

<b>Barbarino v Basf Catalysts, LLC</b>
2016 NY Slip Op 30840(U)
May 5, 2016
Supreme Court, New York County
Docket Number: 190072/14
Judge: Peter H. Moulton
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 50

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JOAN BARBARINO, individually and as Executrix  
of the Estate of ROY BARBARINO, deceased

Plaintiff,

Index No.  
190072/14

-against-

BASF CATALYSTS, LLC et al.,

Defendants.

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**PETER H. MOULTON, J.S.C.**

Plaintiff, whose deceased husband was employed by the New York City Transit Authority as a transit bus body mechanic, was diagnosed with mesothelioma in 2014. Plaintiff moves for a default judgment against R.C.A. Rubber Company ("RCA") pursuant to CPLR § 3215. While plaintiff does not ask for a specific amount of damages, she attaches a proposed judgment in the amount of \$2,100,000. Alternatively, plaintiff seeks a default on liability and an inquest on damages.

To support the motion, plaintiff submits the deposition testimony of Roy Barbarino's co-worker, Robert Pustarfi (Ex J). Pustarfi testified that he worked with Barbarino cutting black and white speckled rubber flooring on buses. He described dust emanating from their work pulling up carpet, ripping up the rubber flooring, and applying body filler. Pustarfi also testified that both men replaced the old black and white speckled rubber flooring

with new black and white speckled rubber flooring, which they obtained from a storeroom. He further testified that the rubber came in large rolls, packaged in brown paper bags. Plaintiff cites Exhibit L (New York City Transit Authority's bus specifications) to demonstrate that RCA supplied the rubber floors. The second attached page is denominated "Floor Covering." It references an "RCA or approved equal" product under the heading "Underseat Areas." It also references "ribbed rubber safety floor covering" which "shall be white confetti RCA 'Tara Floor' 518 or approved equal" under the heading "Aisle." Plaintiff cites Exhibit M, a 1975 invoice from Union Carbide to RCA, bearing the logo "Calidria Asbestos" to demonstrate that RCA purchased asbestos for its products.

Plaintiff further asserts that she served RCA, an "unauthorized foreign business corporation" with the Fifth Amended Complaint on March 30, 2015 and April 15, 2015 (Ex E).<sup>1</sup> The Fifth Amended Complaint alleges that RCA "is a duly organized corporation doing business and/or transacting business in the State of New York and/or should have expected its acts to have consequences with the

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<sup>1</sup>The court takes judicial notice of defendant's website indicating that defendant is an Ohio corporation and a "leader in fabricating sheet rubber transit floors, entrance plates and step treads since the 1950s." The website also reflects that its rubber is used on trains and buses.

State of New York" (Ex C).<sup>2</sup> The affidavit of service (Exhibit E) reflects service on RCA pursuant to BCL § 307. Plaintiff attaches the affidavit of Regenia Hyman regarding her mailing of the Supplemental Summons and Fifth Amended Complaint for "190728 778 US" and the corresponding signed certified/registered mail receipt for "Article Number RE 190 728 778 US" (Exs E and F). Plaintiff also attaches a CPLR 3215 (g) (4) (i) additional notice sent by certified/registered mail under Article Number 7015 0640 0000 9664 9568 and the tracking result for that article (Exs I and J). However, defendant never responded or appeared.

The motion is granted on liability. The issue of damages shall be referred to a special referee to hear and report.

It is hereby

ORDERED that the motion for a default judgment is granted on liability; and it is hereby

ORDERED that the issue of the amount of damages shall be referred to a special referee to hear and report; and it is further

ORDERED that a copy of this Decision and Order shall be served on defendant with notice of entry at least 30 business days prior

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<sup>2</sup>After *Daimler AG v Bauman* 134 S Ct 746 (2014), doing business "continuously and systematically" was no longer enough for presence jurisdiction under CPLR § 301 (absent exceptional circumstances). However, *Daimler* had no affect on long arm jurisdiction under CPLR § 302, which is plaintiff's stated basis for jurisdiction (see Fifth Amended Complaint).

to the hearing before the Special Referee; and it is further

ORDERED that plaintiff shall move to confirm and/or reject the report of the Special Referee.

**This Constitutes the Decision and Order of the Court.**

Dated: May 5, 2016

ENTER:



J.S.C.

**HON. PETER H. MOULTON**  
J.S.C.