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SHORT FORM ORDER

INDEX No. 05-6948

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY



***PRESENT:***

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 11-21-08 (#007)
MOTION DATE 12-3-08 (#008)
MOTION DATE 3-25-09 (#009)
ADJ. DATE 7-29-09
MNEMONIC: # 007 - MD
# 008 - MG
# 009 - XMotD

SHARON FERRANTE,

Plaintiff,

- against -

SHAWN SALERNO, JOHN SALERNO, GENERAL ELECTRIC COMPANY, ELECTROLUX NORTH AMERICA, INC. f/k/a WHITE CONSOLIDATED HOLDING, INC., SEARS, ROEBUCK AND CO., AB ELECTROLUX a/k/a AKTIEBOLAGET ELECTROLUX f/k/a WHITE CONSOLIDATED INDUSTRIES, INC. f/k/a DOMESTIC HOLDINGS INC. f/k/a THE TAPPEN COMPANY, and ELECTROLUX HOME PRODUCTS, INC.,

Defendants.

JOHN SALERNO and SHAWN SALERNO,

Third-Party Plaintiffs,

- against -

THOMAS RYAN and DODIE RYAN,

Third-Party Defendants.

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Upon the following papers numbered 1 to 170 read on this motion and cross motions for summary judgment and to amend the complaint ; Notice of Motion/ Order to Show Cause and supporting papers (007) 1 - 22 ; Notice of Cross Motion and supporting papers (008) 23-45; (009) 46-139 ; Answering Affidavits and supporting papers 140-159; Replying Affidavits and supporting papers ; Other GE et al M/L 160-161, Electrolux 162-163, GE 164-165, Salerno M/L 166, Pltff's M/L 167-169; Defts' M/L 170 ; and after hearing counsel in support and opposed to the motion, it is

***ORDERED*** that this motion (007) by the defendants, Electrolux Home Products, Inc., Electrolux North America, Inc., AB Electrolux, and General Electric Company, for an order pursuant to CPLR §3212 granting summary judgment dismissing plaintiff's complaint, is denied; and it is further

***ORDERED*** that this motion (008) by the defendants, John Salerno and Shawn Salerno, for an order pursuant to CPLR §3212 granting summary judgment dismissing plaintiffs' complaint, is granted and the complaint and cross-claims asserted against them and the third-party complaint are dismissed with prejudice; and it is further

***ORDERED*** that this motion (009) by the plaintiff, Sharon Ferrante (hereinafter plaintiff), for an order pursuant to CPLR §3025 permitting the complaint to be amended is denied without prejudice to renewal upon the submission of proper papers within 30 days of the date of this order; and that part of the motion which seeks an order to compel discovery or to strike the defendants answer is granted only to the extent that the defendants are directed to respond to the plaintiff's demand, dated September 22, 2008, except to those demands referred to in items 1, 2, 3, and 4, within 45 days of the date of this order, and are denied without prejudice as to the remainder of the discovery demands.

The complaint states causes of action concerning a certain General Electric stove, model number JGBP28GEJ4BG, serial number DA2586971, manufacturing number 040618 (hereinafter stove), which tipped causing the plaintiff to sustain severe burns and serious personal injury allegedly due to the failure of the defendants to install an anti-tip device or other safety device and safeguards upon installation of the stove on April 27, 2002 at the premises located at 276 Baylawn Avenue, Copiague, Long Island, New York. Causes of action allege negligent design and distribution of an inherently dangerous product, negligence, breach of express and implied warranties, and strict liability.

The moving defendants in motion (007), Electrolux Home Products, Inc., Electrolux North America, Inc., AB Electrolux, and General Electric Company (hereinafter GE/Electrolux), seek an order granting summary judgment dismissing the complaint asserted against them because they bear no liability. No copies of the defendants' answers have been provided with the moving papers and therefore the action for summary judgment doesn't comply with CPLR §3212.

In motion (008), John Salerno and Shawn Salerno (hereinafter Salerno), who are also the third-party plaintiffs, seek an order granting summary judgment dismissing the complaint because they did not negligently install the subject stove at the plaintiff's premises and thereafter sell the premises with a latent defect.

In motion (009), the plaintiff has submitted opposition to the defendants' applications, and the plaintiff seeks an order pursuant to CPLR §3025 permitting the complaint to be amended; and pursuant to CPLR §3124 to strike the answers of the non-Salerno defendants to compel discovery.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form to require a trial of any issue of fact (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979]) and must assemble, lay bare and reveal her proof in order to establish that the matters set forth in her pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, the plaintiff must show that the defendant's negligence was a substantial factor in bringing about the injury (***Spiegel v Fine Paint Co.*** 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup. Ct. Nassau County 2006]).

A manufacturer who places a defective product into the stream of commerce may be liable for injuries or damages caused by such product (*see* ***Gebo v Black Clawson***, 92 NY2d 387, 392, 681 NYS2d 221 [1998]; ***Liriano v Hobart Corp.***, 92 NY2d 232, 235, 677 NYS2d 764 [1998]; ***Amatulli v Delhi Constr. Corp.***, 77 NY2d 525, 532, 569 NYS2d 337 [1991]). A product may be defective due to a mistake in the manufacturing process, an improper design or a failure to provide adequate warnings regarding the use of the product (***Gebo v Black Clawson***, supra; ***Voss v Black & Decker Mfg. Co.***, 59 NY2d 102, 463 NYS2d 398 [1983]). Depending upon the factual circumstances, a person injured by a defective product may maintain causes of action under the theories of strict products liability, negligence or breach of warranty (*see* ***Voss v Black & Decker Mfg. Co.***, 59 NY2d 102, 463 NYS2d 398 [1983]). Whether an action is pleaded in strict products liability, negligence or breach of warranty, the plaintiff has the burden of establishing that a defect in the product was a substantial factor in causing the injury, and that the defect existed at the time the product left the manufacturer or other entity in the chain of distribution being sued (*see* ***Clarke v Helene Curtis, Inc.***, 293 AD2d 701, 742 NYS2d 325 [2nd Dept 2002]; ***Tardella v RJR Nabisco***, 178 AD2d 737, 576 NYS2d 965 [ 3rd Dept 1991]).

A defectively designed product is one in 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 (*see* ***Voss v Black & Decker Mfg. Co.***, *supra*; ***Bombara v Rogers Bros. Corp.***, 289 AD2d 356, 734 NYS2d 617 [2nd Dept 2001]). Stated differently, a defective product is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce (***Robinson v Reed-Prentice Div.***, 49 NY2d 471, 403 NE2d 440 [1980]; ***Denny v Ford Motor Co.***, 87 NY2d 248, 639 NYS2d 250 [1995]; ***Voss v Black & Decker Mfg. Co.***, *supra*). To establish a strict liability claim based on a defective design, a plaintiff must show the product as designed posed a substantial likelihood of harm, that it was feasible for the manufacturer to design the product in a safe manner, and that the defective design was a substantial factor in causing plaintiff's injury (*see* ***Voss v Black & Decker Mfg. Co.***, *supra*; ***Gonzalez v Delta Intl. Mach. Corp.***, 307 AD2d 1020, 763 NYS2d 844 [2nd Dept 2003]; ***Ramirez v Sears, Roebuck & Co.***, 286 AD2d 428, 729 NYS2d 503 [2nd Dept 2001]).

Distributors of defective products, as well as retailers and manufacturers, are subject to strict products liability (*see* ***Harrigan v Super Prods. Corp.***, 237 AD2d 882, 654 NYS2d 503 [4th Dept 1997]; ***Giuffrida v Panasonic Indus. Co.***, 200 AD2d 713, 607 NYS2d 72 [1994]). Strict products liability extends to retailers and distributors in the chain of distribution even if they "never inspected, controlled, installed or serviced the product" (***Perillo v Pleasant View Assocs.***, 292 AD2d 773, 739 NYS2d 504 [4th Dept 2002]). A products liability case can be proven absent evidence of any particular defect by presenting circumstantial evidence excluding all causes of the accident not attributable to the defendant, thereby giving rise to an inference that the accident could only have occurred due to some defect in the product (***Graham v Walter S. Pratt & Sons Inc.***, 271 AD2d 854, 706 NYS2d 242 [3rd Dept 2000]).

As to the claim of strict liability based on defendants' failure to provide adequate warnings, a manufacturer may be held liable for the failure to warn of the latent dangers resulting from the foreseeable uses of its product which it knew or should have known (*see* ***Liriano v Hobart Co.***, *supra*; ***Rastelli v Goodyear Tire & Rubber Co.***, 79 NY2d 289, 582 NYS2d 373 [1992]). Liability may be imposed based on either the complete failure to warn of a particular hazard or the inclusion of warnings that are inadequate (*see* ***DiMura v City of Albany***, 239 AD2d 828, 657 NYS2d 844 [3rd Dept 1997]; ***Johnson v Johnson Chem. Co.***, 183 AD2d 64, 588 NYS2d 607 [2nd Dept 1992]). However, a manufacturer has no duty to warn product users of dangers that are obvious, readily discernable or apparent (*see* ***Martino v Sullivan's of Liberty***, 282 AD2d 505, 722 NYS2d 884 [2nd Dept 2001]; ***Pigliavento v Tyler Equip. Corp.***, 248 AD2d 840, 669 NYS2d 747 [3rd Dept 1998]; ***Lonigro v TDC Elec.***, 215 AD2d 534, 627 NYS2d 695 [2nd Dept 1995]). The adequacy of the instruction or warning is generally a question of fact to be determined at trial and is not ordinarily susceptible to the drastic remedy of summary judgment (*see* ***Oliver v NAMCO Controls***, 161 AD2d 1188, 556 NYS2d 430 [4th Dept 1990]); ***Lugo v LJN Toys***, 146 AD2d 168, 539 NYS2d 922 [1st Dept 1989]).

A manufacturer of a product may not be held liable for strict products liability or negligence where, after the product leaves the possession and control of the manufacturer, there is a subsequent modification which substantially alters the product and where it is shown that the accident would not have occurred but for the subsequent modification (***Amatulli v Delhi Constr.***

***Corp.***, 77 NY2d 525, 569 NYS2d 337 [1991]; ***Robinson v Reed-Prentice Div. of Package Mach. Co.***, 49 NY2d 471, 426 NYS2d 717 [1980]). Material alterations by 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 (*see* ***Robinson v Reed-Prentice Div. of Package Mach. Co.***, *supra*; ***Mackney v Ford Motor Co.***, 251 AD2d 298, 673 NYS2d 718 [2nd Dept 1998]).

At her examination before trial (hereinafter EBT) on January 24, 2007 the plaintiff testified that, on April 27, 2002, at about 7:30 or 8:00 p.m., she was cooking at the home of her boyfriend, Richard Larsen, who had a free standing General Electric gas range (stove) in his home. She was using this range for the first time and she had placed chicken cutlets in the pre-heated oven, placed the pot of water for cooking ravioli on the right front burner to boil the water on high and placed sauce in a pot on the left front burner to simmer. She thereafter opened the oven door to check the chicken, and went to the cabinet to her left to get a pot holder. When she stepped back, at an angle still facing the left cabinet, the posterior calf of her right leg near the knee hit the top corner portion of the open oven door, causing her to lose her balance and her thigh to strike the oven door, causing her to fall to the floor. As she fell back on the corner of the range, the stove tipped up and forward completely onto its door. The pots of water and sauce fell on top of her, burning her. She did not know who installed the range. Prior to the accident, she had seen a warning label on the left part of the range door when she opened it to place the chicken in the oven.

Upon reviewing the EBT of Shawn Salerno, dated January 4, 2007, and the EBTs of John Salerno, Thomas Ryan, Dodie Ryan and Richard Larson, all dated April 24, 2008, the Court finds that the Salerno defendants have established prima facie entitlement to summary judgment dismissing the complaint as asserted against them. The adduced testimony establishes that after the Salerno defendants sold the premises to the Ryans with the subject stove, the Ryans had ceramic tile work and new cabinets installed in the kitchen by Tony DeSalvo (hereinafter DeSalvo), at which time the stove was removed from the kitchen and then re-installed by DeSalvo upon completion of the tile work on the kitchen floor. The premises, along with the stove, was thereafter sold to Richard Larsen in whose home the plaintiff was cooking when the stove tipped over. The plaintiff has failed to raise a factual issue to preclude summary judgment being granted to the Salernos.

Accordingly, motion (008) is granted and the complaint and cross-claims asserted against the Salerno defendants are dismissed with prejudice.

The defendants GE/Electrolux have submitted the expert affidavit of Randall Fuller (hereinafter Fuller), dated October 2, 2008, in support of their motion for summary judgment. This affidavit is not in admissible form. Moreover, at his EBT, Fuller testified that he did not have an engineering degree. However, he claimed that, through on the job training, he was the most knowledgeable person from White Consolidated Industries (hereinafter White) between 1965 and 2002 regarding range stability testing.

In opposition to motion (007), the plaintiff has submitted the affidavit of her expert, Peter Glasgow (hereinafter Glasgow), dated February 19, 2009. Glasgow stated that he received a BS in Mechanical Engineering and is a licensed professional engineer in New York, and further stated his memberships and employment history, none of which referred to ranges. Instead, he stated that he had educated himself on the industry records and analysis of range stability problems with free standing ranges. Therefore, he has not established himself as an expert in this lawsuit based upon the submissions presented.

Based upon the foregoing, even if Fuller's affidavit comported with CPLR §2309 and the GE/Electrolux defendants included their answer with the moving papers, pursuant to CPLR §3212, there are factual issues which would preclude summary judgment being granted to the GE/Electrolux defendants. Glasgow has not qualified himself as an expert in ranges and their design and safety. No one has produced evidentiary proof concerning whether or not there was an anti-tip bracket on the range, even if not installed, at the time the range tipped over, and whether there were other safety measures available, in the event the bracket failed to prevent tip-over accidents. Glasgow stated that in 1989, the GE/Electrolux defendants supplied the wrong size brackets with the thirty inch free-standing range (referring to plaintiff's exhibit 30 which is not in admissible form). He opines in a conclusory manner that because he did not see any evidence of wearing, stripping or marking of the threads of the leveling legs, it was evidence that there never was an installation of an anti-tip bracket on the subject free standing range by any of the homeowners prior to the plaintiff's accident. However, he has failed to show how such wear and tear would occur on a stationary fixture.

Fuller has indicated in a conclusory manner that the anti-tip bracket was more practical, effective, or technologically possible than other alternatives including break-away door hinges, counterweights, interlock sensor systems, and moving the leveling legs, but offered no basis for the opinion or why they were not used in addition to or in place of the brackets. There are factual issues concerning whether there were other feasible design alternatives or safety devices which could have been utilized in designing and manufacturing the range which were not utilized by the moving defendants in case consumers failed to install the anti-tip device. Fuller gave only a conclusory statement on this issue and did not state why other alternative safety devices were not incorporated into the range.

Accordingly, motion (007) by the GE/Electrolux defendants for summary judgment dismissing the complaint is denied.

Amendments to pleadings are to be liberally granted in the absence of prejudice to the nonmoving party, ***Llama v. Mobile Service Station***, 262 AD2d 457, 692 NYS2d 987. In motion (009) wherein the plaintiff seeks to serve an amended complaint setting forth punitive damages, the plaintiff has failed to submit a copy of the proposed amended complaint to this Court for review, and an attorney's affidavit of merit which also states the reason for the delay in seeking the application (see, ***Briggs v New York City Transit Authority***, 132 AD2d 451, 517 NYS2d 511 [1st Dept 1987]).

Accordingly, that part of motion (009) which seeks to amend the complaint is denied without prejudice to renewal upon the submission of proper papers within thirty days of the date of this order.

The trial court has broad discretion in determining the nature and degree of the penalty to be imposed where a party has refused to comply with discovery demands. Preclusion is a drastic remedy which should be invoked only where a party has refused to comply with discovery demands and the party's conduct is willful and contumacious (***Rankin et al v Miller,*** 252 AD2d 863, 675 NYS2d 717 [3d Dept 1998]). While counsel for the plaintiff does not set forth in his affirmation what demands were made to which the defendants have not responded, or what attempts have been made to resolve the issue, the Court notes in plaintiff's list of exhibits (D) that no response from defendants to the plaintiff's demands for discovery, dated August 8, 2008, August 18, 2008, and September 22, 2008,have been received. The Court further notes that the first demand included in (D) is undated; the second demand is dated August 7, 2008; the third demand is undated; and the fourth demand is dated September 22, 2008.

Accordingly, the GE/Electrolux defendants are directed to respond to the plaintiff's demand, dated September 22, 2008, except as to those demands referred to in items 1, 2, 3, and 4 (see, ***Banigan v Hill,*** 57 AD3d 463, 868 NYS2d 313 [2nd Dept 2008]) within forty-five days of the date of this order.

Dated: April 20, 2010

Pete Flocel
J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**