Tomasino v American Tobacco Co.

2010 NY Slip Op 31457(U)

June 3, 2010

Supreme Court, Nassau County

Docket Number: 27182/97

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

JUSTIN D. TOMASINO, as the Administrator of the Estate of VIVIAN TOMASINO and JUSTIN D. TOMASINO, individually

Plaintiff,

- against -

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., LIGGET & MYERS TOBACCO COMPANY, BROWN & WILLIAMSON INDUSTRIES INC., BROWN & WILLIAMSON TOBACCO CORPORATION, THE TOBACCO INSTITUTE, INC. and THE COUNCIL FOR TOBACCO RESEARCH-USA, INC.,

Defendants.

Index No.: 27182/97
Motion Seq. Nos.: 27, 28
Motion Dates: 02/19/10
02/19/10

The following papers have been read on this motion:

	Papers Numbered
Notice of Cross- Motion, Affirmation and Exhibits	1
Notice of Motion, Affirmation and Exhibits and Memorandum of Law	2
Affirmation in Partial Opposition	3
Reply Affirmation	4

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants, Philip Morris USA, Inc. (f/k/a and sued herein as Philip Morris Incorporated) and The Council for Tobacco Research – USA, Inc. (collectively referred to herein as "Philip Morris") move [Mot. Seq. 28], 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. Defendants, Brown & Williamson Holdings, Inc. (f/k/a Brown & Williamson Tobacco Corporation) and R.J. Reynolds Tobacco Company (collectively referred to herein as "Brown & Williamson") cross move [Mot. Seq. 29], for identical relief.

The motion and cross motion are determined as herein set forth below.

This is a tobacco product liability action. Essentially, plaintiff claims that his decedent, Vivian Tomasino, was unaware of the risks of smoking, became addicted to smoking and developed lung cancer and died in 1997 as a result of smoking cigarettes manufactured by certain of the defendants. Plaintiff commenced this action in September 1997. In June 2003, defendants Philip Morris 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 March 31, 2004, 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:

"Defendant's motions to dismiss the fourth and fifth causes of action, for negligent and defective design and for strict product liability respectively are denied. "...[I]n a design defect case there is almost no difference between a prima facie case in negligence and one in strict liability" (*Lancaster Silo & Block Company v. Northern Propane Gas Company*, 75 AD2d 55, 62 [4th Dept. 1980]). The only difference in the inquiry is that in the negligence action, a determination must be made as to whether the manufacturer acted unreasonably in how it designed the product (*Gonzalez v. Morflo Industries, Inc.*, 931 F. Supp. 159 [EDNY 1996]). Generally, in order to determine if a design defect is present, an assessment must be made as to whether "if the design defect were known at the time of manufacture, a reasonable prudent person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner" (*Denny v. Ford Motor Company*, 87 NY2d 248, 257 [1995]). In making such a determination, the following factors are to be considered: 1) the product's utility to the general public; 2) the product's utility to plaintiff; 3) the likelihood that the product will cause injury; 4) the availability of a safer design of the product; 5) the possibility of designing the product such that it is safer yet still functional and affordable; 6) the injured user's degree of awareness of the product's potential danger; and 7) the ability of the manufacturer to spread the cost of safety related design changes (*Denny v. Ford Motor Company*, supra)."

> "The defendants who are manufacturers and plaintiff have submitted conflicting affidavits of experts which deal with the above referenced inquiry. Accordingly, issues of fact exist which preclude summary judgment as to the defendant manufacturers on the fourth and fifth causes of action (*Miele v. American Tobacco*, supra)."

Following this Court's 2004 decision herein, in 2008, the New York Court of Appeals in *Adamo v. Brown & Williamson Tobacco Corp.*, 11 N.Y.3d 545, 872 N.Y.S.2d 415 (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. *See Rose v. Brown & Williamson Tobacco Corp.*, 53 A.D.3d 80, 855 N.Y.S.2d 119 (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. *See 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. *See 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, "[a] product is defective for the purposes of a negligence or strict products liability claim if it is 'not reasonably safe.' " *See id.* at 549; *Macaluso v. Herman Miller, Inc.*, 2005 WL 563169, at *5 (S.D.N.Y. 2005) *citing Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 639 N.Y.S.2d 250 (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. *See 515 Ave. I Corp. v. 515 Ave. I Tenants Corp.*, 44 A.D.3d 707, 844 N.Y.S.2d 79 (2d Dept. 2007); *Veitsman v. G & M Ambulette Service, Inc.*, 35 A.D.3d 848, 827 N.Y.S.2d 207 (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. *See Dinnalo v. DAL Elec.*, 60 A.D.3d 620, 874 N.Y.S.2d 246 (2d Dept. 2009). *See also Glicksman v. Board of Educ./Cent. School Bd. of Comsewogue Union Free School Dist.*, 278 A.D.2d 364, 717 N.Y.S.2d 373 (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. *See* CPLR 2221[e][2]; *Dinnalo v. DAL Elec.*, *supra.*

In its Prior Order, this Court determined that there were issues of fact relating to "alternative safer 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." *See* (*Sheppard-Mobley v. King*, 10 A.D.3d 70, 778 N.Y.S.2d 98 (2d Dept. 2004), *aff'd. as mod.*, 4 N.Y.3d 627, 797 N.Y.S.2d 403 (2005), *citing Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985) [emphasis supplied]. "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *See Sheppard-Mobley v. King*, *supra*; *Alvarez v. Prospect Hospital*, *supra*; *Winegrad v. New York University Medical Center*, *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. *See Alvarez v. Prospect Hospital*, *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. *See* (*Demshick v. Community Housing Management Corp.*, 34 A.D.3d 518, 824 N.Y.S.2d 166 (2d Dept. 2006), *citing Secof v. Greens Condominium*, 158 A.D.2d 591, 551 N.Y.S.2d 563 (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. *See Adamo v. Brown & Williamson Tobacco Corp., supra.* In the context of defendant's motion for summary judgment in this cigarettes 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 the plaintiff's decedent 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 this Court.

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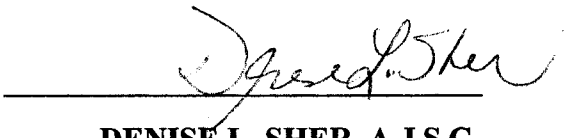

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
June 3, 2010

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