

Distefano v A.O. Smith Wather Prods., Co.
2019 NY Slip Op 31417(U)
May 20, 2019
Supreme Court, New York County
Docket Number: 190364/2014
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ Justice PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION JANE DISTEFANO and PHILLIP DISTEFANO

INDEX NO. 190364/2014

Plaintiff(s),

MOTION DATE 5/17/2019

- against -

MOTION SEQ. NO. 005

A.O. SMITH WATHER PRODUCTS, CO., et al.,

MOTION CAL. NO.

Defendants.

The following papers, numbered 1 to 5 were read on Rain Bird Corporation's motion for summary judgment:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, and Repeating Affidavits.

Cross-Motion: Yes X No

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

Upon a reading of the foregoing cited papers, it is Ordered that defendant Rain Bird Corporation's (hereinafter, "Rain Bird") motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiffs' complaint and all cross-claims against it, is granted.

Plaintiffs Jane and Phillip Distefano commenced this action in the Supreme Court, State of New York, New York County, against several defendants, on September 19, 2014 (Aff. in Supp., Exh. A). On March 13, 2015 Rain Bird filed its Verified Answer (Aff. in Supp., Exh. B). Plaintiffs filed Supplemental Summonses and Amended Complaints on October 8, 24, and November 13, 2014 (Aff. in Supp., Exhs. C, D, and E). Plaintiff Jane Distefano's husband, plaintiff Phillip Distefano testified over the course of several days in November and December 2014. Mr. Distefano alleged that due to his work with various products, asbestos-containing dust settled on his work clothing, and his wife was then exposed to this asbestos dust from washing his work clothing (Aff. in Supp., Exh. F).

Mr. Distefano worked as a union plumber, out of Local 2, from 1962 to 1972 (id. at 97:11-21). Mr. Distefano believed he encountered many different brands of valves, including "Hammond" valves during his career as a union plumber (id. at 513:7-514:20). After leaving the union in 1972, Mr. Distefano opened his own plumbing business, "Distefano Plumbing and Heating" (id. at 391:12-392:9). Mr. Distefano operated this plumbing business until sometime in the early 1980s. (id. at 395:5-16, 472:17-25). Sometime after he ceased operating his own plumbing business, in 1986, Mr. Distefano began working for the New York City Housing Authority (hereinafter, "NYCHA") (id. at 473:4-474:13). At NYCHA, Mr. Distefano's work involved ensuring a given contractor's work was done in compliance with the relevant contract (id. at 476:8-13). He worked at NYCHA until 1993, when he was injured on the job, and subsequently retired. (id. at 510:11-13).

Plaintiffs' allegations of asbestos exposure from "Hammond" valves arise from Mr. Distefano' union work between 1962 and 1972, and not from Mr. Distefano's later work operating his own plumbing business, or his work at NYCHA (id. at 1576:7-23). Mr. Distefano alleged that while working with the union he installed and removed Hammond valves, and that he may have come into

contact with asbestos containing dust from gaskets, internal packing, and external insulation (see *id.* at 1600:4-1638:2).

Defendant-Rain Bird purchased Hammond Valve Corporation in 1984 via an Asset Sale and Purchase agreement (Aff. in Supp., Exh. H). Per the agreement, Rain Bird ultimately purchased the following specific assets from Hammond Valve Corporation: "Property, Plant and Equipment" (*id.* at ¶ 1.a), "Inventory" (*id.* at ¶ 1.b), "Accounts Receivable" (*id.* at ¶ 1.c), "Intangibles" (*id.* at ¶ 1.d), "Other Assets" (*id.* at ¶ 1.e), "Leases" (*id.* at ¶ 1.f), and "Contractual Obligations" (*id.* at ¶ 1.g). Under the Asset Purchase and Sale Agreement, Rain Bird and its subsidiary, "HVC Acquiring" did not purchase any tort liabilities of the seller (see *generally id.*). In fact, Rain Bird and HVC Acquiring specifically agreed to not assume successor liability for torts claims under the language of the Asset Sale and Purchase agreement (discussed further *infra*, see *id.* at ¶ 5.8).

Defendant now moves for summary judgment, arguing that it cannot be held responsible for injuries resulting from defective Hammond Valve Corporation products manufactured before defendant acquired the company in 1984. Plaintiffs oppose the motion claiming that Indiana law governs the tort claims in the instant case and that the Indiana Product Line Successor Rule should apply to make defendant liable for the products liability claims at issue.

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]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, 461 NYS2d 342 [1983], *aff'd* 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

Summary judgment is a drastic remedy that should only be granted if there are no triable issues of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13, 965 NE2d 240 [2012]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party by giving the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]).

Defendant-Rain Bird argues that it did not assume liability for products manufactured by Hammond Valve Corporation before 1984. Rain Bird also argues that none of the exceptions to successor liability under New York law (discussed, *infra*) are satisfied such as to render it potentially liable for plaintiffs' tort claims in this case.

Plaintiffs argue that Indiana state law governs the successor tort-liability issues arising from Rain Bird's 1984 acquisition of the Hammond Valve Corporation. In other words, plaintiffs contend that the asset purchase agreement at issue contains an explicit choice of law clause which would call for this court to apply Indiana law in determining whether the plaintiff's tort claims may proceed against Rain Bird. Upon applying Indiana law, plaintiffs maintain that Rain Bird could be held liable for plaintiff's injuries under Indiana's Product Line Successor Rule.

The Asset Sale and Purchase agreement (through which Rain Bird ultimately acquired Hammond Valve Corporation) contains the following choice of law provision:

22. Construction. This Agreement shall be construed and enforced in accordance with the laws of the State of Indiana.

(Aff. in Supp., Exh. H at ¶ 22, *emphasis added*)

This language only specifies that contractual disputes (i.e., breach of contract claims) amongst the parties to the “agreement” will be governed by Indiana law. The above language does not, however, go so far as to state that tort claims not arising directly out of the contract and the parties thereto are also governed by Indiana law.

Therefore, this court will apply New York law to determine issues of successor liability in this case. In New York, a corporation that acquires the assets of another is not liable for the torts of its predecessor (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 464 NYS2d 437, 451 NE2d 195 [1983]). There are four exceptions to New York’s general rule on successor liability, as the successor 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” (*id.*).

New York declined to “adopt the product line exception” to the rule that a corporation that purchases another corporation’s assets is not liable for the seller’s torts since “extending liability to a corporate successor places responsibility for a defective product on a party that did not put the product into the stream of commerce,” which is inconsistent with the justification for strict products liability (*Semenetz v Sherling & Walden, Inc.*, 7 NY3d 194, 818 NYS2d 819, 851 NE2d 1170 [2006]).

The “De facto merger” and the “mere continuation” theories generally overlap and as a consequence, “no criteria can be identified that distinguish them in any useful manner” (*Lumbard v Maglia, Inc.*, 621 F. Supp. 1529 [SDNY 1985]). “A transaction structured as a purchase-of-assets may be deemed to fall within this exception as a “de facto” merger, even if the parties chose not to effect a formal merger, if the following factors are present: (1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer’s assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller’s business; and (4) continuity of management, personnel, physical location, assets and general business operation” (*Van Nocker v A.W. Chesterton, Co. (In re N.Y.C. Asbestos Litig.)*, 15 AD3d 254, 789 NYS2d 484 [1st Dept. 2005]).

The Asset Sale and Purchase agreement also contains the following provision concerning successor liability:

5.8 General Warranty Against Liabilities

Except as specifically set forth herein, there are no liabilities, responsibilities, debts or obligations, known or unknown, liquidated or unliquidated, fixed or contingent, related to Seller or Condec or their operations (including claims based upon express or implied product warranties) to which Buyer or HVC shall succeed or become subject by reason of the transactions contemplated hereby.

(Aff. in Supp., Exh. H at ¶ 5.8)

This provision indicates that Rain Bird expressly agreed to not assume successor liability for torts claims under the language of the agreement.

In light of the contractual provisions above, it is evident that the Asset Sale and Purchase agreement does not expressly provide for the assumption of successor liability and does not indicate that Indiana law shall govern the tort claims at issue here. Plaintiffs have failed to rebut defendant's prima facie entitlement to summary judgment because they have not shown that any of the exceptions to New York's general successor liability rule apply here such as to render defendant liable. Therefore, summary judgment is granted.

Accordingly, it is ORDERED that defendant Rain Bird Corporation's motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiffs' complaint and all cross-claims against it, is granted, and it is further

ORDERED that the complaint and all cross-claims against defendant Rain Bird Corporation are severed and dismissed, and it is further

ORDERED that the clerk of court enter judgment accordingly.

MANUEL J. MENDEZ
J.S.C.

ENTER:

Dated: May 20, 2019



MANUEL J. MENDEZ
J.S.C.

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