson*, 49 NY2d at 481).

In *Robinson*, the plaintiff, a plastic molding machine operator, was injured when his hand was caught in a machine after his employer had modified the device. The Court of Appeals held that the product, as manufactured, was not defective at the time it left the manufacturer's hands (*id.* at 480). Although the Court recognized that the manufacturer is under a duty to use reasonable care in designing the product when "used in the manner for which the product was intended * * * as well as unintended yet reasonably foreseeable use" (*id.* [internal quotation marks and citation omitted]), it stated that the manufacturer's duty "does not extend to designing a product that is impossible to abuse or one whose safety features may not be circumvented. A manufacturer need not incorporate safety features into its product so as to guarantee that no harm will come to every user no matter how careless or even reckless" (*id.* at 480-481; *see also Bombara v Rogers Bros. Corp.*, 289 AD2d 356, 357 [2d Dept 2001] [manufacturer not liable when worker fell into wheel well while riding on back of trailer]).

However, post-sale modifications that are contemplated or foreseeable by the manufacturer do not absolve the manufacturer of liability. In *Lopez v Precision Papers* (107 AD2d 667, 668 [2d Dept 1985], *affd* 67 NY2d 871 [1986]), the plaintiff's employer removed a safety guard attached to a forklift. The Appellate Division, Second Department held that "[b]ecause of the ease with which the overhead guard could be removed and the forklift's added versatility when operated without the guard, there is a legitimate jury question as to the scope of the forklift's intended purposes" (*id.* at 669). The Court of Appeals affirmed, stating that:

> [i]n contrast with the detaching of the removable safety guard in this case, *Robinson* involved "[m]aterial alterations [i.e., cutting a 6-inch by 14-inch access hole in the safety gate of a plastic molding machine] which work[ed] a substantial change in the condition in which the product was sold by destroying the functional utility of a key safety feature." There is evidence in this record that the forklift was purposefully

manufactured to permit its use without the safety guard

(67 NY2d at 873 [citation omitted]). Subsequent cases have allowed cases to go forward where there is evidence that the safety device was easily removable, and where the user was able to use the product without the device (*see e.g. Fernandez v Mark Andy, Inc.*, 7 AD3d 484, 485 [2d Dept 2004] [manufacturer not entitled to summary judgment where there was evidence that safety guards were easily removable and machine was operable without guards]; *Eiss v Sears, Roebuck & Co.*, 275 AD2d 919, 919-920 [4th Dept 2000] [issues of fact as to whether jointer/planer with easily removable "cutter guard" was reasonably safe]; *Smith v Day Co.*, 242 AD2d 394, 396 [3d Dept 1997] [manufacturer not entitled to summary judgment where the manufacturer's documents stated that platform with permanent latching system was easily removable]; *Tuesca v Rando Mach. Corp.*, 226 AD2d 157, 157-158 [1st Dept 1996], *affd* 89 NY2d 966 [1997] [issue of fact as to whether "even feed machine" was manufactured to permit its use without safety plexiglass guard; guard was not permanently affixed to machine, and defendant's president testified that recommended method to clean machine included removal of the guard]).

In the instant case, even considering plaintiff's allegation that Brother Jimmy's removed the flame arrester, plaintiff has causes of action against Bacardi. Plaintiff alleges that the "flame arrester was removable" (Complaint, ¶ 54). Plaintiff further alleges that Bacardi 151 could "combust" and "explode," and that the flaming contends could be "expelled from the mouth of the bottle," creating a "flamethrower effect" (*id.*). Additionally, plaintiff submits an affidavit stating that Bacardi designed the flame arrester in Bacardi 151 glass bottles so that they could be removed from the bottle, and that it was possible to design a flame arrester that could not be removed (Calcaterra Aff., ¶ 5). Plaintiff also submits evidence that Bacardi actively promoted

the flammable uses of its Bacardi 151 rum product. According to Trendowski, at the National Nightclub and Bar Convention in Las Vegas in 2003, Bacardi had a booth at the convention, and a bartender prepared and ignited flaming cocktails and flaming shots using Bacardi 151 (Trendowski Aff., ¶ 5). Trendowski further states that the flame arrester on a bottle of Bacardi 151 can be removed within a matter of seconds using simple kitchen tools, such as a bottle opener or knife (*id.*, ¶ 7). Further, bartenders regularly remove flame arresters on Bacardi 151 to insert pour spouts into the bottles (*id.*). In view of this evidence, the court cannot conclude, at this stage of the litigation, that the removal of the flame arrester was a "material" alteration or modification of the bottle of Bacardi 151 (*see Lopez*, 67 NY2d at 873).

