Watts-Gillead v Smith
2016 NY Slip Op 31376(U)
June 14, 2016
Supreme Court, Bronx County
Docket Number: 350663/2008
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: Part IA 27

----------X **Index No. 350663/2008**

JANIYA WATTS-GILLEAD, an infant, by Sharon Green as guardian ad litem, and JANEL GILEAD, Individually,

Plaintiffs,

-against-

MICHAEL SMITH, HELEN SMITH, CANJE DISCOUNT, INC., DURST CORPORATION and OATEY SUPPLY CHAIN SERVICES, INC.,

Defendants.

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DECISION and ORDER DECIDING THE PARTIES' RESPECTIVE MOTIONS FOR SUMMARY JUDGMENT

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

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DURST CORPORATION,

Defendant/Third Party Plaintiff,

-against-

Third Party Index 83807/2009

HERCULES CHEMICAL COMPANY, INC. and OATEY SUPPLY CHAIN SERVICES, INC.

Third Party Defendants.

_____X

DURST CORPORATION,

Second Third Party Plaintiff,

-against-

Second Third Party Index 84155/2009

HERCULES CHEMICAL CO., INC. and OATEY SUPPLY CHAIN SERVICES, INC.,

Second Third Party Defendants.

_____X

Recitation, as required by CPLR 2219 (a), of the papers considered in review of motions for summary judgment by various Defendants pursuant to CPLR 3212 seeking dismissal of the Complaint:

Papers	Numbered
Plaintiffs' Motions as to liability against DURST & CANJE, and to Amend Complaint, Affirmation, Affidavits by Dr. Zeliger & Joseph Amadio, Exhibits & Memorandum of Law	1, 2, 3, 4
Cross-motion for Summary Judgment & Opposition by CANJE DISCOUNT, Affirmation, Mitchell Affidavit & Exhibits	5, 6
Motion by DURST for summary judgment and opposition to Plaintiff's motion in its entirety, Affirmation, Brodey Affidavit, Whitlock Affidavit, Dr, Baver Affidavit,	7, 8, 9, 10
Deppa Affidavit, Moon Affidavit, Mitchell Affidavit & Exhibits	11, 12, 13, 14
Affidavit by James Whitlock & Memorandum of Law	15, 16,
Motion by OATEY for summary judgment and contractual & common law indemnity against DURST, Affirmation & Exhibits	17, 18, 19
Motion by HERCULES for summary judgment and indemnification against DURST, Affirmation, Statler Affidavit & Exhibits	20, 21, 22
Plaintiff's Affirmation in Opposition to DURST's Motion & Exhibits & Memorandum	23, 24, 25
Plaintiff's Affirmation in Opposition to CANJE's Motion	26

Plaintiff's Affirmation in support of HERCULE's motion	27
Plaintiff's Affirmation in response to OATEY's motion	28
Plaintiff's Affirmation by Peter S. Delman in opposition to DURST's & CANJE's motion	29
CANJE's Affirmation in Opposition & Exhibits	30
DURST's Affirmation in Opposition to Plaintiff's motion for summary judgment	31
DURST's Affirmation in Opposition to OATEY's motion	32
DURST's Affirmation in Opposition to HERCULE's motion	33
OATEY's Reply Affirmation	34
CANJE's Reply Affirmation & Exhibits	35
HERCULE's Reply Affirmation	36
DURST's Reply Affirmation & Exhibits	37

The within action arises from an accident on June 15, 2008 in Plaintiffs' home. The complaint alleges that the infant **Janiya Watts-Gilead** sustained injury when a bottle of Clobber, an acid based product for clearing drains, splashed upon her face and body. Plaintiffs' landlords, Defendants **Michael Smith** and **Helen Smith** had purchased Clobber at Defendant **Canje Discount's** variety store. There exists a dispute between the infant's mother Plaintiff **Janell Gilead** and the Smith Defendants as to how the product came to be delivered to the Plaintiffs' home and made accessible to the infant.

Plaintiffs commenced this action alleging, *inter alia,* common law negligence in the distribution and selling of Clobber, failing to ensure Clobber was maintained within the custody of persons qualified to handle and use it, and failing to provide the necessary, appropriate and proper warnings regarding the use, care and handling of Clobber.

The answering Defendants interposed their respective affirmative defenses and cross-claims, and all denied liability in their Answers.

After discovery the parties move as follows:

I(A). Plaintiffs move for summary judgment on liability against Defendants **Durst Corporation** and **Canje Discount, Inc.** alleging that Durst breached its contract with Hercules and Oatey not to launch an instrument of harm which caused injury to the infant plaintiff, and that both Defendants were negligent in selling Clobber to a different set of consumers than allowed or expected by Hercules. Plaintiffs present that the manufacturer of Clobber, **Hercules**

Chemical Company, had a policy in place to ensure that Clobber was sold only to professional users; this policy was communicated to all of its distributors and wholesalers via a "Seller's Notice." The Seller's Notice "recommended" that Clobber be used in emergency situations for "clearing clogged drains by PROFESSIONALS ONLY;" it stated that Clobber "is sulfuric acid which burns and destroys human tissue on contact, and which dissolves organic matter. . . inexperienced users may sustain personal injuries if proper precautions, which appear on every container, are not followed in using these products." The Seller's Notice also stated:

> Therefore, this notice is to advise the seller that Hercules prohibits the sale of these products to anyone who is not regularly engaged in the maintenance of drain lines as a function of his/her occupation; and Hercules further warns that Clobber . . . should not be stored or displayed at a place within easy access to persons not qualified to use [it]; and that Clobber . . . should never be advertised for sale without the express written permission of Hercules Chemical Co., Inc.

In 1998 and 2003 Durst signed a Seller's Letter acknowledging Hercules' policy and asserting that "all appropriate measures" were taken to "assure the proper handling, sale and use" of Clobber. Inasmuch as Clobber ended up for sale at Canje's, a typical retail variety store, Plaintiff contends that Durst and Canje breached their contractual duties with Hercules in selling Clobber to a retail store which was not supposed to have the product, and selling it to Mr. Smith, a person who was not allowed to have it. Plaintiffs conclude that Durst and Canje are liable for "ignoring their contractual obligations. . . [which] placed Janiya Watts, who was clearly, at her age, *non sui juris* - at grave risk" [page 12 of Memorandum].

Plaintiffs also contend that Durst and Canje were negligent in failing to use reasonable care in placing Clobber in a store which was unqualified to possess it, and in selling it to any individual willing to purchase it without inquiring as to the buyer's professional plumbing skills.

In support of summary judgment Plaintiffs submitted, *inter alia*, affidavits by **Dr. Harold Zeliger** and **Joseph Amadio**. Dr. Zeliger is a former president of two companies that manufactured, distributed and marketed chemical products. Dr. Zeliger opined that Durst and

Canje "violated both the manufacturer's explicit safety instructions and good and accepted safety practices in the chemical industry" [¶ 3 of Affidavit]. Mr. Amadio is a N.Y. State licensed plumber and owner of his plumbing company; he states that he's only purchased Clobber from plumbing supply houses, that Clobber is not intended to be used by retail consumers, and it is his industry's "standard of care" that Clobber should never be left unattended "or left behind after work is over" [¶5 of Affidavit].

I(B). Plaintiffs also move to amend the complaint to add a claim for punitive damages against Durst, contending that Durst acted with gross negligence and thereby endangered the public.

I(C). Plaintiff **Janell Gilead** also cross-moves to dismiss counterclaims asserted by Defendants Michael Smith, Helen Smith, Canje Discount, Durst Corporation and Oatey alleging that Ms. Gilead was negligent in the supervision of the infant.

II. Defendant **Canje Discount, Inc.** moves for summary judgment in its favor, and seeks dismissal of Plaintiffs' claims, as well as cross-claims and counterclaims asserted by co-defendants and third-party defendants. Canje contends, *inter alia*, that it properly sold Clobber, a legal product, to Smith: a landlord who had purchased the product on two prior occasions, a person with general experience in clearing drains and knew of Clobber's dangers and a person who was prepared to use rubber gloves and a mask while using Clobber. Canje also argues that it owed no duty to Plaintiffs as the "retail sale to one person, such as Smith, cannot give rise to duty of care in favor of unknown parties, such as Plaintiffs" [¶33 of Catalano moving affirmation].

Canje also submitted the affidavit by **Andrew J. Mitchell**, who was retained to investigate whether "sulfuric acid drain openers (SADO) with a sulfuric acid content of at least 93% were available for purchase by ordinary, non-professional consumers at retail stores located in and around the Bronx and whether such SADOs were available for purchase by anyone online" [¶1 of Mitchell affidavit]. Mr. Mitchell described visiting retail stores in the Bronx

vicinity and purchasing *El Diablo* at the **Van Nest True Value Hardware Store** (669 Morris Park Avenue), a True Value affiliate. He also purchased *El Diablo* at **Al Jampol Paint & Hardware Store** (678 Morris Park Avenue), an affiliate of Benjamin Moore. Mr. Mitchell purchased *Clean Shot* (93% sulfuric acid) at a Lowe's home improvement store at 206 Route 303, Orangeburg, NY 10962. When he made his purchases Mr. Mitchell was never asked whether he was a professional plumber and he found no restrictions as to whom these products could be sold to.

Mr. Mitchell annexed internet pages indicating the availability of *Clean Shot* for online purchase from **Lowe's,** availability of *Buster* (93% sulfuric acid) for online purchase from **Home Depot,** the availability of *Black Swan* (93% sulfuric acid) for online purchase from **Amazon**, and the availability of *Liquid Lightening Acid Drain Cleaner (93.2% sulfuric acid)* for online purchase from **Walmart**.

III. Durst Corporation, Defendant/Third-Party Plaintiff/Second Third-Party Plaintiff, moves for summary judgment in its favor, and also seeks dismissal of Plaintiffs' claims, as well as cross-claims and counterclaims asserted by co-defendants and third-party defendants.

As an initial matter Durst contends that it did not owe a duty of care to the infant plaintiff, and it did not control, make contact, or have a special relationship with the parties who were in the best position to have prevented the infant's accident, *to wit*: Canje, Smith or Gilead. Durst argues that even if a duty and breach of duty were established, then Durst's alleged breach of duty was not a proximate cause of the infant plaintiff's injury, since the causal connection between the distribution of Clobber to Canje to the infant is too remote to constitute a "substantial factor" in causing the infant's injuries.

Durst presents it is a wholesale distributor of Clobber with no involvement in the retail sale of Clobber, and that in any event, Clobber is a legal product for sale to retail customers in the United States. Durst contends that Hercules' sales policy that Clobber be sold to "professionals only" consisted of including the "Seller's Notice" in every product sold

throughout its chain of distribution, and requiring "some, but not all, of its distributors" to sign a purported "agreement" stating they were "fully aware of and agree fully to comply with Hercules' policy relating to the distribution and sale of Hercules CLOBBER" [¶¶41 & 43 of O'Connel affirmation dated August 5, 2015]. Durst argues that these basic steps did not create an enforceable contract between Hercules and Durst as it lacked consideration for Durst's promises and lacked definiteness of Durst's obligations. In any event, *assuming arguendo* the existence of an enforceable contract, Plaintiffs cannot establish that Durst owed them any duty of care. *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 140 (2002).

Durst also submitted the affidavit of **James Whitlock**, a vice president of a manufacturer and distributor of sulfuric acid drain line products for the last thirty years. Mr. Whitlock expressed his familiarity with: (1) the Association of Chemical Producers ("ACP"), a not-for-profit organization composed of SADO manufacturers "formed voluntarily in the 1980s to enhance public safety through improved labeling, product design and consumer education;" (2) and the Consumer Product Safety Commission ("CPSC"). According to Mr. Whitlock, "there are no regulatory or statutory prohibitions against the sale of [SADO] products for consumer use," and on three occasions the CPSC declined to limit the sale of the sulfuric acid products only to "professionals" [¶11 of Affidavit]. In paragraph 12 of his Affidavit Whitlock states:

> The CPSC therefore permits the sale of SADO products to consumers provided that the manufacturer complies with the strict labeling and packaging requirements under the Federal Hazardous Substances Act ("FHSA") and the Poison Prevention Packaging Act ("PPPA"), which requires manufacturers to warn consumers about the corrosive nature of the product and to incorporate child-resistant features in the container design.

Mr. Whitlock described buying a bottle of Clobber from a plumber supply outlet with no questions asked. Whitlock also listed six other drain line products, labeled "professional strength," regularly marketed and sold to consumers for household use.

IV. Defendant and Third-Party Defendant **Oatey Supply Chain Services, Inc.** moves for summary judgment in its favor, and also seeks dismissal of Plaintiffs' complaint, as well as cross-claims and counterclaims asserted by co-defendants and third-party defendants. Oatey further seeks contractual and common law indemnification as against Durst.

Oatey presents that Clobber was manufactured by **Hercules Chemical Company, Inc.** , that Oatey was Hercules' sole distributor of Clobber and that Oatey sold Clobber to Durst Corporation pursuant to a Seller's Agreement; the Seller's Agreement "prohibited the sale of Clobber to anyone other than licensed plumbers and those in the business of unclogging drains" [pg. 2 of Judy Brown affirmation]. Oatey contends that Plaintiffs' causes of action against it should be dismissed because:

(1) Oatey distributed Clobber with all the appropriate packaging and warnings in accordance with the Federal Hazardous Substance Act (FHSA) and consequently, plaintiff's cause of action sounding in common law failure to warn is pre-empted by FHSA; and

(2) Oatey sold to Durst "which had a signed agreement in place certifying that Durst would conform to and follow Hercules' policies in the sale and distribution of Clobber" [pg. 7 of Judy Brown affirmation]; consequently, Plaintiffs' claim that Oatey failed to make proper inquiries before selling to Durst must also fail.

Oatey also contends that it is a third-party beneficiary of the Durst/Hercules agreement and is therefore entitled to contractual indemnification from Durst for Durst's breach of the Seller's Notice. Oatey further argues that it complied with Hercules' sales restrictions pursuant to the Seller's Notice and relied upon Durst to do the same; consequently, in the event that Oatey is found to be negligent because Durst sold Clobber to Canje, then Oatey is entitled to common law indemnification from Durst.

V. Hercules Chemical Company, Inc., Third-Party Defendant/Second Third-Party Defendant, moves for summary judgment in its favor, for dismissal of the third-party claims by third-party plaintiff Durst, for judgment granting Hercules indemnification over and against

Durst, and for any and all damages and expenses incurred.

Hercules points out that Durst is the only party which has asserted a claim against it, and that Durst's claim is solely for indemnification over and against Hercules if it is determined that:

(1) Plaintiff was injured during the use of the Clobber product;

(2) the warnings, tags, notices, packaging . . . were insufficient and/or negligent;

(3) Plaintiff's accident was due to any in insufficiency in the warnings;

(4) the warning, packaging, bags or notices of the product were inadequate . . . then same will be due to an improper design of said warnings and/or manufacture of the product and/or packaging . . . by the manufacturer which is the second third-party defendant [See §46 of Cameron affirmation dated 8/25/15]. However, since Plaintiff makes no claim that the product was inadequately or negligently designed or manufactured or packaged, and in its third-party Bill of Particulars Durst denies that the product was in any way defective, that branch of the third-party complaint sounding in defective packaging or warnings should be dismissed. That branch of the third-party complaint seeking indemnification against Hercules should also be dismissed because Durst agreed to indemnify Hercules pursuant to the Seller's Notice/Policy Agreement, not the other way around.

DISCUSSION

The sale and distribution of sulfuric acid-based products is governed by the Consumer Product Safety Commission, and the controlling law is the Federal Hazardous Substances Act [15 U.S.C.A. §§1261 et seq.]. Products such as Clobber, defined under the rubric of "hazardous substances," are either approved for consumer use or banned by the (CPSC).[1] In this case

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[1] Pertinent to this discussion, a "hazardous substance" is defined as
any substance or mixture of substances which is (i) toxic, (ii) corrosive, (iii) is an irritant ... if such substances or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonable handling or use, including reasonable foreseeable ingestion by children.
15 U.S.C.A. §1261(f)(1)(A) [United States Code Annotated, Title 15 Commerce and Trade,

Clobber was approved for consumer use, and as a "hazardous substance," was subject to the labeling requirements under the FHSA [15 U.S.C.A. §1261(p)(1)]. Where the product is in compliance with the labeling requirements of the FHSA, the FHSA preempts causes of action alleging failure to warn and inadequate labeling. *Lopez v. Hernandez*, 253 A.D.2d 414, 676 N.Y.S.2d 613 (2nd Dept. 1998) (child ingested bath water allegedly contaminated by a sulfuric acid based cleaner); *Liz v. William Zinnsser & Co.*, 253 A.D.2d 413, 676 N.Y.S.2d 619 (2d Dept. 1998) (where spray paint can ignited FHSA preempted causes of action predicated on failure to warn and defective design). Here, there is no dispute that Clobber complied with the FHSA labeling requirements. Cases addressing similar accidents as in this case have found in favor of the defendants as long as the product included the requisite federal labeling requirements pursuant to the FHSA, and the product was not defective:

In *Sabbatino* plaintiff purchased "Hot Shot," a sulfuric acid-based drain cleaner to unclog a kitchen sink drain. *Sabbatino v. Rosin & Sons Hardware & Paint, Inc.*, 253 A.D.2d 417, 676 N.Y.S.2d 633 (2nd Dept. 1998). The instructions for use of the product included placing an inverted dishpan or bucket over the drain after pouring the cleaner into the drain; plaintiff failed to so place the bucket and suffered chemical burns when the product exploded and splashed out of the drain. Upon determining that the product's labeling complied with the strict requirements imposed by the CPSC, the court dismissed plaintiff's claims premised upon negligence, breach of express and implied warranty, and strict products liability, holding that "the plaintiffs failed to demonstrate that the drain cleaner was defective, or that anything in its design or packaging contributed to the occurrence of the accident. Rather, notwithstanding his contention that he read and followed all label instructions, the superseding cause of this accident was [plaintiff's] failure to heed the product warning to cover the drain with an inverted dishpan or bucket after pouring the cleaner down the drain." 253 A.D.2d 420, 676 N.Y.S.2d 635.

Cf. *Guadalupe v. Drackett Products Company*, 253 A.D.2d 378, 676 N.Y.S.2d 177 (1st

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Chapter 30 Hazardous Substances, §1261 Definitions]. Chapter 30 Hazardous Substances, §1261 Definitions].

Dept. 1998), where plaintiff was injured after she poured a third of a can of "Crystal Drano" into a glass jar and added hot water whereupon the mixture erupted. Apparently, plaintiff had not read the instructions at all. Under those circumstances, even though the defendants had not met their burden of proof that the product labeling complied with the FHSA, defendants were granted summary judgment as a matter of law dismissing plaintiff's claims for defective product design and inadequate labeling, because any alleged labeling or design defects were not the proximate cause of plaintiff's accident.

Plaintiffs argue that regardless of any compliance in labeling, Clobber is not a safe product and it shouldn't be sold to laymen; that products liability is implicated because Canje and Smith were not the intended end users. However, these are simply different arguments in favor of banning the product, which is the province of the Consumer Product Safety Commission.

Plaintiffs further argue that regardless of the preemption afforded by the FHSA and regardless of whether Clobber may be a legal product, Durst and Canje failed to use reasonable care in carrying out their contractual duties, and by their negligence, launched an instrument of harm which caused injury to the third-party plaintiffs. Specifically, Plaintiff submits that Durst breached its contract with Hercules and Oatey by: (1) selling to Canje, a retail store which was not a "professional regularly engaged in the maintenance of drain lines," and (2) placing Clobber in a place where an unqualified user could buy it. This argument is premised upon the existence of a contract between Durst and Hercules/Oatey. Durst argues that the safety policy did not create a contract, and in any event, there was no contract because there was no consideration and Hercules never took steps to secure enforcement of the policy. Durst's employees testified that there never existed a prohibition that Clobber could not be sold to retailers.

Canje argues that it did not breach any contract since it was never a party to any contract.

The basic requirements of contract formation are (1) at least two parties with legal capacity to contract, (2) mutual assent to the terms of the contract, and (3) consideration. See *Commentaries* 2B, NY PJI3d, 4:1, at 3, 2016 referencing Restatement, Second, Contracts §§9,

12, 23; 1 Williston, Contracts (4th Ed.) 200-09, §3:2. Mutual assent is often referred to as "a meeting of the minds" of the parties on all essential terms of the contract. Id. 2B at 3 [cites omitted]. Here, by its policy letter Hercules informed its customers that "Hercules prohibits the sale of these products to anyone who is not regularly engaged in the maintenance of drain lines as a function of his/her occupation." Hercules further warned that "Clobber . . . should not be stored or displayed at a place within easy access to persons not qualified to use [it]; and that Clobber . . . should never be advertised for sale without the express written permission of Hercules Chemical Co., Inc." Durst satisfied the element of "mutual assent" by signing the agreement letter agreeing to comply with the "Seller's Notice," and to take "all appropriate measures....to assure proper handling, sale and use of this product." Parties to a contract may bargain as they see fit; the adequacy of consideration is a matter for the parties rather than the court to determine. *Commentaries* 2B, NY PJI3d, 4:1, at 7, 2016, quoting *Apfel v. Prudential-Bache Securities, Inc.*, 81 N.Y.2d 470, 600 N.Y.S.2d 433, 616 N.E.2d 1095 (1993); *Mencher v. Weiss*, 306 N.Y.1, 114 N.E.2d 177 (1953); *Rubin v. Dairymen's League Co-op Ass'n,* 284 N.Y. 32, 29 N.E.2d 458 (1940); Restatement, Second, Torts §11. Under this analysis, the court finds Durst made an agreement with Hercules to sell the product to "PROFESSIONALS ONLY; that is, persons whose business includes the maintenance and cleaning of clogged drain lines, and who possess the knowledge and skill required to do so."

Assuming arguendo that there existed a contract, it appears that Hercules did not take any steps to enforce the agreement, monitor its product in the market or follow-up with Durst as to Durst's customer base. While the consequence of breach was that "anyone breaking this agreement will be held liable for any damages suffered by us," Hercules never determined that Durst breached any agreement until now, in the context of this action. At this juncture in the analysis, we enter into legal gymnastics in determining the significance of the Hercules policy. If the Hercules policy was to make its distributors aware of the dangers of the product, then Durst complied with the policy as it shipped the product in the same condition it received it from Hercules, i.e., with all the warnings and labels intact. If the Hercules policy required that Durst

sell only to customers engaged in the maintenance of drain lines, then Hercules failed to enforce and monitor its policy as its product proceeded down the distribution channels. Consequently, where Hercules failed to enforce its policy of limiting sales to customers engaged in the maintenance of drain lines, then it would be a paradox indeed if Durst, further down the distribution chain from Hercules, is held solely liable for the purported breach of a contract whose performance was never enforced.

In any event, aside from Hercules's and Durst's conduct in the performance of their purported contract, is whether the infant plaintiff is a third party beneficiary of that contract. To establish such entitlement, plaintiffs must establish that "(1) there is an existing valid and binding contract between signatories, (2) the contract was intended for the third party's benefit, and (3) the benefit to the third party is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate that party if the benefit is lost." See *Commentaries* 2B, NY PJI3d, 4:1, at 24, 2016, citing *Mandarin Trading Ltd. V. Wildenstein,* 16 N.Y.3d 173, 919 N.Y.S2d 465, 944 N.E.2d 1104 (2011) (remainder of cites omitted). Clearly, Plaintiffs cannot establish they are third-party beneficiaries under these general principles. Plaintiff's counsel posits that Plaintiffs are third-party beneficiaries under "the instrument of harm" theory. Counsel argues that Durst and Canje violated their duty of care in the distribution and sale of Clobber, and thereby launched an instrument of harm which caused injury to the infant plaintiff. *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 773 N.E.2d 485, 746 N.Y.S.2d 120 (2002). In *Espinal* plaintiff slipped and fell in a parking lot and brought suit against her employer's company, the entity under contract to clear snow from the parking lot. The *Espinal* court found that the snow removing company did not owe plaintiff a duty of care and dismissed her claim. *Espinal* considered that there are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care - and thus be potentially liable in tort - to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launches a force or instrument of harm' [cites omitted]; (2) where the plaintiff detrimentally relies on the continued performance of

the contracting party' duties [cites omitted]; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely'" [cites omitted]. *Espinal v. Mellville*, 98 N.Y.2d at 140, 773 N.E.2d at 488, 746 N.Y.S.2d at 123.

