NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

Public Administrator Bronx County as Administrator of the Goods, Chattels and Credits of FERREL CARINO AKA JOSE CARINO, deceased,

Plaintiff,

-against-

488 EAST 188 STREET REALTY CORP., NEW PALACE PAINTERS SUPPLY CO, INC. and T.C. DUNHAM PAINT COMPANY, INC.,

Defendants.

INDEX NUMBER: 300589 ~~305442~~/2008

Present:
HON. **ALISON Y. TUITT**
Justice

485 EAST 188 STREET REALTY CORP.,

Third-Party Plaintiff,

-against-

APPULA MANAGEMENT CORP.,

Third-Party Defendant.

INDEX NUMBER: **83842/2008**

T.C. DUNHAM PAINT COMPANY, INC.,

Second Third-Party Plaintiff,

-against-

APPULA MANAGEMENT CORP.,

Second Third-Party Defendant.

FILED Jun 13 2012 Bronx County Clerk

NEW PALACE PAINTERS SUPPLY CO., INC.,

Third Third-Party Plaintiff,

-against-

APPULA MANAGEMENT CORP.,

Third Third-Party Defendant.

The following papers numbered 1 to 13

Read on this Defendants' Motions for Summary Judgment

On Calendar of **8/22/11**

Notices of Motion-Exhibits, Affirmations and Memorandums of Law 1, 2, 3, 4, 5

Affirmations in Opposition 6, 7, 8

Reply Affirmations/Affidavits 9, 10, 11, 12, 13

Upon the foregoing papers, defendants' motions and cross-motions for summary judgment are consolidated for purposes of this decision. New Palace Painters Supply Co, Inc. (hereinafter "New Palace") moves for dismissal of plaintiff's decedent's negligence, breach of warranties, failure to warn, strict liability OSHA violations, Labor Law §§200 and 241(6). New Palace's motion is granted to the extent that the claims of breach of implied and express warranties, claims based on OSHA violations and Labor Law are dismissed. Plaintiff did not oppose that portion of New Palace's motion which sought dismissal of the OSHA violations and Labor Law claims. New Palace's motion with respect to plaintiff's decedent's claims of negligence, failure to warn and strict liability are denied. T.C. Dunham Paint Company, Inc.'s (hereinafter "Dunham") moves for dismissal of plaintiff's negligence, breach of warranties, failure to warn and defective condition claims. Dunham's motion is granted in part and denied in part, in accordance with the reasoning provided in New

Palace's motion. 485 East 188th Street Realty Corp. (hereinafter "485") cross-moves for summary judgment seeking dismissal of plaintiff's complaint and dismissal of Dunham and Appula Management Corp.'s (hereinafter "Appula") claims against it. This Court previously dismissed plaintiff's complaint as against 485. However, the cross-claims of New Palace against 485 were not dismissed and the Court directed that New Palaces cross-claims against 485 be converted into a third-party action. Thus, this current cross-motion has already been previously decided. Appula cross-moves for summary judgment seeking dismissal of the plaintiff's complaint, as well as the dismissal of the third-party, the second third-party and the third third-party actions. This Court previously dismissed plaintiff's complaint as against 485. Therefore, by operation of law, the third-party action of 485 against Appula was also dismissed.

The within is a personal injury and wrongful death action resulting from an accident on July 26, 2006 at 485 East 188th Street, Apt. 1A in Bronx, New York. Plaintiff's decedent was refinishing a wood floor, in the course of his employment with Appula Management Corp. (hereinafter "Appula"), a residential realty management company, when an explosion occurred resulting in plaintiff's decedent sustaining severe burns. Plaintiff's decedent died of his injuries on September 19, 2008. Most of the evidence in this action derives from another related civil action Marache v. New Palace Painters Supply Co., Inc., Index No. 24470/2006, arising out of the same incident. It is important to note that the parties in this action stipulated that depositions and disclosures made in the Marache action would apply to the instant action. Plaintiff in this action relies on the expert disclosures made by plaintiff's counsel in the Marache action.

At the time of the accident, Victor Marache, Danny Carino and his supervisor, Jose Ferrel Carino (hereinafter "Jose Carino"), employees of Appula, were engaged in the final stages of refinishing the wood floors in Apt. 1A. Appula employed a crew for apartment renovations when tenants moved out, which sometimes included wooden floor refinishing. Appula foreman, Vito Mangiaelli, supervised Jose Carino, who led a crew.

Jose Carino and his co-workers started the refinishing process in Apt. 1A with the application of a lacquer sealer that had been purchased by Appula from defendant New Palace Painters Supply Co., Inc. (hereinafter "New Palace"). The sealer had been manufactured by Akzo Nobel Coatings, Inc. (hereinafter "Akzo") and then distributed by defendant T.C. Dunham Paint Co., Inc. (hereinafter "Dunham:") who then sold it to New Palace. Victor Marache was responsible for moving the buckets of sealer and polyurethane as Jose

Carino applied the substance to the floors. After allowing the sealer to dry for approximately an hour, they began to apply the polyurethane. The fire erupted towards the end of the process, as they were completing the floor at the entrance to the apartment. At the time that the fire started, Jose Carino was standing just outside the doorway of the apartment, but still applying polyurethane to the floor inside the apartment. The bucket of polyurethane that they had been using was still inside the apartment.

Victor Marache testified that Jose Carino had told him to make sure that nothing was plugged in when working with those chemicals to avoid a fire. He also testified that Jose Carino never mentioned about checking the gas line. Mr. Mangiaelli testified that the crew, which included Jose Carino, were told often that all equipment had to be out of the apartment when the floor refinishing products were to be applied; that the electricity and gas should be shut off and that window should be open and the apartment door closed. In addition, Mr. Mangiaelli testified that after an earlier incident in January or February 2006, where someone was smoking near a floor refinishing project, he "baby-sat" the refinishing crew for a time, repeating ad nauseam the precautions that had to be taken. Victor Marache testified that on the date of the incident, the refrigerator was not plugged into the wall outlet but he did not check to see if a pilot light was on, no one asked him to check the stove and to his knowledge that neither Jose or Danny Carino checked the stove. Mr. Mangiaelli also testified that following the incident, that "OSHA" (Occupational Safety & Health Administration) investigated and issued violations to Appula. The OSHA file indicated that it issued a Citation and Notification of Penalty for violation 29 C.F.R. 1926.152(f)(3) which states that "[f]lammable liquids can not be used where there are open flames or other sources of ignition within 20 feet of the operation, unless conditions warrant greater clearance." OSHA categorized the violation as serious and imposed a $2,100 fine against Appula.

Fire Marshal Michael Farrell reported to the scene of the fire to conduct an investigation into the cause and origin of the fire and an Incident Report was generated by the Bureau of Fire Investigation of the Fire Department of the City of New York . In the apartment, he observed large garbage pails of sawdust, 10 gallons of wall paint, five gallons of tile glue, and a five gallon container that someone later told him was polyurethane. Outside the building below a window of the fire apartment was another five gallon container. Someone later told him that it contained lacquer sealer. Initially, in his report, the fire marshal concluded that the fire originated "in the kitchen, in the vapors of an ignitable liquid (laquer)." Later, at his deposition, the fire marshal conceded that the ignitable liquid "could have been" either the lacquer sealer or the polyurethane or both. Fire Marshall Farrell

described the incident as a "flash fire" which ignited then went out as all the "heat sources" were in the kitchen - "[t]he gas stove with the pilate [sic] light, the refrigerator was still plugged in and working that constantly kicks on and off as the temperature in the refrigerator drops, that's where the heat sources for this could take place, ignition sources."

Isaac Schwartz, the owner of Dunham, testified that the Super Sealer product that Dunham shipped to New Palace was obtained by Dunham from the chemical manufacturer Akzo. Akzo shipped 55 gallon drums of the liquid dealer to Dunham, and Dunham repackaged the product, without alteration, into one and five gallon containers. Dunham would place "New Palace" labels on these containers for its customer New Palace. The polyurethane was a product created by Dunham by blending ingredients from different chemical manufacturers. Dunham also "private labeled" polyurethane for New Palace with New Palace's name on the label. The labels in question were "New Palace Paints Professional Super Sealer First Coat Primer - Lacquer - 1 Gallon" and "New Palace Paints Professional Polyurethane Crystal Clear Finish - High Gloss - 1 Gallon".

Plaintiff's decedent asserts claims against defendants based on negligence, strict product liability and breach of warranties. Plaintiff's decedent alleges that the floor refinishing products he was using, polyurethane and the lacquer sealer were defective. Akzo, the manufacturer of the sealer, had been sued by plaintiff in a separate action commenced in Supreme Court, New York County. That action was removed to the United States District Court of the Southern District of New York and it subsequently settled. New Palace is a wholesale/retail paint, hardware and building supply store which sold the subject products to Appula. Dunham distributed the products to New Palace who then sold it to Appula. Defendants argue that summary judgment is warranted because the New York City Fire Department, which investigated the subject fire, concluded that the probable ignition source was the gas stove pilot light in the apartment and/or the refrigerator that was plugged in and operating at the time of the incident. Defendants contend that the sole cause of the fire was plaintiff and/or his employer or fellow employees' failure to extinguish the pilot light and turn off electrical appliances while working with these volatile chemicals. Defendants argue that plaintiff, his supervisor and fellow employees were aware of the dangers of failing to ensure that the gas and electricity were turned off when working with these products and that plaintiff had been continually schooled on the harm that could occur if they failed to do so.

In support of its motion for summary judgment, New Palace references the Fire Incident Report generated by the Bureau of Fire Investigation of the Fire Department of the City of New York which states that

"the fire originated... in the vapors or an ignitable liquid (Laquer)". New Palace also references Dunham's expert chemist, Dr. Harold I. Zeliger, who opines to a reasonable degree of scientific probability, that the subject fire was the result of the ignition of vapors by either the stove pilot light or a spark from the refrigerator. New Palace argues that as the fire plainly had an ignition source, plaintiff cannot maintain his negligence claims based on spontaneous combustion. Dr. Zeliger further opines that the subject products are not defective and that if used as directed both can be applied safely. New Palace contends that plaintiff fails to show in what manner New Palace was negligent as there is no proof that New Palace altered or had knowledge of any alleged defect in either product.

New Palace also argues that that plaintiff's causes of action for breach of warranty must be dismissed. Plaintiff makes claims for breach of implied merchantability and breach of implied fitness for use. New Palace contends that there is no evidence that it ever made any statement of fact or promise to plaintiff regarding either of the subject products. Moreover, New Palace argues plaintiff cannot maintain an action for implied merchantability or fitness for use since New Palace had no reason or way to know any particular purpose for which the products were required, and there is no evidence that Appula relied on New Palace's skill or judgment to select or furnish suitable goods. With respect to plaintiff's claim for any breach of implied warranty of fitness for a particular purpose, New Palace argues that plaintiff cannot maintain such claim since plaintiff's employer, Vito Mangiaelli, testified that no one at Appula ever discussed with anyone at New Palace for what use they purchased the products. New Palace also argues that there is no evidence that the subject products did not function as intended.

Furthermore, New Palace contends that plaintiff's failure to warn claim must also be dismissed because, independent of any product literature, plaintiff was a knowledgeable user of the products who knew or should have known of the potential dangers posed in using the products. New Palace argues that plaintiff conceded that he did not make any effort to read the subject labels, with the exception of noting the word "Flammable" . Plaintiff further testified that he knew that there should not be a flame or fire around the products, and that sometime in the year prior to the incident, Jose Carino had told him that to avoid a fire, they had to be sure that nothing was plugged into the electrical outlets in the apartment. Plaintiff testified that on the morning of the incident, he checked to make sure that the refrigerator was unplugged and that it was unplugged prior to the crew commencing the work in the subject apartment. Plaintiff further testified that there were no tools in the

apartment when the work was being done. New Palace points out, however, that the Fire Incident Report states that the "[r]efrigerator was plugged in and working" and that the "gas to [the] stove in [the] kitchen was on" and the "stove had pilot light". New Palace also argues that plaintiff's contention that there were no tools in the apartment is contradicted by the photographs taken by the Fire Department which clearly show tools and equipment in the apartment. Thus, argues New Palace, notwithstanding plaintiff's knowledge of the danger, plaintiff failed to check to see whether the pilot light in the stove was on and failed to check whether the electricity was connected.

With respect to his strict liability claims, New Palace argues that plaintiff cannot maintain a cause of action against it inasmuch as plaintiff has not and cannot identify a safer, feasible alternative to the subject products that would have comparable characteristics and plaintiff has not identified any flaw in the manufacturing process that led to the product's failure to perform as intended. Finally, New Palace argues that plaintiff's claim for exemplary damages must also be dismissed as there is no evidence to suggest that New Palace altered the products or knew of any labeling deficiencies or unusual dangers inherent in either product. The imposition of punitive damages requires deliberate and intentional wrongdoing that is absent here.

Dunham seeks dismissal of plaintiff's complaint on similar grounds. Dunham argues that the design defect/manufacturing defect claims against it must be dismissed as none of the plaintiff's experts criticize either the lacquer sealer or the polyurethane, the chemical products itself, as being defectively designed or manufactured and only criticize the labeling of the containers. Dunham contends that plaintiff's Chemical Safety Engineering expert, Burton Z. Davidson, limited plaintiff's claims to the factual contention that vapors from the sealer, not the polyurethane, ignited. Dunham further argues that plaintiff' failure to warn claims must also be dismissed as plaintiff testified and admitted that he was aware of the danger of lacquer sealer and that the appliances had to be turned off "to avoid a fire". In addition, Dunham argues that the warnings on the lacquer sealer were adequate as the label of the Super Sealer contained a warning prominently posted on the front that read "**DANGER! HIGHLY FLAMMABLE!**" Warnings were posted in four other places in the label reading: **"DANGER! EXTREMELY FLAMMABLE: VAPORS MAY CAUSE FLASH FIRE."** " Vapors may cause flash fire. Keep away from heat, spark and flame." "Use with adequate ventilation." **"DANGER! EXTREMELY FLAMMABLE."** Therefore, argues Dunham, no reasonable jury would conclude that any alleged failure to warn was a proximate cause of plaintiff's injuries.

Dunham also contends that the warnings on the polyurethane were adequate and that plaintiff's experts do not attribute the flash fire to the polyurethane. Dunham states that there is no disagreement that polyurethane is a combustible product (i.e., having a flashpoint above ambient temperature of 100°F), but it is not flammable and is therefore unlikely that the polyurethane gave off vapors sufficient to be ignited by the gas pilot or refrigerator. Moreover, Dunham argues that plaintiff's negligence and breach of warranty claims must also be dismissed. Because plaintiff cannot establish an inadequate warning or design defect claim, his negligence claims fail. In addition, Dunham alleges that there is no evidence of any express warranties, the Super Sealer and polyurethane acted as expected and the products were safe if used as intended.

Plaintiff strenuously opposes defendants' motions for dismissal of the complaint arguing that there are numerous issues of fact that preclude summary judgment. Plaintiff claims that both defendants herein violated a mandatory warning provision of the New York City Administrative Code ; the Federal Hazardous Substance Act (hereinafter "FHSA"); OSHA; ANSI Standards; Consumer Products Safety Commission regulations (hereinafter "CPSC"); and National Paint and Coatings Associating Labeling Guide labeling guidelines (hereinafter "NPCA") with respect to the safe use of the two products which are the subject of this action. Plaintiff alleges that the sufficiency of the warnings and defendants' compliance with both statutory and regulatory provisions is one for the trier of fact.

Plaintiff alleges that the subject lacquer sealer was prohibited for use with the City of New York. The plaintiff did not purchase the product and was not responsible for how the product was used since he was employed only as a helper and was directed and controlled by his deceased supervisor, Jose Carino who died as a result of the injuries sustained in this incident, and by his overall manager, Mr. Mangiaelli. Plaintiff argues that since Dunham labeled the cans at the request of and for the benefit of New Palace, both defendants are legally responsible for the insufficiency of the warning labels. Plaintiff argues that Isaac Schwartz had absolutely no background in chemistry, chemical engineering or regulatory standards in labeling and product usage and safety. He testified that he only revised labels as a result of lawsuits, and his revisions were from conversations with a salesman from Akzo. He further testified that he used no expertise and primarily used other labels in order to produce the labels on these products. While Dunham only repackaged the lacquer sealer, Dunham manufactured the polyurethane and distributed for sale to New Palace to be used as the top coat or finishing coat on wooden floor after the lacquer sealer was applied as a first coat. Plaintiff alleges that Dunham and Akzo were aware of

this use of the lacquer sealer and were aware of the distribution and retail and commercial sale of this product within the City of New York because both corporations had been sued at least eight times by individuals who claimed severe injuries as a result of flash fires while working on wood floors. Plaintiff further alleges that Isaac Schwartz has failed to produce any records of what protocols he used to develop his label and has failed to produce the Material Safety Data Sheets (hereinafter "MSDS") provided to him by Akzo with regard to the lacquer sealer as required by both OSHA regulations and the FHSA. In addition, plaintiff alleges that although Isaac Schwarz mixed and manufactured the polyurethane product at his plant, he did not flashpoint-test the end product and, therefore, any representation on the label with regard to its flashpoint was misleading.

Plaintiff argues that after extensive discovery in the Federal Court action, it became clear that the component chemical manufacturers of the polyurethane warned Isaac Schwartz with respect to the dangers of their product but Dunham failed to pass on those warning to New Palace via a MSDS or to Appula the purchaser of the product. In the Federal case, Akzo exchanged the report of Dr. Kenneth Brown who opined that "it is the responsibility of the sellers of the finished product to identify the hazards for these products on their own labels, based on their knowledge of the expected and foreseeable use of the product." Dr. Brown further opined that "[Akzo's] product is not a consumer product and cannot be expected to know if [its] chemical will end up being sold through retail outlets..." .

According to plaintiff's expert, Burton Z. Davidson, within a reasonable chemical engineering certainty, the fire started after the sealer was ignited by either "a live pilot gas flame"; "an electrical spark from a compressor motor, such as a refrigerator; or "the triboelectricity from the continual movement of the product in the containers and the dipping of the applicator brush." Dr. Davidson also opines that inadequate ventilation could have contributed to the fire's ignition because, although the "windows and doors were open", it was "a hazy, hot and humid day." The MSDS for the sealer provides the flashpoint of this product to be minus 4°. A flashpoint temperature reading signifies "the lowest temperature (of the liquid sample) at which application of the test flame causes the vapor at the surface of the liquid to flash, that is, ignite but not continue to burn." Super Sealer is classified as an Extremely Flammable Liquid (i.e., flashpoint below 20°). Dr. Davidson states that it is for this reason, the dangerous flammability of the vapors that the City of New York banned the use of this product for indoor application in 2003 and required sellers to place notice to users of that fact, not only on the label, but at the store in a separate display. See, 3 RCNY §28-05. Dr. Davidson also states that the sealer had a

flashpoint of -4°F whereas the flashpoint of the polyurethane is 105°F; that at the point where the workers were the combustion flame front advanced through the subject apartment. Dr. Davidson opines that the lacquer sealer with a flashpoint of -4°F is an extremely flammable, highly dangerous substance. In addition, he states that it is most probable that the cause of this fire was primarily the vapors from the chemical substance with a flashpoint of -4°F; that given the fact that the maximum temperature on the date of the incident was 85 degrees, it would be scientifically impossible that the polyurethane vapors alone, with a flashpoint of 100°F was the sole cause of this fire. Dr. Davidson opines that it was the vapor fume mixture of residual laquer sealer fumes and polyurethane fumes that was the fuel for this fire.

Dr. Davidson further opines, in relevant part, that the MSDS and the warnings placed upon the labels affixed to the 5-gallon containers of lacquer sealer and polyurethane were ineffective, inadequate and in violation of the law in the following manner: There is no sign on this label or container warning distributors, users and end-users that "INDOOR USE OF THIS PRODUCT IS PROHIBITED IN NEW YORK CITY" and the use of the Super Sealer at the location of the incident was directly against the law; ANSI Standard Z129.1 (an industry-wide labeling standard) requires that, for hazardous chemical substances used in occupational settings, labeling language shall not be based only upon the inherent properties of a chemical, but shall be directed toward the avoidance of hazardous exposures resulting from customary and reasonable occupational use, misuse, handling and storage; Both Dunham for writing the label and New Palace for endorsing the label and selling the product violated Section 28-05(3)(i)(ii) of the Administrative Code of the City of New York which require a conspicuous and durable tag containing a warning that indoor use of this product is prohibited in New York City and also a separate sign in the area which the product is displayed for retail sale containing the same warning; the labeling and MSDS were inadequate in that the statement "use with adequate ventilation" that appears on the can is arbitrary, subjective, unintelligible and non-executable in practical terms for lay end-users like plaintiff in that the phrase is not connected in any way to fire danger and, thus not comport with good labeling practices contained in ANSI Standards and NPCA Guidance Manuals. Dr. Davidson also opines that the failure to put fire safety warning or instructions on the products on the absolute necessity to turn off main gas valves and electric circuit breakers before using the product and keeping them off until all vapor fumes have evaporated was also in violation of industry standards.

Dr. Kenneth Laughery, another of plaintiff's experts, also submits an affidavit. Dr. Laughery

works in the field of Human Engineering which has come to be known as Human Factors and Ergonomics. Dr. Laughery states that it is clear from a Human Factors view that the extreme flammability of the sealer and its potential for causing a flash fire is highly technical in nature and cannot be expected to be known or discoverable by a consumer or industrial user. Dr. Laughery further states that it was imperative that plaintiff and his co-workers should have been provided with an adequate warning system, coming from the product source to and through the entire distribution of the product, specifically the distributor Dunham and the retailer New Palace. Dr. Laughery opines that the label as well as the MSDS provided by Dunham to New Palace was defective because the verbiage "use only with adequate ventilation" lacks specificity and is a classic example of a non-explicit inadequate warning. It does not provide the user with information regarding the kind of ventilation needed. Further, there is no reference to explosion proof electrical ventilation which is referred to in the MSDS but not on the container label. He also opines that it is clearly inadequate as far as ventilation in the application of the sealer in conjunction with a polyurethane product and that stating to keep product away from open flames is an insufficient warning with regard to electrical appliances and pilot lights.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300

East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

In all but the most unusual circumstances, the adequacy of the warning is a question for the trier of fact. Morrow v. Mackler Productions, Inc., 657 N.Y.S.2d 705 (1st Dept. 1997); Polimeni v. Minolta Corp., 653 N.Y.S.2d 429, 431 (3d Dept. 1997). See also Urena v. Biro Mfg. Co., 114 F3d 359 (2d Cir. 1997)("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.") "Failure-to-warn liability is intensely fact-specific, including but not limited to such issues as feasibility and difficulty of issuing warnings in the circumstances; obviousness of the risk from actual use of the product; knowledge of the particular product user; and proximate cause. Liriano v. Hobart Corp., 92 N.Y.2d 232, 237 (1998).

"A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known." Liriano v. Hobart Corp., 92 N.Y.2d 232, 237 (1998). This rule applies with equal force to distributors and retailers. Anaya v. Town Sports Intern, Inc., 843 N.Y.S.2d 599 (1st Dept. 2007) citing Godoy v. Abamaster of Miami, 754 N.Y.S.2d 301 (2d Dept. 2003). Liability extends not only to those who manufacture the defective product, but also to any party in the direct distributive chain. Cover v. Cohen, 61 N.Y.2d 261 (1984). This rule pertains to the bulk supplier doctrine which is where a product is sold in bulk then repackaged and sold as it was here. The doctrine is based on the notion that the immediate distributee is in a better position to warn the ultimate consumer of the dangers associated with the finished product. Marache v. Akzo Nobel Coatings, Inc., 2010 WL 908467 (S.D.N.Y. 2010) citing Polimeni, 653 N.Y.S.2d at 431. The duty to warn generally extends to warning the ultimate consumers of the dangers resulting from the foreseeable use of the product". Urena, 114 F3d at 359.

Once a warning is given, the focus shifts to the adequacy of the warning. New York Courts have required that the warnings clearly alert the user to avoid certain unsafe uses of the product which would appear to the user to be normal and reasonable. Marache, 2010 WL 908467 (citations omitted). Liability may be premised on the absence of warnings as to a particular hazard of the product or on the insufficiency of the warnings provided. Sosna v. American Home Products, 748 N.Y.S.2d 548 (1st Dept. 2002).

"New York recognizes two exceptions to a failure to warn claim: (1) 'where the injured party was fully aware of the hazard through knowledge, observation or common sense,' i.e, that he was a knowledgeable user, (2) where the risks are open and obvious." Santoro v. Donelly, 340 F.Supp.2d 464, 486 (S.D.N.Y. 2004).

Under the knowledgeable user doctrine, "when a warning would have added nothing to the user's appreciation of the danger, no duty to warn exists as no benefit would be gained by requiring a warning." Liriano, 92 N.Y.2d at 242. "The knowledgeable user exception is usually reserved for professionals or other experts who are experienced with the product in question." Donald v. Shinn Fu Co., 2002 WL 32068351. "The knowledgeable user exception has not been applied to lay persons, even those with some familiarity with the product." Billiar v. Minn. Mining & Mfg. Co., 623 F.2d 240, 244 (2d Cir. 1980).

Defendants in the instant action did not demonstrate prima facie entitlement to judgment as a matter of law on plaintiff's strict products liability cause of action based on failure to warn. Summary judgment must be denied as defendants failed to demonstrate that the warnings on the labels were adequate as a matter of law and that there are no issues of fact as to causation and plaintiff's purported knowledge of the dangers. Defendants have failed to show that plaintiff was a knowledgeable user as he was not a professional or expert in using the chemicals at issue. In addition, the conflicting affidavits of the parties' engineering experts raise triable issues of fact as to whether defendants can be held accountable for plaintiff's accident on a failure to warn theory.

The affidavits of plaintiff's experts are sufficient to raise an issue of fact not only as to whether defendants' labeling of the lacquer sealer and polyurethane deviated from the industry standards and provisions, but also as to whether any such deviation was a proximate cause of plaintiff's severe injuries. A jury could reasonably conclude, on the basis of the warnings that plaintiff's experts assert should have been included on the label, that the warnings that were provided were inadequate and inconspicuous. Under such circumstances, defendants who provide insufficient warnings cannot avoid liability solely because the plaintiff did not read the warnings that were provided. See, German v. Morales, 806 N.Y.S.2d 493 (1st Dept. 2005).

Plaintiff's strict product liability claims against defendants based on design defect and breach of warranty must be dismissed. Defendants have moved for summary judgment on both claims. With respect to the design defect claim, plaintiff has failed to offer any opposition and, therefore, the claim must be dismissed. With respect to the breach of warranty claim, plaintiff offers a feeble opposition. Plaintiff has asserted express warranty, implied warranty of merchantability and implied warranty of fitness for a particular purpose. Plaintiff weakly argues that Dunham sold the sealer to New Palace, gleaned from prior lawsuits, that it was being sold and used in New York City, in violation of Section 28-05 of the Administrative Code. Plaintiff also argues

that even if New Palace was not informed of the provision by Dunham, it should have been familiar with all local ordinances governing the sale and use of its products.

"To establish the breach of an express warranty, the plaintiff must show that there was an affirmation of fact or promise by the seller, the natural tendency of which [was] to induce the buyer to purchase and that warranty was relied upon to the plaintiff's detriment." Barrett v. Black & Decker (U.S.) Inc., 2008 WL 5170200. "The plaintiff must set forth the terms of the warranty upon which he relied." Id. Plaintiff here does not address whether defendants made any promises nor is there evidence that plaintiff relied on any promise. In addition, plaintiff does not make a showing for his implied warranty of merchantability and fitness claim. "The implied warranty of merchantability is guarantee by the seller that its goods are fit for the intended purpose for which they are used and that they will pass in the trade without objection. To establish that a product is defective for purposes of a breach of implied warranty of merchantability claim, a plaintiff must show that the product was not reasonably for [its] intended purpose." Wojcik v. Empire Forklift, Inc., 783 N.Y.S.2d 698 (3d Dept. 2004) (citations omitted). Plaintiff's opposition papers are completely silent on this claim as well as his claim for implied warranty of fitness for a particular purpose and, therefore, those claims are also dismissed.

This constitutes the decision and Order of this Court.

Dated: May 29, 2012

Hon. Alison Y. Tuitt