

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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KATRINA WILLIAMS, Index No.: 705934/2016
Plaintiff, Motion Date: 12/6/18
- against - Motion Seqs.: 11, 12, 13

MADVAPES HOLDINGS, LLC, VAPE EASY, and
LG CHEM, LTD.,
Defendant.

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The following numbered papers read on these three separate motions by defendants Madvapes Holdings, LLC, (Madvapes), Vape Easy, (Vape), and LG Chem Ltd., (LG), each for summary judgment dismissing the plaintiff's complaint, and all cross claims against them, and by Madvapes seeking conditional summary judgment for common law indemnification as against codefendant LG, and by Vape seeking conditional summary judgment for common law indemnification as against both codefendants LG and Madvapes.

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	EF 280-293; 294-304; 306-317
Answering Affidavits-Exhibits.....	EF 359-368; 369-380; 381-397; 398-404; 407-410;411-422;429
Reply Affidavits.....	EF 423-425; 426-428; 430-433

Upon the foregoing papers it is ordered that these motions are determined as follows:

This is an action to recover for personal injuries allegedly sustained by the plaintiff Katrina Williams (Williams), when a lithium-ion battery, sold to her by retailer codefendant Vape, exploded in her pants pocket. Vape obtained the battery, manufactured by defendant LG, from the distributor codefendant Madvapes.

Generally, strict liability may be imposed on retailers, distributors and manufacturers who act to place the defective product in the stream of commerce regardless of privity, foreseeability or due care. (See *Finerty v Abex Corp.*, 27 NY3d 236 [2016].) There are three distinct claims for strict products liability, a mistake in manufacturing, an improper design, or an inadequate or absent warning for the use of the product. (See *Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859 [2d Dept 2009].) A manufacturer is under a duty to use reasonable care in designing its product when used in the manner intended as well as unintended but yet reasonably foreseeable. (See *Robinson v Reed - Prentice Div. of Package Mach. Co.*, 49 NY2d 471 [1980].) A manufacturer also has a duty to warn against latent dangers resulting from reasonably foreseeable uses of its product, whether intended or not. (See *Liriano v Hobart Corp.*, 92 NY2d 232 [1998].) Liability may be premised upon the complete absence of warnings as to a particular hazard or upon the inclusion of warnings that are insufficient. (See *Robinson*, 49 NY2d 471.) In the event a third party has made substantial alterations to the product rendering it defective or unsafe so as to be the sole proximate cause of plaintiff's injuries, the manufacturer will not be held liable. (See *Liriano*, 92 NY2d 232.) A failure to provide necessary warnings gives rise to liability not only against the manufacturer, but against the distributor and retailer as well. (See *Reece v J.D. Posillico, Inc.*, 164 AD3d 1285 [2d Dept 2018].) In a products liability matter, a party who is only vicariously liable by operation of law and not by any act of negligence is entitled to common law indemnity from an upstream distributor or manufacturer. (See *Godoy v Abamaster of Miami, Inc.*, 302 AD2d 57 [2d Dept 2003].) However, a manufacturer will not be held liable if the product is found to have no defect if used in the manner it was intended, or that was reasonably foreseeable. (See *Robinson*, 49 NY2d 471.) To be entitled to common law indemnification, a party must show that it was not responsible for its own culpable conduct, but merely vicariously liable without proof of any negligence on its own part. (See *McCarthy Turner Const., Inc.*, 17 NY3d 369 [2011].)

In support of its motion, the defendant Madvapes submitted, among other things, the pleadings, its attorney's affidavit, a copy of the plaintiff's deposition, a copy of the transcript of the videoconferenced deposition of Joon Young Shin a/k/a Alex Shin, (Shin), team leader in LG's quality department, copies of the deposition and separate affidavit of Mark Hoogendoorn, (Hoogendoorn), chief technical officer of Madvapes and a copy of the deposition of Peter Nguyen, (Nguyen), president of Vape. In addition to these submissions, in support of its own motion, LG submits, inter alia, post accident documents showing how it now requires written acknowledgment from its distributors that the

batteries are not intended for personal use. Vape submitted the pleadings, its attorney's affirmation, and the same aforesaid depositions.

In her deposition, the plaintiff stated that she purchased the battery from Vape, for use in her vape unit. At the time of the incident, the subject batteries were in her pocket because she intended to have them recharged. Nguyen contends that he sold the batteries in the same unopened packaging received from Madvapes. The batteries were individually boxed. Madvapes' witness Hoogendoorn states in his deposition that Madvapes obtained the batteries from nonparty E-fest, an upstream distributor for LG, and that the batteries were packaged in boxes of 50, consisting of 25 smaller boxes with two individually wrapped batteries in each box. Although he describes some research performed by other employees for Madvest, including himself, his description of this research is sparse in detail, and he ultimately asserts that Madvapes relied primarily upon nonparty E-Fest's recommendations regarding which batteries to purchase. After receiving the batteries from E-Fest, Madvapes unpacked the batteries, stamped a barcode on each unopened individual box, repacked, shipped and sold them as lots of individual batteries. He claims to be unaware that the batteries were solely intended for use in power tools. Hoogendoorn further acknowledged that he was aware of a few alleged instances of battery malfunctions and of resultant lawsuits since 2015, particularly involving his own company.

As a distributor of the battery, Madvapes is subject to strict liability to the plaintiff, in that it is undisputed that it put the batteries into the stream of commerce, and accordingly liability attaches regardless of privity, foreseeability or the exercise of due care. (*See Silver v Sportsstuff, Inc.*, 130 AD3d 907 [2d Dept 2015].) Usually, the distributor of the product can seek indemnification from the manufacturer. (*See Godoy*, 302 AD2d 57.) In the event it is found that there is a defect or design flaw, such may be the case. (*Id.*) However, here, amid allegations that Madvapes used the product in a manner unintended and unauthorized by the manufacturer, the evidence submitted by Madvapes does not sufficiently resolve all issues of fact such as, whether Madvapes knew or should have known that the batteries were not manufactured for use in vape units, whether it conducted proper due diligence as to suitability of these batteries for the purposes for which they were intended, and whether it had an obligation to provide appropriate warnings as to their use. (*See McCarthy*, 17 NY3d 369; *Nagel v Brothers Intern. Food, Inc.*, 34 AD3d 545 [2d Dept 2006], and are questions to be decided by the trier of facts. (*See Derderian v Felix Contr. Corp.*, 51 NY2d 308 [1980].)

On its motion, LG has taken the position that the batteries were not intended for personal use, and only for use in power tools. According to Shin's testimony, there were no warnings printed on the batteries or on the boxes in which the batteries were shipped, nor were any separate warnings packed with the batteries. LG's expert witness opined that the battery malfunction was caused by bridging the positive and negative contacts simultaneously, however he did not address the danger or likelihood of a malfunction when the battery is transported in an individual's pocket. Also unresolved is how handling the battery for power tool use differs from personal use when preparing the battery for recharging. (See *Robinson*, 49 NY2d 471 .) Under these circumstances, the determination as to whether any warnings were necessary or sufficient to alert the product user to potential hazards, is one for the jury to decide. (See *Magadan v Interlake Packaging Corp.*, 45 AD3d 650 [2d Dept 2007]; *Johnson v Johnson Chemical Co. Inc.*, 183 AD2d 64 [2d Dept 1992].) In addition, even if the product had been used in a manner unintended by the manufacturer, whether such use was reasonably foreseeable is also a question for the jury. (*Magadan*, 45 AD3d 650; *Liriano*, 92 NY2d 232.)

Since neither codefendants Madvapes or LG have resolved all triable issues regarding their own culpability, their motions for summary judgment are denied in all respects. (See *McCarthy*, 17 NY3d 369.)

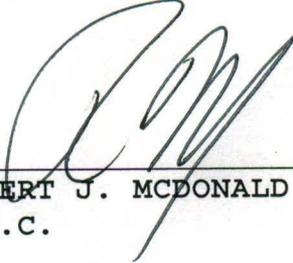
The evidence submitted by the retailer, Vape, demonstrates that the product was sold as it was received; it did not alter, or use the product in any other manner than anticipated when purchasing the batteries from codefendant distributor Madvapes, for purposes of resale to consumers. (See *Lowe v Dollar Tree Stores, Inc.*, 40 AD3d 264 [2d Dept 2007].) Although the issue between and among the codefendants Madvapes and LG as to whether the use was reasonably foreseeable, whether the battery was defective or had a design flaw, and whether one or both of the codefendants were liable, it is clear that Vape is entitled to common law indemnification from the upstream distributor, or the manufacturer, or both. (See *Silver*, 130 AD3d 907; *Lowe*, 40 AD3d 264.) Having met its prima facie burden, the codefendants fail to raise triable issues of fact. (See *Zuckerman v City of New York*, 49 NY2d 557 [1980].)

Accordingly, the motion for summary judgment by Madvapes (seq. no. 11) seeking to dismiss plaintiff's complaint and granting common law indemnification against the manufacturer LG is denied.

The branch of the motion by Vape (**seq. no. 12**) seeking dismissal of plaintiff's complaint is denied, however, that part of its motion seeking conditional summary judgment on its cross claims for common law indemnification against Madvapes and LG is granted dependent upon whether the plaintiff can prevail on her claims against Vape.

The motion for summary judgment by LG (**seq. no. 13**) seeking to dismiss plaintiff's complaint is denied.

Dated: April 5, 2019
Long Island City, N.Y.



ROBERT J. MCDONALD
J.S.C.