

Germain v American Intl. Indus.
2019 NY Slip Op 32778(U)
September 18, 2019
Supreme Court, New York County
Docket Number: 190049/2017
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

EDDIE GERMAIN and MILDRED GERMAIN, as Personal Representative of the Estate of MICHELLE M. GERMAIN, Plaintiffs,

- against -

AMERICAN INTERNATIONAL INDUSTRIES, et al., Defendants.

INDEX NO. 190049/2017 MOTION DATE 09/14/2019 MOTION SEQ. NO. 012 MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion for summary judgment by defendant American International Industries Inc.:

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, American International Industries's motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' Complaint and all cross-claims against it, alternatively for partial summary judgment dismissing the plaintiffs' claims for punitive damages is granted. All claims and cross claims against American International Industries are severed and dismissed.

In February of 2017 Michelle Germain was diagnosed with epithelial mesothelioma. On August 4, 2017 Michelle M. Germain (hereinafter referred to as "decedent") died from the disease. Plaintiffs, the surviving spouse and decedent's daughter, brought this action on behalf of the estate alleging that the decedent contracted the disease from being exposed to asbestos in a variety of ways. It is alleged decedent was exposed to asbestos containing talc in "Clubman Talc" products that were manufactured by American International Industries (hereinafter "American") and NesleMur Company.

Decedent testified that she was exposed to "Clubman Talc" that was used by her husband, Eddie Germain, in a barbershop he worked in, and at one point owned, in Queens, New York, from about 1978 through 1993 or 1994 (Opp. Exh. 1, pgs. 439-441, 449 and 839 and Exh. 5, pgs. 44-45).

At her deposition the decedent stated that her husband initially worked in the barbershop in Queens, New York part-time, at least bi-weekly. Decedent visited her husband at the barbershop in Queens New York and claimed that her visits became longer after he became the owner in 1985 (Opp. Exh 1 at pgs. 20-26 and 447). Decedent claimed that when she observed Mr. Germain at work in New York, he would sprinkle or pour the talcum powder on a brush and apply it to the back of a customer's neck. She testified that her husband would make at least two shakes of the Clubman talcum powder unto a brush before using it. Decedent stated that this procedure took place each time Mr. Germain finished cutting hair, and recalled that while she was visiting, it would happen at least fifteen (15) times in one day (Opp. Exh. 1, pgs. 455-458, Exh. 2, pgs. 203 and 216).

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

Decedent testified that she was also exposed to the asbestos contaminated Clubman talcum powder by washing Mr. Germain's aprons when they lived in Queens, New York. She claimed that he had two aprons, a white one worn by Mr. Germain when he cut hair and a black one that was worn by his clients. She described the process of washing the aprons as shaking the apron to remove the dust (*powder*) and hair, then making sure there was nothing else attached, like metal clips, and putting the aprons into the washing machine (Opp. Exh. 1, pgs. 461-469 and Exh. 5, pg. 42).

Decedent claimed that after they moved to Florida, starting in October of 1994 through August of 2003, Mr. Germain continued to work as a barber in a unisex beauty salon owned by a woman named Carmen. Decedent stated that her husband continued to use Clubman's talcum powder products on clients in the same manner as in New York. She claimed that she visited her husband at Carmen's beauty salon in Florida about two to three times a week (Opp. Exh. 1, pgs. 475-481 and 832-833 and Exh. 2, pg. 378). Decedent testified that after they moved to Florida, Mr. Germain used the Clubman talcum powder he brought with him from New York and used it when he cut his cousin Anthony Holly's and their son Jamar's hair in their garage where he had set up a work station. Decedent testified that her son's hair was cut every three weeks and his cousin, Mr. Holly's hair was cut every two months (Opp. Exh. 1, pgs. 454-460 and 486-492). Decedent claimed that she was present when her husband cut hair in the garage. She testified that sometimes she would use a broom to sweep the garage floor after her husband was done cutting hair (Opp. Exh. 4 pgs. 105-106 and Exh. 5 pg. 44). She stated that after he stopped working at Carmen's beauty salon, her husband continued to cut hair in the garage until approximately 2016 (Opp. Exh. 1, pgs. 495-496).

Eddie Germain testified at his deposition that he purchased the Queens, New York barbershop from Klebert Derenoncourt in 1985, and in 1990 he sold the barbershop to Mr. Pradel. He testified that he worked for Mr. Pradel about four or five months after the sale of the barbershop to him, and then stopped cutting hair until after he moved to Florida in 1994. Mr. Germain stated that he had two cases of Clubman talcum powder that had been purchased by Mr. Derenoncourt, that were included in the sale when Mr. Germain purchased the business from Mr. Derenoncourt in 1985. Mr. Germain testified that he continued using the Clubman talcum powder Mr. Derenoncourt had purchased during the time he owned the Queens barbershop and during the four or five months he continued to work at the Queens, New York barbershop after he sold it to Mr. Pradel. Mr. Germain stated that he used the Clubman talcum powder purchased by Mr. Derenoncourt in New York for the entire time he owned and was working at the Queens barbershop in New York, the entire time he worked as a barber after he moved to Florida, and for all of the haircuts he did at home (Mot. Exh. K, pgs. 339-340, 357-358, 379-384).

Mr. Germain testified that he worked part time at Carmen's beauty salon in Florida for two and a half (2½) to three (3) years. He stated that his last year working as a barber at Carmen's beauty salon would have been 1997 or 1998 (Mot. Exh. K, pg. 368). Mr. Germain testified that he stopped working at Carmen's beauty salon to work as a musician, and he was never employed as a barber again (Mot. Exh. K, pg. 419-420). He claims that he used one case of Clubman talcum powder from the barbershop in Queens, New York, while he was working at Carmen's beauty salon in Florida. Mr. Germain stated that he used the second case of Clubman talcum powder at home when he was cutting his son Jamar's hair. Mr. Germain testified that he stopped cutting hair at home when his son Jamar was about nineteen (19) or twenty (20) years old, in 2007 or 2008. Mr. Germain stated that he did not cut anyone else's hair at home (Mot. Exh. K pgs. 435-438).

At his deposition, Jamar Germain deferred to his father's testimony as to the manner his hair was cut and the time periods involved (Opp. Exh. 4, pgs. 92-95).

Plaintiffs commenced this action on February 13, 2017, and subsequently amended the complaint four times, the Fourth Amended Complaint substituted the decedent's daughter, Mildred Germain as representative of the estate (Mot. Exh. A and NYSCEF Doc. # 114). Plaintiffs' Second Amended Complaint dated February 21, 2017- under the Second Standard Complaint - asserts four causes of action for: (1) negligence for wrongful death and survival damages, (2) strict liability for wrongful death and survival damages, (3) loss of services, society and consortium and (4) punitive damages (Mot. Exh. B). American answered plaintiffs' second amended complaint on March 20, 2017 (Mot. Exh. C).

American now moves for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' Complaint and all cross-claims against it, alternatively, American seeks partial summary judgment dismissing the plaintiffs' claims for punitive damages.

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 N.Y. 2d 833, 652 N.Y.S. 2d 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 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party by giving the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 A.D. 2d 583, 677 N.Y.S. 2d 136 [1st Dept. 1998]).

At the outset, American argues that it is not liable for plaintiff's claims prior to August 13, 1987. American claims that it purchased some of the Neslemur Company's assets from its then owner Kleer-Vu, on August 13, 1987, but that the parties expressly agreed that American was not assuming the tort or product liabilities of the Neslemur Company. In support of its argument American provides the affidavit of its Executive Vice-President, Charles Loveless, which confirms that the company did not blend, sell or distribute Clubman talcum powder prior to 1987. American also provides a copy of the asset purchase agreement with the Neslemur Company which states that the tort liabilities are not being assumed (Mot. Exh. E).

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" (*Schumacher v Richards Shear Co.*, 59 NY2d 239, *supra*).

The four exceptions do not apply to hold American liable for the torts of its predecessor the Neslemur Company. American cannot be considered a mere continuation of the Neslemur Company since there was no purchase of the manufacturing facilities, equipment or the real property. American paid the Neslemur Company cash consideration for the assets it purchased and there was no transfer of stocks from either company. There is no common ownership of assets or shared employees, no common owners or officers between the corporations. There was no consolidation or merger of the two companies. The Asset Purchase Agreement did not require American to acquire the Neslemur Company's liabilities. Additionally, plaintiffs do not oppose summary judgment on American's alleged liability for plaintiffs' claims prior to August 13, 1987 (Opp. Memo. of Law, pg. 1 of 18, Preliminary Statement). American is granted summary

judgment on plaintiffs' claims related to decedent's exposure to asbestos contaminated Clubman talcum powder products prior to August 13, 1987.

American has made a prima facie for summary judgment dismissing the decedent's claims for alleged exposure to asbestos in Clubman Talc. Mr. Germain's deposition testimony establishes that after the move to Florida he continued to use the Clubman talcum powder products from the two cases that were purchased by Klebert Derenoncourt before 1985. American is not liable for any alleged asbestos contaminated Clubman talcum powder purchased before August 13, 1987. American is not liable for any exposure to Clubman talc purchased by Mr. Derenoncourt before 1985.

Plaintiffs have not provided any evidence that would raise an issue of fact on the purchase of talc used by Mr. Germain after he purchased the barbershop in 1985, or after he moved to Florida in 1994. Decedent's deposition testimony contradicts Mr. Germain's testimony about the length of time the alleged asbestos contaminated Clubman talcum powder was used in Queens New York and in Florida. Mr. Germain had first hand knowledge of what he purchased with the business (specifically the two cases of Clubman talcum powder which were sold to him with the business and which were purchased by Mr. Derenoncourt before 1985), when and where he used those cases of Clubman talcum powder. Even if decedent testified as to the two cases of Clubman talcum powder, her testimony is hearsay, contrary to that of Mr. Germain's which is non-hearsay because he had first hand knowledge of the events, warranting summary judgment dismissing plaintiffs' claims against American, which includes the claims of exposure for the entire period he worked in the barbershop in Queens and the entire period he worked in Florida.

ACCORDINGLY, it is ORDERED that defendant American International Industries's motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' Complaint and all cross-claims against it, alternatively for partial summary judgment dismissing the plaintiffs' claims for punitive damages, is granted, and it is further,

ORDERED that plaintiffs' claims and all cross-claims asserted against American International Industries for the sale, distribution or supply of asbestos contaminated Clubman talcum powder are severed and dismissed, and it is further,

ORDERED that American International Industries is directed to serve a copy of this Order with Notice of Entry pursuant to NYSCEF e-filing protocol on the remaining parties, the General Clerk's Office and the County Clerk's Office, who are directed to mark their records accordingly, and it is further,

ORDERED that the clerk of court enter judgment accordingly.

ENTER:



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Dated: September 18, 2019

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE