

Shea v American Tobacco Co.

2010 NY Slip Op 31315(U)

May 14, 2010

Supreme Court, Nassau County

Docket Number: 8938/03

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

SCAN

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THERESA SHEA, as the Executrix of the Estate of
WILLIAM J. SHEA, JR., and THERESA SHEA,
Individually,

Plaintiff,

-against-

**MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 8938/03
Motion Seq. No.: 12**

THE AMERICAN TOBACCO COMPANY, AMERICAN
BRANDS, INC., LORILLARD INC., LORILLARD TOBACCO
COMPANY, PHILIP MORRIS INCORPORATED, PHILIP
MORRIS COMPANIES, INC., RJR NABISCO, INC., R.J.
REYNOLDS TOBACCO COMPANY, LIGGETT GROUP, INC.
now known as BROOKE GROUP, LTD., LIGGETT & MYERS
TOBACCO COMPANY, BROWN & WILLIAMSON INDUSTRIES,
INC., BROWN & WILLIAMSON TOBACCO CORPORATION,
THE TOBACCO INSTITUTE, INC. and THE COUNCIL FOR
TOBACCO RESEARCH-USA, INC.,

Defendants.

DECISION AND ORDER

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Defendants, R.J. Reynolds Tobacco Company ("Reynolds") and Brown & Williamson Holdings, Inc. (f/k/a Brown & Williamson Tobacco Corporation, sued herein individually and as successor by merger to The American Tobacco Company ("Brown & Williamson") move [Mot. Seq.

12], pursuant to CPLR §2221(e), for an Order granting renewal of their motion for summary judgment, and upon renewal, for an Order pursuant to CPLR §3212, dismissing the Plaintiff's claims for negligent and strict products liability design defect. The motion is determined as herein set forth below.

This is a tobacco product liability action. Essentially, Plaintiff claims that William J. Shea, Jr., developed lung cancer and died as a result of smoking cigarettes manufactured by two of the Defendants, the American Tobacco Company and R.J. Reynolds Tobacco Company. Plaintiff commenced this action in October 1997. In November 2005, Defendants Reynolds and Brown & Williamson moved for summary judgment to dismiss, *inter alia*, Plaintiff's fourth and fifth causes of action for negligent and defective design and strict product liability, respectively. On May 12, 2006, this Court issued an Order (referred to hereinafter as the "Prior Order") granting in part and denying in part, Defendants' summary judgment motions. Insofar as is relevant here, the Court denied the branch of Defendants' motions dismissing Plaintiff's negligent and defective design claims, finding an issue of fact as to whether the cigarettes could be designed in a safer manner. Specifically, in its Prior Order, this Court held, in pertinent part, as follows:

Design defect/products liability

Plaintiff asserts a claim in products liability based upon a "design defect," that the carcinogenic nature various compounds contained in the tobacco used in the manufacture of cigarettes. Defendants argue that this products liability claim is pre-empted by the 1969 Act. In *Cipollone*, the Supreme Court did not reach the question of whether design defect/products liability claims are pre-empted by the federal statute because the district court held that those claims were barred on other grounds. 505 U.S. 512. Thus, this Court must determine whether the legal duty upon which a design defect claim is predicated constitutes a "requirement or prohibition based on smoking and health. . . imposed with respect to advertising or promotion. In

Robinson v Reed-Prentice, 49 NY2d 471 (1980), the Court of Appeals analyzed the nature of a products liability claim arising from a design defect in the product.

Where a product presents an unreasonable risk of harm, notwithstanding that it was meticulously made according to detailed plans and specifications, it is said to be defectively designed....[H]owever,.... some products, for example knives, must by their very nature be dangerous in order to be functional. Thus, a defectively designed product is one which, at the time it leaves the seller hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use; that is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce. Design defects, then, unlike manufacturing defects, involve products made in the precise manner intended by the manufacturer. Since no product may be completely accident proof, the ultimate question in determining whether an article is defectively designed involves a balancing of the likelihood of harm against the burden of taking precaution against that harm.

49 NY 2 d at 479. Thus, the duty upon which a design defect claim is predicated is the duty of a manufacturer to make a reasonably safe product. While the contours of that duty are determined by weighing the utility of the product against the inherent danger, the duty is imposed with respect to the manufacture of the product not its advertising promotion. Contrary to Defendants' argument, imposing strict products liability upon manufacturers of cigarettes does not prohibit cigarette manufacture. Rather, products liability simply calls for "the burden of consumer injuries to be borne by the manufacturer, who can transfer the costs to the general public as a component of the selling price" (*Grant-Howard Associates v General Housewares Corp.*, 63 NY2d 291, 296 (1984)). Because a design defect claim is not predicated upon a duty imposed with respect to advertising or promotion and does not come into conflict with the 1969 Act, Plaintiff design defect/products liability claim is not pre-empted (Cf. *Tomasino v American Tobacco Co.*, 23 AD2d 546 [2d Dept. 2005]).

Defendants further argue that even if Plaintiff's products liability claim is not pre-empted, it should be dismissed because, as a matter of law, cigarettes were not "defective." Defendants assert that cigarettes met consumer expectations, utility

outweighed risks, and no safer, alternative design was available. Defendants cannot prevail on any of these arguments on summary judgment.

As the court has already noted both with regard to the failure to warn and misrepresentation claims, a jury could find that, even in the 1970's, many people did not understand that cigarettes caused cancer. Thus, there is a question of fact as to whether cigarettes met the expectations of the average consumer.

As to utility, it appears based on defendants' own research that people smoke for a variety of psychological and physiological reasons. For example, some people smoke to appear worldly or sophisticated while others smoke to stimulate or calm themselves. It might be argued that these effects of smoking are "advantages" in only a sad and cynical sense. In any event, in view of the possibility of addiction and deadly disease, a jury question is clearly presented as to whether the supposed benefits outweigh the inherent danger of the product.

Finally, as to the availability of an alternative design, several of defendants' own experts opined that a "medically acceptable cigarette" was possible. Thus, it is for the jury to determine whether a safer alternative cigarette design justified the cost of developing the product. Thus, the court cannot rule as a matter of law that cigarettes were not defective. As noted, only American Tobacco, Brown & Williamson, and R.J. Reynolds manufactured cigarettes smoked by Shea. Accordingly, summary judgment on the design defect/products liability claim is denied as to defendants American Tobacco, Brown & Williamson, and R.J. Reynolds but granted as to the other defendants.

Following this Court's 2006 decision herein, in 2008, the New York Court of Appeals in *Adamo v Brown & Williamson Tobacco Corp.*, 11 NY3d 545 [2008], clarified the legal standard for a design defect claim as applicable to cigarettes. The Plaintiff in *Adamo*, who

died while waiting for her case to reach the Court of Appeals, had been a regular smoker since the 1950s (*Rose v Brown & Williamson Tobacco Corp.*, 53 AD3d 80, 92 [1st Dept 2008]). The Plaintiff therein smoked full-tar brands manufactured by R.J. Reynolds; The American Tobacco Company, now a part of Brown & Williamson; and PM USA (*Id.* at 92). At trial on a claim for negligent product design, the Plaintiff offered evidence that light cigarettes, which contain “significantly lower levels of tar and nicotine” were a safer alternative design to full-tar cigarettes, and thus that the latter design was unreasonably dangerous (*Adamo v Brown & Williamson Tobacco Corp.*, *supra* at 550). The Court of Appeals reversed the jury verdict in favor of the Plaintiff, holding that it was not sufficient merely to show that an alternative cigarette design was safer--a Plaintiff must also show that the alternative design remained functional (*Id.* at 551). Specifically, “[t]he function of a cigarette is to give pleasure to a smoker . . . Plaintiffs made no attempt to prove that smokers find light cigarettes as satisfying as regular cigarettes . . . ” (*Id.* at 550). Thus to plead adequately that a product whose only function is to please a customer has a design defect, a Plaintiff must allege both that the product could be designed in a safer manner, and that the safer alternate design is “as acceptable to consumers” (*Id.* at 551). While the design defect claim in *Adamo* was founded in negligence rather than strict liability (*Id.* at 549), “[a] product is defective for the purposes of a negligence or strict products liability claim if it is ‘not reasonably safe’ ” (*Macaluso v Herman Miller, Inc.*, 2005 WL 563169, at *5 [SDNY 2005]) *citing* *Denny v Ford Motor Co.*, 87 NY2d 248, 257 [1995]). Therefore, because *Adamo* addressed an element of establishing that cigarettes are “not reasonably safe,” its holding is applicable to a claim for strict liability, as well.

Upon the instant application defendants seek to renew that portion of the Prior Order that denied their motion to dismiss the fourth and fifth causes of action predicated upon negligent design and strict products liability. Defendants proffer that the Court of Appeals' decision in *Adamo*, directly and dispositively impacts Plaintiff's design claims. Specifically, defendants submit that in *Adamo*, the Court of Appeals rejected a smoker's claim that cigarettes were defectively designed and that therefore, applying the binding precedent of *Adamo*, this Court should dismiss Plaintiff's design claims as a matter of law.

Pursuant to CPLR §2221(e):

A motion for leave to renew: (1) shall be identified specifically as such; (2) shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and (3) shall contain reasonable justification for the failure to present such facts on the prior motion. (*515 Ave. I Corp. v 515 Ave. I Tenants Corp.*, 44 AD3d 707 [2d Dept 2007]); *Veitsman v G & M Ambulette Serv., Inc.*, 35 AD3d 848 [2d Dept 2006]).

It must be noted at the outset that a motion for leave to renew based upon a change in the law, as in this case, must be made prior to the entry of a final judgment or before the time to appeal has expired (*Dinnalo v DAL Elec.*, supra; see also *Glicksman v Board of Educ./Cent. School Bd. of Comsewogue Union Free School Dist.*, 278 AD2d 364 [2d Dept 2000]). Here, since defendants have made their respective motions prior to trial and prior to the entry of a final judgment, this Court herewith deems the instant motions to be timely.

The Court of Appeals' decision in *Adamo* represents a sufficient change in the decisional law to support defendants' motion to renew (CPLR §2221[e][2]; *Dinnalo v DAL Elec.*, 60 AD3d 620, 621 [2d Dept 2009]).

In its Prior Order, this Court determined that there were issues of fact relating to the availability of a "safer, alternative design." Defendants are correct to point out that the "consumer acceptability"

element was not previously addressed by this Court in its Prior Order. However, this element was added by the Court of Appeals for tobacco cases following this Court's Prior Order. Thus, obviously, the new "consumer acceptability" element was not (and could not have been) addressed by this Court.

Here, the critical issue before this Court is whether it is the Plaintiff who bears the initial burden of proving alternative safer design and consumer acceptability or whether the defendants are required to "disprove" that there are no alternative safe cigarettes that are as acceptable to consumers. In answering this question, this Court need look no further than the application underlying the instant motion to renew; i.e., defendants seek to renew their motion for summary judgment and upon renewal, for an Order, pursuant to CPLR §3212, dismissing the Plaintiff's claims for negligent and strict products liability design defect.

It is well settled that "[o]n a motion for summary judgment pursuant to CPLR §3212, the *proponent* must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Sheppard-Mobley v King*, 10 AD3d 70, 74 [2d Dept 2004], *aff'd. as mod.*, 4 NY3d 627 [2005], *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [emphasis supplied]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Sheppard-Mobley v King*, *supra*; *Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*Alvarez v Prospect Hosp.*, *supra*). The admissible evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference (*Demshick v Community Housing Management Corp.*, 34 AD3d 518, 521 [2d Dept 2006], *citing Secof v Greens Condominium*, 158 AD2d 591 [2d Dept 1990]).

Pursuant to the Court of Appeals holding in *Adamo*, the Plaintiff is under an obligation to present evidence that any proposed safer, alternatively designed cigarettes would be as acceptable to consumers as the original design (*Adamo v Brown & Williamson Tobacco Corp.*, supra). In the context of Defendant's motion for summary judgment in this cigarette product liability action, however, this Court finds that it is the Defendant, as the proponent of a motion for summary judgment to dismiss the complaint, who is required to prove that there are no alternative safe cigarettes that are as acceptable to consumers as the high tar brands that Plaintiff smoked. The Defendants bear the burden of making a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.


It must be clarified that this Court does not dispute or challenge the Defendant's reading of the *Adamo* decision. However, while the majority in *Adamo* stated that proof of an equally acceptable alternative is an essential element of Plaintiff's design claim and is necessary for Plaintiff to state a prima facie case, this Court cannot overlook the fact that the *Adamo* Court was already at the trial stage of the litigation where Plaintiff bears the initial burden of making a *prima facie* case. Here, unlike *Adamo*, this litigation is only at the summary judgment stage where the movant - in this case, the Defendants - bear the initial burden of demonstrating a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.

In this regard, the Defendants who are manufacturers, have failed to introduce any evidence or argument pertaining to the prior determination by this Court that there were questions of fact as to whether the alternative design proposed by the Plaintiff was safer and feasible. Further, in light of *Adamo*, the Defendants have now also failed to introduce any new evidence pertaining to the new "consumer acceptability" element required by *Adamo*.

Therefore, while this Court grants the Defendants' motion to renew, upon renewal, this Court denies their underlying motion for summary judgment dismissal of Plaintiff 's negligent and defective design claims as well as the strict products liability claim.

This constitutes the Decision and Order of the Court.

DATED: May 14, 2010
Mineola, N.Y. 11501

ENTER: 

HON. MICHELE M. WOODARD
J.S.C.

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