SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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SANDRA FOSCHI,

Plaintiff,

- v -

ROBERT E. KINNAMAN & BRIAN A. RAMAEKERS, INC., JOLIE KELTER, MICHAEL MALCE,

Defendants.

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INDEX NO 150696/2013

MOTION DATE

MOTION SEQ. NO 004; 005

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 112, 114, 116, 117, 118, 119, 120, 121, 122, 123, 131, 135, 136

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 113, 124, 125, 126, 127, 128, 129, 130, 132, 133, 134

were read on this motion to/for JUDGMENT - SUMMARY.

Based on the foregoing, the motions are granted.

In this property damage and products liability matter, defendants Robert E. Kinnaman & Brian A. Ramaekers, Inc. (Ramaekers), in motion sequence 4, and Jolie Kelter and Michael Malce, in motion sequence 5, move for summary judgment against plaintiff Sandra Foschi pursuant to CPLR §3212. Plaintiff alleges that a large 16-inch refracting lens known as the "Cape Canaveral Lens" sold by Ramaekers was the source of a fire in her apartment that caused substantial damage. Plaintiff relies upon a products liability theory to recover, namely, that defendants failed in their duty to warn of the dangers of the lens refracting light so strongly that it could start a fire. Defendants strenuously reject plaintiff's theory and assert that they do not owe plaintiff a duty and the lens sculpture was not the proximate cause of the fire. The decisions and orders are as follows:

FACTS

Plaintiff Foschi received the Cape Canaveral Lens, a sculpture made of a 16-inch refracting lens mounted on a metal base, as a gift from her friend Emmanuelle Barrilla (NYSCEF Doc No 95 – Foschi Tr at p118:18-25). Barrilla purchased the sculpture from Ramaekers, an antiques store (*id.* at p119). At the time of purchase,

the owners of Ramaekers were not present, and their friends from a neighboring store, defendants Kelter and Malce, assisted Barrilla with the purchase (NYSCEF Doc No 96 at p16). Barrilla then gave the sculpture to Foschi as a gift. At the time of purchase, there was no warning of a potential hazard that the large lens could refract sunlight in such a manner as to cause a fire. And the lens came with no documentation or label concerning this potential danger.

Foschi placed the sculpture with the refracting lens in a windowsill in her apartment and displayed it for two years before the fire occurred on March 6, 2012 (NYSCEF Doc No 125). Plaintiff, relying on the affidavits of her experts, an engineer and a meteorologist, claims that the refracting lens focused sunlight onto a suitcase filled with clothes that caught fire and caused her damages. The engineer, James Bernitt, who visited the site on August 23, 2017, conducted two experiments in the apartment to cause a fire under the same circumstances as in March 6, 2012, by using a nine-inch convex lens: the first experiment used a wooden rectangular as a combustible; and the second experiment used paper and wood put into a suitcase. In both experiments, the wood ignited in five seconds, and the paper ignited in ten seconds (NYSCEF doc no 119, ¶¶ 11-12). The meteorologist, Joseph Sobel, who did not visit the site, concluded that "the angle of the sun between 1:06 p.m. through 2:54 p.m. on the day of the occurrence, resulted in the full amount of solar irradiation ... should there have been no blinds, or drapes blocking the irradiation ... would have been sufficient to have ignited combustibles" (NYSCEF doc no 120 – Sobel aff, ¶¶ 8-9).

Defendants, for their part, rely on the FDNY fire marshal who investigated the fire at plaintiff's apartment and a meteorologist, in concluding that the fire was caused by a DVD/VCR player. The fire marshal, Andre Ramos, testified that upon his investigation of the fire on March 9, three days after the fire, he determined that the fire "originated ... in the living room, underneath a wooden mantle, in combustible material (DVD player). Fire extended up to the wooden mantle. Fire further extended to adjacent suitcase" (NYSCEF doc no 98 - Ramos tr pp 26, 31, 34). Plaintiff disposed of the DVD before any verification could be made (NYSCEF Doc No 95 at p108). The meteorologist, John Lombardo, visited the site on March 27, 2017, to assess blockages to the sun streaming into plaintiff's window, such as buildings or trees. Lombardo averred that it was meteorologically impossible for the fire to have been caused by the lens as plaintiff suggests. One reason is that on March 6, 2012, the direct sun reaching the lens would have been between 1:06 pm – 2:54 p.m. The fire started at 3:17 p.m. when the direct sun was obstructed from reaching the lens. And, "the angle and elevation of the sun did not allow sunshine, albeit direct or coming through the lens, to reach the suitcase based on its location" (NYSCEF doc no 100 – Lombardo aff, p 12).

DISCUSSION

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp*, 298 AD2d 224, 226 [lst Dept 2002]).

In a products liability matter, "it is well settled that a manufacturer may be held liable for placing into the stream of commerce a defective product which causes injury" (*Gebo v Black Clawson Co.*, 92 NY2d 387, 392 [1998]). "Where a defective product is sold by a seller, dealer or distributor engaged in its normal course of business, the burden of strict liability has been imposed" (*id.*). "A manufacturer, wholesaler, distributor, or retailer who sells a product in a defective condition is liable for injury which results from the use of the product regardless of privity, foreseeability or the exercise of due care" (*Godoy v Abamaster of Miami, Inc.*, 302 AD2d 57, 60 [1st Dept 2003]). Thus, as a threshold matter, the defendant must be a manufacturer, distributor, or retailer for liability to attach.

Kelter and Malce are not manufacturers, wholesalers, distributors, retailers, or involved in placing the Cape Canaveral Lens into the stream of commerce and therefore had no duty to warn plaintiff of the risks of the lens. Kelter and Malce at no point controlled the lens, nor did they profit off the sale of the lens and merely completed Barrilla's transactions on behalf of Ramaekers as a courtesy. As Kelter and Malce are absent from the chain of distribution and commerce, they owe no duty to plaintiff and their motion for summary judgment is granted. This action is dismissed as against them.

Ramaeker, on the other hand, was the retailer for the Cape Canaveral Lens and was responsible for placing it into the stream of commerce. "A manufacturer who places a defective product on the market that causes injury may be liable for the ensuing injuries. A product may be defective when it contains a manufacturing flaw, is defectively designed or is not accompanied by adequate warnings for the use of the product" (*Liriano v Hobart Corp*, 92 NY2d 232, 237 [1998] [citations omitted]). Manufacturers and retailers have a duty to warn against latent dangers resulting from foreseeable uses of its products and against unintended uses of the product that are reasonably foreseeable (*id.*).

However, "a limited class of hazards need not be warned of as a matter of law because they...pose open and obvious risks" (*id.* at 241). "Where a danger is readily apparent as a matter of common sense, there should be no liability for failing to warn someone of a risk or hazard which he appreciated to the same extent as a warning would have provided" (*id.* at 242, citing Prosser and Keeton, Torts §96 [5th ed.]; *see also Bazerman v Gardall Safe Corp*, 203 AD2d 56, 57 [1st Dept 1994]).

Ramaeker credibly argues that a lens' ability to refract light falls into the common-sense category, and therefore they owed no duty to plaintiff. By its very nature a lens concentrates light and creates a potential risk or hazard of fire. This is a fact known even to school children. "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 NY2d at 242). "If a manufacturer must warn against even obvious dangers, '[t]he list of foolish practices warned against would be so long, it would fill a volume" (*id.* citing *Kerr v Koemm*, 557 F Supp 283, 288 [SDNY 1983]).

Plaintiff's theory on the cause of the fire is based on product liability and her case relies on the affidavits of her two experts. However, none of her experts discussed the fire marshal's investigation and findings. Their respective investigations assume that the sun and the lens are the sole cause of the fire, and they proceed to explain how the fire can be started based on plaintiff's theory. Examining these experts' explanations however raises more questions than they answer. Plaintiff's meteorologist stated that the sun, as reflected through the lens, at 1:06 p.m. through 2:54 p.m. on the day of the occurrence, resulted in the full amount of solar irradiation. And plaintiff's engineer, in replicating the fire, used a convex lens, wood, and paper, when the solar irradiation was at its fullest, stated that the fire erupted in five or ten seconds in his two experiments. The combination of both experts' assessments is that the fire would have started at 2:54 p.m. or 2:55 pm at the latest on March 6, 2012. It is undisputed that the fire in plaintiff's apartment started about twenty-two minutes later at 3:17 p.m.

Plaintiff largely ignores the findings of fire marshal Andre Ramos. The only dispute on the fire marshal's findings is made by plaintiff's attorney, who does not profess to be knowledgeable in investigating causes of fires. Ramos, who was questioned by plaintiff's counsel at his examination before trial, remained steadfast in his findings which were supported by documents. The other experts, who were not deposed, merely gave their expert opinions on a situation that plaintiff presented. What is clear is the undisputed findings by the fire marshal three days after the fire is that the proximate cause of the fire was plaintiff's DVD player. The fire spread upwards to the wooden structure that the DVD was on and then over to the nearby suitcase.

Plaintiff's complaint is unclear as to whether defendants are liable under a strict liability or negligence framework. However, it is of no moment because "[w]here liability is predicated on a failure to warn, New York views negligence and strict liability claims as equivalent" (*Martin v Hacker*, 83 NY2d 1, 8 fn. 1 [1993] [citing *Wolfgruber v Upjohn Co.*, 72 AD2d 59, 62 [4th Dept 1979]). As such, the defendants do not owe plaintiff a duty to warn based on negligence or strict liability grounds.

Plaintiff also makes a threadbare claim that defendants are negligent and liable on a theory of res ipsa loquitor. This theory is only warranted when plaintiff can establish 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 have been due to any voluntary action or contribution on the part of the plaintiff" (*Dermatossian v New York City Trans. Auth.*, 67 NY2d 219, 226 [1986]). In the instant matter, none of the defendants had exclusive control of the Cape Canaveral Lens as it was under the exclusive control of plaintiff Foschi. Defendants did not place or instruct plaintiff to place the lens in the windowsill. Therefore, defendants cannot be liable on a theory of res ipsa loquitor.

In sum, defendants have shown that they did not owe a duty to plaintiff and that the lens was not the proximate cause of the fire. Based on the finding in favor of defendants, their argument on spoliation of evidence by plaintiff is academic and will not be addressed.

Accordingly, it is hereby ORDERED that defendant Robert E. Kinnaman & Brian A. Ramaekers, Inc.'s motion for summary judgment (motion sequence #004) is granted; it is further

ORDERED that defendants Jolie Kelter and Michael Malce's joint motion for summary judgment (motion sequence #005) is granted; it is further

ORDERED that the complaint is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants, as written.

9/28/2018
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE