

FILED
NORTH COUNTY DIVISION
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(10)
CLERK SUPERIOR COURT
SAN DIEGO COUNTY, CA

1 Robert A. Ring, Bar No. 97850
Susan H. Green, Bar No. 101736
2 RING & GREEN APC
3435 Overland Avenue
3 Los Angeles, California 90034
Telephone No.: (310) 226-2550
4 Facsimile No.: (310) 226-2459

5 Attorneys for Plaintiff Kemper Independence
Insurance Company
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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 IN AND FOR THE COUNTY OF SAN DIEGO
11 NORTH COUNTY REGIONAL CENTER, UNLIMITED CIVIL JURISDICTION

12 37-2018-00026126-CU-PL-NC

13 KEMPER INDEPENDENCE INSURANCE)
COMPANY,)

CASE NO.:

14 Plaintiff,)

COMPLAINT FOR DAMAGES FOR: _____

15 vs.)

- 1. SUBROGATION - -
- 2. NEGLIGENCE;
- 3. STRICT PRODUCTS
- 4. LIABILITY;
- 5. FAILURE TO WARN;
- 6. BREACH OF EXPRESS
- 7. WARRANTY; and
- 8. MONEY PAID

16 OETIKER, INC. and DOES 1 through 60,)
17 inclusive,)

18 Defendants.)
19)
20)
21)

22 Plaintiff Kemper Independence Insurance Company ("Plaintiff") hereby alleges as
23 follows:

24 FIRST CAUSE OF ACTION

25 (For Subrogation - Negligence against all Defendants)

26 1. Plaintiff is, and at all times herein mentioned has been, a corporation duly
27 organized and existing under and by virtue of the laws of the State of Illinois and duly qualified to
28 transact, and transacting, business in this state as an insurance company.

1 2. Plaintiff is informed and believes, and based thereon alleges, that Defendant
2 Oetiker, Inc. ("Oetiker") is, and at all times herein mentioned has been, a corporation duly
3 organized and existing under and by virtue of the laws of the State of New Jersey. Plaintiff further
4 is informed and believes, and based thereon alleges, that said Defendant is, and at all times herein
5 mentioned has been, transacting business in the State of California in the County of San Diego.

6 3. Plaintiff is ignorant of the true names and capacities of Defendants sued herein
7 as DOES 1 through 60, inclusive, whether individual, corporate, associate or other, and, therefore,
8 sues said Defendants by such fictitious names. Plaintiff is informed and believes, and based thereon
9 alleges, that each of the fictitiously named Defendants is responsible in some manner for the events
10 described herein and is liable to Plaintiff for the damages it has incurred. Plaintiff will amend this
11 Complaint to show the true names and capacities of the fictitiously named Defendants when the same
12 have been ascertained.

13 4. Plaintiff is informed and believes, and based thereon alleges, that at all times
14 mentioned herein, Defendants, and each of them, were the agents, servants, employees, joint
15 venturers, predecessors-in-interest and/or successors-in-interest of each of the remaining Defendants
16 and in doing the things herein alleged were acting within the purpose and scope of said agency,
17 employment and/or joint venturer. The exact terms and conditions of the employment, agency
18 and/or joint venturer relationships are unknown to Plaintiff at this time, but when the information is
19 ascertained, leave of court will be sought to insert the appropriate allegations.

20 5. [REDACTED] (collectively the "Insureds"), during the
21 relevant time period herein, owned the real property and improvements thereon located at [REDACTED]
[REDACTED] which improvements included a house (the "Premises").
23 Plaintiff insured the Insureds and the Premises pursuant to a duly issued insurance policy (the
24 "Policy")

25 6. Plaintiff is informed and believes, and based thereon alleges, that in or about
26 2008, Defendants DOES 1 through 10, inclusive, and each of them, built the house on the Premises,
27 which construction included the installation of plumbing lines and clamps thereon.

28 7. Plaintiff is informed and believes, and based thereon alleges, that the plumbing

1 parts installed by Defendants DOES 1 through 10, inclusive, and each of them, included a stainless
2 steel, single-ear clamp with product markings of 29.6, OET, PAT and PEX (the "Clamp")
3 manufactured by Defendants Oetiker and DOES 11 through 20, inclusive, and each of them. The
4 Clamp contained components parts manufactured, sold and distributed by Defendants DOES 21
5 through 40, inclusive, and each of them, and was sold and distributed by Defendants DOES 41
6 through 60, inclusive, and each of them.

7 8. However, Defendants, and each of them, so negligently, carelessly, recklessly
8 and unlawfully designed, manufactured, assembled, sold, distributed, maintained, serviced, stored,
9 transported, and installed the Clamp in an improper way, such that on December 8, 2016, the Clamp
10 fractured, causing a discharge of water and substantial damages to the Premises.

11 9. As a result of the negligence of Defendants, and each of them, the Insureds
12 sustained property damages in the amount of \$30,761.97.

13 10. On or before April 17, 2017, Plaintiff, in accordance with the terms of the
14 Policy, paid \$29,761.97 as a result of the property damages sustained. The Insureds were
15 responsible for the remaining \$1,000.00.

16 11. Prior to the commencement of this action, the Insureds assigned to Plaintiff the
17 right to collect any and all sums which they paid as a result of this loss.

18 12. Plaintiff notified Defendants, and each of them, of the payments made by
19 Plaintiff, of Plaintiff's right to subrogation and of the assignment of claims, and demanded payment
20 from Defendants, and each of them, in the amount of \$30,761.97.

21 13. Notwithstanding said demands, Defendants, and each of them, have failed and
22 refused, and continue to fail and refuse, to pay Plaintiff the whole or any part thereof, and the sum
23 of \$30,761.97 is due and owing to Plaintiff from Defendants, and each of them, together with
24 accumulated interest thereon at the maximum legal rate from and after April 17, 2017.

25 SECOND CAUSE OF ACTION

26 (For Strict Products Liability against Oetiker and DOES 1-60)

27 14. Plaintiff repeats, repleads and realleges each and every allegation set forth in
28 paragraphs 1 through 13, inclusive, of this Complaint, as though fully set forth hereat.

1 15. Defendants Oetiker and DOES 11 through 20, inclusive, and each of them, are,
2 and at all times herein mentioned have been, engaged in the business of manufacturing and
3 assembling clamps of the same make and model as the Clamp referred to herein.

4 16. Defendants DOES 21 through 40, inclusive, and each of them, are and at all
5 times herein mentioned have been, engaged in the business of manufacturing component parts to be
6 used in clamps of the same make and model as the Clamp referred to herein and in selling and
7 distributing said component parts to Defendants Oetiker and DOES 11 through 20, inclusive, and
8 each of them.

9 17. Defendants DOES 41 through 60, and each of them, are, and at all times herein
10 mentioned have been, in the business of selling at retail to members of the general public, clamps of
11 the same make and model as the Clamp referred to herein that were manufactured and assembled by
12 Defendants Oetiker and DOES 11 through 20, inclusive, and each of them, and sold the specific
13 Clamp referred to herein.

14 18. Defendants Oetiker and DOES 11 through 60, inclusive, and each of them, knew
15 and intended that their clamps, including the specific Clamp that is the subject matter hereof, were
16 to be used in residential homes without inspection for defects.

17 19. Plaintiff is informed and believes, and based thereon alleges, that at the time
18 Defendants DOES 1 through 10, inclusive, and each of them, installed the specific Clamp at issue at
19 the Premises, the Clamp was defective and unsafe for its intended purpose in that, among other
20 things, it was susceptible to fracturing which fracture would and/or could result in discharges of
21 water such as that which occurred.

22 20. Plaintiff further is informed and believes, and based thereon alleges, that at the
23 time the Clamp was installed and/or placed at the Premises, the owners of said Premises, including
24 the Insureds, were unaware of any defects in said Clamp.

25 21. Plaintiff further is informed and believes, and based thereon alleges, that at all
26 times relevant herein the Clamp was used only for the purpose in which intended.

27 22. On or about December 8, 2016, as a proximate result of the defects in the
28 Clamp, the outer loop of the Clamp fractured, resulting in a discharge of substantial amounts of

1 water into the Premises.

2 23. As a proximate result of the defects in the Clamp, the Insureds sustained
3 property damages in the amount of \$30,761.97.

4 24. On or before April 17, 2017, Plaintiff, in accordance with the terms of the
5 Policy, paid \$29,761.97 as a result of the property damages sustained. The Insureds were
6 responsible for the remaining \$1,000.00.

7 25. Prior to the commencement of this action, the Insureds assigned to Plaintiff the
8 right to collect any and all sums which they paid as a result of this loss.

9 26. Plaintiff notified Defendants, and each of them, of the payments made by
10 Plaintiff, of Plaintiff's right to subrogation and of the assignment of claims, and demanded payment
11 from Defendants, and each of them, in the amount of \$30,761.97.

12 27. Notwithstanding said demands, Defendants, and each of them, have failed and
13 refused, and continue to fail and refuse, to pay Plaintiff the whole or any part thereof, and the sum
14 of \$30,761.97 is due and owing to Plaintiff from Defendants, and each of them, together with
15 accumulated interest thereon at the maximum legal rate from and after April 17, 2017.

16 THIRD CAUSE OF ACTION

17 (For Failure to Warn against all Defendants)

18 28. Plaintiff repeats, repleads and realleges each and every allegation set forth in
19 paragraphs 1 through 27, inclusive, of this Complaint, as though fully set forth hereat.

20 29. The subject Clamp and its component parts were designed, manufactured,
21 assembled, installed, maintained, and/or sold by Defendants Oetiker and DOES 1 through 60,
22 inclusive, and each of them, and were marketed by said Defendants and intended by said Defendants
23 to be used by technically unsophisticated consumers.

24 30. At the time Defendants DOES 1 through 10, inclusive, and each of them,
25 installed the Clamp, the Clamp was defective and unsafe for its intended purpose in that, among
26 other things, the Clamp and its component parts were so improperly designed, manufactured,
27 installed, serviced and/or assembled so as to create a risk of fracturing which would result in a flow
28 of water due to the failure of the Clamp.

1 31. As such, the Clamp and its component parts, as manufactured, designed,
2 assembled and installed, were defective in that said Defendants, and each of them, failed to warn of
3 conditions and circumstances surrounding the use of the Clamp, which if used in the manner for
4 which intended still could fracture and fail, such as the fracture and failure which occurred.

5 32. As a proximate result of the failures of Defendants Oetiker and DOES 1 through
6 60, inclusive, and each of them to warn of the hazards in connection with the Clamp, and on or
7 about December 8, 2016, the Clamp fractured and the Insureds sustained property damages as a
8 result in the amount of \$30,761.97.

9 33. On or before April 17, 2017, Plaintiff, in accordance with the terms of the
10 Policy, paid \$29,761.97 as a result of the property damages sustained. The Insureds were
11 responsible for the remaining \$1,000.00.

12 34. Prior to the commencement of this action, the Insureds assigned to Plaintiff the
13 right to collect any and all sums which they paid as a result of this loss.

14 35. Plaintiff notified Defendants, and each of them, of the payments made by
15 Plaintiff, of Plaintiff's right to subrogation and of the assignment of claims, and demanded payment
16 from Defendants, and each of them, in the amount of \$30,761.97.

17 36. Notwithstanding said demands, Defendants, and each of them, have failed and
18 refused, and continue to fail and refuse, to pay Plaintiff the whole or any part thereof, and the sum
19 of \$30,761.97 is due and owing to Plaintiff from Defendants, and each of them, together with
20 accumulated interest thereon at the maximum legal rate from and after April 17, 2017.

21 FOURTH CAUSE OF ACTION

22 (For Breach of Express Warranties against DOES 1-10)

23 37. Plaintiff repeats, repleads and realleges each and every allegation set forth in
24 paragraphs 1 through 36, inclusive, of this Complaint, as though fully set forth hereat.

25 38. Plaintiff is informed and believes, and based thereon alleges, that at the time
26 Defendants DOES 1 through 10, inclusive, and each of them, pursuant to an express warranty,
27 warranted the Premises against any construction defects or failure of parts for a period of ten years,
28 which warranties were still in place at the time of the December 8, 2016, incident that is the subject

1 of this Complaint, and which warranties included the obligations of Defendants to pay for any
2 damages as a result of any construction defects or the failure of any parts used in the construction of
3 the house at the Premises.

4 39. Plaintiff further is informed and believes, and based thereon alleges, that its
5 Insureds, and their predecessors in interest, performed all conditions, covenants and obligations
6 required on their part to be performed in order for the warranties to remain in effect.

7 40. Defendants DOES 1 through 10, inclusive, and each of them, breached the
8 warranties given by failing to compensate the Insureds for the damages sustained as a result of the
9 failure of the Clamp on December 8, 2016, just eight years after its installation at the Premises.

10 41. As a proximate result of the breaches of the express warranties by Defendants
11 DOES 1 through 10, inclusive, and each of them, and on or before April 17, 2017, Plaintiff, in
12 accordance with the terms of the Policy, paid \$29,761.97 as a result of the property damages
13 sustained. The Insureds were responsible for the remaining \$1,000.00.

14 42. Prior to the commencement of this action, the Insureds assigned to Plaintiff the
15 right to collect any and all sums which they paid as a result of this loss.

16 43. Plaintiff notified Defendants, and each of them, of the payments made by
17 Plaintiff, of Plaintiff's right to subrogation and of the assignment of claims, and demanded payment
18 from Defendants, and each of them, in the amount of \$30,761.97.

19 44. Notwithstanding said demands, Defendants, and each of them, have failed and
20 refused, and continue to fail and refuse, to pay Plaintiff the whole or any part thereof, and the sum
21 of \$30,761.97 is due and owing to Plaintiff from Defendants, and each of them, together with
22 accumulated interest thereon at the maximum legal rate from and after April 17, 2017.

23 FIFTH CAUSE OF ACTION

24 (For Money Paid against All Defendants)

25 45. Plaintiff repeats, repleads and realleges each and every allegation set forth in
26 paragraphs 1 through 4, inclusive, of this Complaint, as though fully set forth hereat.

27 46. Within the last two years, in Escondido, California, Defendants, and each of
28 them, became indebted to Plaintiff in the amount of \$30,761.97 for money paid by Plaintiff and its

1 assignor for the benefit of Defendants, and each of them.

2 47. No portion of the above sum has been paid, notwithstanding demand therefor by
3 Plaintiff, and there is now due, owing and unpaid from Defendants, and each of them, to Plaintiff,
4 the sum of \$30,761.97, together with interest thereon, calculated at the maximum legal rate, from
5 and after April 17, 2017.

6 WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them, as
7 follows:

8 ON ALL CAUSES OF ACTION

- 9 1. For damages in the amount of \$30,761.97;
10 2. For interest on the above sum at the maximum legal rate from and after April
11 17, 2017;
12 3. For costs of suit incurred herein; and
13 4. For such other and further relief as the Court may deem just and proper.

14 Dated: May 22, 2018

RING & GREEN APC

15
16 By:



Susan H. Green

17 Attorneys for Plaintiff Kemper Independence Insurance
18 Company