

**State Farm Fire & Cas. Co. v Watts Indus., Inc.**

2017 NY Slip Op 32526(U)

October 17, 2017

Supreme Court, Suffolk County

Docket Number: 10-3506

Judge: Arthur G. Pitts

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CAL. No. 16-01285OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 43 - SUFFOLK COUNTY

**PRESENT:**

Hon. ARTHUR G. PITTS  
Justice of the Supreme Court

MOTION DATE 12-22-16 (011)

MOTION DATE 3-9-17 (012)

ADJ. DATE 5-4-17

Mot. Seq. # 011 - MD

# 012 - MD

-----X  
STATE FARM FIRE & CASUALTY  
COMPANY A/S/O STANLEY SHERWOOD,  
  
Plaintiff,

LAW OFFICE OF STUART D. MARKOWITZ  
Attorney for Plaintiff  
575 Jericho Turnpike, Suite 210  
Jericho, New York 11753

- against -

SCHNADER HARRISON SEGAL & LEWIS, LLP  
Attorney for Defendants  
140 Broadway, Suite 3100  
New York, New York 10005

WATTS INDUSTRIES, INC.,  
  
Defendants.

HAMMILL, O'BRIEN, CROUTIER, DEMPSEY,  
PENDER & KOEHLER, P.C.  
Attorney for Third-Party Defendant ERC  
6851 Jericho Turnpike, Suite 250  
Syosset, New York 11791

-----X  
WATTS INDUSTRIES, INC.,  
  
Third-Party Plaintiff,

- against -

ERC INTERNATIONAL, USA, INC., AND  
AMTROL, INC.,  
  
Third-Party Defendants.

-----X  
AMTROL, INC.,  
  
Third-Party Plaintiff,

- against -

MENDENHALL FUEL, INC.,  
  
Third-Party Defendants.  
-----X

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Upon the following papers numbered 1 to 33 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; 21 - 33; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers     ; Replying Affidavits and supporting papers     ; Other Memoranda of Law; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion (011) by defendant Watts Industries, Inc. and the motion (012) by State Farm Fire & Casualty Company are consolidated for the purposes of this determination; and it is

**ORDERED** that the motion by defendant Watts Industries, Inc. for summary judgment dismissing the complaint against it is granted to the extent indicated herein, and is otherwise denied; and it is

**ORDERED** that the motion by plaintiff State Farm Fire & Casualty Company, incorrectly denominated as a cross motion, for summary judgment in its favor on the issue of liability is denied.

This subrogation action was brought by plaintiff State Farm Fire & Casualty Company ("State Farm") to recover the cost to repair damage caused to the home of its insured, Stanley Sherwood, by the release of water and steam from a boiler located in the basement of the property. The Sherwood residence is located at 4 Old School House Lane, East Hampton, New York. By its complaint, State Farm alleges, inter alia, that its subrogee sustained flood damage to his basement, and steam damage throughout the entire residence, as a result of the failure of a defective pressure relief valve ("PRV") inside the boiler's expansion tank. The complaint further alleges that the manufacturer of the PRV, defendant Watt's Industries, Inc. ("Watts"), is liable for plaintiff's damages, as it designed, manufactured, tested, sold, and distributed the allegedly defective device, and failed to adequately warn the public of the dangers and risks associated with the use of the PRV. Watts joined issue, denying plaintiff's claims and asserting affirmative defenses. Shortly thereafter, it commenced a third-party action against third-party defendants ERC International, USA, Inc. ("ERC") and Amtrol, Inc. ("Amtrol"), the respective manufacturers of the subject boiler and expansion tank. After the third-party actions were joined, Amtrol brought a second third-party action against Mendenhall Fuel, Inc. ("Mendenhall Fuel"), the independent contractor that maintained the Sherwood residence's heating system. The parties subsequently executed stipulations discontinuing both third-party actions, and the note of issue in the main action was filed on July 18, 2016.

Watts now moves for summary judgment dismissing the complaint against it on the grounds it complied with industry standards when it manufactured the PRV in question, that State Farm will be unable to show that a design defect existed when the PRV left Watts' control, and that State Farm can neither exclude other causes for the PRV's failure nor demonstrate the applicability of the res ipsa loquitur doctrine of liability under the circumstances of this case. In support of its motion, Watts submits, among other things, copies of the pleadings, copies of the transcripts of the parties' deposition testimony, a copy of a publication by the American Society of Mechanical Engineers setting forth guidelines for the construction of boilers and pressure vessels, photographs of the subject boiler, and expert affidavits by Michael Mullavey P.E. and Julius Ballanco P.E.

State Farm opposes the motion and cross moves for summary judgment in its favor on the issue of liability, arguing that Watts' own experts concede that the PRV did not perform as intended, and that a prima facie case of a manufacturing defect is established by the expert affidavit of Alan Fidellow P.E., who concludes that the PRV failed to close after it opened to relieve pressure in the boiler, thereby, causing the unlimited release of water and steam in the Sherwood residence. State Farm also contends that the Watts motion is based upon factual inaccuracies related to the alleged failure of the boiler's expansion tank, and the replacement of components such as the circulator pump and aquastat. Additionally, State Farm asserts that the affidavit of Watts' experts are contradicted by earlier deposition testimony or based on speculation and conjecture, and that even if the affidavits were credited, summary judgment would be inappropriate where, as in this case, the opinions of the parties' respective experts differ on crucial issues of fact.

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 issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate the existence of such issues. However, mere conclusions and unsubstantiated allegations are insufficient to demonstrate the existence of triable issues (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). Moreover, in determining a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Thus, "[o]n a motion for summary judgment the facts are to be construed in a light most favorable to the non-moving party and should be denied where there is any significant doubt whether a material issue of fact exists or if there is even arguably such an issue" (*see Bulger v Tri-Town Agency*, 148 AD2d 44, 47, 543 NYS2d 217 [3d Dept 1989]).

Initially, it is noted that inasmuch as plaintiff failed to oppose the branches of Watts' motion for summary judgment dismissing the causes of action based on the failure to warn, breach of warranty, and the doctrine of res ipsa loquitur, the court deems those claims abandoned (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 962 NYS2d 102 [1st Dept 2013]; *Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]; *Genovese v Gambino*, 309 AD2d 832, 833, 766 NYS2d 213 [2d Dept 2003]). In any event, the undisputed evidence in this case, which includes evidence that the PRV in question was installed on the boiler at the Sherwood residence by Mendenhall Fuel eleven months prior to the incident, and maintained by the same company during that time, negates the element of "exclusive control," an essential requisite for a cause of action predicated on the doctrine of res ipsa loquitur (*see Dermatossian v New York City Transit Auth.*, 67 NY2d 219, 501 NYS2d 784 [1986]; *Kyte v Mid-Hudson Wendico*, 131 AD3d 452, 15 NYS3d 147 [2d Dept 2015]; *McMahon v Gold*, 78 AD3d 908, 910 NYS2d 561 [2d Dept 2010]).

Similarly, the court finds plaintiff's claim based on a failure to warn is not actionable, as the PRV in question was installed by a plumber who had previous experience installing such PRVs, and plaintiff failed to proffer any evidence that the product warning provided by Watts were inadequate, or that the failure to include additional product warnings was a proximate cause of the incident (*see Warlikowski v Burger King*, 9 AD3d 360, 780 NYS2d 608 [2d Dept 2004]; *Payne v Quality Nozzle Co.*, 227 AD2d 603, 643 NYS2d 623 [2d Dept 1996]; *see also Martino v Sullivan's of Liberty*, 282 AD2d 505, 722 NYS2d 884 [2d Dept 2001]; *Lonigro v TDC Elecs.*, 215 AD2d 534, 627 NYS2d 695 [2d Dept 1995]). For similar reasons, plaintiff's cause of action based on Watts' alleged breach of warranty must be dismissed under the circumstances of this case. "In order for an express warranty to exist, there must be an affirmation of fact or promise by the seller, the natural tendency of which is to induce the buyer to purchase. Thus, for a buyer to recover for breach of express warranty, he must show that the warranty was relied on" (*Friedman v Medtronic, Inc.*, 42 AD2d 185, 190, 345 NYS2d 637 [2d Dept 1973]; *see CBS, Inc. v Ziff-Davis Pub. Co.*, 75 NY2d 496, 554 NYS2d 449 [1990]). Further, there can be no claim of implied warranty of merchantability from a manufacturer to a remote purchaser not in privity with that manufacturer where only property damage, and not personal injury, is alleged (*see Arthur Glick Leasing, Inc. v William J. Petzold, Inc.*, 51 AD3d 1114, 858 NYS2d 405 [3d Dept 2008]; *Adirondack Combustion Techs., Inc. v Unicontrol, Inc.*, 17 AD3d 825, 793 NYS2d 576 [3d Dept 2005]; *Donahue v Ferolito, Vultaggio & Sons*, 13 AD3d 77, 786 NYS2d 153 [1st Dept 2004]). Therefore, inasmuch as the PRV in question was purchased by Mendenhall Fuel and no representations regarding the PRV were made to the homeowner before the device was installed on the boiler, there can be neither a showing of privity nor reliance between the subrogor and Watts (*see CBS, Inc. v Ziff-Davis Pub. Co.*, 75 NY2d 496, 554 NYS2d 449 [1990]; *Adirondack Combustion Techs., Inc. v Unicontrol, Inc.*, *supra*; *Schneidman v Whitaker Co.*, 304 AD2d 642,

