

Watts v A & J Plumbing & Heating Corp.

2018 NY Slip Op 32337(U)

September 19, 2018

Supreme Court, New York County

Docket Number: 190281/2016

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13

Just. MANUEL J. MENDEZ

IN RE: NEW YORK CITY ASBESTOS LITIGATION J.S.C.

BARBARA WATTS as Executrix for the Estate of JOHN WATTS and BARBARA WATTS as spouse,

INDEX NO. 190281/2016

MOTION DATE 08/29/2018

MOTION SEQ. NO. 005

Plaintiffs, - against -

A & J PLUMBING & HEATING CORP., Ind. and as successor to, LARCHMONT PLUMBING SUPPLY, et al.,

MOTION CAL. NO.

Defendants.

The following papers, numbered 1 to 8 were read on this motion to dismiss pursuant to CPLR §3211[a][1] and CPLR §3211[a][7] and/or pursuant to CPLR §3212 for summary judgment, by defendant, The Dyson-Kissner-Moran Corporation:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [] Yes [X] No

Upon a reading of the foregoing cited papers it is Ordered that Defendant The Dyson-Kissner-Moran Corporation's motion pursuant to CPLR §3211[a][1] and CPLR §3211[a][7] and/or for summary judgment pursuant to CPLR § 3212 dismissing the plaintiffs' claims in the Amended Complaint and in the Third-Party Complaint asserted against it, is granted.

The decedent, John Watts, was diagnosed with mesothelioma on August 2, 2016. Mr. Watts stated at his deposition that he was exposed to asbestos from his purchase and use of 25 pound bags of cement containing asbestos from the "Borders" store in Port Chester, New York in or around 1965 and the 1970's (Opp. Ex. 2, pgs. 848-850, 856-860, and 885-889).

Plaintiffs commenced this action on September 16, 2016 to recover for damages resulting from Mr. Watt's exposure to asbestos. The complaint was subsequently amended four times (See NYSCEF Doc. # 184). In the third amended complaint (NYSCEF Docket # 23), plaintiffs sued multiple corporate entities as owner of the "Borders Plumbing Supply" (hereinafter referred to as "Borders") in Port Chester, naming The RAL Supply Group, Inc., individually and as successor to Intercounty Supply Co. Inc. and Border Sales Inc. (hereinafter referred to as "The RAL Supply Group, Inc."), Intercounty Supply Inc. and Dyson-Kissner-Moran Corporation (hereinafter referred to as "DKM"), individually and as successor to Border Sales Inc., as defendants. On April 5, 2017 a third party action was commenced by The RAL Supply Group, Inc. naming DKM as a third-party defendant (NYSCEF Doc. #114). The third-party action asserted claims against DKM for breach of contract, indemnification and contribution (NYSCEF Doc. #114).

DKM alleges that RAL Plumbing and Heating Supply, Inc. operated a "Border Sales Division" for the wholesale of plumbing, heating and air-conditioning supplies, from a store located at 225 South Regent Street, Port Chester, New York (See Mot. Seq. 008, Exh. 2 (NYSCEF Doc. # 228), pg. 1, "Recitals," para. A.). DKM claims that Border Sales, Inc. was formed on June 12, 1985 solely to accept the "Border Sales Division's" assets. It is also alleged that on June 13, 1985 Border Sales Inc. entered into an Asset Purchase Agreement (1985 APA) with RAL Plumbing and Heating Supply, Inc. and The RAL Corporation, in which the assets of the "Border Sales Division" pertaining to the Borders store located in Port Chester, New York, were sold to Border Sales, Inc. (See Mot. Seq. 008, Exh. 2

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

(NYSCEF Doc. # 228), pg. 1, "Recitals" para. A). The 1985 APA only dealt with the "Borders" store in Port Chester, New York and its assets. It was not a full merger of the companies (See Mot. Seq. 008, Exh. 2 (NYSCEF Doc. # 228)).

On December 4, 1986 DKM entered into an Asset Purchase Agreement (1986 APA) with The RAL Corporation, RAL Leasing & Credit Corporation, RAL Plumbing and Heating Supply, Inc., and the shareholders of The RAL Corporation (Mot. Exh. 5). DKM claims that the 1986 APA explicitly excluded liabilities related to the 1985 APA in existence before the closing date. The RAL Corporation, RAL Leasing & Credit Corporation and RAL Plumbing and Heating Supply, Inc. retained their product liability and comprehensive general liability insurance policies (Mot. Exh. 5, para. §1.02 and exh. 2.01(h)).

On December 31, 1986 RAL Plumbing and Heating Supply, Inc. changed its name to LAR Plumbing, Inc. (Mot. Seq. 008, Exh. 3 (NYSCEF Doc. # 229)). It is alleged that through a series of transactions in 1997 and 1998 Border Sales Inc. merged with Bedford Hills Supply, becoming Intercounty Supply, LLC. The LAR Acquisition Corporation was created on January 21, 1993 (Mot. Exh. 8). On April 30, 1993, The LAR Acquisition Corporation (as Purchaser) entered into an Asset Purchase Agreement (1993 APA) to purchase assets of The RAL Corporation (as seller), at that time a wholly owned subsidiary of DKM (Mot. Exh. 10).

DKM's motion seeks an Order dismissing the claims asserted against it pursuant to CPLR §3211[a][1] on documentary evidence that utterly refutes plaintiff's claims, and pursuant to CPLR §3211[a][7] for failure to state a cause of action. Alternatively, it seeks summary judgment pursuant to CPLR §3212, dismissing the claims asserted against DKM in the Amended Complaint and in the third-party action.

A motion to dismiss pursuant to CPLR §3211[a][1] requires that the party seeking dismissal produce documentary evidence that "utterly refutes plaintiff's factual allegations conclusively establishing a defense as a matter of law" (*Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y. 2d 314, 774 N.E. 2d 1190, 746 N.Y. 2d 858 [2002]). Plaintiff is provided with every favorable inference and the complaint is construed liberally. A motion to dismiss pursuant to CPLR §3211[a][1] does not require that the plaintiff establish the ultimate success of the allegations (*African Diaspora Maritime Corp. v. Golden Gate Yacht Club*, 109 A.D. 3d 459, 968 N.Y.S. 2d 459 [1st Dept., 2013]).

Dismissal pursuant to CPLR §3211[a][7] requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and is properly pled, establishing a potentially meritorious claim (*Leon v. Martinez*, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). "When determining a motion to dismiss, the court must accord the plaintiffs the benefit of every potentially favorable inference (*Goldman v. Metropolitan Life Ins. Co.*, 98 N.Y. 2d 314, 774 N.E. 2d 1190, 746 N.Y.S. 2d 858 [2002]).

"It is the general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor. There are exceptions; a corporation may be held liable for the torts of its predecessor if: (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of 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" (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 464 NYS2d 437, 451 NE2d 195 [1983]).

A "de facto merger" can exist after a purchase of assets if a majority of the following factors exist: (a) "continuity of ownership" (b) the dissolution of the selling corporation as soon as possible after the transaction (c) the purchaser assumes liabilities that are necessary for the seller's business to continue uninterrupted and (d) management, personnel, physical location, assets and general business operation are continued (*In re New York City Asbestos Litigation*, 15 A.D. 3d 254, 789 N.Y.S. 2d 484 [1st Dept., 2005]). The continuity of ownership, where shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation, is the most significant factor to establish a de facto merger (*Oorah, Inc. v. Covista Communications, Inc.*, 139 A.D.

3d 444, 30 N.Y.S. 3d 626 [1st Dept. 2016] and Kretzmer v. Firesafe Products Corp., 24 A.D. 3d 158, 805 N.Y.S. 2d 340 [1st Dept. 2005]).

Affording every favorable inference, plaintiffs have failed to state meritorious causes of action against DKM for products liability and negligence. They have not shown that there was any assumption of liability by DKM under the 1986 APA or that there was a “de facto” merger. There was no continuity of ownership of the Borders store in Port Chester by DKM or assumption of liabilities under the 1986 APA, which excluded the 1985 APA. DKM is entitled to dismissal pursuant to CPLR 3211[a][7] of plaintiffs’ causes of action asserted against it.

Plaintiffs’ claims even if liberally construed, under the 1985 APA and 1986 APA cannot stand. The 1985 APA entered into between Border Sales Inc. as purchaser, and RAL Plumbing and Heating Supply, Inc. and The RAL Corporation as sellers, does not have any provision addressing assumption of pending liability. The 1985 APA transferred the assets of the “Border Sales Division” which included the “Borders” store located in Port Chester, New York, to Border Sales, Inc. (See Mot. Seq. 008, Exh. 2 (NYSCEF Doc. # 228), pg. 1, “Recitals” para. A).

The liability retained by RAL Plumbing and Heating Supply, Inc. and The RAL Corporation under the 1985 APA, was an “Excluded Asset” of the 1986 APA for which DKM did not assume any liability. The 1986 APA in Section 1.01(a) permits the transfer of assets “except as otherwise provided in Section 1.02 hereof” (See Mot. Exh. 5, pg. 2, Section 1.01(a)). Section 1.02 of the 1986 APA titled “Excluded Assets” states in relevant part, “the Purchased Assets to be sold to Purchaser (DKM) hereunder shall not include any right, title, interest or claim of Sellers or Shareholders in, to, relating to or arising under any of the following (hereinafter together referred to as the “Excluded Assets”).” The 1986 APA Section 1.02 (11) refers to “all assets disclosed on Exhibit 1.02(11) hereto” (See Mot. Exh. 005, pg. 6, Section 1.02 and p. 8, Section 1.02(11)). Exhibit 1.02(11), Titled “Additional Excluded Assets” includes the 1985 APA as an excluded asset (See Mot. Exh. 5, Exhibit 1.02(11), pg. 1). The 1986 APA Section 1.03(b)(13) and Section 1.03(d) each specifically make an exception for “any Excluded Asset,” stating that the Purchaser (DKM) does not assume liability for excluded assets (See Mot. Exh. 5, Section 1.03 (b) pg. 11, 103(b)(13) pg. 17, and 103(d) pg. 18).

DKM correctly argues that there was no retained liability for occurrences prior to the 1986 APA, which would include the period from 1965 through 1970 when the decedent-plaintiff, John Watts, alleges he was exposed to asbestos. The 1986 APA Section 1.03, titled, “Liabilities Assumed by Purchaser or Retained by Sellers,” under Section 1.03(a) states: “Purchaser (DKM) shall assume no liabilities of Sellers...except that Purchaser will assume and agree to pay, satisfy and discharge in accordance with their terms (subject to any available defenses or offsets) effect and contingent upon the occurrence of the closing, the following liabilities, payments and obligations of the sellers:” (Mot. Exh. 5, Section 1.03 (a), pg. 8). The 1986 APA Section 1.03 (a)(3) identifies liability on product liability claims assumed by the Purchaser (DKM) and states in relevant part:

“the liabilities, payments and obligations of Sellers for the repair or replacement of products arising out of or based upon claims in respect of products delivered sold or shipped to other persons whether on, or before or after the closing date (including claims for returns) and the liabilities, payments and obligations arising out of third party product liability claims based upon occurrences after the Closing Date relating to products sold or shipped to other persons whether on, before or after the closing date, except, that Purchaser does not assume any liabilities of Sellers arising out of or based upon negligence or breach of warranty (other than repair or replacement) in respect of products delivered sold or shipped to other persons by Sellers on or before the Closing Date or third-party product liability claims in respect of products delivered or sold or shipped to other persons by Sellers on or before the Closing Date based upon occurrences on or before the Closing Date...” (Emphasis Added) (Mot. Exh. 5, Section 1.03(a)(3), pg. 10)

The Expert Witness affirmation of Professor Jeffrey J. Haas stating that the language in the 1986 APA Section 1.03 (a)(3), that excludes liability for third party product liability claims for “occurrences on or before the Closing Date [December 24, 1986],” does not apply to asbestos claims, is unpersuasive. Professor Haas relies on *In re Viking Pump Inc. and Warren Pumps, LLC Insurance Appeals*, 148 A. 3d 633 [Del. Sup., 2016], a case from the Delaware Supreme Court that states that “occurrence” as defined for insurance claims applies to a “continuous process” and not just initial exposure. He states that this case establishes that DKM remains liable under the 1986 APA, through decedent-plaintiff John Watts diagnosis of mesothelioma.

In the context of New York insurance Law, an “occurrence” is not defined as the injury (the decedent-plaintiff’s mesothelioma), but the cause (exposure)(See *International Flavors & Fragrances, Inc. v. Royal Ins. Co. of America*, 46 A.D. 3d 224, 844 N.Y.S. 2d 257 [1st Dept., 2007]). In the context of products liability, a contract provision excluding liability “arising from any occurrence that takes place, or is alleged to have taken place prior to the closing date” has been interpreted as resulting in no retention of liabilities for claims submitted after the closing date (See *Tekni-Plex, Inc. v. Astro-Valcour, Inc.*, 293 A.D. 2d 256, 740 N.Y.S. 2d 33 [1st Dept., 2002]). In either context, DKM did not assume liability pursuant to the terms of the 1986 APA, before the Closing Date. DKM assumed liability for claims, that were not excluded, after the December 24 1986 Closing Date, which was long after the decedent-plaintiff’s alleged exposure in 1965 through approximately 1970, warranting dismissal pursuant to CPLR §3211[a][1].

Section 6.11(1) of the 1986 APA that refers to joint and several liability between DKM and RAL Acquisition Corporation, is inapplicable. Section 6.11(1) only applies to the assignability of DKM’s obligations to a subsidiary under the 1986 APA. Since there was no obligation retained by DKM as to the 1985 APA under the 1986 APA, there is no joint and severable liability as to plaintiff’s claims (See *Mot. Seq. 008, Exh. 2 (NYSCEF Docket # 228)*, Section 6.11 (1) pg. 81). The lack of alleged ambiguities in the 1986 APA warrants dismissal pursuant to CPLR §3211[a][1] of plaintiffs’ causes of action asserted against DKM.

On May 7, 2018 The RAL Supply Group Inc.’s motion to dismiss plaintiffs’ claims asserted against them and any cross-claims and for summary judgment, filed under Motion Sequence 006 was granted on default (NYSCEF Docket # 305). Motion Sequence 006 did not seek summary judgment on the claims asserted in the third-party action against DKM.

The third-party complaint relies on the 1993 APA, as the basis for the claims of indemnification, breach of contract, and indemnification and contribution asserting that The RAL Supply Group Inc. was acquired and was part of LAR Acquisition Corp. and is allegedly a third-party beneficiary of the agreement. DKM has established that The RAL Supply Group Inc. was not mentioned or named as a party to the 1993 APA (Mot. Exh. 10). There is no support for the third-party plaintiff’s claim that RAL was an intended beneficiary of the 1993 APA agreement. That 1993 APA agreement under §7 titled “Indemnification” provides, that the seller, “RAL Corporation, a wholly owned subsidiary of DKM,” is required to “indemnify and hold harmless” the purchaser which is only identified as, “LAR Acquisition Corp.” (Mot. Exh. 10, pg. 13). The 1993 APA does not apply to the Port Chester store it only applies to the “Hudson Valley” and Connecticut stores (Mot. Exh. 10, Whereas Clause, pg. 1). The RAL Supply Group Inc. did not oppose this motion and DKM has established through documentary evidence that dismissal is warranted pursuant to CPLR §3211[a][1].

DKM seeks to have this motion treated as a motion for summary judgment relying on the evidence presented in its motion to dismiss under CPLR §3211[a][1] and CPLR §3211[a][7].

CPLR §3211[c] permits a Court in its discretion to treat a motion to dismiss as a motion for summary judgment where the parties indicate that they are “deliberately

charting a summary judgment course,” or when a “purely legal question” is presented (Mihlovan v. Grozavu, 72 N.Y. 2d 506, 531 N.E. 2d 288, 534 N.Y.S. 2d 656 [1988]).

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 NY2d 833, 652 NYS2d 723 [1996]). It is only after the burden of proof is met that the burden switches to the nonmoving party to rebut that prima facie showing, by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 NY2d 525, 569 NYS2d 337 [1999]).

DKM has made a prima facie showing that it is entitled to summary judgment on plaintiffs claims. Plaintiffs have failed to raise any issues of fact on their claim that DKM has successor entity liability. They did not prove that DKM assumed liability under the 1986 APA or that there was a de facto merger.

Accordingly, it is ORDERED, that defendant, The Dyson-Kissner-Moran Corporation’s motion pursuant to CPLR §3211[a][1] and CPLR §3211[a][7] and/or for summary judgment pursuant to CPLR § 3212, dismissing the plaintiffs’ claims asserted against it in the Amended Complaint and the Third-Party Complaint, is granted, and it is further,

ORDERED that the causes of action asserted against The Dyson-Kissner-Moran Corporation in the Amended Complaint, are severed and dismissed, and it is further,

ORDERED that this action shall continue as to the remaining defendants, and it is further,

ORDERED that The RAL Supply Group, Inc., individually, and as successor to Intercounty Supply Co. Inc. and Border Sales Inc.’s Third-Party Complaint is dismissed, and it is further,

ORDERED that the Clerk of the Court shall enter judgment accordingly.

ENTER:



MANUEL J. MENDEZ

Dated: September 19, 2018

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE