SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 7
NASSAU COUNTY

ROBERT J. GROCCIA and MICHELLE GROCCIA,

Plaintiff(s),

-against-

THE SHOWER DOOR, CENTURY BATHWORKS, INC. and CONSOLIDATED GLASS,

Defendant(s).

ORIGINAL RETURN DATE:02/15/07
SUBMISSION DATE: 03/30/07
INDEX No.: 010308/05

MOTION SEQUENCE #2,3,4

The following papers read on this motion:

Notice of Motion.....	A-B
Order to Show Cause.....	C
Cross-Motion.....	H
Answering Papers.....	D,E,G,I
Reply.....	F,J

The motion and cross-motion by defendants Century Bathworks, Inc. ("Century") and The Shower Door ("TSD"), respectively, for an Order of this Court pursuant to CPLR 3212 awarding them summary judgment dismissing plaintiffs' complaint and any cross-claims is determined in accordance herewith.

Motion, brought by Order to Show Cause by defendant Consolidated Glass ("Consolidated"), for an order pursuant to CPLR 603 and CPLR 1010 severing the action as against it is DENIED.

This case arises out of an incident which occurred at the home of plaintiffs on March 31, 2005. Plaintiff Robert J. Groccia sustained personal injuries when a glass shower door allegedly shattered during ordinary use.

The product was a Century shower door Centec series CT-5, with a silver anodized finish and clear tempered glass, with an inside towel bar and an outside towel bar on opposite doors (*see id* at ¶8). Defendant, Century, however, denies manufacturing or tempering the shower door in question (*see Motion*, Ex. H [Verified Answer to Notice to Admit] ¶1). Plaintiff purchased said

door from defendant TSD located on Merrick Road, Massapequa, New York some time in November 2001 (*Id*). The door was installed in plaintiffs' home by defendant TSD on November 9, 2001 (*Id; see also Aff. In Opp. To Century's Motion*, Ex. 3 [Response to Notice to Admit]).

Plaintiff Robert Groccia testified at his EBT that this accident occurred on March 31, 2005 in the downstairs bathroom of his home. This bathroom was renovated in November 2001. Plaintiff describes the shower in this bathroom as a stall shower with two sliding clear glass doors (*Motion,* Ex. I [Robert Groccia EBT] pp. 16-17). He stated that both he and his wife used this shower every day up until the date of the accident. He also stated that from the time the shower door was installed on November 9, 2001 until the date of the accident, plaintiffs did not have any additional work done to the shower doors. Plaintiff testified that there were no leaks to the door from the time it was installed up until the time of the accident.

The accident occurred after plaintiff Robert Groccia had entered the shower and was in the process of moving the door closed. The shower door had not been completely closed when the glass shattered (*see Plaintiff's Aff. In Opp.*,¶¶2-3). Other than his left hand making contact with the inside towel bar to slide the door toward the closed position, plaintiff denied that any other part of his body made contact with the shower door before the door began to shatter (*Motion*, Ex. I [Robert Groccia EBT], pp. 32-33).

Plaintiff further stated that "[f]rom what I saw, there were very, very small pieces and then there were very large pieces"(*Id.*, p.77). In his affidavit in opposition to defendants' motion for summary judgment dismissal, plaintiff describes being injured by "a big shard of glass from the shower door" (*Aff in Opp.*, ¶4).

At his EBT, defendant Century's plant manager, Mark Smerak, testified that they purchase glass "already tempered, already cut to size, holes already drilled, ready to be used" (*Motion*, Ex. K [Smerak EBT], p. 10). The type of glass used in the Centec Series CT-5 doors sold by Century in 2001 was tempered glass (*Id.*, p. 18). Smerak explained that tempered glass is a safety glass that undergoes a certain heating and cooling process so that ultimately it is caused to break in "very small tiny pieces" (*Id.*, pp. 18-20). Tempering raw glass in Smerak's observations makes the glass stronger (*Id.*, p. 20). Smerak stated that any holes that are drilled into the tempered glass are drilled before the glass undergoes the tempering process (*Id.*, pp. 39-40). Smerak explained that when the glass gets to Century, "nothing's attached to the glass" (*Id.*, p. 58) and other than adding roller clips to the glass, Century ships the "extruded metal" including the towel bars and handles to the installation company in a separate box with the shower doors (*Id.* pp. 58-59).

Century's plant manager, Smerak, also explained at his EBT that in 2000 and 2001, the glass would arrive from suppliers and would be spot-checked to determine whether the tempered glass, when broken, would break into pieces that were too large (*Id.*, pp. 27-30). If a piece of glass was too large when it broke, it would be returned to the manufacturer (*Id.*, p. 31). Interestingly, Smerak also attested at his EBT as follows:

Q: Are you aware of any phenomenon where tempered glass can spontaneously break without any type of direct impact?

A: There is a term called spontaneous breakage that we're aware of. Nobody seems to be sure what it is, just that the glass breaks.
(*Id.*, p. 97).

Plaintiffs commenced this action against defendants TSD and Century on June 23, 2005 (*Motion*, Ex. C). The complaint alleged six causes of action: (1) negligence; (2) breach of express and implied warranties; (3) strict liability; (4) breach of contract; (5) negligent installation; and (6) loss of services. Issue was joined by service of answers by both defendants. Subsequently, this matter was certified as trial ready pursuant to certification order dated September 11, 2006 (*Id.*, Ex. B). Despite the September 11, 2006 certification order, discovery continued and on November 3, 2006 a further deposition of defendant Century took place by its trucking/warehouse manager, John Spazante. Spazante stated under oath that his duties included ordering the already tempered glass. He explained that he would know that the glass is tempered by checking for the manufacturer's logo so that "[i]f there was no logo on the glass, that would mean we would consider it not tempered" (*Spazante EBT*, p. 18). Spazante testified that Consolidated was the manufacturer of the glass for plaintiffs' shower door (*Id.*, p. 22).

As a result of information gleaned at Spazante's deposition, a third-party action was commenced by Century against Consolidated on or about November 8, 2006 (*Consolidated OTSC*, Ex. D). Contemporaneously with the service of a third-party summons and complaint impleading Consolidated, plaintiff moved to serve a supplemental summons and complaint. Said motion was granted by this Court on January 29, 2007 (*Id.*, Ex. F). In the mean time, the Note of Issue was filed on December 5, 2006 (*Motion*, Ex. A) and Consolidated joined issue by service of its answer on or about January 2, 2007 (*Consolidated OTSC*, Ex. E).

By Order to Show Cause dated February 9, 2007, Consolidated moves to sever the action as against it.

CPLR 603 grants the court the discretion to order a severance for convenience or to avoid prejudice (*Duch v. Giacquinto*, 15 AD2d 20 [3rd Dept. 1961]). A severance will not be granted when the convenience of disposing of all the issues involved in the litigation outweighs any possible prejudice to the party seeking the severance (*Klein v. City of Long Beach*, 154 AD2d 346 [2nd Dept. 1989]; *Eugene J. Busher Co. v. Galbreath-Ruffin Realty Co.*, 16 AD2d 750 [1st Dept. 1962]).

Consolidated seeks a severance (1) because "all of the discovery in the main action has already been completed" (*Consolidated Aff.*, ¶11); (2) "in order to protect the rights of the defendant/third party defendant Consolidated Glass" (*Id.*, ¶12); and (3) it will be significantly prejudiced if the severance is not granted.

This is essentially a products liability action involving the seller/installer, distributor and manufacturer of an allegedly defective product which was placed in the stream of commerce and which, ultimately, injured plaintiff. Clearly, these overlapping issues against all of the parties should be tried together for judicial efficiency and to prevent potentially inconsistent outcomes. Accordingly, defendant Consolidated's motion to sever the action as against it is denied.

In the event disclosure surrounding the relatively recent addition of Consolidated as a named defendant has not been completed when this action is called for trial, application may be made to the Justice presiding in the DCM Trial Part to vacate the Note of Issue, thereby addressing any lingering claim of prejudice.

Both defendant Century and defendant TSD seek summary judgment dismissing each of plaintiffs' six denominated causes of action.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing papers (*Id.*; *Alvarez v. Prospect Hosp.*, 68 NY2d 320).

However, once this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve (*Alvarez v. Prospect Hosp.*, *supra*. Mere conclusions and unsubstantiated allegations or assertions are insufficient (*Zuckerman v. City of New York*, 49 NY2d 557, 562; see, *Pomerantz*, *supra)* even if made by an expert (see, *Aghabi v. Sebro*, 256 AD2d 287).

First Cause of Action: Plaintiffs' first cause of action alleges negligence in the design, manufacture, assembly, distribution, sale and installation of the subject shower door.

The testimony of Century's employees establishes prima facie that it was not involved in the manufacture, sale or installation of the subject shower door and that any assembly was minimal. Its involvement in design -- including material, specifications when ordering from its supplier -- is, however, not meaningfully addressed and Century does not provide any expert testimony to establish that the design of the door was reasonable.

Insofar as plaintiffs' expert opines that Century was the likely entity which did the glass tempering (used to strengthen the door), his affidavit is without foundation and speculative. That the samples of tempered glass purchased by plaintiffs' expert were not tempered by the sellers themselves does not establish who in the pre-sale chain of manufacture and distribution did the tempering. In the further face of Century's explicit denial of ever having tempered glass, the fact that Century's name was etched on the glass door is equally indicative of having been manufactured and tempered for Century and not by Century. Consolidated is notably silent in this regard.

Century is accordingly awarded partial summary judgment dismissing the first cause of action against it except to the extent plaintiffs allege negligent design.

Regarding defendant TSD, it is undisputed that it installed the subject shower door. Defendant TSD, however, establishes prima facie evidence that its installation was not a cause of the accident since plaintiffs' own expert identifies the pre-drilled towel bar holes as the source of the door's defect.

Plaintiffs' contention that defendant TSD should nevertheless have discovered the existence of these cracks before installation is both speculative and belied by plaintiffs' expert who discovered the cracks only upon "[c]lose examination of the glass around the drilled holes using a 10 power magnifying lens" (affidavit, at ¶9). The cracks were described as "clam shell shaped ... with up to about .05 inch radius" (*Id.*).

TSD is awarded partial summary judgment dismissing plaintiffs' first cause of action against it.

Second Cause of Action: Plaintiffs' second cause of action alleges breach of both express and implied warranties.

Given the failure of plaintiffs to set forth the terms of any express warranty, dismissal of this claim as against both Century and TSD is warranted (see, *Davis v. New York City Housing Auth.*, 246 AD2d 575).

Plaintiffs' claim of breach of implied warranty, however, survives.

On a claim for breach of implied warranty, privity is not at issue (see, *Heller v. U.S. Suzuki Motors Corp.*, 64 NY2d 407, 411; UCC 2-318. "The [focus is] on the expectations for the performance of the product when used in the customary, usual and reasonably foreseeable manners. The cause of action is one involving true 'strict' liability, since recovery may be had upon a showing that the product was not minimally safe for its expected purposes -- without regard to the feasibility of alternative designs or the manufacturer's 'reasonableness' in marketing it in that unsafe condition" (*Denny v. Ford Motor Company*, 87 NY2d 248, 258-259; see PJI 2:142).

Without regard to the sufficiency of plaintiffs' opposition papers, the alleged shattering of the shower door for no apparent reason (compare, *Broderick v. Albany International Corp.*, 297 AD2d 693), after only 3-1/2 years of normal use involving a large shard of glass despite tempering fails to constitute prima facie evidence that the glass shower door was fit for its ordinary purposes. Consideration of the affidavit in opposition of plaintiffs' expert merely underscores the need for a trial.

Third Cause of Action: Summary judgment dismissing plaintiff's third cause of action for strict products liability is denied.

A cause of action for strict products liability is only "subtly different" from that of breach implied warranty (*Denny v. Ford Motor Co.*, *supra*, at p.255) and movants again fail to demonstrate their prima facie entitlement to dismissal of this cause of action.

Fourth Cause of Action: In the absence of evidence of a contract provision with relevance to how this accident is alleged to have occurred, and of privity with defendant Century, plaintiffs' fourth Cause of action for breach of contract is dismissed.

Fifth Cause of Action: This court has already dismissed that portion of plaintiffs' first cause of action insofar as plaintiffs claim negligent installation by Century and TSD. As plaintiffs' fifth cause of action essentially re-states this claim, it is again dismissed.

Sixth Cause of Action: Plaintiffs' sixth cause of action is a claim by plaintiff Michelle Groccia for loss of services. As at least one of her spouse's claims survive, so too does the derivative claim.

This decision constitutes the order of the court.

Dated: 5-7-07

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J.S.C.

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