While Bacardi argues that it cannot be liable because Bacardi 151 was not being used for its "normal purpose," a manufacturer has a duty to design its product so that it avoids an unreasonable risk of harm when it is being used for an unintended but foreseeable use (*Lugo v LJN Toys*, 75 NY2d 850, 852 [1990]). Although many of the cases use the negligence concept of "foreseeability" in this context, the focus of analysis in a strict products liability case is whether the use to which a product was put by the consumer was abnormal, given the realities of actual use of the product by consumers generally (*Robinson*, 49 NY2d at 479-480). Considering the evidence submitted by plaintiff, the court cannot say at this juncture that the use of Bacardi 151 for flaming drinks or desserts or pyrotechnic displays is unforeseeable or abnormal.

Finally, the court disregards Bacardi's contention, made for the first time in its reply, that it has no duty to control the conduct of third persons (*see Matter of Allstate Ins. Co. v Dawkins*, 52 AD3d 826, 827 [2d Dept 2008] ["(t)he function of reply papers is to address arguments made in opposition to the position taken by the movant, not to permit the movant to introduce new

arguments or new grounds for the requested relief"]). For the same reason, the court does not consider Bacardi's reply argument that the removal of the flame arrester was akin to a choice not to utilize an optional safety device (*see id.*).

Proximate Cause

Bacardi contends that the proximate cause of plaintiff's injury was not the Bacardi 151 rum product. Rather, according to Bacardi, the proximate cause of plaintiff's injuries was the recklessness displayed by Brother Jimmy's, Brother Jimmy's employee, Kevin Bulla[4], and Brother Jimmy's owner and manager.

In response, plaintiff contends that it is for the jury to decide whether the alleged defects were the proximate causes of her injury.

To establish a prima facie case in negligence or strict products liability, a plaintiff must generally show that the defendant's negligence or defective product was a substantial factor in causing the plaintiff's injury (*see Adams*, 2010 NY Slip Op 04022 at *4; *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784 [1980]; *see also* Restatement [Second] of Torts § 431, Comment *a* [the word "substantial" is used in the sense that reasonable people would regard it as a cause]). "There may be one, or more than one, substantial factor" (*Ohdan v City of New York*, 268 AD2d 86, 89 [1st Dept], *lv denied* 95 NY2d 769 [2000]).

Any break in the nexus between the defendant's negligence (or the defectiveness of a product) and plaintiff's injury may affect the defendant's liability (*Kush v City of Buffalo*, 59 NY2d 26, 33 [1983]). "An intervening act will be deemed a superseding cause and will serve to

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[4]Bulla was apparently charged with reckless endangerment in the second degree and assault in the second degree (Gutchess Aff., Exh. C).

relieve defendant of liability when the act is of such an extraordinary nature or so attenuates defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant" (*id.*). Even the "criminal intervention of third parties may . . . be a reasonably foreseeable consequence of circumstances created by the defendant"; the question is whether the "intervening, intentional act of another is itself the foreseeable harm that shapes the duty imposed" (*Bell v Board of Educ. of City of N.Y.*, 90 NY2d 944, 946, 947 [1997] [internal quotation marks and citations omitted]).

For instance, in *Bell* (90 NY2d 944, *supra*), a sixth-grade student sued the New York City Board of Education after she was raped on a class field trip, after she left the park where the field trip was being held and failed to return to the park by the departure time. The Court of Appeals held that the rape was not unforeseeable as a matter of law, and that a rational jury could have found that the school's failure to supervise the plaintiff was a substantial cause of her injuries (*id.* at 946-947). In *Newman v McDonald's Rests. of N.Y., Inc.* (48 AD3d 1152 [4th Dept 2008]) and *Lopez v Barrett T.B. Inc.* (38 AD3d 1308 [4th Dept 2007]), the plaintiffs were injured during robberies at restaurants owned and operated by the defendants. In both cases, the Fourth Department concluded, based on the defendants' past experiences, that the likelihood of criminal conduct was not unforeseeable as a matter of law (*Newman*, 48 AD3d at 1153; *Lopez v Barrett T.B. Inc.*, 38 AD3d at 1309). Similarly, in *Kender v Taj Mahal Hotel* (234 AD2d 518 [2d Dept 1996]), the court held that, given the history of prior criminal activity on the premises, it could not be said that the criminal conduct at issue was unforeseeable as a matter of law.