In this case the court finds that Durst did not "launch a force or instrument of harm" on the grounds that (1) Clobber is an approved product for consumers under the jurisdiction of the Consumer Products Safety Commission and encompassed within the Federal Hazard Safety Act, and (2) Durst sold the product with all the labeling and warnings as required by the Seller's Notice and relevant statutes. Plaintiff's reliance on *Yun Tung Chow v. Reckitt & Coleman, Inc.*, 17 N.Y.3d 29, 950 N.E.2d 113, 926 N.Y.S.2d 377 (2011), and *Gebo v. Black Clawson Company*, 92 N.Y.2d 387, 703 N.E.2d 1234, 681 N.Y.S.2d 221, is misplaced. In *Yun Tung* plaintiff brought suit against the manufacturer and distributor of a drain cleaner containing lye; the case concerned issues of product liability, defective design, breach of warranty and failure to warn, which are not on point here. *Gebo* concerned a protective guarding of an embossing machine; *Gebo* is also not on point as the suit alleged claims in strict products liability, negligent design, failure to provide adequate warnings and breach of warranty.

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The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. *Alvarez v. Propect Hospital*, 68 N.Y..2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy that deprives a litigant or his or her day in court; the party opposing a motion for summary judgment is entitled to all favor inferences that can be drawn from the evidence submitted, and the papers will be scrutinized carefully in a light most favorable to the non-moving party. See *Aasaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dep't 1989). Summary judgment will be granted only if there are no material, triable issues of fact. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957).

After consideration of the parties' submissions and oral argument the motions are decided

as follows:

I(A) Plaintiffs' motion for summary judgment against Durst and Canje is **denied** for failure to establish entitlement to summary judgment on liability as a matter of law, for the reasons hereinbefore discussed.

I(B) Plaintiffs' motion to amend the complaint to add a claim for punitive damages against Durst is **denied** for failure to establish that Durst acted with gross negligence.

I(C) Plaintiff **Janell Gilead's** motion to dismiss counterclaims sounding in contribution, indemnification and/or negligent supervision is **denied.** Plaintiff Janel Gilead submits that parental immunity is applicable in this case, citing *Holodook v. Spencer*, which holds there is no cause of action against a parent for negligent supervision of a child. 36 N.Y.2d 35, 40, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974). However, the court finds that Janel Gilead owed a duty of care in the handling of Clobber that was not specific to the parent/child relationship. Rather, whether Clobber was thrust into the mother's hands, or it was left in the front steps of the premises, once Janell Gilead was in possession and control of Clobber she owed a duty of care in its handling to all the occupants of the home, not just to the infant. Consequently, the parental immunity invoked in *Holodook v. Spencer* does not trigger under the facts herein.

II. Motion by Canje is **granted** in its entirey upon establishing that the transfer of Clobber from Canje to Smith to Plaintiffs broke any causal connection between Canje's sale to Smith and the accident. Moreover, *Sabbatino v. Rosin & Sons Hardware & Paint, Inc.*, 253 A.D.2d 417, 676 N.Y.S.2d 633 (2nd Dept. 1998) is on point in favor of Canje.

III. Motion by Durst is **granted** in its entirety upon establishing that Durst did not owe a duty to Plaintiffs, that the connection from Durst to Canje to Smith to Plaintiff is remote, and in any event, Durst was not the proximate cause of the infant's injuries as a matter of law.

IV. Motion by Oatey is **granted** in its entirety;

V. Motion by Hercules is **granted** in its entirety.

Dated: June 14, 2016

Hon. Julia I. Rodriguez