Astacio v Birdie 141 Broadway Assoc.
2020 NY Slip Op 31074(U)
April 27, 2020
Supreme Court, New York County
Docket Number: Index No. 159804/2015
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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XIOMARA ASTACIO,

Plaintiff,

- v -

BIRDIE 141 BROADWAY ASSOCIATES, MASON MANAGEMENT SERVICES CORP., STELLAR MANAGEMENT LTD., STELLAR MANAGEMENT LTD., LIBBY MANAGEMENT SERVICES CORP.,

Defendants.

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INDEX NO. 159804/2015

MOTION DATE

MOTION SEQ. NO. 002, 003, 004

DECISION + ORDER ON MOTION

BIRDIE 141 BROADWAY ASSOCIATES, MASON MANAGEMENT SERVICES CORP., STELLAR MANAGEMENT LTD., STELLAR MANAGEMENT LTD., LIBBY MANAGEMENT SERVICES CORP.,

Third-Party Plaintiffs,

-against-

WORLD AND MAIN, LLC, APARTMENT HOUSE SUPPLY CO., INC.,

Third-Party Defendants.

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Third-Party
Index No. 595147/2017

The following e-filed documents, listed by NYSCEF document number (Motion 002) 74-88, 123, 131-136, 153, 154, 156, 160, 163-168

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 89-102, 124, 137, 138-142, 149, 162, 169-173

were read on this motion to dismissal.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 103-122, 125-127, 143-148, 150, 158, 161, 174-178

were read on this motion for summary judgment.

By notice of motion, third-party defendant Apartment House Supplies Co., Inc. a/k/a Apartment House Supplies (AHS) moves pursuant to CPLR 3212 for an order summarily dismissing the third-party complaint and all cross claims asserted against it. Plaintiff opposes; defendants/third-party plaintiffs (Birdie, collectively) and third-party defendant World and Main, LLC d/b/a Comfort Zone (World) do not oppose. (Motion seq. 002).

By notice of motion, World moves pursuant to CPLR 3212 for an order summarily dismissing the third-party complaint and all cross claims asserted against it. Plaintiff opposes; Birdie and AHS do not oppose. (Motion seq. 003).

By notice of motion, Birdie moves pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes; AHS and World do not oppose. (Motion seq. 004).

By notice of cross motion, plaintiff cross-moves pursuant to CPLR 3025(b) and 203(f) for an order granting her leave to amend the complaint. Birdie, World, and AHS oppose.

I. BACKGROUND

By summons and verified complaint dated September 22, 2015, plaintiff alleges that due to the negligence of Birdie, the owner and manager of the building in which she resides, she was injured when a pot of hot oil fell on her. (NYSCEF 76). On February 21, 2017, Birdie commenced a third-party action against World and AHS, respectively, the distributor and retailer of the alleged mechanism of plaintiff's injury, an electric two-burner stove, advancing causes of action for negligence, strict products liability, breach of warranty, and products liability. (NYSCEF 78). AHS filed its answer to the third-party action on April 18, 2017 (NYSCEF 80), and World filed its answer on January 26, 2018 (NYSCEF 79).

A. Plaintiff's depositions (NYSCEF 82, 98, 99, 113, 114)

At her depositions, plaintiff testified that at the time of her accident, she resided at 561

West 141 in Manhattan. In her kitchen, there is a gas stove, above which are storage cabinets. In early 2014, as gas service was interrupted in the building, Birdie provided residents with two-burner electric stoves.

Plaintiff used approximately ten different electric stoves over the year during which the building was without gas, as each would turn off on its own and not turn back on, which she attributed to her daily use of them. Each time a stove stopped working, the building's porter and superintendent would replace it with a boxed and brand-new one. Each lasted approximately three weeks, and plaintiff denies ever having dropped or damaged them, but claims that some of the plastic components of each would become warped from ordinary use. She reasons that the building's superintendent and porter were aware the stoves had stopped working because she was obliged to turn in the old ones in order to get new ones. She knows of two other tenants who had complained of similar problems, such as stoves turning on by themselves and quickly breaking, but did not know to whom the complaints were made.

The stoves provided by Birdie had two burners, each with a control knob for turning it on and adjusting the heat; each had a light that indicated whether the burner was on. Plaintiff left each stove she used on a wooden board which lays on top of her gas burners, and she would leave the stoves plugged, having turned off the knobs.

On April 22, 2015, plaintiff noticed that the plastic parts of the stove, including the knobs, had been softened by the heat of the stove, but she denied any cracks. She placed a pot on the stove's right burner, which she always used because it got hotter than the left burner, but did not turn it on. The indicator lights for each burner was off and the knobs were set to the off position.

Plaintiff poured oil into the pot and left it uncovered. Fifteen minutes later, she reached

into one of the overhead cabinets and accidently knocked a can over which fell into the oil, causing oil to splash and burn her.

When plaintiff had received the stove, it was neither cracked nor dented, and as the instructional manuals were identical for each stove she had used, she read only the first one she had received and disposed of the others. Plaintiff had the stove for two weeks before her accident, during which it never dropped or fell, and she had made no complaints about it to the building. She had used the stove without incident the night before her accident. She is unaware of anyone else having used her stove in the interim.

On the errata sheet accompanying her first deposition, plaintiff clarifies that she does not leave the stove plugged in all the time, but only when she is going to use it. However, in her second deposition, she reiterates that she always leaves the stove plugged in.

B. Birdie's deposition (NYSCEF 83, 100, 115)

At his deposition, the property manager of defendant Stellar Management Ltd., who at the time of plaintiff's accident, managed plaintiff's building, testified that he was responsible for tenant complaints and had visited the building two to three times a week.

In April 2014, as tenants were unable to use their gas stoves, as a courtesy, Birdie provided them with electrical stoves. The property manager purchased 60 or 70 of the stoves from AHS, which delivered them to the building for the property manager to distribute. The superintendent distributed the stoves to the tenants and was unaware of any tenant returning a stove. He did not recall receiving any complaints about them, and upon arrival, the boxes were in good condition, and he never opened them and was unaware as to whether anyone else had. Nor did he know whether any tenant had complained about them to the building's superintendent, but if plaintiff had an issue with a stove not working, the building's superintendent would have

informed him; he did not recall the superintendent relaying any complaints from plaintiff.

C. World's deposition (NYSCEF 85, 101, 116)

At his deposition, World's director of quality assurance testified that World is a distributor of home and hardware products to retailers and wholesalers. It owns the brand and distributes the model of the stove used by plaintiff. The governing body for small electrical appliance safety is "Underwriters Laboratory" (UL), which publishes standards for the certification of appliances by other third-party agencies. The applicable standard for the stove is "UL 1026," and a third-party independent laboratory certified the model used by plaintiff.

The director also reported that World creates warning labels that are attached to the boxes and various stove parts, and appear in the instruction manuals that accompany the stoves in accordance with UL 1026. World creates the manual in compliance with the "absolute minimum requirements" of UL 1026, and had it become aware that the stoves were spontaneously turning on, it would have "follow[ed]-up." The director, however, was unaware of any complaints concerning the functionality or safety of the stoves.

When shown a photograph of plaintiff's stove (NYSCEF 86), the director identified on it a sticker reflecting that the stove had passed inspection in China by World's quality control ("QC passed"). He also testified that the packaging for the stoves is tested by dropping a box, packed as it would be sold and shipped, ten times. The box is then examined, and if any functional damage, loose parts, or cosmetic damage is found, the stoves are rejected.

D. AHS's deposition (NYSCEF 84, 102, 117)

At his deposition, AHS's owner testified that AHS buys the stoves from World and other vendors and sells them. AHS issues no warranties for the stoves, and on receipt of a stove from a distributor, it indicates any damage to the box and rejects it. AHS has never received notification

from any of its suppliers or manufacturers that the stoves had been recalled nor has it received any complaints from its customers concerning the stoves it has sold.

E. World's expert evidence (NYSCEF 97)

World submits the affidavit of a professional engineer who states that he inspected both the stove in issue and another stove of the same brand, and observes that the stove's instruction manual contains the following pertinent directives:

1) Unplug from outlet when not in use;

2) Do not operate any appliance … [if] damaged in any manner.

Upon his examination of the stove, the expert observed that it had a mark from "Intertek ETL" reflecting that the unit complies with "UL Standard 1026." He also saw that the plastic housing around the right control knob was fractured, deformed, and cracked, and that the knob itself was scratched and "recessed." When he plugged in the stove, the right burner turned on regardless of the position of the control knob, which could be turned past the high position in both directions. The stove also emitted an odor.

The expert maintains that although the stove was designed, manufactured, and distributed in accordance with UL 1026, and was safe for its intended use when exercising reasonable care, as plaintiff admittedly operated the stove when it was clearly damaged and left it plugged in when not in use, she misused it. He thus concludes that plaintiff's accident was due not to a deficiency in its design or manufacture, but to plaintiff's misuse of it and to a "modification to the [stove] subsequent to its original design and manufacture in which the right thermal control switch had sustained mechanical damage."

F. Plaintiff's expert evidence (NYSCEF 133, 139, 145)

Plaintiff submits the affidavit of a professional engineer who states that he inspected the

stove plaintiff had used at the time of her accident, which he partially disassembled during his inspection, and two stoves of the same brand. Upon opening the stove, he observed that the right burner control knob is disconnected from the electrical control switch, and thus, when the stove is plugged in, the right burner heats up even if the control switch is turned off. He opines that the stove's malfunctions and deformities resulted from overheating. He also saw cracks on the stove's plastic side cover but denies that they contributed to plaintiff's accident.

The expert also states that the stove's indicator lights fail to show whether a particular burner is on because refraction from the plastic gives the appearance that the light is off when it is on, and vice versa. In examining the other stoves, he observes that when heat was applied to one of the knobs, it melted, thereby disconnecting it from the electrical switch like the knob of plaintiff's stove. As a result of his inspection, he concludes that plaintiff's stove became deformed due to overheating which caused the control knob to no longer function. In addition, the stove's design allowed the control knob to become overheated with regular and intended use, which could have been prevented had the knob been made of a more heat-resistant material, and by thermally isolating it from the heat source. The stove's indicator lights, which were insufficient to signal that a burner is on, could have been more safely designed by making the light brighter or more powerful, and by using a different translucent light cap which would not refract the light in a confusing manner.

Plaintiff's expert disputes the finding of World's expert that mechanical damage was the cause of plaintiff's accident, as the cracking on the stove is cosmetic only. Rather, given his aforementioned findings, the stove apparently violates UL standard 1026, which requires that products be resistant to temperatures resulting from normal or abnormal use.

II. BIRDIE'S MOTION FOR SUMMARY JUDGMENT (MOT. SEQ. FOUR)

A. Contentions

1. Birdie (NYSCEF 103-122)

Birdie alleges that it lacked actual and constructive notice of the stove's defect, observing that the stoves were kept by it in their original, unopened packaging, that it received no complaints from tenants that the stoves were defective, and that the stove in issue had been previously used by plaintiff without incident.

To the extent that plaintiff argues that it was negligent in providing a defective stove and for failing to restore the building's gas service for too long, Birdie argues that having reached into the overhead cabinet while cooking and dropped the can into the pot of oil, plaintiff engaged in intervening acts which broke the chain of causation. Moreover, it argues that its failure to restore the building's gas service, in and of itself, is too attenuated to have proximately caused plaintiff's injuries. That Birdie had provided the stove, moreover, does not render it liable, as the stove was brand-new and factory-sealed when provided to plaintiff.

2. Plaintiff (NYSCEF 144-147)

In opposition, as pertinent to Birdie's motion, plaintiff argues that whether harm is foreseeable constitutes a jury question.

3. Reply (NYSCEF 161)

Birdie contends that plaintiff offers no evidence that it had actual or constructive notice of the stove's alleged defect and/or that its alleged negligence caused her injuries, and it reiterates its earlier contentions concerning notice and causation.

B. Analysis

To prevail on a motion for summary judgment, the movant must establish, *prima facie*,

its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

Landowners owe persons on their land a duty of reasonable care to maintain their property in a safe condition. (*Tagle v Jakob*, 97 NY2d 165, 168 [2001]). While all negligence claims require the plaintiff to establish that the defendant breached a duty owed to him or her, and that such breach was the proximate cause of the plaintiff's damages (*Salvador v New York Botanical Garden*, 71 AD3d 422, 423 [1st Dept 2010]), Birdie raises only issues of causation and notice.

1. Causation

A defendant's negligence may be found to have proximately caused an injury where it was "a substantial cause of the events which produced the injury." (*Mazella v Beals*, 27 NY3d 694, 706 [2016], quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). There can be more than one proximate cause of an injury, and whether a defendant's conduct proximately caused the plaintiff's injury is generally a question of fact. (*Newman v RCPI Landmark Properties, LLC*, 28 NY3d 1032, 1033 [2016]). Here, it is undisputed that Birdie provided plaintiff with an allegedly defective stove which substantially caused plaintiff's accident.

Even if a defendant's negligence caused an injury, an intervening act may break the chain of causation and relieve the defendant of liability if the intervening act was a "normal or foreseeable" consequence of the defendant's negligence. (*Hain v Jamison*, 28 NY3d 524, 529 [2016]; *Gordon v E. Ry. Supply, Inc.*, 82 NY2d 555, 562 [1993] [intervening acts are "of such an extraordinary nature or so attenuated from the defendants' conduct that responsibility for the injury should not reasonably be attributed to them"]). Here, Birdie offers no evidence that plaintiff's practice of storing items in the overhead cabinet or that she would knock a can into a pot of hot oil on the stove were acts so unforeseeable or of such an extraordinary nature that it cannot be held liable for providing plaintiff with the allegedly defective stove.

2. Notice

A defendant-landlord moving for summary judgment in a negligence action has the burden of demonstrating that it neither created the hazardous condition nor had actual or constructive notice of it. (*DeMatteis v Sears, Roebuck & Co.*, 11 AD3d 207, 207 [1st Dept 2004]). As there is no dispute that Birdie neither designed nor manufactured the stove, Birdie demonstrates that it did not create the hazardous condition. Moreover, evidence that no complaints about the stoves had been received by Birdie and that the boxes containing them were not damaged is sufficient to establish, *prima facie*, that Birdie lacked actual notice of the condition.

To demonstrate a lack of constructive notice, Birdie must also establish that the defect was not visible and apparent and that it did not exist for a sufficient length of time before plaintiff's accident for its employees to discover and remedy it. (*Gordon v. Am. Museum of Nat. History*, 67 NY2d 836, 837 [1986]). That the property manager had received no complaints of stoves having spontaneously turned on nor any indication from the superintendent that such a

complaint had been lodged demonstrates, *prima facie*, that Birdie lacked constructive notice.

As plaintiff does not address the issue of notice, she raises no issue of fact.

Absent any remaining causes of action against Birdie or merit to plaintiff's proposed additional causes of action against Birdie (*see infra* at III.B.1), Birdie has no cause of action against third-party defendants. Consequently, third-party defendants' motions to dismiss the third-party complaint are moot.

III. PLAINTIFF'S CROSS MOTION TO AMEND

A. Contentions

As plaintiff's negligence claim against Birdie is dismissed and there remain no causes of action against Birdie, AHS's and World's contentions in support of their motions to dismiss, along with plaintiff's contentions in opposition thereto, are considered to the extent that they address the merits of plaintiff's proposed additional causes of action. (*See JPMorgan Chase Bank, N.A. v Low Cost Bearings N.Y. Inc.*, 107 AD3d 643, 644 [1st Dept 2013] [relying upon summary judgment contentions in determining sufficiency of proposed amendments]).

1. Plaintiff (NYSCEF 131-135, 138-141, 144-147)

Plaintiff seeks leave to amend her complaint by adding allegations in support of a cause of action for strict products liability as to Birdie and by adding World and AHS as direct defendants, alleging strict products liability and negligence. She argues that defendants are not prejudiced as the case includes a cause of action for products liability, and as the third-party action was commenced before the statute of limitations, there is no issue of timeliness. She also references the bill of particulars served on third-party defendants which, she maintains, suggest theories of products liability. Moreover, she notes, the stove has been inspected.

In support, plaintiff submits the proposed amended complaint. (NYSCEF 147).

Plaintiff argues that material issues of fact arise from the competing affidavits of the experts and that she has offered *prima facie* evidence that she used the stove for its intended purpose, that the stove was defectively designed, and that the stove caused her injury, thus satisfying her burden on the motion to amend the complaint.

2. Birdie (NYSCEF 161)

Birdie asserts that plaintiff's motion is untimely and that she fails to offer an explanation for her delay. In addition, it claims prejudice on the ground that notwithstanding its commencement of the third-party action for strict products liability, it has never defended against one. Moreover, plaintiff's proposed amendment is meritless, as Birdie is the end-user of the stove and not part of the distribution chain. It observes that it did not sell, market, or profit from the stoves, having only provided them to tenants as a courtesy, free of charge. As a matter of public policy, it argues, holding it liable for providing the stoves as a courtesy would dissuade landlords from doing so in the future.

3. AHS (NYSCEF 74-88, 156, 163)

AHS appeals to the court's discretion and ask that plaintiff be denied leave to amend absent a reasonable excuse for her four-year delay and after she filed her note of issue. Having failed to retain an expert because only Birdie had advanced a cause of action for products liability and had not retained one, AHS asserts that it will be prejudiced by plaintiff's amendment. AHS also observes that plaintiff offers no affidavit of merit or otherwise demonstrates that the proposed amendments are meritorious. Rather, AHS maintains, plaintiff fails to show the existence of a manufacturing defect or defective design and offers no support for either, nor does she demonstrate how the stove may be more safely designed or that there exist no other causes for her injuries. And, having failed to provide evidence that the stove did

not perform appropriately, AHS asserts that plaintiff's claim for breach of an express warranty is not viable.

According to AHS, plaintiff also fails to show that the stove came with a deficient warning, and even if it had, she does not show that such a warning proximately caused her injuries. To the extent that plaintiff is presumed to have read and heeded an adequate warning, AHS argues that the presumption is rebutted by her testimony that she did not read the instruction manual that came with the stove before using it.

Plaintiff's expert opinion should be precluded, AHS contends, because she did not disclose the expert during pretrial discovery and only retained the expert to defeat the pending summary judgment motion after having obtained two adjournments of the motion.

Even if permitted to submit an affidavit, AHS alleges, plaintiff's expert is unqualified to render an opinion as his expertise is in "golf carts and other motor vehicles," and his findings that the stove was misshapen due to heat and "not because it had been damaged before inspection," and that the cracking was cosmetic in nature are all unsupported, AHS claims, and the expert does not address whether plaintiff's actions were a superseding cause of the accident.

4. World (NYSCEF 88-102, 162)

World argues that plaintiff's motion for leave to amend her complaint is untimely and unsupported by a reasonable excuse, and that it is prejudiced because, having laid bare its arguments in support of summary judgment, it is precluded from moving again. In addition, while it inspected the stove, it did so as a third-party defendant and its expert's analysis may have been different in opposing plaintiff's different direct claims. Due to plaintiff's destructive testing of the stove, World complains, the stove is no longer available for examination by a jury at trial.

World also maintains that plaintiff fails to allege a manufacturing or design defect, and assuming that she had, she fails to demonstrate that the defect is causally connected to the alleged accident.

The stove was accompanied by adequate warnings, World contends, which plaintiff admits having failed to read. Thus, had she acted in accordance with the instructions directing that the stove be unplugged when not in use, the accident would not have occurred. Additionally, although the manual directs that consumers not use the stove when it is damaged, plaintiff used it despite the damage she saw at the time of the accident. Thus, World maintains, plaintiff proximately caused the accident, having used the stove in a manner contrary to the instruction manual and, when she knocked the can into the pot of hot oil, she caused a superseding event, thereby causing her injury.

World denies having been negligent as the stove satisfied all applicable codes and regulations and was tested by an independent laboratory which found that it satisfied packaging standards. In addition, there were no prior complaints about the stove nor had any been recalled.

World also contends that plaintiff's expert is unqualified to render an opinion, as his career focused on "motor vehicle machinery, with a smattering of work on ladders and 3d printers." In addition, World alleges that as the expert disassembled the stove and permanently altered it, he deprived some parties of a meaningful opportunity to test it. Thus, plaintiff violated her duty to preserve evidence for trial and consequently, a spoliation charge should be given at trial or the expert's testimony should be rejected.

5. Reply (NYSCEF 164-167, 169-172, 174-177)

Plaintiff contends that as the third-party complaint contains no substantive information, she had no reason to believe that the third-party defendants were proper defendants or that any

claims against them would be meritorious. She observes that issue was not joined by third-party defendants until January 26, 2018, and that in their answers, third-party defendants deny that they manufactured and/or sold the stove.

Plaintiff observes that World sent an expert to inspect the stove, that AHS sent only attorneys, and that Birdie did not inspect the stove. Moreover, none of the photographs taken at the inspection was exchanged and the parties had not exchanged disclosures pursuant to CPLR 3101(d) before the note of issue was filed, and given World's disclosure of its expert report in July 2019, it was not until then that plaintiff became aware that World's expert had found nothing wrong with the stove and accused her of being the sole cause of her accident. Plaintiff then retained an expert and learned that it was necessary to disassemble the stove in order to inspect it.

Plaintiff maintains that she notified all parties of her expert's intent to disassemble the stove and submits a letter dated September 23, 2019 from World reflecting its receipt of the notice and that it wanted to attend the inspection. By letter dated September 24, 2019, plaintiff's counsel advised that the testing, which had been completed, had been restricted to photographing, measuring, plugging in, and turning on the stove, and that if further testing was needed which would require opening the stove, he would advise the parties. By letter dated October 1, 2019, plaintiff's counsel advised that the expert was going to open the stove and that it was unknown whether the stove would be damaged as a result. He added that World had asked to attend, and that if the other parties wanted to do so, they would be accommodated. By letter dated October 2, 2019, AHS's counsel asked to attend the inspection. (NYSCEF 166, 171, 176).

In any event, plaintiff observes that there is no evidence or expert opinion supporting the assertion that the stove is no longer suitable for testing.

Plaintiff alleges that Birdie did not appear for the inspection, as indicated by the sign-in sheet reflecting third-party defendants' appearance and Birdie's non-appearance. (NYSCEF 167, 172, 177). Once her expert determined that the stove was defective, plaintiff was then able to move to amend. She argues that her filing of the note of issue is immaterial and that her opposition to the motions for summary judgment demonstrates the merit of her proposed amendments, reiterating that no prejudice will result from amending the complaint.

B. Analysis

Pursuant to CPLR 3025(b), a party may amend its pleadings at any time by leave of court, "which shall be freely given upon such terms as may be just...." It is well-settled that leave to amend pleadings under this section should be liberally granted unless the amendment plainly lacks merit or would prejudice or surprise the other parties. (*MBIA Ins. Corp. v Greystone & Co.*, 14 AD3d 499, 499 [1st Dept 2010]). However, when a plaintiff moves to amend after having filed the note of issue, the court must exercise caution. (*Bailey v Vill. of Saranac Lake, Inc.*, 100 AD3d 1089, 1090 [3d Dept 2012], *lv dismissed* 20 NY3d 1053 [2013]).

1. Birdie

A plaintiff who sustains an injury from a defective product may advance causes of action for negligence, strict products liability, and breach of express and/or implied warranty. (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 106 [1983]).

That plaintiff is alleged to be late in moving to amend and offers no excuse for her delay is immaterial absent a showing of prejudice. (*See Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 959 [1983] [lateness, absent prejudice, is not a basis to deny motion to amend]; *Messinger v Mount Sinai Med. Ctr.*, 279 AD2d 344, 345 [1st Dept 2001] [whether plaintiff offered a reasonable excuse is immaterial absent prejudice]).

Birdie's spurious contention that it is prejudiced as a result of having to now defend a products liability action, despite advancing identical causes of action against third-party defendants, is not only unsupported in the law, but appears disingenuous. However, while an affidavit of merit is not required (*Boliak v Reilly*, 161 AD3d 625, 625 [1st Dept 2018]), plaintiff must demonstrate that "the proffered amendment is not palpably insufficient or clearly devoid of merit." (*MBIA Ins. Corp.*, 74 AD3d at 500). Plaintiff's proposed additional causes of action against Birdie lack such merit, as Birdie was not part of the chain of distribution, and thus, may not be held strictly liable for any defects in the stove. (*See Gobhai v KLM Royal Dutch Airlines*, 85 AD2d 566, 567 [1st Dept 1981], *affd* 57 NY2d 839 [1982], *order recalled* 458 NYS2d 879 [1st Dept 1983] [airline that incidentally provided allegedly defective slippers during flight could not be held strictly liable]). Likewise, it cannot be held liable for a breach of warranty. (*Curry v Davis*, 241 AD2d 924, 925 [4th Dept 1997]).

2. AHS and World

To the extent plaintiff's proposed claims against third-party defendants are identical to Birdie's claims against them, they offer no explanation as to how their defense against Birdie materially differs from their defense against plaintiff. That AHS did not retain an expert to defend its claims solely because Birdie did not does not evidence prejudice. Rather, it constitutes a chosen strategy and neither AHS nor World identifies what additional discovery is needed. (*Licameli v Roberts*, 277 AD2d 1057, 1057 [4th Dept 2000]). To the extent that AHS alleges being prejudiced by the testing, plaintiff offers unrebutted evidence that AHS could have, but did not, attend the inspection with an expert. In any event, there is no evidence that the stove cannot be tested. That third-party defendants may be precluded from moving for summary judgment again is not prejudicial as they moved to dismiss the same claims as asserted by Birdie, and

absent additional discovery, the proof necessary to dismiss Birdie's claims is identical to that needed to dismiss plaintiff's new claims.

Nevertheless, to the extent that plaintiff seeks to add as against AHS and World causes of action for negligence against which they have not defended and which require different proof than those falling within strict products liability, she fails to demonstrate, or even argue, that such claims against them are meritorious. (*See MBIA Ins. Corp.*, 74 AD3d at 500 [party seeking amendment has burden of demonstrating that amendment "is not palpably insufficient or clearly devoid of merit"]). In any event, plaintiff's proposed negligence claims also lacks merit. (*See infra* at III.B.2.ii).

i. Failure to warn

A defendant may be held liable "for the failure to warn of the foreseeable risks and dangers involved in the use of its product." (*Torres v City of New York*, 127 AD3d 1163, 1167 [2d Dept 2015]). Neither plaintiff nor her expert address the adequacy of the stove's written warning, and thus, she fails to demonstrate any merit to her proposed cause of action for failure to warn.

In any event, plaintiff posits that her accident was caused when the stove spontaneously turned on and World offers unrebutted evidence that it warned users to unplug the stove while not in use and not use it when damaged. Plaintiff, despite having read the manual that came with the first stove she received, kept the stove plugged in when she was not using it and used it despite seeing that the stove's plastic was warped. Moreover, World also offers expert evidence that plaintiff's accident was attributable to her failure to comply with World's warnings. Thus, given the sufficient warning, plaintiff's proposed cause of action for failure to warn lacks sufficient merit. (*See Fisher v Multiquip, Inc.*, 96 AD3d 1190, 1192 [3d Dept 2012] [dismissing

failure to warn claim where defendant established that it provided safety instructions and warnings of danger encountered by plaintiff]).

ii. Negligence and breach of warranty

Although as a retailer, AHS has a duty "to inspect for and to discover such defects as a reasonable physical inspection would disclose" (*Naples v City of New York*, 34 AD2d 577, 578 [2d Dept 1970]), it cannot be held liable in negligence or breach of warranty "for injuries sustained from the contents of a sealed product even though a test might have disclosed a potential danger" (*Porrazzo v Bumble Bee Foods, LLC*, 822 F Supp 2d 406, 422 [SD NY 2011], quoting *Brownstone v Times Square Stage Lighting Co.*, 39 AD2d 892, 892 [1st Dept 1972]). Plaintiff offers no evidence that AHS should have discovered the alleged defects, and in any event, AHS offers unrebutted evidence that it inspects the stoves and that if any damage is found, the stoves are rejected, and that it is unaware of any complaints or other issues with the stoves. Thus, plaintiff fails to demonstrate any merit to her proposed causes of action for negligence and breach of warranty against AHS.

As a distributor, World may be held liable in negligence for the sale of a defective product or for failure to warn "only if it fails to detect a dangerous condition that it could have discovered during the course of a normal inspection while the product was in its possession." (*Pelman v McDonald's Corp.*, 237 F Supp 2d 512, 523 [SD NY 2003]). Plaintiff offers no evidence that World should have detected a defect in the stoves with a normal inspection, and in any event, World's deposition testimony establishes that the stoves were inspected and found to be compliant with industry standards, and that World had no notice of any defect, specifically that it turned on by itself. Thus, plaintiff fails to establish merit to her proposed negligence claim against World. (*See Sideris v. Simon A. Rented Servs., Inc.*, 254 AD2d 408, 409 [2d Dept 1998]

[defendant proved lack of notice with evidence that it inspected product; absent evidence that reasonable inspection did not take place or that defendant otherwise had notice, plaintiff failed to raise issue of fact]).

In contrast to AHS, a retailer that received sealed and packaged stoves, World, as the distributor, was able to inspect the stoves themselves and may be held liable for breach of warranty if the stove is not "fit for the ordinary purposes for which such goods are used." (*Denny v Ford Motor Co.*, 87 NY2d 248, 258 [1995], quoting UCC 2–314[2][c]). While World's expert opines that the stove was safe for its intended purpose, and that any damage to the unit was mechanical, his opinion is unsupported. Moreover, plaintiff demonstrates that her claim for breach of warranty is not completely devoid of merit, as her expert opines that the stove became overheated, damaged, and consequently, hazardous, from normal and ordinary use.

Having served as an expert witness in cases involving products liability and electrical accidents, (NYSCEF 139), plaintiff's expert is qualified to offer expert evidence in this case. That he was retained for the purpose of opposing the summary judgment motions, absent an allegation of prejudice or surprise, is of no moment, and in any event, plaintiff testified about the defect and described it in her bill of particulars before the close of discovery. (*See e.g.*, *Baulieu v Ardsley Assocs., L.P.*, 85 AD3d 554, 555 [1st Dept 2011] [affidavit of previously unidentified expert considered where specifics of claim were disclosed in bill of particulars and deposition testimony]).

While World argues that plaintiff's expert should be precluded from testifying because he conducted destructive testing, it does so in reply to a summary judgment motion made well after the test was conducted. In any event, "spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before

the adversary has an opportunity to inspect them" (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]), and here, not only did World have an opportunity to examine the stove, but plaintiff afforded every party the opportunity to attend the testing, and no party objected or sought court intervention.

Accordingly, plaintiff may advance a cause of action for breach of warranty against World.

iii. Manufacturing defect

A cause of action based on a manufacturing defect addresses whether the product failed "to perform in the intended manner due to some flaw in the fabrication process." (*Denny v Ford Motor Co.*, 87 NY2d 248, 258 [1995]).

Plaintiff offers no support for her proposed manufacturing defect claim, as neither she nor her expert offer evidence that the stove's defects were due to misconstruction, regardless of a defect in design. (*See Pierre-Louis v DeLonghi Am., Inc.*, 66 AD3d 859, 861 [3d Dept 2009], quoting *Caprara v Chrysler Corp.*, 52 NY2d 114, 128 [1981] ["a defectively manufactured product is flawed because it is misconstructed without regard to whether the intended design of the manufacturer was safe or not"]). Moreover, AHS and World submit unrebutted evidence that the stove had passed quality control inspections, was built in compliance with industry standards, was tested to ensure that it could withstand shipping through the drop testing, and was in good condition when plaintiff received it. (*See Ross v Alexander Mitchell & Son, Inc.*, 138 AD3d 1425, 1427 [4th Dept 2016] [dismissing manufacturing defect claim where product was designed according to specification and in compliance with industry standards, and was tested before shipping]).

iv. Design defect

A cause of action for a design defect focuses on whether, if "the design defect were known at the time of manufacture, a reasonable person would conclude" that the product's utility outweighs the risk inherent in marketing a product so designed." (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 108 [1983]).

Plaintiff demonstrates merit to her claim, as her expert opines that the stove was prone to damage from overheating when used normally, that the indicator lights did not show whether the stove was on, and that there were feasible design alternatives.

World's expert evidence that the stove's defects were due to mechanical damage, as opposed to a design flaw, is fatally conclusory. To the extent that World and AHS offer evidence demonstrating that the stove was built in compliance with industry standards, such evidence alone does not preclude a design defect claim. (*See Palmatier v Mr. Heater Corp.*, 159 AD3d 1084, 1086 [3d Dept 2018], quoting *Mercogliano v Sears, Roebuck & Co.*, 303 AD2d 566 [2d Dept 2003] [compliance with industry standards "is merely some evidence of due care and does not preclude a finding of negligence"]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion for summary judgment of defendants/third-party plaintiffs Birdie 141 Broadway Associates, Mason Management Services Corp., Stellar Management Ltd., and Libby Management Services Corp. (mot. seq. four) is granted in its entirety, and plaintiff's causes of action against these defendants are severed and dismissed; it is further

ORDERED, that as no claim remains against defendants/third-party plaintiffs, the third-party complaint is severed and dismissed, and the motions for summary judgment by third-party

defendants (mot. seq. two and three) are denied as moot; it is further

ORDERED, that plaintiff's cross motion to amend is granted to the extent she seeks to advance a cause of action for breach of warranty against World, and causes of action for design defect against World and AHS, and is otherwise denied; it is further

ORDERED, that as the filing of non-emergency applications in non-essential matters is presently prohibited due to the current COVID-19 (coronavirus) crisis, plaintiff is directed to file an amended complaint with notice of entry within 20 days after the court first permits such filings; and it is further

ORDERED, that the parties are directed to email Catherine Paszkowska at cpaszko@nycourts.gov to schedule a virtual settlement conference with the court.

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4/27/2020
DATE

BARBARA JAFFE, J.S.C.

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