These principles have been applied equally in the strict products liability context. In *Anaya v Town Sports Intl., Inc.* (44 AD3d 485 [1st Dept 2007]), the plaintiff was injured while

descending a rock climbing wall operated by defendant TSI. The plaintiff was injured because an employee of TSI had tied the plaintiff's safety line to a non-weight bearing loop on the harness rather than the anchor point on the harness. The plaintiff asserted causes of action sounding in negligence and strict products liability against the manufacturer and retailer. The First Department rejected their assertions that the TSI's employee's conduct was a superseding cause of plaintiff's injury as a matter of law:

> Here, TSI's employee testified that she knew the safety line was not to be tied to the gear loop. However, she did not know what purpose the gear loop served, and accidently tied the safety line to it. While it appears that this employee had minimal training on the proper use of the harness and had not read the manual or technical notice, the record does not permit a finding that the employee's conduct was unforeseeable as a matter of law. The record is replete with evidence indicating the foreseeability of the risk that novice users of the harness (or for that matter other inexperienced persons such as the employee) might mistakenly tie safety lines to gear loops. Had the harness been designed without a gear loop or with a weight bearing gear loop, or had clearer warnings been on the harness itself, the accident may have been prevented. Accordingly, triable issues of fact exist regarding whether the alleged defective design of the harness, the alleged inadequate warnings, or both, was a substantial factor in causing plaintiff's injuries.

(*id.* at 487-488).

Bacardi has not demonstrated that Bulla's conduct in igniting Bacardi 151 was unforeseeable as a matter of law. Questions of foreseeability are for the court to determine where there is only one inference to be drawn from the undisputed facts (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010]; *Mei Cai Chen v Everprime 84 Corp.*, 34 AD3d 321, 322 [1st Dept 2006]). First, as in *Anaya*, the court cannot conclusively determine that the bartender was familiar with the flammable properties of Bacardi 151. Second, plaintiff has submitted evidence indicating that Bacardi 151 is commonly used for flaming drinks and desserts. According to Trendowski, Bacardi 151 is used in bartending pyrotechnic displays far more than any other alcoholic

beverage (Trendowski Aff., ¶ 4). Samuel Leikind, the owner and president of a firm which specializes in the marketing and distribution of alcoholic beverages, states that it is common knowledge in the industry that Bacardi 151 is frequently used for its highly flammable propensities (Leikind Aff., ¶ 4). Calcaterra states that, when he was hired to design a flame arrester for Bacardi 151 bottles, Bacardi management was aware that people had been burned in the vicinity of bottles of Bacardi 151 (Calcaterra Aff., ¶ 2). Additionally, plaintiff provides recipes for flaming drinks published on the internet, YouTube videos purportedly showing the flammable properties of Bacardi 151, and complaints filed against Bacardi in New York and other jurisdictions in which plaintiffs alleged that Bacardi 151 was defectively designed (Gaier Affirm., Exhs. G-J).

Punitive Damages

Bacardi further contends that plaintiff's request for punitive damages should be dismissed, because plaintiff does not allege that Bacardi manufactured Bacardi 151 maliciously, with an evil motive, or with deliberate disregard of the rights of others. Bacardi maintains that plaintiff's conclusory allegations are insufficient to support her claim for punitive damages.

In opposition, plaintiff argues that her allegations are sufficient to support a claim for punitive damages, and that her evidence is sufficient to demonstrate that Bacardi has actual knowledge of injuries from Bacardi 151's flammable properties.

The purpose of punitive damages is not to compensate the injured party, but to punish the tortfeasor and deter similar conduct on the part of others (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007]). Thus, "[p]unitive damages are available in a tort action where the wrongdoing is intentional or deliberate, presents circumstances of aggravation or outrage,

evinces a fraudulent or evil motive, or is in such conscious disregard of the rights of another that it is deemed willful and wanton" (*Bishop v 59 W. 12th St. Condominium*, 66 AD3d 401, 402 [1st Dept 2009], citing *Prozeralik v Capital Cities Communications*, 82 NY2d 466, 479 [1993]). Therefore, the defendant's conduct must rise above "mere negligence" (*McDougald v Garber*, 73 NY2d 246, 254 [1989] [citation omitted]). In *Home Ins. Co. v American Home Prods. Corp.* (75 NY2d 196, 204 [1990]), the Court of Appeals noted, in a failure to warn case, that "[w]hile no case involving punitive damages in a strict products litigation has come before our court, nothing in New York law or public policy would preclude an award of punitive damages in a strict products case, where the theory of liability is failure to warn and where there is evidence that the failure to warn was wanton or in conscious disregard of the rights of others." The Court noted that although punitive damages are not appropriate in all types of product liability litigation, the relevant inquiry is whether the conduct was wilful and wanton (*id*).

Here, plaintiff alleges that her injuries "were due to the knowing, intentional, wanton, reckless, grossly negligent, and careless misconduct of the [Bacardi] defendants" (Complaint, ¶ 57). In addition, plaintiff has offered evidence which appears to support her argument that Bacardi had notice of burns from Bacardi 151, and that Bacardi promoted the pyrotechnic use of Bacardi 151 (Trendowski Aff., ¶¶ 2, 4, 5; Leikind Aff., ¶ 3; Gaier Affirm., Exh. G). In view of this, plaintiff's request for punitive damages is adequate at this juncture (*see Cristallina v Christie, Manson & Woods Intl.*, 117 AD2d 284, 295 [1st Dept 1986] [complaint contained requisite allegations of recklessness and conscious disregard of consignor's rights]). Bacardi's arguments are more suitable for a motion for summary judgment or at trial (*see e.g. Colombini v Westchester County Healthcare Corp.*, 24 AD3d 712, 715 [2d Dept 2005] [on motion for

summary judgment, court held that manufacturer of MRI machine could not be liable for punitive damages for accident where patient was struck by metal oxygen tank which was drawn into machine; company had supplied instruction manual containing specific warnings concerning ferrous materials]; *Dubecky v S2 Yachts*, 234 AD2d 501, 502 [2d Dept 1996] [on defendant's motion for summary judgment, plaintiff's demand for punitive damages was stricken since there was no evidence of defendant's conscious disregard of the rights of others, or conduct so reckless so as to amount to such disregard]).

Brother Jimmy's Cross Claims for Indemnification and Contribution

Finally, Bacardi argues that Brother Jimmy's cross claim for contribution should be dismissed because it did not breach any duty to Brother Jimmy's or to plaintiff. Bacardi further contends that Brother Jimmy's does not state a cause of action for contractual indemnification, because Bacardi does not sell directly to retail establishments such as Brother Jimmy's, and any such sale would violate New York's three-tier distribution system. Bacardi contends that plaintiff has not alleged that Brother Jimmy's is vicariously liable for any wrongdoing by Bacardi.

Brother Jimmy's argues that it sufficiently pleads a cause of action for contribution, and that Bacardi has presented no admissible evidence regarding Brother Jimmy's entitlement to contractual indemnification.

"A party seeking contribution must show that the party from whom contribution is sought owes a duty to him or to the injured party and that a breach of this duty has contributed to the alleged injuries" (*Crimi v Black*, 219 AD2d 610, 611 [2d Dept 1995]). Further, a "party sued for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim

for common law indemnification" (*Mathis v Central Park Conservancy*, 251 AD2d 171, 172 [1998]). A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005] [internal quotation marks and citations omitted]). "Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence" (*Martins v Little 40 Worth Assoc., Inc.*, – AD3d –, 2010 NY Slip Op 02866, *2 [1st Dept 2010]).

As noted above, plaintiff has viable causes of action against Bacardi in strict products liability and negligence. Accordingly, Barcadi's argument, that the cross claim for contribution should be dismissed has no merit, because it is based on the assumption that Barcardi did not breach a duty owed to either Brother Jimmy's or to plaintiff. However, since Brother Jimmy's only makes conclusory allegations as to its entitlement to contractual indemnification, the cross claim seeking contractual indemnification is dismissed (*see Fowler v American Lawyer Media*, 306 AD2d 113 [1st Dept 2003] ["[V]ague and conclusory allegations are insufficient to sustain a breach of contract cause of action"] [internal quotation marks and citation omitted]). Moreover, Brother Jimmy's is sued for its own wrongdoing, and not on a theory of vicarious liability, and therefore, the cross claim for common-law indemnification has no merit.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (sequence number 001) of defendants Bacardi U.S.A., Inc., Bacardi Corporation, Bacardi Bottling Corporation, and Bacardi Imports n/k/a Bacardi U.S.A.,

Inc. to dismiss the complaint and cross claims asserted against them is granted to the extent that the cross claims for contractual and common law indemnification are dismissed, and is otherwise denied; and it is further

ORDERED that defendants are directed to serve an answer to the amended complaint within 20 days after service of a copy of this order with notice of entry.

This Constitutes the Decision and Order of the Court.

Dated: May 18, 2010

ENTER:

J.S.C.
EMILY JANE GOODMAN

FILED
MAY 27 2010
NEW YORK
COUNTY CLERK'S OFFICE