

O'Sullivan v Borg-Warner Corp.

2021 NY Slip Op 30021(U)

January 4, 2021

Supreme Court, New York County

Docket Number: 190180/2012

Judge: Adam Silvera

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

PRESENT: HON. ADAM SILVERA PART IAS MOTION 13

Justice

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ANTHONY O'SULLIVAN, AS ADMINISTRATOR FOR THE
ESTATE OF PATRICK O'SULLIVAN, BRIGID O'SULLIVAN,

Plaintiff,

- v -

BORG-WARNER CORPORATION, CBS CORPORATION,
F/K/A VIACOM INC., CUMMINS ENGINE COMPANY,
INC., DANA COMPANIES, LLC, FORD MOTOR COMPANY,
FREIGHTLINER CORPORATION, GENERAL ELECTRIC
COMPANY, GOODYEAR CANADA, INC, HONDA OF
AMERICA MFG., INC, HONEYWELL INTERNATIONAL,
INC., INGERSOLL-RAND COMPANY, INTERNATIONAL
TRUCK AND ENGINE CORPORATION, MACK TRUCKS,
INC, MAREMOUNT CORP, NISSAN NORTH AMERICA,
INC, OWENS-ILLINOIS, INC, PERKINS ENGINES, INC,
PNEUMO ABEX LLC, SUCCESSOR IN INTEREST TO
ABEX CORPORATION (ABEX), RAPID-AMERICAN
CORPORATION, STANDARD MOTOR PRODUCTS, INC,
THE GOODYEAR TIRE AND RUBBER COMPANY,
TOYOTA MOTOR SALES, U.S.A., INC, TRANE U.S.
INC., F/K/A AMERICAN STANDARD INC, U.S. RUBBER
COMPANY (UNIROYAL), AMERICAN HONDA MOTOR
CO., INC. (AHM), AMERICAN HONDA MOTOR CO INC
(AHM), BORG WARNER MORSE TEC INC, CBS CORP
F/K/ A WESTINGHOUSE ELECTRIC CORP, HONEYWELL
INTERNATIONAL INC F/K/A ALLIED SIGNAL INC/BENDIX,
UNION CARBIDE CORP,

Defendant.

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INDEX NO. 190180/2012
MOTION DATE 05/29/2020
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.
Before the Court is defendant Nissan North America, Inc.'s (hereinafter referred to as "NNA")

motion for summary judgment, pursuant to CPLR 3212, for a finding in favor of NNA on the
grounds that said defendant has made a prima facie case demonstrating lack of causation and to
dismiss Plaintiffs' Fourth Amended Verified Complaint and all cross-claims against NNA.

Plaintiffs oppose the motion.

NNA's motion contends that plaintiffs have failed to establish that NNA sold or distributed "Nissan" brand vehicles at the time of plaintiff decedent Patrick O'Sullivan's ("Decedent") alleged exposure to asbestos. The case at issue arises from Decedent's diagnosis of fatal lung cancer, which led to his death on February 8, 2012. Plaintiffs allege that Decedent's lung cancer was caused by his exposure to asbestos over the course of his career as a cars and parts mechanic. Decedent worked as a car and parts mechanic throughout the 1970s at several gas stations including Sky Service, Esso, and Danny's Texaco where he performed brake jobs. This work included changing brakes that created asbestos dust which plaintiff breathed in (Aff In Op, Exh 2 at 309-310).

Here, upon motion for summary judgment, NNA alleges that Decedent could not have been exposed to asbestos in "Nissan" brand vehicles for which NNA is responsible. NNA avers that it did not begin distributing "Nissan" brand vehicles until after Decedent's alleged time of exposure. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). A defendant seeking summary judgment in a products liability case involving asbestos must make a prima facie case that its product could not have contributed to the causation of the plaintiff's injury (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462 [1st Dept 1995]). The defendant must "unequivocally establish that its product could not have contributed to the causation of plaintiff's injury' for the court to grant summary judgment" (*Matter of N.Y.C. Asbestos Litig.*, 122 AD3d 520 [1st Dept. 2014]).

NNA argues that plaintiffs fail to establish causation for Decedent's lung cancer. In support of their motion, NNA attaches the affidavit of their former Director of Product Safety,

Environmental, Robert Kenji Yakushi (Mot, Yakushi Aff). Mr. Yakushi testified that during the time period that Decedent testified to have worked on “Nissan” automobiles NNA had not yet begun to distribute “Nissan” brand vehicles and did not distribute “Nissan” branded vehicles until 1983 (*id.* at 2-3, ¶¶7-8). Decedent testified that he worked on Nissan branded vehicles in the 1970s and that he went to go work for the City of New York Fire Department in 1980 (Aff in Opp, Exh 2 at 156, ¶¶17-22). Further Decedent testified that he could not remember whether the asbestos products in question were branded with the Nissan name (*id.* at 344, ¶¶13-24). Decedent testified that he would use Nissan brakes on the Nissan Vehicles (*id.* at 244, ¶¶19-22; 247, ¶¶ 19-24).

NNA has demonstrated that its predecessor company did not distribute “Nissan” brand vehicles at the time plaintiffs allege Decedent was exposed to “Nissan” asbestos products. If Decedent was allegedly installing “Nissan” brakes and clutches into “Nissan” vehicles, those vehicles would need to have been in circulation at the time of the alleged exposure. Decedent’s timeline for his exposure to Nissan’s asbestos products is not feasible. Defendant has established that Nissan vehicles did not exist in the United States in the 1970s and thus could not have contributed to the causation of plaintiff’s injury. Thus, defendant has made a prima facie showing of entitlement to judgment as a matter of law and the burden shifts to plaintiffs to raise an issue of fact.

In opposition, plaintiffs allege that defendant has failed to make a prima facie showing of entitlement to summary judgment because their motion is “based on gaps in testimony” (Aff in Op at 2, ¶4). Plaintiffs aver that defendant’s counsel could have filled in these gaps by questioning Mr. O’Sullivan as to whether Nissan was the brand or the manufacturer of the vehicles and parts that he worked on in the 1970s. Plaintiffs note that NNA admitted in its

Answers to Interrogatories that it was the distributor of Nissan manufactured products during the relevant time period, including brake linings and clutch facings, and that such parts contained asbestos (*id.* at 6, ¶23). In support of their opposition, plaintiffs rely on this Court's ruling in *Callahan v. A.O. Smith Water Products Co.* Index No. 190038/14, April 28, 2014 [J. Heitler]. The Honorable Sherry Klein Heitler denied summary judgment to a manufacturer of valves whose brand was not specifically identified by the deponent because the witness was never asked to do so by defense counsel (Aff in Opp, Exh 5). In another opinion in the same case Judge Heitler denied summary judgment to another valve manufacturer, noting "the infirmity of the defendant's motion is that it attempts to fault [the witness] for not answering a question that he was never asked." (*Id.*, Exh 6 *Callahan v. A.O. Smith Water Products Co.* Index No. 190038/14, March 28, 2014 [J. Heitler]).

The Court finds that the case at bar is distinct from those which plaintiffs base their argument on. Here, Decedent was in fact questioned about Nissan asbestos containing products. Plaintiffs attempt to raise a feigned issue of fact as to whether Decedent was asked if he worked with Nissan-manufactured vehicles and parts. Here, defendant is not faulting plaintiffs for a question that was never asked. Decedent clearly identified Nissan as the brand, which he had worked on during the alleged exposure. Decedent testified to working with Nissan parts on Nissan vehicles, vehicles which defendant has demonstrated were not in circulation during the time that plaintiff testified to working on them.

The Court finds that there is no gap in the testimony of Decedent. Decedent was asked to identify any additional brands and models of vehicles he worked on but never mentioned any other names of vehicles distributed by NNA, which could have been in circulation at the alleged time of exposure (Mot, Exh C at 60, 78, 79, 140, 142). Defendant has demonstrated that at the

alleged time of exposure it only distributed Datsun vehicles, a make that was not identified by Decedent during his deposition. Thus, plaintiffs' opposition fails to raise an issue of fact and defendant's motion is granted as it has made a prima facie showing of lack of causation and is entitled to summary judgment to dismiss plaintiffs' Complaint.

Accordingly, it is

ORDERED that defendant's motion for summary judgment, pursuant to CPLR 3212, for a finding in favor of NNA on the grounds that said defendant has made a prima facie case demonstrating lack of causation and to dismiss plaintiffs' Complaint and all cross-claims against NNA is granted; and it is further

ORDERED that the Complaint is dismissed in its entirety as against defendant NNA with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption

ORDERED that within 30 days of entry, defendant NNA shall serve a copy of this Decision/Order upon all parties with notice of entry.

This Constitutes the Decision/Order of the Court.

ADAM SILVERA, J.S.C.

1/04/2021
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: