

Barawa v Acker Drill Co.
2013 NY Slip Op 33034(U)
December 2, 2013
Sup Ct, NY County
Docket Number: 190272/12
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLERPART 30

Justice

BURAWA, ROBERT BRUCE,
ETAL.

INDEX NO.

190272/12

MOTION DATE

MOTION SEQ. NO.

03

MOTION CAL. NO.

- v -
ACKER DRILL COMPANY,
ETAL.(FORD MOTOR CO.)

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

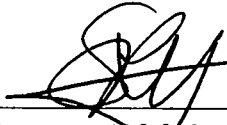
Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the
memorandum decision dated 12-2-13.Dated: 12-2-13
HON. SHERRY KLEIN HEITLER J.S.C.Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITIONCheck if appropriate: ☒ DO NOT POST ☐ REFERENCEMOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----- X
ROBERT BRUCE BARAWA and DEBORAH
ANN BURAWA,

Index No. 190272/12
Motion Seq. 003

Plaintiffs,

DECISION & ORDER

-against-

ACKER DRILL COMPANY, et al.,

Defendants.
----- X

SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant Ford Motor Company ("Ford") moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that there is no material issue of fact whether plaintiff Robert Barawa was exposed to asbestos fibers released from a product manufactured, distributed, or sold by Ford. Plaintiffs argue that summary judgment is inappropriate because Ford's products included numerous asbestos-containing components manufactured by third-party suppliers.¹

Plaintiff Robert Burawa was diagnosed with mesothelioma on June 4, 2012. He died on January 21, 2013. Prior to his death, Mr. Burawa and his wife Deborah Burawa commenced this action to recover for personal injuries caused by Mr. Burawa's exposure to asbestos-containing products over the course of more than twenty years during which he performed automotive and marine repairs.

Mr. Burawa was deposed on October 5, 2012 and November 19, 2012.² He testified that during the early 1950's when he was 8-10 years old he began assisting at his father's Queens, New York repair

¹ Plaintiffs do not oppose that branch of Ford's motion which seeks dismissal of plaintiff Deborah Burawa's loss of consortium claim. Accordingly, Ford's motion is granted in that respect only.

² Copies of his deposition transcripts are submitted as defendant's exhibit F ("Deposition").

shop, Bay Towing. Mr. Burawa worked at the shop full-time until he was 25 when he became a drilling operator at a paper mill. He continued to work at the shop part-time thereafter. Brake jobs, clutch jobs, and exhaust work made up a majority of Bay Towing's auto repair business. In this regard, Mr. Burawa testified that he was exposed to asbestos while replacing clutches on Ford, Chevrolet, and Dodge passenger cars (Deposition pp. 68, 165):

Q. Do you believe you may have been exposed to asbestos as a result of your helping to prep a vehicle for clutch work?

A. Yes, because I would handle that stuff. Again, they would put it in, but I would always handle that type of thing.

Q. When you say "that stuff," what are you talking about?

A. The clutch plate, the pressure plate, the throw-out bearing.

Q. Would you be exposed to asbestos as a result of the removal of an old clutch?

A. I would.

Q. And from the installation of a new clutch?

A. Yes, because I handled all of that.

* * * *

Q. Do you remember who manufactured any of the vehicles that you installed a BorgWarner clutch on while at Bay Towing?

A. Yes, Chevrolets, Fords, Dodges.

By 1970, marine repairs had become the vast majority of Bay Towing's business. Mr. Burawa testified that he rebuilt engines and salvaged junk engines for spare parts and was exposed to asbestos from scraping Victor-brand head gaskets off of marine engines manufactured by Ford, Chrysler, and Chevrolet, among others (Deposition pp. 81-82, 188):

Q. Going back to Bay Towing, is there any other way that you believe you were exposed to asbestos-containing materials as a result of working on the marine engines?

A. Gaskets.

Q. Do you recall the names of any of the engine manufacturers? . . .

A. You had Chris-Craft. You had Ford. You had Chrysler

* * * *

- Q. Tell me a little bit about the process for which you removed the Victor gaskets? What did you do.
- A. If they were really, really froze on, you would scrape as much as you possibly could because sometimes they were stuck to the head and the block, so half of it will come apart as you're taking it apart. After you did that, if it was really, really rough, we had what we call a porter cable. It runs a wire wheel, all flexible. If it was very rough, then you would want to use that. That was more protective of the motor than if you were to dig in hard with a scraper and put a notch of something in the steel.

The movant on a summary judgment motion must establish its defense sufficiently to warrant a court's directing judgment in its favor as a matter of law by demonstrating the absence of any material issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In asbestos-related litigation, should the moving defendant establish, *prima facie*, its entitlement to summary judgment, the plaintiff must then demonstrate that there was actual exposure to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). While the plaintiff need only show "facts and conditions from which the defendant's liability may be reasonably inferred," (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995]), the plaintiff cannot rely on conjecture or speculation. *Roimesher v Colgate Scaffolding*, 77 AD3d 425, 426 (1st Dept 2010). Should the moving party fail to present a *prima facie* case, the court need not consider the sufficiency of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985).

The documentary evidence corroborates Mr. Burawa's testimony that Ford sold passenger cars with several asbestos-based components, including clutches, and that Ford sold asbestos-containing clutches as replacement parts.³ A 1977 Ford memorandum provides that "Ford is essentially out of the asbestos product manufacturing business" but that "[a] significant number of key components containing asbestos are however purchased from outside suppliers." The memorandum notes that these

³ Plaintiffs' exhibit B, Attachment I(j).

suppliers' inability to meet OSHA regulations would present "a serious supply problem for Ford."⁴ In fact, testimony from a former Borg-Warner employee suggests that Ford was a major purchaser of Borg Warner's asbestos clutches during the 1960's and 1970's.⁵ With respect to Ford's marine engine division, a Ford document entitled "Suppliers of Asbestos-Containing Materials" confirms that Ford purchased its head gaskets from Victor, among others.⁶

Ford argues that it cannot be held liable for any non-original asbestos-components in its vehicles and automobiles, and because Mr. Burawa did not know the service history of the engines on which he worked it would be speculative to assume they contained original parts. However, Mr. Burawa's testimony that he was exposed to asbestos over the course of twenty-plus years from both new and old clutches is sufficient evidence from which a jury could reasonably infer that he worked with and was exposed to asbestos from Borg-Warner clutches original to Ford vehicles. Similarly, Ford has given this court no reason to assume that the regular maintenance of Ford marine engines required the removal and replacement of head gaskets at any point in time. There is no evidence on this motion that the Ford marine engines Mr. Burawa salvaged could not have included their original parts making it reasonable to infer that some of the head gaskets on the salvaged Ford marine engines were original.

Ford's reply papers purport to establish that it had no duty to warn against asbestos-containing products that were manufactured by third-party suppliers. While in general the court will not even consider arguments made for the first time in reply papers, *Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 (1st Dept 2006), it is notable that Ford's only supporting proof in this regard is an

⁴ Plaintiffs' exhibit E.

⁵ Plaintiffs' exhibit C, pp. 23-33.

⁶ Plaintiffs' exhibit G.

affidavit by a Ford Design Analysis Engineer that lacks any documentary support.⁷ Such unsupported, uncross-examined evidence cannot satisfy the defendant's burden (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Republic Nat. Bank of New York v Luis Winston, Inc.*, 107 AD2d 581, 582 [1st Dept 1985]), particularly in light of the fact that it is submitted for the first time in reply. *See Batista v Santiago*, 25 AD3d 326, 341 (1st Dept 2006).

Accordingly, it is hereby

ORDERED that Ford Motor Company's motion for summary judgment is granted only with respect to plaintiffs' eleventh cause of action for loss of consortium, and is otherwise denied; and it is further

ORDERED that plaintiffs eleventh cause of action for loss of consortium as against Ford is hereby severed and dismissed in its entirety; and it is further

ORDERED that Ford's motion for summary judgment is otherwise denied in its entirety; and it is further

The Clerk of the Court is directed to enter judgment accordingly

This constitutes the decision and order of the court.

ENTER:

DATED:

12-2-13



SHERRY KLEIN HEITLER, J.S.C.

⁷

The affidavit, sworn to September 18, 2013, is submitted as exhibit B to Ford's reply affirmation. The affiant states from his "personal knowledge based upon the course of my employment with Ford, my review of Ford documents, including historical data, and communications with current and former Ford employees, Ford has never designed or manufactured any asbestos-containing friction components . . . Ford never required or directed its suppliers to use asbestos in the design and manufacture of those component parts" and that "Ford has never had any control over the material composition of those parts designed, manufactured and supplied by aftermarket (non-Ford brand) manufacturers."

Id. ¶¶ 9, 10.