758 NYS2d 142 [2d Dept 2003]; *Donahue v Ferolito, Vultaggio & Sons, supra*; *Scaringe v Holstein*, 103 AD2d 880, 477 NYS2d 903 [3d Dept 1984]).

As for plaintiff's remaining strict products liability claims, in actions alleging strict products liability "the manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages" (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 106, 463 NYS2d 398 [1983]). "[A] defectively manufactured product is flawed because it is misconstrued without regard to whether the intended design of the manufacturer was safe or not. Such defects result from some mishap in the manufacturing process itself, improper workmanship, or because defective materials were used in [its] construction" (*Caprara v Chrysler Corp.*, 52 NY2d 114, 128-129, 436 NYS2d 251 [1981]). In order to establish a prima facie case in a products liability case alleging a manufacturing defect, a plaintiff must prove that the product did not perform as intended, and that the product was defective when it left the manufacturer's control (see *Rosado v Proctor & Schwartz*, 66 NY2d 21, 25, 494 NYS2d 851 [1985]). In a case based upon circumstantial evidence, an inference that the product was defective when it left the manufacturer's control is permitted only if the plaintiff proves that the product has not performed as intended and excludes all other causes of the accident not attributable to the defendant (see *Halloran v Virginia Chems.*, 41 NY2d 386, 388, 393 NYS2d 341 [1977]).

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 (*Robinson v Reed-Prentice Div., supra*, at 479, 426 NYS2d 717; see *Voss v Black & Decker Mfg. Co., supra*; *Bombara v Rogers Bros. Corp.*, 289 AD2d 356, 734 NYS2d 617 [2d Dept 2001]). To establish a strict liability claim based on a defective design, a plaintiff must show that 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 [2d Dept 2003]). In determining whether a plaintiff has made this showing, certain risk-utility factors must be considered (see *Scarangella v Thomas Built Buses*, 93 NY2d 655, 659, 695 NYS2d 520 [1999]). The risk-utility factors that must be considered are: (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; (6) the degree of awareness of the potential danger that can be attributed to the injured user; and (7) the manufacturer's ability to spread the cost of safety-related design changes (see *Denny v Ford Motor Co.*, 87 NY2d 248, 257, 639 NYS2d 250 [1995]). These factors are "rooted in a recognition that there are both risks and benefits associated with many products and that there are instances in which a product's inherent dangers cannot be eliminated without simultaneously compromising or completely nullifying its benefits" (*Denny v Ford Motor Co., supra* at 257).

Here, Watts met its prima facie burden on the motion by submitting affidavits by professional engineers Michael Mullavey P.E. and Julius Ballanco P.E., which state, among other things, that Watts complied with all applicable industry standards in its design and manufacture of the PRV, that the PRV was not defective when it left Watts' control and had a long time history of widespread problem free use, and that their personal inspections of the PRV and the boiler revealed multiple other causes of the incident in question, including failure of boiler component parts such as the expansion tank, the aquastat, the tridicator gauge, and the circulator pump (see *Terwilliger v Max Co., Ltd.*, 137 AD3d 1699, 28 NYS3d 507 [4th Dept 2016]; *Rabon-Willimack v Robert Mondavi Corp.*, 73 AD3d 1007, 905 NYS2d 190 [2d Dept 2010]; *Preston v Peter Luger Enters., Inc.*, 51 AD3d 1322, 858 NYS2d 828 [3d Dept 2008]; *Gian v Cincinnati Inc.*, 17 AD3d 1014, 794 NYS2d 215 [4th Dept 2005]; *Wesp v Carl Zeiss, Inc.*, 11 AD3d 965, 783 NYS2d 439 [4th Dept 2004]). The affidavits by Watts' experts assert that the incident was caused because the boiler in question reached exceedingly high temperatures and pressures due to the failure of its component parts, thereby causing the PRV to open violently and remain

in that position for an extended period of time. Both experts also identify the absence of a proper discharge line to carry away excess water and steam from the boiler as an aggravating cause of the damage to the Sherwood residence. The burden, therefore, shifted to State Farm to submit evidence that raises a triable issue as to whether the PRV was defectively designed or manufactured and, if so, whether such defects were proximate causes of the subrogor's damages (*see Alvarez v Prospect Hospital, supra; Winegrad v New York Univ. Med. Center, supra*).

In opposition, State Farm submitted, among other things, the affidavit of Alan Fidellow, who is a forensic consultant in the areas of mechanical and HVAC engineering. The Fidellow affidavit states that deposition testimony by Watts' own experts, namely, Michael Mullavey P.E. and John McCabe P.E., reveal that the PRV was stuck in the open position following the incident, and that its seal disc also was missing. The affidavit further asserts that neither of Watts' experts, despite conceding that the PRV was tested at even greater temperatures, could account for the failure of the PRV to return to a closed position after the boiler reached 212 degrees Fahrenheit, and that they failed to set forth any alternative explanation, other than a malfunction of the PRV, for what would cause the PRV's seal disc to become dislodged from the device. According to the affidavit, follow-up tests conducted by Fidellow revealed that the boiler's expansion tank did not fail, and that the aquastat, tridicator gauge, and circulator pump were all left in the boiler after the incident and continued to function properly after the defective PRV was replaced. In addition, the Fidellow affidavit states that the PRV had been placed on the boiler less than one year prior to the incident, and that PRVs are typically manufactured to last longer than one year, and to withstand very high temperatures and pressure build up. Fidellow concludes, within a reasonable degree of engineering certainty, that the Watts' PRV did not function as intended and exhibited a manufacturing defect when it opened to relieve heat pressure but failed to close afterwards. The Fidellow affidavit, therefore, not only identifies circumstantial evidence of possible manufacturing and design defects in the PRV, but rebuts the other possible causes of the incident identified by Watts' experts. Given these sharply conflicting expert opinions, the court determines that significant triable issues exist warranting a denial of Watts' motion (*see Barclay v Techno-Design, Inc.*, 129 AD3d 1177, 10 NYS3d 665 [3d Dept 2015]; *Melendez v Abel Womack, Inc.*, 103 AD3d 609, 959 NYS2d 252 [2d Dept 2013]; *Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 887 NYS2d 628 [2d Dept 2009]; *Steuhl v Home Therapy Equip., Inc.*, 51 AD3d 1101, 857 NYS2d 335 [2d Dept 2008]). Accordingly, the motion by defendant Watt's Industries, Inc. for summary judgment dismissing the complaint against it is denied.

As to the motion by plaintiff State Farm Fire & Casualty Company, which has been incorrectly denominated as a "cross motion," the court notes that the motion is denied as untimely, as it was made almost eight months after the signing of the note of issue (CPLR 3212 [a]; *see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]). In any event, denial is required where, as in this case, the court has determined above, that significant triable issues exist as to whether the PRV was defectively designed and manufactured (*see Alvarez v Prospect Hospital, supra; Winegrad v New York Univ. Med. Center, supra*).

Dated: Riverhead, New York  
October 17, 2017

  
ARTHUR G. PITTS, J.S.C.

\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION