

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. EDWARD W. MC CARTY, III

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

JOHN PATERNO and PAULA PATERNO,

Plaintiff(s)

INDEX No.6668/05

-against-

SUB-ZERO FREEZER CO., INC., INVENSYS
CONTROLS, MR. JAY APPLIANCES ANNEX, INC.,
and GREAT NORTHERN INSURANCE COMPANY,

MOTION DATE:11/20/06
MOTION SEQ.#001

Defendant(s)

The following papers read on this motion:

Notice of Motion/Order to Show Cause	X
Cross-Motion	
Answering Affidavit	X
Replying Affidavits	X

Motion by plaintiffs for: (1) an order pursuant to CPLR 3124 and 3126 compelling disclosure from defendant Sub-Zero Freezer Co., Inc. (hereinafter, "Sub-Zero"), or, alternatively, striking Sub-Zero's answer; (2) an order pursuant to CPLR 3025(b) granting plaintiffs leave to amend their complaint; and (3) an order pursuant to CPLR 305(c) amending the caption to remove Great Northern Insurance Company as a defendant herein, is decided as set forth herein.

At the outset, it should be noted that by stipulation so ordered by this Court on November 30, 2006, plaintiffs withdrew the first branch of their motion concerning discovery, leaving only the issues of amending the complaint and amending the caption to be decided by this Court on this motion.

In this product liability action, plaintiffs allege that a water valve manufactured by defendant Invensys Controls (hereinafter, "Invensys") and contained in a

refrigerator/freezer manufactured by defendant Sub-Zero, purchased by plaintiffs from defendant Mr. Jay Appliance Annex, Inc. (hereinafter, "Mr. Jay") experienced a catastrophic failure, causing extensive water damage to plaintiffs' residence.

Plaintiffs' Amended Verified Complaint alleges causes of action against defendants Sub-Zero, Invensys and Mr. Jay for: (1) strict products liability; (2) breach of implied warranties; and (3) negligence. Plaintiffs now seek leave to amend their complaint again to add causes of action against defendants Sub-Zero, Invensys and Mr. Jay for failure to warn and for failure to recall.

Plaintiffs' motion to amend is based upon their contention that defendants failed to warn plaintiffs and other consumers of the susceptibility to "freeze bursting" of the subject water valve, when either the valve itself or its feeder piping is subjected to freezing temperatures. Moreover, plaintiffs contend that defendants failed to recall the subject valve when it began using stronger valves.

CPLR 3025(b) provides that leave to amend pleadings shall be freely given. While leave to amend is to be liberally granted, absent prejudice or surprise resulting from the delay, a proposed amendment that is totally devoid of merit or palpably insufficient as a matter of law should not be granted. (See, *Glaser v County of Orange*, 20 AD3d 506.)

Based upon the documentation submitted by plaintiffs in their motion to amend, it appears that they may have a viable cause of action for failure to warn. No prejudice may be claimed by defendants for plaintiffs' delay in moving for such amendment in that the plaintiffs were not deposed until after this motion was made and defendants were on notice of plaintiffs' desire to amend the complaint to include this cause of action before plaintiffs' depositions were taken.

While plaintiffs' failure to warn claim may be plausible, their proposed failure to recall claim fails to state a cognizable cause of action and will not be allowed.

That branch of plaintiffs' motion which seeks leave to amend their complaint to add a cause of action for failure to warn is granted, so much as seeks leave to amend to add a cause of action for failure to recall is denied.

That branch of plaintiffs' motion which seeks to amend the caption to remove Great Northern Insurance Company as a defendant herein, is granted, without opposition. Plaintiffs have agreed to discontinue their action as against defendant Great Northern Insurance Company, with prejudice, and a stipulation to that effect has been signed by counsel for all parties hereto.

Date 2-21-07

ENTERED

EDWARD W. McCARTY III

J.S.C.

FEB 26 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE