

Garcia v New York City Hous. Auth.

2020 NY Slip Op 31879(U)

June 18, 2020

Supreme Court, New York County

Docket Number: 150249/2016

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 150249/2016

FAUSTO GARCIA,

Plaintiff,

MOTION SEQ. NO. 011, 012, 013

- v -

NEW YORK CITY HOUSING AUTHORITY, PEERLESS
PREMIER APPLIANCE CO., P.C. RICHARD & SON, LLC,
METRO FACTORY SERVICE INC., PREWAY SERVICE,
INC., MAJOR APPLIANCE SERVICE CO. OF NEW YORK
CITY, INC., BURNER SYSTEMS INTERNATIONAL, INC.,
ROBERTSHAW CONTROLS COMPANY, INC.,

DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 011) 296, 297, 298, 299,
300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 324, 330, 331,
332, 333, 334, 335, 336, 337, 354, 355, 357, 360, 361

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 012) 263, 264, 265, 266,
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were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 013) 327, 328, 329, 346,
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were read on this motion to/for JUDGMENT - SUMMARY

Motion sequence numbers 011, 012 and 013 are consolidated for disposition.

These three summary judgment motions arise in a personal injury action involving an
alleged flash fire that began in a surface burner in a gas stove (the stove) in a New York City
Housing Authority (NYCHA) apartment at 95 Old Broadway in Manhattan on April 23,

2015. Plaintiff Fausto Garcia alleges that, when he was attempting to light the stove, a flash fire occurred, and his clothes caught on fire, causing extensive personal injuries. The stove was manufactured by moving defendant Peerless Premier Appliance Co. (Peerless), and allegedly sold to non-moving defendant NYCHA by moving defendant P.C. Richard & Son LLC (PC Richard). Defendants Burner Systems International, Inc. and Robertshaw Controls Company, Inc., two related companies (together Burner Systems), supplied internal components of the stove, including the gas control valve and the spark ignition system (the module), which were manufactured by nonparty Harper Wyman.

The amended verified complaint (the complaint) contains four causes of action. The first and third, stated against all three moving defendants, sound in products liability. The first cause of action alleges negligent design, manufacturing and testing, failure to warn of an unreasonably unsafe condition, and also relies upon the doctrine of *res ipsa loquitur*. The second cause of action is based on breach of express and implied warranties. The third sounds in strict liability and the fourth alleges negligence, breach of express and implied warranties, and negligent installation against PC Richard only.

In motion sequence 011, PC Richard moves for summary judgment dismissing the complaint and all cross claims in their entirety or, in the alternative, dismissing all claims for negligence, breach of express and implied warranties of merchantability and negligent installation against it. PC Richard also seeks a conditional judgment of common law indemnification against Peerless.

In motion sequence numbers 012 and 013, respectively, Peerless and Burner Systems move for summary judgment dismissing the complaint and all cross claims against them.

Plaintiff testified at his deposition (Gerstmann affirmation., exhibit N), that he turned the knob to light the left front burner. It made a continuous clicking noise, but the burner did not light. He smelled gas. He kept it on for approximately two minutes. He turned it off, waited 90 seconds and turned it on again, at which time a “ball of fire” immediately emitted from the stove and ignited his clothing (*id.*, at 36).

The record contains conflicting accounts by plaintiff regarding his actions, including whether he used a match to light the stove, or whether he stood too close to the stove while cooking. Plaintiff submits the affidavit of Dr. Roger F. Salisbury, who opines that plaintiff was unable to make coherent statements following the incident due to the cognitive effects of his injuries and medications (Greenberg aff, exhibit A). These differing versions of events present factual issues that are not relevant to the present motions.

NYCHA furnished the stove to plaintiff and was responsible for its installation and maintenance. NYCHA representatives had previously made at least two service calls to the apartment in response to complaints that the surface burners made a clicking sound when the knob was turned, but would not light, and then the burner would ignite one to two minutes later (Amendola affirmation, exhibit J, pp 17, 65). The first service call was made on June 20, 2013, the date of plaintiff’s initial complaint about the burner. The problem was described as normal wear and tear and was repaired in 20 minutes. The second service call was made by NYCHA, pursuant to a complaint on February 17, 2015, that the stove made a clicking sound but did not light. NYCHA did not make any repairs between the second service call and the incident, but noted that the gas jet was clogged by grease and made the further notation that the repair was awaiting approval.

Plaintiff and the moving defendants have each submitted affidavits from expert witnesses. This Court finds, in the exercise of its discretion, that the four proposed expert witnesses submitting affidavits on behalf of plaintiff, PC Richard, Peerless, and Burner Systems: John M. Tobias (Tobias), Daniel Seeley of Peter Vallas Associates (Vallas), Donald J. Hoffmann (Hoffmann), and Steven Pietropaolo (Pietropaolo) respectively, are all duly qualified as experts (*Board of Mgrs. of 195 Hudson St. Condominium v 195 Hudson St. Assoc., LLC*, 63 AD3d 523, 524 [1st Dept 2009]).

Peerless argues that there is no basis for liability against it for three reasons. First, it asserts that plaintiff has failed to present any expert opinion identifying any industry standard violated by Peerless in the design or manufacture of the stove, or in any of the warnings which accompanied the stove. Peerless maintains that the stove and its component parts and user manual were certified as compliant with American National Standards Institute (ANSI) section Z21.1, which regulates household cooking gas appliances, by a third-party testing group, CSA Group (CSA).

Second, Peerless argues that the stove and its components underwent extensive testing by CSA, including testing for leaks and of the spark ignition system and gas control valve. Third, it contends that the use of open burners with no reignition feature is reasonably safe, is ANSI approved, and has been used for decades without issue. It alleges that there have been no recalls by the Consumer Products Safety Commission and the basic design of the stove has been used by leading manufacturers. Next, Peerless argues that plaintiff cannot prove causation, and that the cause of the fire must be classified as “undetermined” according to National Fire Protection Association Standard 921 because plaintiff has allegedly given conflicting accounts about how the fire started.

After the stove was removed from the apartment, it was inspected three times. According to the Vallas Report (Lamendola affirmation, exhibit Q), 13 people attended an inspection and testing of the stove on September 17, 2017, including representatives of the manufacturer, attorneys and expert witnesses. The findings included evidence of grease and fluid spillage down the back of the stove “including the surrounding cover box which protected the spark ignition module” (Vallas Report at 7), and that the writing was no longer legible on the control knobs. The report noted that the two rear burners were bent downward, but there was no explanation why.

At the same inspection, the stove was tested by connecting it to an electrical supply and hooking up the gas supply, but the gas was never opened up, although a gas pressure monitor and gauges were connected. When the knobs for the stovetop burners were turned to the light position, no audible clicking sound was heard and no spark was generated, but turning the oven knob did produce a spark. There are three ignitor tips. Each stovetop ignitor tip serves two burners, while the oven is served by one. When the wires were swapped inside the module, which was between the oven and the stovetop, a spark was produced on the stovetop, but not in the oven.

The Vallas Report also reflects that, at an inspection on May 31, 2018, attended by experts, attorneys and corporate representatives, the cover of the module was removed, revealing staining on the interior surface of the cover. “Evidence indicated liquid gained entrance at a gap from two side panels where they met at the corner of the box” (*id.* at 14). The Vallas Report further indicates that one of the two circuit boards inside the module was discolored by contamination and had failed. It includes a photograph (*id.* at 15-16). Additionally, the Vallas Report notes that the module has two printed circuit boards and two small coils within a plastic

enclosure. The enclosure showed signs of warping where it was secured to the back of the stove, and electrical damage to the printed circuit board on the underside of the board, as well as evidence of the failure of a gap cap capacitor and an adjacent diode. This caused interruption of the electrical circuit on the circuit board serving the stovetop burners, thereby preventing spark ignition. Specifically, the Vallas Report states:

“This lack of spark would allow gas to accumulate around a burner head and underneath the cooktop. The fugitive gas would continue to flow until it came in contact with a competent ignition source while the natural gas was within flammable range”

(Vallas Report at 10-11).

Tobias opines that the stove was defectively designed in four respects. It has open burners that allow grease and fluids to drain into the body of the stove; the surface burners lack a reignition system while the oven has one; the module is improperly placed inside the stove and inadequately protected from fluids spilling through the open burners; and the lettering on the dials was defectively designed because it was illegible after five years of use. The dials were not manufactured by defendants but purchased from an unidentified third-party vendor. Tobias also opines that the direction in which the knobs are turned to light a burner is the opposite of the industry standard, and could have caused excessive gas to accumulate. Tobias also states that an alternative design for a reignition system for the stove top was available in 2009, was feasible, and cost effective. Tobias opines that an electronic device called a thermophile, which was widely available in 2009, converts thermal energy into electrical energy, and

“can cause a gas valve to open or remain open, or to close, stopping the supply of natural gas should a pilot light or gas flame go out or fail to ignite”

(Tobias aff, paragraph 35).

Tobias opines that, for an additional \$83.00 over the cost of the stove, a reignition system could have been installed which included the surface burners, that this would have prevented the

flash fire, and that this feature was available on other domestically manufactured stoves in 2009, including one manufactured by General Electric in 1997.

The Hoffman affidavit opines that the stove was reasonably safe at the time of manufacture, that there is no design defect in the stove, that Peerless engaged an independent testing service, complied with all applicable ANSI standards as of 2009 when the stove was manufactured, that sealed burners and a stovetop reignition system were not required by any industry standard then or now, and that there is no evidence that sealed burners or a reignition system would have prevented the incident. Hoffmann also states that the design used by the stove remains in use by major manufacturers of stoves. Hoffmann further maintains that plaintiff's explanation of how the incident occurred is inconsistent with the expert findings at the inspections that the module was not working and could not produce a spark, and that, because natural gas is lighter than air, the risk of explosion was minimal.

Peerless also submits the affidavit of its vice president for engineering and operations, Gary Siburt, who states that the stove was individually tested for spark, and that the failure of the module is not the result of any defect, but rather is a maintenance issue, and is easily and routinely repaired. He states that the stove complied with all industry standards at the time of its manufacture. Siburt states that the system called "flame rectification" is the oven reignition system (Siburt dep at 16-127), and it lights the pilot light for the oven. He does not think that the same reignition system would work for the surface burners because there is a delay. Siburt also opines that a reignition system is a necessary safety feature for the oven because it is an enclosed space that can produce an explosion if gas is allowed to build up. Further, Siburt states that sealed burners cost more and are designed to maintain a cleaner unit since there is no worry about food and spillovers getting under the top.

Burner Systems submits the expert affidavit of Pietropaolo, who opines that there is no evidence that plaintiff's injuries were caused by a defect in the components manufactured by Burner Systems. He states that the inspection showed that the failure to spark was caused by

“environmental damage to the control circuitry due to the exposure of water or other contaminants which allowed a fault at the circuit board controlling the signal from the module to the igniters for the top burner”

(Pietropaolo aff, paragraph 18).

Pietropaolo concludes that it was the responsibility of “NYCHA as the owner of the premises and the entity charged with the duty to inspect, maintain and repair the range”

(Pietropaolo aff, paragraph 20).

In motion sequence number 011, PC Richard has established its prima facie case for judgment as a matter of law on all causes of action by submitting evidence that demonstrates that it could not have sold the particular stove involved in the fire because it was manufactured in July 2009, six months after the last delivery to NYCHA, as evidenced by two bulk purchase orders dated August 22, 2008, and January 14, 2008, and delivered on January 25, 2009 (Menna affirmation, exhibit E). PC Richard thus established by business records that it did not sell the stove (see *Spiconardi v Macy's E., Inc.*, 83 AD3d 472, 473 [1st Dept 2011]), and plaintiff has not submitted any non-speculative evidence of a purchase by NYCHA after the date of the incident sufficient to raise a factual question as to either the date of manufacture of the stove, or whether PC Richard sold or installed the Stove.

Additionally, PC Richard has established that Peerless fully assembled each stove that it sold to PC Richard and delivered it in its original sealed packaging to PC Richard for resale, PC

Richard did not install or maintain the stove, and PC Richard did not alter that packaging. Nor was PC Richard required to do any further testing.

PC Richard's motion for summary judgment is granted, and all causes of action against it are dismissed. PC Richard's cross motion for a judgment of conditional indemnification is denied as moot.

In motion sequence numbers 012 and 013, a factual issue is presented regarding whether the stove was defectively designed. Peerless and Burner Systems have failed to demonstrate as a matter of law that the design of the stove, with open burners, and a module that is susceptible to being rendered inoperative by fluids and grease falling through the open burners, is reasonably safe, and that either the cover for the module or the module itself were not negligently designed or manufactured. "ANSI standards are not relevant to causes of action grounded in strict products liability" (*Jemmott v Rockwell Mfg. Co., Power Tools Div.*, 216 AD2d 444, 445 [2d Dept 1995][citation omitted]). The third-party testing and alleged absence of recalls do not establish defendants' entitlement to judgment as a matter of law.

Evidence of the presence of the gap on the cover of the module, as well as the fact that the protective cover was warped where it was attached to the wall of the stove, raises a factual question of whether the module was negligently designed, installed or manufactured, and whether a reasonable inspection by Burner Systems or Peerless would have discovered the gap, if it existed at the time of assembly. Plaintiff has demonstrated that a factual issue is presented as to whether the stove "did not perform as intended and that it was defective at the time it left the hands of the manufacturer" (*Fitzpatrick v Currie*, 52 AD3d 1089, 1090 [3rd Dept: 2008]). A factual issue is also presented of whether it was foreseeable that grease and fluids could pass through the open burners and disable the module, thereby preventing a spark from

occurring. Foreseeability is generally a question of fact (*see Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 315 [1980]).

Significant factual issues regarding causation and comparative negligence also exist given the substantial inconsistencies in plaintiff's statements, and his acknowledgment that he left the knob on for two minutes after it failed to spark. Summary judgment is generally inappropriate in design defect cases (*Legari v Lawson Co.*, 189 AD2d 1089, 1091 [3d Dept 1993]).

The analysis for the jury involves weighing:

“seven factors identified as relevant to the risk-utility analysis: 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”

(*Voss v Black & Decker Mfg.*, 59 NY2d 102,108-109 [1983] [internal quotation marks omitted]).

The question for the jury, then, is whether, after weighing the evidence and balancing the product's risks against its utility and cost, it can be concluded that the product as designed is not reasonably safe (*see Voss* at 109).

Thus, in a design defect cause of action sounding in strict liability, as opposed to one for negligent design, there is no requirement that the plaintiff prove that the manufacturer acted unreasonably in designing the product. “The focus shifts from the conduct of the manufacturer to whether the product, as designed, was not reasonably safe” (*Voss* at 107).

The Tobias affidavit demonstrates the existence of a factual question regarding whether the stove, as designed, posed a substantial risk of harm to an end user due to the presence of open burners, the absence of a reignition system for the top burners, and the possibility that grease and

debris could flow into the module, as positioned, and disable the spark while the gas continued to flow, presenting an unreasonable risk of explosion. Tobias has demonstrated, prima facie, that “it was feasible to design the product in a safer manner” (*Voss* at 108), by using a thermophile and closed burners, at reasonable cost (*see Fahey v A₂O₂ Smith Corp.*, 77 AD3d 612 [2d Dept 2010]).

The requirement of proximate cause in strict products liability cases alleging defective design is satisfied when the jury, after weighing the above quoted factors, and concluding that the design was defective, finds that the defect was a substantial factor in causing plaintiff's injury (*Voss* at 109-110).

Garcia's res ipsa loquitur argument is insufficient. The doctrine requires that:

“(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not be due to any voluntary action or contribution on the part of the plaintiff and (4) evidence as to the true explanation of the event must be more readily accessible to the defendant than the plaintiff”

(*Searle v Suburban Propane Div. of Quantum Chem. Corp.*, 263 AD2d 335, 339–40 [3d Dept 2000] [citations omitted]).

On the undisputed facts of this case, the element of exclusive control cannot be established on the part of any defendant, because plaintiff cannot rule out that the stove was misused by any of the multiple residents of the apartment or third-parties who removed and examined the stove (*see Barney-Yeboah v Metro-North Commuter R.R.*, 25 NY3d 945, 946 [2015]; *Dermatossian v New York City Tr. Auth.*, 67 NY2d 219 [1986]).

Peerless has demonstrated that its warnings were sufficient as a matter of law.

The second cause of action alleging breach of express and implied warranties is dismissed as time-barred (*see Schwatka v. Super Millwork, Inc.*, 106 AD3d 897 [2d Dept 2013]).

The fourth cause of action is also dismissed on the motion of PC Richard.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant P.C. Richard & Son LLC-for summary judgment dismissing the complaint and all cross claims against it is granted, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the cross motion by defendant P.C. Richard & Son LLC for a conditional judgment of indemnification against defendant Peerless Premier Appliance Co. is denied as moot; and it is further

ORDERED that the motion for summary judgment by defendant Peerless Premier Appliance Co. for summary judgment dismissing the complaint, and all cross claims against it, is

granted, to the extent of dismissing the second cause of action, and is otherwise denied; and it is further

ORDERED that the claims against P.C. Richard & Son LLC are severed, and the claims against the remainder of the defendants, with the exception of the second cause of action against defendant Peerless Premier Appliance Co., shall continue; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant P.C. Richard & Son LLC shall serve a copy of this order, with notice of entry, on all parties, as well as on the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)); and it is further

ORDERED that this constitutes the decision and order of the court.

6/18/2020

DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: