

Muy v East Coast Masonry Designs Corp.

2007 NY Slip Op 34343(U)

December 24, 2007

Supreme Court, Nassau County

Docket Number: 5377-04/

Judge: F. Dana Winslow

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

**TRIAL/IAS, PART 9
NASSAU COUNTY**

EFRAIM MUY

Plaintiff,

-against-

MOTION DATE: 08/21/07

MOTION SEQ. NO.: 005

INDEX NO.: 005377/2004

**EAST COAST MASONRY DESIGNS CORP.,
ELECTROLUX CONSTRUCTION PRODUCTS**

Defendant(s).

The following papers having been read on the motion (numbered 1-3)

- Notice of Motion.....1**
- Reply Affirmation.....2**
- Affirmation in Opposition.....3**

Motion by the attorneys for the defendant Electrolux Construction Products, a division of Electrolux Professional Outdoor Products, Inc. n/k/a Husqvarna Professional Outdoor Products, Inc. (Electrolux) for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint and all claims against defendant, Electrolux Construction Products, a division of Electrolux Professional Outdoor Products, Inc. n/k/a Husqvarna Professional Outdoor Products, Inc. (Electrolux) is **granted**.

Plaintiff commenced this action to recover for personal injuries he sustained on August 7, 2002, while using a Target tile saw allegedly manufactured by defendant Electrolux, when a piece of brick or brick particles, thrown off by the saw, entered his eye causing him to sustain a loss of vision. In the fourth through seventh causes of action of the complaint, plaintiff asserts claims against

defendant Electrolux, sounding in negligence, breach of express warranty, breach of implied warranty and strict products liability.

In paragraph "7" of the verified complaint the plaintiff alleges that he was injured by a certain Target tile saw bearing serial no. NT084165 manufactured and distributed by defendant Electrolux.

Prior to 1989, Target tile saws were manufactured by Federal Mogul Corporation. Electrolux's predecessor CMV InterAmerica, Inc. purchased the Target product line from Federal Mogul in 1989. The Purchase Agreement between Federal Mogul and CMV InterAmerica, Inc. provided that CMV InterAmerica, Inc. did not assume any liabilities of Federal Mogul for product liability or other claims for any product sold by Federal Mogul prior to the closing date of the purchase in 1989. When CMV purchased the Target product line from Federal Mogul, it purchased only the assets. Federal Mogul continued as an independent corporation, with no relationship to CMV InterAmerica, Inc. or Electrolux. CMV InterAmerica, Inc. changed its name to Target Product, Inc. in June, 1989. CMV/Target Products, Inc. began manufacturing Target tile saws in June, 1989. Target Products, Inc. changed its name to Diamant Boart in 1994. Diamant Boart, Inc. was acquired by Electrolux Construction Products in 2002. Hereinafter CMV InterAmerica, Inc.; Target Products, Inc., and Diamant Boart, Inc. shall be referred to collectively as "Electrolux" and/or "Electrolux and its predecessors." Electrolux has maintained the corporate records of Diamant Boart, Inc. and its predecessor companies with respect to serial numbers used for Target tile saws. Electrolux alleges no number beginning with "NT" was used by the defendant, or its predecessors, as a serial number for a Target saw. Electrolux claims that prior to its purchase of the Target products line in 1989, neither CMV

InterAmerica, Target Products, Inc., Diamant Boart, Inc. or Electrolux ever made a Target brand saw of any kind, including the tile saws. The first Target tile saw manufactured by CMV InterAmerica Target Products, Inc./Diamant Boart was made in June, 1989. CMV Inter/America, Target Products, Inc., Diamant Boart, Inc. and Electrolux allege after the acquisition of Diamant Boart in 2002 by Electrolux, the latter never made any Target saw with the serial number NT08146S or NT081465. Further, Electrolux asserts the only component part used in a Target saw which had a separate serial number was the motor. No engine number used the serial number NT08146S. Defendant also asserts that the only other number which appears on Target tile saw is a stamped part number on those component parts which are die cast. The number NT08146S or NT081465 was never used as a part number for any part for any Target saw manufactured by Electrolux., Diamant Boart, CMV InterAmerica or Target Products, Inc. Target brand tile saws were manufactured by Federal Mogul prior to 1989. Prior to the date that Federal Mogul manufactured Target saws, the brand had been manufactured by other companies, since at least the 1950's.

The saw that caused plaintiff's injury has been lost or destroyed. The acquisition of the Target product line from Federal Mogul Corporation on March 31, 1989 pursuant to the terms of the asset purchase agreement provided for Federal Mogul to retain all liability for Target brand saws manufactured prior to March 31, 1989.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. *Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404. A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a

movant. *Alvarez v Prospect Hospital*, 66 NY2d 320; *Winegrad v New York University Medical Center*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133. The defendant has made an adequate *prima facie* showing of entitlement to summary judgment by demonstrating that the Target tile saw the plaintiff was using on the date of the accident was not manufactured by Electrolux or its predecessor companies, to wit: CMV InterAmerica; Target Products, Inc., and Diamant Boart, Inc. Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Friends of Animals, Inc. v Associated Fur Mfgs., Inc.*, 46 NY2d 1065. Conclusory statements are insufficient. *Sofsky v Rosenberg*, 163 AD2d 240, *aff'd*. 76 NY2d 927; *Zuckerman v City of New York*, 49 NY2d 557; *see Indig v Finkelstein*, 23 NY2d 728; *Werner v Nelkin*, 206 AD2d 422; *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781, *app dism.* 53 NY2d 1028; *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 AD2d 868, *lv app den.*, 82 NY2d 660.

In opposition to the motion for summary judgment the attorney for the plaintiff submits that the time when the Target saw was manufactured is unknown “and it is just as likely as not that the saw was a new product which was directly manufactured by defendant.” He also states that “defendant, whose witness testified that Electrolux has kept all records pertaining to the product line from 1989 forward, is in the best position to conclusively state that Target tile saws of that description were, or were not, manufactured after a certain time period. That determination would resolve the question of when this particular Target product

was made, and which manufacturer was responsible for its negligent design, warnings, and/or manufacture.” The defendant has submitted documentation of all of the serial numbers of all the Target tile saws it, and its predecessors, manufactured from 1989 through 2007 (Affidavit of James McMenemy, Exhibit E, Notice of Motion) (C. Gustafsson Deposition at pg. 75, L. 20; pg. 78, L. 12; pg. 92, L. 4-22 Exhibit D Notice of Motion). Plaintiff has not offered any credible evidence that Electrolux manufactured a saw with the serial number provided by plaintiff (complaint ¶ 7).

The identity of the manufacturer of a defective product may be established by circumstantial evidence. Further, circumstantial evidence may sufficiently demonstrate the maker’s identity, notwithstanding the destruction of the allegedly defective product after use. The circumstantial evidence of identity of the manufacturer of a defective product causing personal injury must establish that it is reasonably probable, not merely possible or evenly balanced, that the defendant was the source of the offending product (“circumstantial evidence in a products liability case ‘must justify an inference of probability as distinguished from mere possibility’). Speculative or conjectural evidence of the manufacturer’s identity is not enough.” *See Healy v Firestone Tire Co.*, 87 NY2d 596, 601-602, citing *D’Amico v Manufacturers Hanover Trust Co.*, 173 AD2d 263, 266; *Perez v New York Tel. Co.*, 161 AD2d 191, 192; *Sosa v Joyce Beverages*, 159 AD2d 335, 337.

The plaintiff’s proof is insufficient to establish with any reasonable probability that a Target saw manufactured by the Electrolux defendants between 1989 and 2002 caused plaintiff’s accident. Plaintiff does not allege the age of the Target tile saw, i.e., whether it was new or old so as to even establish the period in which it was manufactured. If the plaintiff cannot demonstrate that the Electrolux

defendant manufactured the Target saw, but, rather, it was manufactured by Electrolux's predecessor, Federal Mogul, then plaintiff's assertion that the defendant Electrolux should be deemed responsible as if it had put the Target saw into the stream of commerce in the first instance is misplaced. Even if plaintiff demonstrated (which he did not) that Federal Mogul manufactured the alleged Target tile saw that caused the accident, Electrolux would still not be liable. Defendant Electrolux has demonstrated that in 1989 only the assets of Federal Mogul were acquired. Under New York law, "[a] corporation that acquires the assets of another corporation generally is not liable for the torts of its predecessor." *Meadows v Amsted Indus., Inc.*, 305 AD2d 1053, 0154. There are four exceptions to this general rule in New York. A corporation may have successor liability if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations. None of the exceptions to the general rule apply in this case. Neither Electrolux nor any of its predecessors assumed the liability of Federal Mogul. Defendant's predecessors did not merge with Federal Mogul. Neither CMV InterAmerica (the original purchaser from Federal Mogul) nor any predecessor of Electrolux is a continuation of Federal Mogul. After its 1989 sale of the Target product line Federal Mogul continued as a separate corporation and Federal Mogul continues to exist as a separate corporation today. There is no of evidence to support plaintiff's assertion of a fraudulent transaction. Electrolux acknowledges the name changes and mergers of the various entities between 1989 and 2002 and its responsibility for all Target tile saws manufactured from 1989 to 2002. The Asset Purchase Agreement

entered into 1989 did not allow Federal Mogul, the seller, or CMV InterAmerica, the buyer (Electrolux's predecessor) to escape their respective obligations. On the contrary, Federal Mogul continued to conduct business as a viable corporation and retained its liability for any defect in a Target product it made prior to the 1989 sale. CMV InterAmerica, Electrolux, and its predecessors assumed liability only for products they made after the 1989 asset sale. This was a normal asset sale with a logical division of responsibility. The fraud exception does not apply.

Electrolux acknowledges its responsibility for its predecessors, to wit: CMV InterAmerica, Target Products, Inc. and Diamant Boart, Inc. Electrolux is not, as plaintiff asserts, playing a game of corporate name changes with its predecessor corporation to avoid liability. Conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact. *See Billordo v E.P. Realty Associates*, 300 AD2d 523; *see Zuckerman v City of New York*, 49 NY2d 557, 562; *Dunlap v Levine*, 271 AD2d 396.

The "product line" exception that would impose liability on Electrolux for any proven torts of Federal Mogul, from whom it purchased the assets, does not apply in New York. In *Semenetez v Sherling & Walden, Inc.*, 7 NY3d 194, the Court of Appeals stated at pg. 201:

"[E]xtending liability to the corporate successor places responsibility for a defective product on a party that did not put the product into the stream of commerce. This is inconsistent with the basic justification for strict products liability, 'which is to place responsibility for a defective product on the manufacturer who placed that product into commerce. The corporate successor has not

created the risk, and only remotely benefits from the product. The successor has not invited usage of the product or implied its safety. Since the successor was never in a position to eliminate the risk, a major purpose of strict liability in modifying a manufacturer's behavior is also lost' [citations omitted]."

The motion for summary judgment dismissing the complaint and all claims against defendant Electrolux Construction Products is **granted**.

This Constitutes the Order of the Court.

Dated: 12/24, 2007

ENTER:

[Handwritten signature]
J.S.C.

ENTERED

JAN 24 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**