

**Durcan v A.O. Smith Water Prods. Co**

2022 NY Slip Op 32056(U)

June 24, 2022

Supreme Court, New York County

Docket Number: Index No. 190121/2020

Judge: Adam Silvera

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

**PRESENT: HON. ADAM SILVERA**

**PART 13**

*Justice*

X

PATRICIA DURCAN,

Plaintiff,

INDEX NO. 190121/2020

MOTION DATE 04/26/2021

MOTION SEQ. NO. 001

- v -

A.O. SMITH WATER PRODUCTS CO, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, AMERICAN BILTRITE INC, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, CBS CORPORATION, F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, COMPUDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC, DAP, INC, DOMCO PRODUCTS TEXAS, INC, EATON CORPORATION, INDIVIDUALLY AND AS SUCCESSOR -IN-INTEREST TO CUTLER-HAMMER, INC, GENERAL ELECTRIC COMPANY, INTERNATIONAL PAPER COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO CHAMPION INTERNATIONAL CORPORATION, AS SUCCESSOR TO UNITED STATES PLYWOOD CORPORATION, LEVITON MANUFACTURING CO., INC, PB HEAT LLC, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO PEERLESS INDUSTRIES, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), SCHNEIDER ELECTRIC USA, INC. FORMERLY KNOWN AS SQUARE D COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC, WEYERHAEUSER COMPANY,

Defendant.

**DECISION + ORDER ON MOTION**

Upon the foregoing documents, it is hereby ordered that Defendant PB Heat LLC's (hereinafter referred to as PB Heat) motion to dismiss and to impose sanctions is denied for the reasons set forth below.

Peerless Industries was established in 1981. From its inception to 2019, Peerless Industries' insurers defended and indemnified the company against all asbestos related lawsuits. PB Heat was formed on April 16, 2003, by the filing of the Certificate of Formation. *See* Notice of Motion, Exh. E. Shortly thereafter, Atlantic Shores Corporation (hereinafter referred to as Atlantic Shores) acquired both assets and liabilities to a company named Peerless Heater Company on April 30, 2003. *See Id.* at Exh. F, Declaration of Doug Shuff, dated June 12, 2019. Atlantic Shores was the sole member of PB Heat at the time of this transaction. As a part of this transaction, any asbestos related liability prior to September of 1997 was not assumed by Atlantic Shore, as the liability pre-1997 remained with Peerless Heater Company. Following such transaction, Atlantic Shore transferred the assets and liabilities acquired from Peerless Heater Company to PB Heat. *Id.* at Exh. L, Bill Of Sale, dated April 30, 2003. Subsequently, Peerless Heater Company merged with Boiler Products Co., a subsidiary wholly owned by Peerless Industries, thus dissolving Peerless Heater Company. As a result, the pre-1997 asbestos related liability transferred to Boiler Products Co.

In the instant matter, Plaintiff filed suit against PB Heat claiming exposure to asbestos, arguing that the doctrine of successor liability is applicable to PB Heat. PB Heat moves to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action and further, under CPLR 3211(a)(1) based upon the documentary evidence. Finally, PB Heat moves for sanctions under 22 NYCRR 130-1.1 for alleged frivolous conduct.

As to PB Heat's motion to dismiss for failure to state a cause of action, such motion "assumes the truth of the material allegations and everything reasonably to be implied therefrom. . . [T]he plaintiff must be 'given the benefit of every possible favorable inference' and the motion to dismiss will fail if, 'from [the pleading's] four corners factual allegations are

discerned which taken together manifest any cause of action cognizable at law”. *Khan v Newsweek, Inc.*, 160 AD2d 425, 426 (1st Dept 1990) (internal citations omitted). Defendant contends that the complaint utilizes “legal boilerplate language and lacks any factual allegations that could possibly warrant the imposition of successor liability against PB Heat”. See Memorandum of Law In Support of PB Heat, LLC’s Motion to Dismiss, p.i. However, if such alleged boilerplate language rises to the level of stating a cause of action, the motion to dismiss must be denied. After careful review of the papers herein, as well as the language of the complaint, the Court finds that Plaintiff has stated a cause of action. The complaint states “[f]or any entity referenced in this Complaint. . . Plaintiff(s) alleges as follows: (1) the successor entity or corporation expressly or impliedly assumed the predecessor’s tort liability or liabilities described herein; (2) there was a consolidation or a de jure or de facto merger of the seller and purchaser; (3) the purchasing entity or corporation was a mere continuation of the selling entity or corporation; or (4) the transaction was entered into fraudulently to escape such liabilities or obligations.” See Notice of Motion, Exh. B, Weitz & Luxenberg, P.C. Standard Complaint for Personal Injury No. 8, Verified Complaint, ¶ 6. The Plaintiffs have set forth clear and unambiguous factual allegations that relate to successor liability. Taking the four corners of the pleading as true, a cause of action in relation to successor liability has been alleged.

Defendants also move to dismiss the complaint under CPLR 3211(a)(1), claiming that the documentary evidence proffered demonstrates PB Heat is not a successor in interest to Peerless Industries. Pursuant to “CPLR 3211(a)(1), dismissal may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law”. *Seaman v Schulte Roth & Zabel LLP*, 176 AD3d 538, 538-39 (1st Dept 2019) (internal quotations omitted). Here, PB Heat contends that “[d]ispelling any

suggestion that Atlantic Shores assumed any product/asbestos related liabilities from the asbestos era, the Peerless Heater Company/Atlantic Shores APA (Section 3 – Schedule 3.1(a)(15)) expressly states that Atlantic Shores assumes “[a]ny and all liabilities, whether known or unknown, now existing or as might arise hereafter, with respect to events, conditions, acts and omissions existing or occurring with respect to Peerless [Heater Company] products sold and installed after September 1997.” See Memorandum of Law In Support of PB Heat, LLC’s Motion to Dismiss, p. xii – xiii (internal emphasis omitted). While PB Heat’s documentary evidence is proffered to establish that Atlantic Shores, and thereafter PB Heat, did not assume any liability of Peerless Industries prior to 1997, such documents fail to refute each of Plaintiff’s allegations regarding successor liability, such as the mere continuation doctrine which “refers to corporate reorganization, . . . where only one corporation survives the transaction; the predecessor corporation must be extinguished”. *Schumacher v Richards Shear Co., Inc.*, 59 NY2d 239, 245 (1983). Plaintiff correctly argues that “[t]his doctrine is wholly applicable here, as PB Heat and PHC entered into a ‘corporate reorganization’ in 2003 where only PB Heat survived.” See Affirmation In Opposition to Defendant PB Heat LLC’s Motion To Dismiss, ¶ 19. Thus, PB Heat’s documentary evidence fails to utterly refute each of the factual allegations set forth in the complaint.

Finally, as to sanctions, PB Heat moves for sanctions against Weitz and Luxenberg P.C. for frivolous conduct. “[C]onduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.” 22 NYCRR 130-1.1(c). Since the complaint is not without merit, contains factual allegations that

substantiate a cause of action without the intent to prolong litigation, and further refute the documentary evidence relied upon by PB Heat, the complaint is not frivolous.

Accordingly, it is

ORDERED that Defendant's motion to dismiss is denied in its entirety; and it is further

ORDERED that Defendant's motion for sanctions is denied in its entirety; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the decision / order of the Court.

6/24/2022  
DATE

  
ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	