

Friedel v Asbestos Corp., Ltd.
2019 NY Slip Op 34069(U)
March 14, 2019
Supreme Court, Erie County
Docket Number: 810168/2017
Judge: Deborah Chimes
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SUPREME COURT : STATE OF NEW YORK
EIGHTH JUDICIAL DISTRICT

In Re: EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

VERNON L. FRIEDEL and JOANNA M. FRIEDEL,
his spouse

Plaintiffs

DECISION AND ORDER

vs.

Index No. 810168/2017

ASBESTOS CORPORATION , LTD., et al.,

Defendants

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

THOMAS A. HENDERSON and SHARON HENDERSON,
his spouse

Plaintiffs

Index No. 805211/2017

vs.

ASBESTOS CORPORATION , LTD., et al.,

Defendants

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DENNIS C. SCHREIBER and MARJORIE A.
SCHREIBER, his spouse

Plaintiffs

vs.

Index No. 806760/2017

AJAX MAGNATHERMIC, CORP., et al.,

Defendants

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

SHIRLEY J. THRUSH, Executor of the Estate of
TERRY W. THRUSH, Deceased and Individually
as the Surviving Spouse of TERRY W. THRUSH,

Plaintiff

vs.

Index No. E 162678/2017

ASBESTOS CORPORATION, LTD., et al.,

Defendants

Defendant Special Electric Company, Inc. (Special Electric) moves to dismiss plaintiffs' complaints, pursuant to CPLR § 3211 (a) (7), on the ground that it is a dissolved corporation and immune from suit. Plaintiffs oppose the motions, arguing that New York law allows these actions to be maintained.

In support of its motion in *Friedel*, defendant Special Electric submitted its Notice of Motion dated September 15, 2017, the Affirmation in Support of Eric M. Gernant, II, Esq., with attached exhibits, dated September 15, 2017; the Reply

In re: Eighth Judicial Dist. Asbestos Litig.: Vernon L. Friedel, Erie Co. Index No. 810168/2017; Thomas A. Henderson, Erie Co. Index No. 805211/2017; Dennis C. Schreiber, Erie Co. Index No. 806760; Terry J. Thrush, Niagara Co. Index No. E162678/1017.

Affirmation in Support of Eric M. Gernant, II, Esq., with attached exhibits, dated October 3, 2017.

In opposition to the motion in *Friedel*, plaintiffs submitted the Attorney Affirmation of Dennis P. Harlow, Esq. , with attached exhibits, dated September 25, 2017.

In support of its motion in *Henderson*, defendant Special Electric submitted its Notice of Motion dated May 7, 2017, the Affirmation in Support of Eric M. Gernant, II, Esq., with attached exhibits, dated May 9, 2017; the Reply Affirmation in Support of Eric M. Gernant, II, Esq., with attached exhibits, dated July 26, 2017.

In opposition to the motion in *Henderson*, plaintiffs submitted the Attorney Affirmation of Dennis P. Harlow, Esq. , with attached exhibits, dated June 2, 2017; the Supplemental Attorney Affirmation of Dennis P. Harlow, Esq. , with attached exhibit, dated June 2, 2017;

In support of its motion in *Schreiber*, defendant Special Electric submitted its Notice of Motion dated June 15, 2017, the Affirmation in Support of Eric M. Gernant, II, Esq., with attached exhibits, dated June 15, 2017; the Reply Affirmation in Support of Eric M. Gernant, II, Esq., with attached exhibits, dated July 26, 2017 .

In opposition to the motion in *Schreiber*, plaintiffs submitted the Attorney Affirmation of Dennis P. Harlow, Esq. , with attached exhibits, dated July 17, 2017.

In re: Eighth Judicial Dist. Asbestos Litig.: Vernon L. Friedel, Erie Co. Index No. 810168/2017; Thomas A. Henderson, Erie Co. Index No. 805211/2017; Dennis C. Schreiber, Erie Co. Index No. 806760; Terry J. Thrush, Niagara Co. Index No. E162678/1017.

In support of its motion in *Thrush*, defendant Special Electric submitted its Notice of Motion dated November 17, 2017, the Affirmation in Support of Eric M. Gernant, II, Esq., with attached exhibits, dated November 17, 2017; the Reply Affirmation in Support of Eric M. Gernant, II, Esq., with attached exhibits, dated December 14, 2017.

In opposition to the motion in *Thrush*, plaintiff submitted the Attorney Affirmation of Keith R. Vona, Esq. with attached exhibits, dated November 28, 2017.

Plaintiffs allege injury caused by exposure to asbestos at their place of employment, Durez Plastics (Durez), a division of the Occidental Chemical Corporation, located in North Tonawanda, New York. The complaints allege that Special Electric, a supplier of raw asbestos fibers to Durez, was responsible for plaintiffs' injuries.

Special Electric was incorporated in Wisconsin in 1957. The company filed for bankruptcy in April 2004 in the United States Bankruptcy Court for the Eastern District of Wisconsin. On December 21, 2006, a Second Amended Plan of Reorganization (Bankruptcy Plan) was confirmed by the Bankruptcy Court. In 2004, John Erato, who had been employed by Special Electric in a variety of capacities since 1974, became president of the corporation. He resigned his position in November 2009. Despite notification to Erato from Special Electric's insurance companies that failure to appoint a successor president could constitute a breach of

In re: Eighth Judicial Dist. Asbestos Litig.: Vernon L. Friedel, Erie Co. Index No. 810168/2017; Thomas A. Henderson, Erie Co. Index No. 805211/2017; Dennis C. Schreiber, Erie Co. Index No. 806760; Terry J. Thrush, Niagara Co. Index No. E162678/1017

its policies and reserved the right to deny coverage to claimants, no successor was appointed. Wisconsin’s Department of Financial Institutions “administratively or involuntarily dissolved” Special Electric, effective September 11, 2012. Notice of that dissolution was published in three Wisconsin newspapers on May 8, 2014.

Special Electric asserts that publication of the notice of dissolution started a two year clock for submission of all claims against it and that claims made after that date are barred pursuant to Wisconsin Law¹. Defendant states that the issue of whether a dissolved corporation is subject to suit is governed by the state of its incorporation, here, Wisconsin, and that the complaints herein must be dismissed.

Plaintiffs maintain that “suits against dissolved corporations or their insurers

¹ Wisconsin corporations are governed by Chapter 180, Subch. XIV of its laws. Relevant provisions of 180.1407 of that chapter state:

(1) A dissolved corporation may publish notice of its dissolution and request that persons with claims, whether known or unknown, against the corporation ...present them in accordance with the notice.

* * *

(2) Except as provided in sub. (3), if the dissolved corporation publishes a newspaper notice in accordance with sub.(1). a claim against the dissolved corporation ...is barred unless the claimant brings a proceeding to enforce the claim within 2 years after the publication date of the newspaper notice, if the claimant is any of the following:

* * *

C. A claimant whose claim is contingent or based on an event occurring after the effective date of the dissolution.

In re: Eighth Judicial Dist. Asbestos Litig.: Vernon L. Friedel, Erie Co. Index No. 810168/2017; Thomas A. Henderson, Erie Co. Index No. 805211/2017; Dennis C. Schreiber, Erie Co. Index No. 806760; Terry J. Thrush, Niagara Co. Index No. E162678/1017

are permitted in some cases and disallowed in others”, asserting that under the facts and circumstances here, Special Electric may be sued in New York. Plaintiffs argue that because defendant was doing business in New York by supplying asbestos to Durez, it is subject to New York’s laws which permit dissolved corporations to be sued. Plaintiffs challenge the publication of the notice of dissolution, claiming that only the corporation may publish, not, as here, attorneys hired to represent Special Electric in defense of the asbestos claims. Plaintiffs therefore claim that Wisconsin’s two year period for institution of suit never began. Plaintiffs assert that at minimum, this issue creates a question of fact. In addition, plaintiffs contend that dismissal of these complaints would deprive them of access to Special Electric’s insurance coverage thus violating New York’s and Wisconsin’s public policy as well as the Bankruptcy Plan.

In reply, defendant maintains that plaintiffs’ cited exceptions to the general rule that New York abide by the other states’ dissolution statutes are “factually and procedurally dissimilar and unpersuasive”. Further, defendant argues, plaintiffs’ attempts to cast doubt upon the validity of the dissolution and effect of the plan fail, as they have failed previously in the courts of Wisconsin and California. Finally, defendant asserts that plaintiffs have failed to establish that New York public policy would override this court’s obligation to follow Wisconsin Law.

It is undisputed that corporations are creatures of the state of their incorporation. Dissolution of corporations and its effects are subject to the law of

In re: Eighth Judicial Dist. Asbestos Litig.: Vernon L. Friedel, Erie Co. Index No. 810168/2017; Thomas A. Henderson, Erie Co. Index No. 805211/2017; Dennis C. Schreiber, Erie Co. Index No. 806760; Terry J. Thrush, Niagara Co. Index No. E162678/1017

the state of incorporation.

“The decisions of this court are all to the effect that a private corporation in this country can exist only under the express law of the state or the sovereignty by which it was created. Its dissolution puts an end to its existence, the result of which may be likened to the death of a natural person. There must be some statutory authority for the prolongation of its life, even for litigation purposes.”

*Chicago Title & Trust Co. v Forty-One
Thirty-Six Wilcox Bldg. Corp., 302 US
120, 124-125 (1937)*

New York has long recognized and applied foreign dissolution statutes.

In *Sinnott v Hanan*, 214 NY 454 (1915), the Court of Appeals recognized and applied a New Jersey statute allowing dissolved corporations to prosecute and defend suits, settle their affairs and dispose of assets. The court ruled that because of the New Jersey statute, the action against the dissolved New Jersey corporation did not abate in New York.

In *Mock v Spivey Co.*, 167 AD2d 230 (1st Dept 1990) plaintiff asserted causes of action in negligence, breach of warranty and strict products liability against Spivey Company, Inc.(Spivey) , a Pennsylvania corporation. Spivey had been dissolved pursuant to a certificate issued by the Pennsylvania Department of State on March 18, 1985. The First Department followed the Pennsylvania law that permitted suit against a dissolved corporation only within two years of such dissolution and affirmed the dismissal of the plaintiff's complaint. The court noted,

In re: Eighth Judicial Dist. Asbestos Litig.: Vernon L. Friedel, Erie Co. Index No. 810168/2017; Thomas A. Henderson, Erie Co. Index No. 805211/2017; Dennis C. Schreiber, Erie Co. Index No. 806760; Terry J. Thrush, Niagara Co. Index No. E162678/1017

" The same statutory provision has previously been held to be a substantive limitation upon a plaintiff's right to sue, entitled to extraterritorial application by the New York court (*Bayer v Sarot*, 51 AD2d 366, *affd on opn below* 41 NY2d 1070)." *id.*

In 1975, in *Bayer* (1st Dept 1996), plaintiff alleged her husband's death was caused by a defective heart valve manufactured by a Pennsylvania corporation. In dismissing this action against the valve manufacturer, dissolved in Pennsylvania on March 22, 1972, the court applied Pennsylvania law holding:

"At common law all actions, either pending or thereafter instituted, abate upon the final dissolution of a corporation and judgments subsequently entered against the dissolved company are null and void. Also all persons who had contracted or done business with the dissolved corporation are charged with knowledge of the statutes governing the termination of its corporate existence upon dissolution, and of the statutes governing its liquidation, and are bound thereby [citations omitted] . Thus, the Pennsylvania statute is not a procedural limitation upon a right to sue; it substantively grants a two-year extension to the termination of the right to bring action expressed in the common law."

51 AD2d at 368-369.

Courts have similarly held in asbestos cases. In *Herlihy v Supply Corp.*, (2012 WL 171028, Sup Ct, NY County, Jan. 10, 2012, Heitler, J.) a plaintiff injured by exposure to asbestos sued SVI. Defendant incorporated in Alabama, moved to dismiss. The court found that SVI's dissolution under Alabama law mandated dismissal of the New York action, because suit was not brought prior to

In re: Eighth Judicial Dist. Asbestos Litig.: Vernon L. Friedel, Erie Co. Index No. 810168/2017; Thomas A. Henderson, Erie Co. Index No. 805211/2017; Dennis C. Schreiber, Erie Co. Index No. 806760; Terry J. Thrush, Niagara Co. Index No. E162678/1017

the two year survival period prescribed by Alabama Law. The court noted "the issue of whether a dissolved corporation may be subject to suit is governed by the laws of its state of incorporation". Judge Heitler further noted this rule has been consistently applied in New York citing *Republique Francaise v. Cellosilk Mfg. Co.*, 309 N.Y. 269, 278, (1955); *Mock v Spivey Co.*, *supra* and *Bayer v. Sarot*, *supra*.

Likewise, in *Germain v A.O. Smith Water Products Co.*, 41 Misc3d 1228 [A] , *aff'd sub nom, In re New York City Asbestos Litig.*, 116 AD3d 571 (1st Dept, 2014), the court applied New Jersey' s dissolution statute to a valve manufacturer sued in New York, but incorporated in New Jersey.

A more recent asbestos decision directly on point is *In re: New York City Asbestos Litigation[Stromholm]*, *Sup. Ct. NY Co.*, March 15, 2017, Moulton, J. , Index No. 190177/2016 . In *Stromholm*, while the parties' arguments differ in some respects than here, the court recognized and applied the Wisconsin dissolution statute in dismissing the complaint against Special Electric. "Plaintiff's attempt to avoid the effect of Wisconsin's dissolution statute fails. The motion must be granted because plaintiff did not timely file a claim against Special Electric under Wisconsin Statute § 180.147 (2)..."

This court recognizes that a number of courts in other states have granted Special Electric's motion².

² *McCoy v Special Electric*, (Philadelphia Court of Common Pleas, August 4, 2016 [Special's objection on grounds of dissolution sustained. However, the decision is stamped

In re: Eighth Judicial Dist. Asbestos Litig.: Vernon L. Friedel, Erie Co. Index No. 810168/2017; Thomas A. Henderson, Erie Co. Index No. 805211/2017; Dennis C. Schreiber, Erie Co. Index No. 806760; Terry J. Thrush, Niagara Co. Index No. E162678/1017

In reply, plaintiffs rely on *Hammond v Nat. Life Assoc.*, 58 AD 453 (1st Dept 1901) and cite *Independent Investor Protective League v Time, Inc.*, 50 NY2d 259 (1980) *City of New York v New York and South Brooklyn Ferry & Steam Transp. Co.* 231 NY 18 (1921) and *Shane v Evening Post Pub. Co.*, 168 NY 18 (1901) for their argument that there are exceptions to recognition and application of foreign dissolution statutes. In addition, plaintiffs urge the court to follow previous Eighth District asbestos judges Justice James B. Kane in *Matter of Eighth Jud. Dist. Asbestos Litig. (Casali)* and Judicial Hearing Officer John P. Lane in *Matter of Eighth Jud. Dist. Asbestos Litig. (Freiheit)*. None of these authorities persuade the court to apply anything other than the rule that foreign dissolution statutes be recognized and applied.

In *Hammond*, the court recognized that the defendant was incorporated and dissolved under Connecticut law. The issue the court addressed was whether a

"uncontested"] ; *Avina v Amcord, Inc.*, (Calif. Superior Court, September 19, 2016 [demurrer of Special Electric sustained, but plaintiff given leave to amend]); *Palacio v Borg-Warner*, (Calif. Superior Court, August(?) 19, 2016 [Same decision as in as *Avina*]); *Schaefer v Ferguson Enterprises*, (NJ Superior Court, March 31, 2017 [granting Special's motion to dismiss, but no specifics]); *DeSalvo v. Advanced Auto Parts*, (Ill. Circuit Court, July 14, 2017 [Special Electric's Motion to dismiss granted. "The same reasoning applies in other states such as Illinois. Like Wisconsin, Illinois bars commencement of claims after the expiration of the corporate survival statute because the entity no longer exists, no longer has the capacity to be sued, and therefore, no judgment can be taken against it." Citing *Matter of Sager*, 967 NE 2d 1203 [Ill., 2012]); *Hart v Special Electric* (Calif. Court of Appeal, November 26, 2018 [dismissal of Special Electric upheld- not violative of Bankruptcy Plan]); *In re: Asbestos Litigation* (Sup. Court of Delaware, December 7, 2017 [Special Electric's motion granted, citing Wisconsin law.])

In re: Eighth Judicial Dist. Asbestos Litig.: Vernon L. Friedel, Erie Co. Index No. 810168/2017; Thomas A. Henderson, Erie Co. Index No. 805211/2017; Dennis C. Schreiber, Erie Co. Index No. 806760; Terry J. Thrush, Niagara Co. Index No. E162678/1017

creditor could attach the dissolved corporations property located in New York. The court held that “[T]he foreign corporation dissolved and dead in the domicile of its origin, should be deemed alive in the foreign state *so far as* to save the remedy of its own citizens against the property within its own jurisdiction ...” [emphasis added].

This court notes the holding in *Hammond* was questioned and restricted to its facts in *Martyne v American Union Fire Insurance Co. of Philadelphia*, 216 NY 183 (1915) which also illustrated the principle that a dissolved corporation can not be sued unless permitted by the state of its incorporation.

The other cases cited by plaintiffs lend no more assistance: in *Shayne*, a libel action, the court permitted plaintiff to proceed against the shareholders of a dissolved corporation; in *City of New York*, a dispute over breach of a real estate covenant, the court simply interpreted language in a New York statute which allowed a dissolved New York corporation to “wind up” its affairs; and in *Independent Investor Protective League*, the court held that shareholders’ derivative action could proceed although the subject corporation had dissolved.

Assuming these cited cases are exceptions to the rule, the facts resulting in such exceptions do not apply to the facts before this court.

Regarding the prior rulings of Justices Kane and Lane, this court is obligated to follow the holdings of the New York Court of Appeals and the New York Appellate

In re: Eighth Judicial Dist. Asbestos Litig.; Vernon L. Friedel, Erie Co. Index No. 810168/2017; Thomas A. Henderson, Erie Co. Index No. 805211/2017; Dennis C. Schreiber, Erie Co. Index No. 806760; Terry J. Thrush, Niagara Co. Index No. E162678/1017.

Division decisions. Therefore this court declines to follow the trial court decisions of the *Casali* and *Fisher* cases, which appear to be contrary to the higher court holdings.

Contrary to plaintiffs' argument, application of the Wisconsin dissolution statute does not trigger a conflict of laws analysis. "[T]he first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved (*Matter of Allstate Ins. Co. [Stolarz—New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 223 [1993]; see *Bodea v TransNat Express*, 286 AD2d 5, 8 [2001])." (*Burnett v. Columbus McKinnon Corp.*, 69 ADd 58, 60 (4th Dept 2009))

Here, the court finds no such conflict exists because New York recognizes foreign dissolution statutes.

Regarding the plaintiffs' public policy argument, plaintiffs have not cited and the Court has been unable to find, any precedent holding that the application of a dissolution statute violates New York's public policy. To the contrary, the only case addressing the public policy argument noted:

"In this regard, the 'public policy doctrine' is a recognized exception to the implementation of an otherwise applicable foreign law by which a New York court may decline to enforce such law because it is repugnant to New York public policy. See *Schultz v. Boy Scouts of Am.*, 65 NY2d 189, 202, (1985). However, the party seeking to invoke such exception has the 'heavy burden of proving that the foreign law

In re: Eighth Judicial Dist. Asbestos Litig.: Vernon L. Friedel, Erie Co. Index No. 810168/2017; Thomas A. Henderson, Erie Co. Index No. 805211/2017; Dennis C. Schreiber, Erie Co. Index No. 806760; Terry J. Thrush, Niagara Co. Index No. E162678/1017

is contrary to New York public policy... for public policy is not measured by individual notions of expediency and fairness or by a showing that the foreign law is unreasonable or unwise.” *Id.*

* * *

In addition, it is simply not enough to invoke the doctrine because the Alabama statute bars plaintiffs from recovery against SVI in New York. As Justice Cardozo observed in *Loucks v. Standard Oil Co.*, 224 NY 99, 110-111 (1918), “[o]ur own scheme of legislation maybe different That is not enough to show that public policy forbids us to enforce the foreign right.... We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.” *Herlihy, supra*

Plaintiffs also argue the dissolution of Special Electric in Wisconsin was improper because Special Electric’s defense attorneys published the notice of dissolution and not the corporation.

In *Morehouse v Special Electric Co., Inc.* (Wisconsin Circuit Ct., April 14, 2016, Troupis, J., Case No., 14CV1154), the court recognized the publication was not by an officer or shareholder of Special Electric, yet denied the plaintiff’s request to reinstate the corporation. This court defers to the Wisconsin court’s analysis relative to this issue.

Plaintiffs further argue that if dissolution was allowed, the prior Bankruptcy Plan would be frustrated. The court notes that in *Stromholm*, the court held that the Bankruptcy Plan did not preempt the Wisconsin dissolution statute and applied

In re: Eighth Judicial Dist. Asbestos Litig.: Vernon L. Friedel, Erie Co. Index No. 810168/2017; Thomas A. Henderson, Erie Co. Index No. 805211/2017; Dennis C. Schreiber, Erie Co. Index No. 806760; Terry J. Thrush, Niagara Co. Index No. E162678/1017

that statute, granting Special Electric's motion to dismiss.

Likewise, the Bankruptcy Court *In Re Special Electric Company Inc*, US Bankruptcy Ct. ED Wisconsin, October 7, 2016, refused to reopen the case to enforce the Bankruptcy Plan.


Finally, though it may seem contrary to a sense of justice that, through this statutory mechanism, insurance proceeds are inaccessible to plaintiffs, the issue here is one of timeliness, and has a similar effect to that of a statute of limitations. If a cause of action is commenced too late, the injured party cannot have access to insurance proceeds.

Plaintiffs have not succeeded in persuading this court that it should not recognize and apply the Wisconsin dissolution statute.

Defendant's motion is granted.

SO ORDERED:

DATED: Buffalo, New York
March 14, 2019


HON. DEBORAH A. CHIMES
Justice of the Supreme Court