

<b>Berger v Aerco Intl., Inc.</b>
2021 NY Slip Op 30742(U)
March 10, 2021
Supreme Court, New York County
Docket Number: 190376/2018
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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STANLEY BERGER, as Administrator for the Estate of
LORRAINE T. BERGER and STANLEY BERGER,
Individually,

INDEX NO. 190376/2018

MOTION DATE 11/23/2020

Plaintiff,

MOTION SEQ. NO. 002

- v -

DECISION + ORDER ON MOTION

AERCO INTERNATIONAL, INC., et. Al.,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210

were read on this motion to/for DISMISS

Before the Court is defendant Gare Incorporated's ("Gare") motion for summary judgment, pursuant to CPLR 3212, granting summary judgment in favor of Gare dismissing plaintiffs' Complaints and all cross-claims against Gare. Plaintiffs oppose the motion.

The case at issue stems from plaintiff Lorraine Berger's ("Decedent") June 22, 2018 diagnosis of mesothelioma that led to her death on April 30, 2019. Plaintiffs allege that Decedent's disease was causally connected to her asbestos exposure from Gare asbestos-containing products. Gare's motion contends that Gare has no liability for claims or litigation based on events occurring before July 21, 1983.

"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]).

Here, Gare avers that it cannot be held liable for Decedent's exposure to Gare products because it was not incorporated until after Decedent stopped working with ceramics. Decedent testified that she began working with ceramics in the mid to later 1970s while taking ceramics classes in peoples' homes or in local ceramics shops (Aff in Op, Exh 3 at 81-118). Decedent testified that while working in her home she began to use Gare slips product (*id.* at 125-126; 137). In 1978 Decedent started her own ceramics company, "Ceramics by Lori, Inc." where she used Gare slips to make ceramic products until 1981 when she dissolved the company (*id.* at 163:21-164:4). Decedent worked from 1982 to 1983 as head of the ceramics department at Camp Venture, a home for adults with special needs, where she worked with Gare glaze (*id.* at 203:23; 205:8-206:9; 214:24-215:4; 216:23-217:1). After Decedent finished working at Camp Venture in June 1983 she ceased working with any ceramic materials, and thus stopped using Gare products, in any capacity (*id.* at 216:23-217:1).

"It is the general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor" (*Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239 ([1983] [finding that "[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"]). In support of their motion Gare submits an Asset Purchase Agreement (the "Agreement") and the affidavit of David Alaimo, the President and Chief Operating Officer of Gare, which

demonstrates that assets of Gare Incorporated, which later changed its name to Geeanna Incorporated (“Old Gare”) were purchased by Pequot Acquisitions Company Inc. on July 21, 1983 (Mot, Exh L). Mr. Alaimo testified that his father formed Pequot Acquisitions on July 19, 1983 in order to purchase assets from Old Gare (*id.*). Pursuant to the Agreement, Pequot Acquisitions, did not assume “[o]bligations and liabilities arising out of all claims or litigations now pending or threatened or which may be brought hereafter against Seller based upon events occurring prior to the Closing Date” (*id.* at 5: 2.2 (f)). After the Agreement was signed, Pequot Acquisitions changed its name to Gare Incorporated (*id.* ¶¶10-14). Defendant has demonstrated that Decedent alleged to have been exposed to asbestos from Old Gare products before Gare purchased select assets from Old Gare on July 21, 1983. Gare has demonstrated that it did not assume any of Old Gare’s liabilities arising out of all claims or litigations which occurred prior to the closing date on July 21, 1983 and thus cannot be held liable for plaintiffs alleged injuries.

In opposition, plaintiffs fail to demonstrate that Gare assumed the liabilities of Old Gare. Plaintiffs have the burden to demonstrate that Gare is liable for the torts of its predecessor. Plaintiffs have failed to demonstrate that any exceptions to the general rule, which shield a corporation from the torts of its predecessor exist in the case at bar. As such, defendant’s motion to dismiss is granted.

Accordingly, it is

ORDERED that defendant’s motion for summary judgment, pursuant to CPLR 3212, granting summary judgment in favor of Gare dismissing Plaintiff’s Complaints and all cross-claims against Gare is granted; and it is further

ORDERED that the Complaint is dismissed in its entirety as against Gare 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; and it is further

ORDERED that within 30 days of entry, defendant Gare Incorporated 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.

3/10/2021  
DATE

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION

GRANTED IN PART  OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE