

**Warren v Drut**

2024 NY Slip Op 30638(U)

February 29, 2024

Supreme Court, New York County

Docket Number: Index No. 158690/2021

Judge: Leslie A. Stroth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LESLIE A. STROTH PART **12M****

*Justice*

-----X

BARBARA WARREN,

Plaintiff,

- v -

OLEG DRUT, VICTORIYA DEMIANENKO, PAUL'S  
APPLIANCE AND ELECTRONICS, INC., CDR  
CONSULTING CORP., DYNAMIC MARKETING INC.

Defendant.

-----X

INDEX NO. 158690/2021

MOTION DATE 06/27/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 53, 54, 55, 56

were read on this motion to/for

DISMISS

Upon the foregoing documents, it is

Defendant Dynamic Marketing Inc. (Dynamic) moves for an order dismissing plaintiff's complaint pursuant to CPLR 3211 (a)(10), for failure to join an indispensable party. Plaintiff cross-moves for a default judgment and sanctions pursuant to 22 NYCRR 130-1.1 against Dynamic for making a frivolous motion.

This is an action alleging negligence and strict products liability. The complaint alleges as follows: plaintiff sustained serious injuries in connection with the use of a Coyote Gas Grill, 36 C-Secret Model C2C36LP (Grill) used in the premises located at 25 Pheasant Close West, Southampton, NY, installed by CDR Construction. Plaintiff alleges that defendants assembled, tested and inspected the Grill. The defects in the design, manufacturing, assembling and testing of the Grill resulted in plaintiff's injuries. Dynamic is alleged to have distributed, sold and placed the Grill into the "stream of commerce." It had a duty to ensure that the Grill was

properly and adequately manufactured, designed, constructed, produced, tested and distributed free of any defects.

In its motion to dismiss, Dynamic denies manufacturing the Grill. According to Dynamic, the Grill was manufactured by a Texas company, Coyote Outdoor Living, Inc. (Coyote). Dynamic contends that it purchased the Grill from a distributor and resold it, unopened. Dynamic refers to CPLR 3211 (a) (10), that states that the court should not proceed in the absence of an entity who should be a party. Dynamic argues that Coyote, as the manufacturer of the Grill, is not a party here and is indispensable to this action. Dynamic contends that Coyote played a major part in manufacturing the Grill and could be responsible for plaintiff's injuries. Coyote's absence from this action will also undermine Dynamic's and the other defendants' attempts at indemnification or contribution.

Dynamic acknowledges that an action can be maintained in the absence of a necessary party. However, it contends that not including Coyote, which is allegedly beyond the jurisdiction of this state, would result in an unfair, inequitable trial.

Plaintiff opposes the motion and cross-moves for a default judgment. By stipulation, the parties allowed Dynamic to serve an answer beyond the time permitted by statute. Plaintiff claims that instead of an answer, Dynamic made a frivolous motion for dismissal. Plaintiff argues that Coyote is not a necessary party in this action, that she has the right to sue any alleged tort-feasor in an action of this nature, and that Dynamic has the options of impleader or separately suing Coyote. Plaintiff seeks a default judgment due to Dynamic's failure to answer.

Plaintiff also seeks sanctions against Dynamic's counsel for bringing a frivolous motion that lacks merit and prolongs this action.

Dynamic argues that plaintiff failed to join an indispensable party in this action, requiring a dismissal of this action. CPLR 1001 (a) mandates the joinder of a party in two situations: (1) where that party is necessary if complete relief is to be accorded between the persons who are parties to the action; and (2) where the unnamed party might be inequitably affected by the judgment in the action. Dynamic is obviously referring to the first situation, that it would suffer incomplete relief if Coyote is not subject to liability by plaintiff or the named defendants. Dynamic argues that it is entitled to seek relief from Coyote, which specifically issued a written limited warranty.

This is a case where defendants are jointly and severally liable. This means that each party is individually liable to plaintiff for the whole of the harm (Restatement, Torts 2d., section 875). Joint tort-feasors need not be sued together. Plaintiff can sue any or all tort-feasors (*see Hecht v City of New York*, 60 NY2d 57, 62 [1983]).

Dynamic's motion is denied. Even if Coyote is a necessary party, plaintiff is not obliged to name it as a defendant. It would be Dynamic's right to implead Coyote or commence a separate action pertaining to an indemnification or contribution claim. Dynamic did not specify why Coyote is beyond the jurisdiction of this court, since Coyote could be doing business or have an office in New York.

The Court does not grant a default judgment at this time. Dynamic may serve an Answer within ten days after the service of this order with Notice of Entry. Failure to serve and file an answer without a reasonable explanation will result in a default judgment.

Regarding sanctions, the Court finds that although Dynamic's motion was insufficient to be granted, the issues raised are not frivolous. Further, plaintiff has not suffered any prejudice as a result of it. Therefore, the Court denies plaintiff's motion for sanctions.

Accordingly, it is

ORDERED that defendant Dynamic Marketing Inc.'s motion to dismiss is denied; and it is further

ORDERED that defendant is to serve an answer on plaintiff within ten days after service of this order with notice of entry; and it is further

ORDERED that plaintiff Barbara Warren Benenson's cross-motion for a default judgment and sanctions is denied; and it is further

ORDERED that within 30 days of entry of this order, counsel for the moving party shall serve a copy of this order upon all parties, with notice of entry, and shall file such notice via NYSCEF.

This constitutes the decision and order of the Court.

DATE: 2/29/2024

  
\_\_\_\_\_  
HON. LESLIE A. STROTH  
J.S.C.