Harleysville Preferred Ins. Co. v Children's Palace Childcare Ctr., Inc.
2023 NY Slip Op 34750(U)
December 15, 2023
Supreme Court, Monroe County
Docket Number: Index No. E2019005067
Judge: Christopher S. Ciaccio
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HARLEYSVILLE WORCESTER INSURANCE COMPANY
GWP LLC
GATEWAY PLAZA

CHILDRENS PALACE CHILDCARE CENTER INC
DELL INC
DELL COMPUTERS INC

Total Fees Paid: $0.00

Employee: CW

State of New York

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SUPREME COURT
STATE OF NEW YORK MONROE COUNTY

HARLEYSVILLE PREFERRED INSURANCE COMPANY, and HARLEYSVILLE WORCESTER INSURANCE COMPANY, as subrogee of G.W.P. LLC, d/b/a GATEWAY PLAZA,

Plaintiffs,

-vs-

CHILDREN'S PALACE CHILDCARE CENTER, INC., DELL, INC., and DELL, INC. d/b/a DELL COMPUTERS, INC.,

Defendants.

DECISION
(Motion Nos. 5 and 6)

Index No. E2019005067

Appearances

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Hon. Christopher S. Ciaccio, A.J.S.C.

Plaintiffs Harleysville Preferred Insurance Company, and Harleysville Worcester Insurance Company ("Harleysville") insured G.W.P. LLC, d/b/a/ Gateway Plaza, the owner of a commercial property that was damaged in a fire.

Having paid the damages sustained by its insured and been subrogated to its claim, Harleysville brought an action sounding in strict product liability and negligence against Defendants Dell Inc. and Dell Inc. d/b/a Dell Computers, Inc. ("Dell"), claiming that the fire was caused by a defective power cord that Dell manufactured and/or shipped and which was used by the Children's Palace Childcare Center, Inc. ("Children's Palace"), a tenant at the Gateway Plaza. Harleysville also claims that Dell breached its warranty of express and/or implied merchantability.

In the same action Harleysville also sued the Children's Palace, claiming that it was "negligent, reckless and/or otherwise failed to use due care in the course of its use, care, maintenance, tenancy, and occupancy of the leased premises, among other things, failing to take appropriate precautions to prevent a fire from originating therein."

Dell and the Children's Palace now each move separately for summary judgment. Dell argues that it did not manufacture, sell or ship the power cord. Additionally, it argues that the power cord did not cause the fire. Children's Palace argues it had no notice or any reason to know of any defective condition on its property that could have caused or contributed to a fire.

For the reasons below, because the defendants have each established their entitlement to judgment as a matter of law, and Harleysville failed to come forward with admissible proof sufficient to create a material issue of fact, the motion of Dell for summary judgment is **GRANTED** and the action against it is **DISMISSED.** The motion of Children's Palace is likewise **GRANTED** and the action against it is **DISMISSED.**

FACTS

The following facts are not disputed.

On June 2, 2016, a fire broke out at a commercial plaza located at 2338-2360 Lyell Avenue in the Town of Gates, County of Monroe. The Gates Fire Department "fire command" reported that the fire was found to be inside the location occupied by the Children's Palace. An investigator from the Rochester Fire Department assisting with the investigation gave the opinion that the fire originated in the area of an alcove within a room of the Children's Palace, but he was unable to determine if the "fire originated below the ceiling level or above it."

According to his deposition testimony, Amos McCullough ("Amos"), the owner of Children's Palace, had purchased in 2013 two Dell personal computers from an Office Max store. The computers each came in a box and each box contained a power cord.

Amos stated that he could not recall whether the boxes in which the computers and power cords came had any markings on them let alone the name "Dell," although he did recall that each box was "sealed." No testimony was given regarding how the boxes were sealed. He never looked at an instruction manual. He did not know who put the computer components in the boxes:

Q: So as far as you were concerned, were you buying a computer that was packaged by Dell and sent to Office Max and sold directly to you?

A: I don't know who packaged up the computers. I just know I bought it from Office Max. It was in the box.

Deposition transcript of Amos McCullough, P. 114, L. 15-21.

He had no training or background in electronics let alone electrical engineering. He plugged each power cord into separate "power strips" also known as a "Relocatable Power Tap" (or RPT). The power strips (two) were then plugged into an electrical outlet located on a wall directly behind the table on which the computers were located.

The area where the power cords were located was not subject to foot traffic. The cords ran under a desk. At no time from the date of purchase until the date of the fire did Amos ever notice a problem with either power cord, such as fraying, sparks, damage, tattering, etc. The power cords always performed and never caused a breaker switch to trip. They remained under the table from the date of installation, untouched. He was not aware of any dangerous condition.

There was an "electrical room" near the premises of the Children's Palace but not on them. The landlord was responsible for maintaining the electrical room. Amos noticed people coming in and out of the room, but as far as he knew it was always locked, he did not have access to it, and the room was not accessible from his premises except by exiting. He never went into the electrical room, but when he looked into it, he saw a "maze" of wiring, which to him meant that "I don't know how one knew where one wire was coming from. It was just a cluster of wires."

It is undisputed that the plug of the power cord and the strands of wire connecting the plug to the terminal. were composed of sub-standard materials that did not meet the standards of the "Underwriters Laboratory." Any identifying stickers or registration numbers were burned off.

Expert submissions

In support of its motion and on the issue of whether it manufactured the power cord in question, Dell submitted affidavits of two witnesses previously disclosed as part of CPLR 3101(d)(1) expert disclosure[1].

Jay Voigt averred that he has been a "product safety investigator" with Dell since 2020, and that he was a "regulatory product engineer" with Dell from 1998 through 2020. Over the course of his career, he has been familiar with Dell products, including power cord sets and plugs, and he can state that the power cords in question, the ones purchased by Amos and that came in the box with the Dell computers, were not sold or manufactured by Dell.

In arriving at his conclusion, he reviewed Harleysville's CPLR 3101(d)(1) expert disclosure which included summaries of the anticipated testimony of Lee Tutt, a "forensic materials scientist," and of Howard DeMatties, a "forensic electrical engineer." Mr. Voight assumed the accuracy of the observations they each made of the power cords and other devices in the area where the fire had occurred. He noted that each expert had concluded that the plug of each power cord was made of an inferior substance – nickel coated aluminum – and that each power cord utilized undersized wires. These features, Mr. Voight concluded, mean (to summarize his conclusions) that the cords were not compliant with the applicable material and performance requirements established by the Underwriters Laboratories ("UL") and thus could not have been manufactured, shipped or sold by Dell, which to his knowledge and experience only used power cords complaint with UL standards. As he stated:

"I have never seen any power cord sold or supplied by Dell that had either sub-18AWG conductors or aluminum plug blades. Such power cords are not (and have never been) sold or supplied by Dell. Dell's suppliers of power cords do not (and have never) supplied power cords with either of those characteristics to Dell. Dell's suppliers are contractually bound to supply

[1] Children's Palace submitted Harleysville's CPLR 3101(d)(1) expert disclosure responses. Those are not discussed here, as they are inadmissible.

power cords that meet the UL and Dell requirements (and therefore they do not and have not supplied power cords of the type allegedly at issue in this case).

A second Dell employee, Shawn Dempsey, averred that he has been employed by Dell for thirty years, and most recently, is currently a product safety investigator. He is "knowledgeable about Dell's products and [is] able to identify a damaged Dell product by comparing its physical characteristics to an exemplar of the same product model and/or by comparing a product's documentation (diagrams, blueprints, product manuals, visual guides) to the damaged product."

He is also "familiar with the certification requirements that each Dell product must fulfill before it can be sold. For instance, in the United States, all Dell products must satisfy Underwriter's Laboratories' ("UL") product safety standards, before they can be sold."

He described the various ways Dell tracks the purchase of Dell products: product codes on damaged equipment, purchaser address or telephone numbers, etc. No Dell products could be traced to Children's Palace.

He attended a scene inspection on July 27, 2016; however, he was told that all evidence of computer and monitor remains had been removed.

He was present for an examination of the evidence on Friday March 10, 2017, along with Dell's counsel and Dell-retained electrical engineer, Rich Vicars.

Based on his observations of the computers and monitors, Mr. Dempsey "was able to determine that the two computers were both Dell OptiPlex 760 desktop computers, as the physical characteristics (location of air vents, connectors, expansion card slots, etc.) aligned with that model." Further, he stated that "OptiPlex 760 model desktop computers were shipped by Dell during the 2008-2010 timeframe," meaning that if Amos purchased the computers in 2013, then the "computers had been out of Dell's possession for at least approximately 3 years and up

to 5 years." Also, he stated that during the time that Dell was shipping Optiplex computers, it only supplied power cords with 18AWG conductors and plug blades containing copper material. Dell to his knowledge never used a power cord with sub-18AWG or with aluminum blades. "Dell only supplies power cords with 18AWG conductors and with plug blades containing copper material (including during the time that Dell shipped the OptiPlex 760 model computer)."

On the issue of whether the power cord caused the fire, Dell submitted the affidavit of Rich Vicars, a "certified fire and explosion investigator for Jensen Hughes" with 33 years of experience in "failure analysis, systems engineering and design, manufacturing and operations," and currently serves as the Director of Forensic Sciences for Jensen Hughes. In that capacity he leads a "fire investigation and failure analysis team for its Global Operations Division. He has a Bachelor of Science degree in electrical engineering from Purdue University.

He attended multiple examinations of evidence.

Drawing on his observations of the evidence and damaged materials taken from the Children's Palace; security video footage, the number of nearby possible (and not ruled-out) ignition sources such as a printer, the lack of "continuous connection between any of the electrical devices, including the Dell desktop computers, and any position on the RPT," including position # 6, thus making any conclusion that the power cord at issue was plugged into position #6 speculative; the non-existence of power cord strands at position #5 and #6 of the RPT "that would permit reliable analysis"; and the displacement of much of the material from the fire scene before it could be examined; he states that "The correct classification of the cause of this fire loss is 'undetermined' under the required fire science methodology." Further, he avers that "There is no evidence that the power cord referenced by Plaintiff's experts more likely than not

caused the fire," and that "There is not evidence that any Dell product more likely than not caused the fire at issue."

In opposition to Dell's motion and Childcare Palace's motion, Harleysville submitted the (unsworn) reports of two experts.[2]

Lee Tutt, a "forensic material scientist at Forensic and Failure Analysis, Inc," has a doctorate in inorganic chemistry and works primarily doing investigations into "product failures."

Tutt's report relates that the power cords were "severely underrated and used a poor alloy comprising the conductors for the intended use. The nickel coated aluminum is also a poor choice for the plug terminals, as the potential for galvanic corrosion and degradation is high." The report includes photographs of the damaged power cord.

Harleysville also submitted the expert report of Howard DeMatties, a "forensic electrical engineer." Upon review of the available evidence, which included multiple site and laboratory examinations of the debris and materials recovered from the site, he concluded that the fire originated in an alcove of the Children's Palace where the computers were located. Also, he opined that the power cord plugged into the #6 outlet of an RPT had sustained an "electrical failure." He noted that "Based on the reports and materials found in the debris, the area under the table where the RPT was located was full of paper products and holiday decorations, some of which were contained in cardboard boxes and plastic totes. These light combustible materials are competent ignition sources for an arc fault at the plugset."

He noted additionally that there was improper wiring throughout the premises maintained by Children's Palace. The outlet (or "receptacle") into which the RPT strips were plugged was

[2] Harleysville also submitted its (inadmissible and thus not considered) expert disclosure responses.

"improperly wired … with evidence of a bad connection and resistive heating." The circuit breaker or fuse for the outlet should have used a "15 amp breaker" given the size of the wires, not a "30 amp breaker." A plug for a power strip in the ceiling, used to power a ceiling mounted TV, had been cut and the power strip's wire spliced directly into an open junction box in the ceiling.

ANALYSIS

It is well settled that "[t]he proponent on a summary judgment motion bears the initial burden of establishing entitlement to judgment as a matter of law by submitting evidence sufficient to eliminate any material issues of fact" (*Oddo v City of Buffalo*, 159 AD3d 1519, 1520 [4th Dept 2018]; *see Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992]; *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980].)

"Once [that] showing has been made ..., the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Kwitek v Seier*, 105 AD3d 1419, 1421-22 [4th Dept 2013] [internal quotations and citations omitted]; *see also Bulluck v Fields*, 132 AD3d 1382, 1382 [4th Dept 2015]).

Dell's summary judgment motion

"In the case of a defendant who denies having manufactured an allegedly defective product, the burden is met when the defendant supports its summary judgment motion with affirmative evidence that it did not manufacture the product that caused the injury" (*Antonucci v Emeco Indus.*, 223 AD2d 913, 914 [3d Dept 1996], citing *Kessler v Joe Hornstein, Inc.,* 207 AD2d 278 [1st Dept 1994]; *Whelan v GTE Sylvania,* 182 AD2d 446 [1st Dept 1992]).

Here, Dell has met its initial burden with regard to the issue of whether it manufactured, sold and/or shipped the power cord.

The affidavits of the Dell employees, both of whom had worked for Dell for years, constitute "affirmative evidence" (*Antonucci* at 914) that it did not manufacture the power cord (*see generally Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992]; *Bevens v Tarrant Mfg. Co., Inc.*, 48 AD3d 939 [3d Dept 2008]; *Kessler v Joe Hornstein, Inc.*, 207 AD2d 278 [1st Dept 1994]).

The power cords had characteristics that neither employee had ever known to be associated with power cords supplied Dell for its computers. In forming that opinion, Dell employee Dempsey compared the product's physical characteristics "to an exemplar of the same product model and/or by comparing a product's documentation (diagrams, blueprints, product manuals, visual guides) to the damaged product," thus distinguishing this case from *Ebeneezer Baptist Church v. Little Giant Manufacturing Co., Inc.*, 28 A.D.3d 1173 (4th Dept. 2006), cited by Harleysville.

There a defective heater had caused a fire in the Ebenezer Baptist Church which then sued Little Giant Mfg. Co., Inc., the distributor and manufacturer of the heater. The Appellate Division, Fourth Department, affirmed the trial court which had held that the manufacturer did not establish as a matter of law that it was not the manufacturer or supplier of the heater, even though Little Giant Mfg. Co. had submitted evidence that "the heater at issue had a metal control housing unit and that it did not sell heaters with such units" (*Ebenezer Baptist Church v Little Giant Mfg. Co., Inc.*, 28 AD3d 1173, 1174 [4th Dept 2006]).

That evidence, it was held, lacked a factual foundation and was conclusory. In attempting to establish that it did not manufacture or sell the heater in question, Little Giant

submitted affidavits of two employees, apparently not its own but of its supplier and co-defendant "Superior Fiberglass, Inc." Their affidavits, noted the court, did not set forth the records they had examined in making their determination, thus the affidavits were deemed "conclusory." Little Giant also submitted evidence that it had bought heaters from Superior Fiberglass, Inc., who in turn had bought "all" its heaters from Little Giant (*Ebenezer Baptist Church v. Little Giant Mfg. Co., Inc.*, 28 A.D.3d 1173 [4th Dept. 2006]), thus creating doubt as to whether it had at some point distributed the defective heater.

Here, the affidavits are from Dell employees, not of a co-defendant or supplier, who referenced Dell's internal documents to compare the power cords to Dell-manufactured products, and whose knowledge of the characteristics of Dell power cords stretches back years.

Harleysville cited, but did not discuss, *Antonucci v Emeco Indus., Inc.* (223 AD2d 913, 914 [3d Dept 1996]), but that case that is distinguishable as well. There the plaintiff was unable to identify the manufacturer and/or the model number of the chair that caused his injury, and defendant moved for summary judgment. Supreme Court denied the motion and the Appellate Division affirmed, finding that "(D)efendant submitted no *affirmative* (emphasis added) evidence that it did not manufacture the chair that caused plaintiff's injury" (*Antonucci v Emeco Indus.*, 223 AD2d 913, 914 [3d Dept 1996]).

Here, as noted above, substantial "affirmative" evidence exists. Unlike in *Antonucci,* a Dell employee and a Dell expert inspected the damaged equipment and made their observations part of their submissions[3].

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[3] In another Fourth Department case, *Universal Resources Holdings, Inc. v N. Penn Pipe & Supply, Inc.* (129 AD3d 1671 [4th Dept 2015]) it was held that the defendant had not established sufficiently that it did not manufacture the defective pipe which injured the plaintiff, finding defendant had not produced "affirmative evidence" (*Universal Resources Holdings* at 1671). The court, however, chose not to recite the factual submissions, so the case provides little guidance as to what it will deem "affirmative evidence" other than to state a generalized rule of law.

More nearly on point, on the very fact-specific issue of the identity of the manufacturer of a defective product, are *Whelan v GTE Sylvania*, 182 AD2d 446, 449 (1st Dept 1992) (holding that the affidavit of expert that a light bulb which exploded and injured the plaintiff's son overcame as a matter of law the "bald assertion" by the father that he bought a GTE Sylvania light bulb); *Bevens v Tarrant Mfg. Co., Inc.*, 48 AD3d 939 (3d Dept 2008) (granting summary judgment where an expert affidavit stated that a defective wire that caused injury was not manufactured by the defendant); *Kessler v Joe Hornstein, Inc.* 207 AD2d (278 1st Dept 1994) (holding that the presence of a nearby box with the defendant's name on it not enough to overcome expert testimony that the movie projector bulb which exploded and caused injury was not manufactured by the defendant).

Harleysville also claims that Dell's contention that it did not design, manufacture, sell or otherwise provide the defective cord is "conclusory," because its product safety investigator "provides no actual explanation or theory as to how, when or why the cord it contends it would have supplied with its computer and monitor products was replaced with the admittedly inadequate and improper cord."

Harleysville is mistaken for two reasons. One is simply that Dell's evidence as detailed in the expert submissions are not conclusory at all. The cases affirming summary judgment and cited above detail similar fact patterns and submissions.

Two, in requiring an "actual explanation" of how a non-Dell power cord got into a box with Dell computers, Harleysville seeks to place the burden on Dell to "prove a negative" (*Martinez v Hunts Point Coop. Mkt., Inc.*, 79 AD3d 569, 570, [1st Dept 2010]) that the packaging of the Dell computer from the factory was tampered with or re-sold. Dell does not have the burden on that issue, and "our jurisprudence does not require a defendant [moving

for summary judgment] to prove a negative on an issue as to which [it] does not bear the burden of proof" (*Martinez v Hunts Point Coop. Mkt., Inc.*, 79 AD3d 569, 570 [1st Dept 2010] (internal quotations and citations omitted).

Dell having met demonstrated it entitlement to judgment as a matter of law, the burden shifts to Harleysville to show by admissible evidence a material issue of fact.

Harleysville attempts to do so by arguing that 1) the defective power cord came in "sealed packaging" with a Dell computer; 2) that Amos purchased the Dell components "new" from Office Max.

Neither argument creates a material issue of fact.

Harleysville (or counsel) misrepresents the facts. Amos McCullough never said the computer components were "new," a characterization which suggests there is evidence that the components came straight from the Dell factory.

He never used the phrase "sealed packaging." He testified simply that the box was sealed (NYSCEF Doc. No. 108, Tr. p. 114: "And was the box sealed? A. Yes."). He did not say how it was sealed or whether he could tell from the way it was sealed that it had never been opened. Also, the defective power cord was not "packaged" with a Dell computer. The plain meaning of something having been "packaged" is that the components are put into a box at the same time. No testimony or evidence attests to that.

At best Harleysville can argue that circumstantial evidence exists to allow the inference that Dell manufactured the power cords (*see e.g. Ebenezer Baptist Church v Little Giant Mfg. Co., Inc.*, 28 AD3d 1173, 1174 [4th Dept 2006]: "The identity of the manufacturer or supplier may be established by circumstantial evidence…"; *Otis v Bausch & Lomb*, 143 AD2d 649, 650 [2d Dept 1988] ["… the identity of the manufacturer of the product are issues of fact capable of

proof by circumstantial evidence] [citing *Coley v Michelin Tire Corp.*, 99 AD2d 795 [2d Dept 1984]; *Yager v Arlen Realty & Dev. Corp.*, 95 AD2d 853 [2d Dept 1983]; Weinberger, NY Products Liability § 8:05).

Here, however, the alleged circumstantial evidence is too "speculative" and "remote" (*Deal v Wood*, 48 AD3d 1093, 1094 [4th Dept 2008]) to defeat summary judgment, even when the "[t]he totality of the evidence (is) viewed in a light most favorable to the nonmoving party" and is given "the benefit of every reasonable inference" (*Kennedy v Atlas Fence, Inc.*, 90 AD3d 1122, 1123 [3d Dept 2011], citing *Gadani v. Dormitory Auth. of State of N.Y.*, 43 AD3d 1218, 1219 [3d Dept 2007]).

In that regard it has been held that "Speculative or conjectural evidence of the manufacturer's identity is not enough (*Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596, 602 [1996]), and that there must exist a "reasonable probability" that a defendant manufactured the product that caused the plaintiff's accident (*Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596, 602 [1996]; *see also Ebenezer Baptist Church v Little Giant Mfg. Co., Inc.*, 28 AD3d 1173, 1174 [4th Dept 2006]).

Harleysville can only show that a power cord was in a box with a Dell computer system sold by a third-party seller. But this alone does not constitute "a reasonable probability" of the existence of a fact, circumstantial or otherwise, and in making that judgment, common sense, or at least common experience, must be considered. No case law needs to be cited to say that most people have an experience of returning items to a store, especially electronic equipment, often having discarded the original boxes (but still looking for the refund), and of purchasing new equipment in a box that has tape with which it has been re-sealed. Most people also have the

experience of swapping out power cords with newer, and perhaps unknowingly, sub-standard power cords.

If Harleysville had presented proof that the computers had been recently manufactured and shipped, say, within even the prior year; if the computers had been bought directly from Dell; if the box had Dell markings; if the "seal" on the box were hermetic in some way, such that the box could not be "re-sealed," thus confirming that the computers hadn't been returned and re-packaged by Office Max; if the components inside the box, including the power cords, were "sealed," as they often are in plastic wrap, suggesting that they were "packaged" together by Dell; then it could be said that sufficient circumstantial evidence exists to deny summary judgment and justify a trial on the issue of whether Dell manufactured the power cord. But none of those circumstances are present here.

Thus, it is explicitly held here that any inference that Dell manufactured the power cords in question based on the power cords having been in the same box as the Dell computers is speculative, not reasonably probable, and cannot defeat the motion for summary judgment.

This case can be distinguished from *Clark v Globe Bus. Furniture Inc.*, 237 AD2d 846, 847 [3d Dept 1997], in which the Third Department upheld the lower court's denial of summary judgment, holding that "gaps in its adversary's case does not entitle the moving party to summary judgment" (citing *Antonucci v. Emeco Indus.*, 223 AD2d 913, 914) and noting that "the identity of [a] manufacturer . . . may be proven circumstantially" (citing *Healey v Firestone Tire & Rubber Co.*, 87 NY 2d 596, 601; *Otis v Bausch & Lomb,* 143 AD2d 649, 650). The court referred to the fact that a photocopy was produced of a sticker bearing the defendant's logo that had been allegedly removed from the bottom of the chair, from which it found there was sufficient

circumstantial evidence to defeat the defendant's claim that it never manufactured a chair with a certain model number (*Clark v Globe Bus. Furniture Inc.*, 237 AD2d 846, 847 [3d Dept 1997]).

Here there was no sticker or registration code was on the power cords (it burned off), and nothing else to allow the inference that Dell manufactured the power cord.

Thus, Dell is entitled to summary judgment as a matter of law on the issue of whether it manufactured or shipped the power cord in question.

Dell also argues in support of its motion that it did not cause the fire because, as set forth by its expert, the cause of the fire is "undetermined," and Harleysville has come forward with no proof (in its expert disclosure) that the power cord in question caused the accident. The issue is moot, in light of the holding above that Dell did not manufacture the power cord claimed to have been the cause of the fire. Nonetheless, Dell has established its entitlement to judgment on this issue as well. A defendant meets his burden by submitting evidence that the cause of a fire is "undetermined" (*New York Mut. Underwriters v King*, 85 AD3d 1645, 1646 [4th Dept 2011]; *Cataract Metal Finishing, Inc. v City of Niagara Falls*, 31 AD3d 1129, 1130 [4th Dept 2006]).

In response, Harleysville submitted unsworn expert reports which are inadmissible, and insufficient to create a material issue of fact (*Austin v CDGA Natl. Bank Trust & Canandaigua Natl. Corp.*, 114 AD3d 1298, 1300 [4th Dept 2014]; *Stowell v Safee*, 251 AD2d 1026, 1026 [4th Dept 1998]).

Dell would be entitled to judgment on the causation issue as well.

Conclusion

As Dell has established as a matter of law that it did not manufacture the power cord, the breach of warranty claims are also dismissed.

The motion for summary judgment is **GRANTED** and the complaint against Dell is **DISMISSED** in its entirety.

Children's Palace's summary judgment motion

In regard to premises liability, "one who both occupies and controls the property, has a common-law duty to keep the premises it occupies in a reasonably safe condition, even when the landlord has explicitly agreed in the lease to maintain the premises" (*Parslow v Leake*, 117 AD3d 55, 61 [4th Dept 2014]; *see also Reimold v Walden Terrace, Inc.*, 85 AD3d 1144, 1145 [internal quotations and citation omitted] ; *Milewski v Washington Mut., Inc.*, 88 A.D.3d 853, 854–855; *Bulluck v Fields*, 132 AD3d 1382, 1382 [4th Dept 2015]).

Harleysville's theory as to Children's Palace is that the owner Amos McCullough and/or its employees were "negligent, reckless and/or otherwise failed to use due care in the course of its use, care, maintenance, tenancy, and occupancy of the Leased Premises, among other things, failing to take appropriate precautions to prevent a fire from originating therein, and that as a result, "a fire originated in the Leased Premises on or about June 2, 2016, resulting in severe damage to the property" of its insured.

Specifically, as set forth in its expert disclosure,[4] Harleysville asserts three areas of concern that caused or contributed to the fire and resulting damage.

One is that a power cord that came with a computer Amos purchased was defective and sustained a "failure," (although it does not state that the failure caused the fire) and that somehow Children's Palace knew or should have known it was defective.

[4] There are no interrogatories or bills of particular that set forth the theories and facts as to how the fire started. The expert disclosure is the only filed document, other than the complaint, upon which the court, let alone the parties, can use to discern to what exactly Children's Palace is supposed to respond.

Two, Harleysville's expert, Howard DeMatties, states (in an unsworn and therefore inadmissible report) that "Based on the reports and materials found in the debris, the area under the table where the RPT was located was full of paper products and holiday decorations, some of which were contained in cardboard boxes and plastic totes. These light combustible materials are competent ignition sources for an arc fault at the plugset."

Three, there was improper wiring throughout the premises maintained by Children's Palace. The outlet (or "receptacle") into which the RPT strips were plugged was "improperly wired … with evidence of a bad connection and resistive heating." The circuit breaker or fuse for the outlet should have used a "15 amp breaker" given the size of the wires, not a "30 amp breaker." A plug for a power strip in the ceiling, used to power a ceiling mounted TV, had been cut and the power strip's wire spliced directly into an open junction box in the ceiling.

Even if DeMatties' observations and contentions (insinuations, really) are to be considered (although inadmissible), by affidavit and deposition testimony Amos McCullough, on behalf of Children's Palace, negates each theory and establishes entitlement to judgment as a matter of law.

He stated that at no time during the period Children's Palace conducted business at 2348 Lyell Avenue (2013-2016) did he ever notice any defect or issue with the power cords, such as wear and tear, or damage, or circuits breaker caused to trip, nor was he ever notified of any defects or issues. At no time did he ever witness any event that caused him to believe that one or both power cords connected to the Dell computers created a dangerous condition or a risk of fire.

In his deposition he spoke of an electrical room, the wires in which seemed to him to be inexplicably a maze" and "a mess," however the electrical room was not on his premises, the room was ordinarily kept locked, and having no electrical training he had no reason to know that

there was anything about the electrical room that posed a hazard. Moreover, Harleysville's expert disclosure does not mention the "electrical room" as being defective or the cause of the fire.

Regarding the "papers and decorations" as being an "ignition source, Amos testified that there were none. His actual testimony at page 116 of the transcript of his deposition testimony is as follows:

Q: And were the power strips and the outlet -- were they underneath the table where the computers were located?

A. Yes.

Q. Was there anything else under that table?

A. No. Not that I recall.

Q. Not that you recall. Did they keep paper for the printer somewhere in the area?

A. Yeah. There was paper in the area. I don't know where.

In his report Mr. DeMatties states that he did not personally observe the area under the table, but rather relied upon "reports," none of which are identified by Mr. DeMatties, and none are part of the expert disclosure or part of any submission, so that his observation is to be disregarded. If he is referring to the Monroe County Fire Incident Report (NYSCEF # 109, Exhibit G to Harleysville Statement of Material Facts), the reporting investigator ("R/I") states that he observed "various combustibles present in the 'before and after' care room (where the fire originated) "that were not burned."

Thus, the actual testimony contradicts Harleysville's assertion, but even if it were true, that papers and decorations stored near an outlet created a hazard, it would be irrelevant unless it

can be shown that Amos knew or had reason to known that storing those paper products near an electrical outlet (an entirely normal, common, "every day" thing to do) created a hazard.

Amos never addressed wiring issues with the power outlet or receptacle or with a power strip in the ceiling. In a sense, there was no reason he should have. No evidence was ever produced through discovery that the outlet looked or appeared defective, since the faulty wiring was on the other side of the wall that was the boundary of the premises. Amos as tenant cannot be held responsible for not having traced back the wiring to the receptacle to see if it was faulty. Further, that the plug caused the fire is raised nowhere in any of the expert disclosure. The same is true of the power strip in the ceiling.

While it has been held, and Harleysville argues, that Children's Palace cannot rely on "gaps in the plaintiff's proof" (*Sarago v. Iroquois Fence, Inc.*, 206 A.D.3d 1654 [4th Dept. 2022]), here Children's Palace does not have the burden to state lack of knowledge, actual or constructive, of a condition which has not been shown or even alleged to have anything to do with the accident. There has to be an initial showing, somewhere in the pleadings and disclosure, that a complained-of condition caused the fire. Nowhere in Harleysville's expert disclosure is there a statement as to what, if anything, caused the fire. In that regard, it is not dissimilar from a slip and fall case, in which "… a defendant may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall without engaging in speculation" (*Doner v Camp*, 163 AD3d 1457 [4th Dept 2018]).

Moreover, Children's Palace is not required to "prove a negative" (*Martinez v Hunts Point Coop. Mkt., Inc.*, 79 AD3d 569, 570, [1st Dept 2010]) as "our jurisprudence does not require a defendant [moving for summary judgment] to prove a negative on an issue as to which [it] does not bear the burden of proof" (*Martinez v Hunts Point Coop. Mkt., Inc.*, 79 AD3d 569,

570 [1st Dept 2010] (internal quotations and citations omitted). A defendant moving for summary judgment on the issue of notice of a defective condition "is not required to prove lack of notice where the plaintiff has not pointed to any evidence of notice." (*Martinez v Hunts Point Coop. Mkt., Inc.*, 79 AD3d 569, 570-71, citing *Wellington v Manmall, LLC*, 70 AD3d 401 [1st Dept 2010]).

All that is known from DeMatties' report is that the "fire development" was in an alcove located at a computer workstation on the premises of the daycare center, and that a power cord sustained an "electrical failure" and was composed of "inferior components prone to mechanical damage and over-heating." Even if this is deemed an admissible opinion as to causation, it speaks not at all to the role played by the power strip in the ceiling, the outlet receptacle, the "papers and decoration" stored under the table, or the "electrical room."

Thus, Children's Palace has established its entitlement to judgment as a matter of law.

In opposition Harleysville has submitted no proof that Amos knew that the power cord was defective and sub-standard, or that he knew or should have known that plugging the power cords into a wall outlet was a hazard. There is no proof (or case law) that a tenant of a commercial space, like Amos, should know that electrical receptacles and the ceiling power cords may be defective and posed hazards.

Likewise, it has submitted no proof that Amos knew or should have known of a defect with respect to the electrical room. Simply because the wires appeared to be a "mess" in the electrical room does not provide a basis to infer that Amos should have known that the wiring presented a fire hazard or otherwise created an unsafe condition in his space. There is not even an opinion that the "mess" in the electrical room was a hazard or had anything to do with the fire. Also, even if it can be inferred that the condition of the electrical room should have raised some

suspicion as to whether it presented a fire hazard, Harleysville has not shown that Amos had any control over the electrical room. It was not on his premises, and it can be safely and reasonably presumed it was controlled by the landlord.

As noted above, Harleysville also submitted in opposition the (also inadmissible) expert disclosure and unsworn report of one Lee Tutt (NYSCEF Nos. 112, 113). Mr. Tutt says nothing about the responsibility of Children's Palace as to whether the owner knew or should have known of any defect or dangerous condition associated with the power cord, the electrical room, or the fact that he used all the receptacles on the power strip. He draws no definitive conclusion (certainly none within a degree of certainty) about what caused the fire.[5] Additionally, the unsworn report is inadmissible.

This case can be distinguished from *Bulluck v Fields* (132 AD3d 1382, 1382 [4th Dept 2015]). There a fire broke out in a residence, and a personal injury action was brought against the owner. The trial court denied summary judgment and the Appellate Division, Fourth Department affirmed, stating that there was a triable issue of fact as to "whether the fire was the result of defendant's negligence in maintaining a dangerous condition at her residence, i.e., faulty electrical wiring in the room where the fire originated" (*Bullock* at 1382). The facts here are different. Children's Palace did not own the electrical wiring in the receptacle or electrical room (if it even could be shown to have been the cause of the fire) and had no responsibility to assume or oversee the landlord's duty to maintain it, if he could have even detected that it was faulty, which other than by dismantling the receptacle he could not. It would be wholly unreasonable to affix a duty on the tenant of a commercial space to examine each outlet for "faulty wiring." Here,

[5] In the related case arising out of the same fire, Erie Insurance company v. Children's Palace, et.al., Index #2019005048, Erie submitted an affidavit of Mr. Tutt, In the last numbered paragraph Mr. Tutt says that the defective power cord caused the fire. That was not submitted here.

the only visible wiring issue was the "maze" of wires in an electrical room maintained by the owner of the strip plaza, which no one says presented a hazard.

While it is true that the power cord was faulty and was on the premises, it would be equally unreasonable to place on the owner of a daycare center a duty to know that the plugs and wiring on the power cord purchased from a known nationwide seller of computer equipment were below UL standards and constituted a fire hazard.

Accordingly, Harleysville having failed to demonstrate a question of fact as to whether Children's Palace and/or its employees had notice, actual or constructive, of a dangerous condition existing with the power cord, the (non-existent) papers and decorations, the electrical room, the receptacle, and/or the ceiling power strip, and having failed to establish that they had control over the or that they had notice of a dangerous or defective condition associated with them, or even that any of them caused or contributed to the fire, the motion for summary judgment is **GRANTED** and the complaint against Children's Palace is **DISMISSED.**

CONCLUSION

The complaint is dismissed in its entirety.

Dated: 2-15-2023

HON. CHRISTOPHER S. CIACCIO
Acting Supreme Court Justice