

<b>Barbarino v BASF Catalysts LLC</b>
2022 NY Slip Op 32593(U)
July 28, 2022
Supreme Court, New York County
Docket Number: Index No. 190072/2014
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

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INDEX NO. 190072/2014

JOAN BARBARINO,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 019

- v -

BASF CATALYSTS LLC, BORGWARNER MORSE TEC INC., BRIDGESTONE AMERICAS INC., CARLISLE COMPANIES INC., CATERPILLAR INC., CERTAINTEED CORP., CUMMINS INC. (F/K/A CUMMINS ENGINE CO. INC.), DANA COMPANIES LLC, DIAMLER BUSES NORTH AMERICA INC. (INDIVIDUALLY, DOING BUSINESS AS AN AS SUCCESSOR TO ORION INTERNATIONAL, ORION BUS INDUSTRIES, ONTARIO BUS INDUSTRIES AND BUS INDUSTRIES OF AMERICA), EATON CORP., GENERAL AUTOMOTIVE CORP. (INDIVIDUALLY, DOING BUSINESS AS AN AS SUCCESSOR TO FLXIBLE CO.), GENERAL ELECTRIC CO., GEORGIA-PACIFIC LLC, GILLIG CORP., GKN ROCKFORD INC., GOODRICH AEROSTRUCTURES GROUP (INDIVIDUALLY, DOING BUSINESS AS AND AS SUCCESSOR TO ROHR INC. AND FLXIBLE CO.), GOODRICH CORP., HENNESSY INDUSTRIES INC., HONEYWELL INTERNATIONAL INC. (F/K/A HONEYWELL INC., ALLIED SIGNAL INC. AND BENDIX CORP.), KELSEY-HAYES CO., LEAR SIEGLER DIVERSIFIED HOLDINGS CORP., LIPE AUTOMATION CORP. (F/K/A LIPE-ROLLWAY CORP.), MACK TRUCKS INC., MAREMONT CORP., MERITOR INC. (INDIVIDUALLY AND AS SUCCESSOR TO ROCKWELL INTERNATIONAL CORP.), MILLENNIUM TRANSIT SERVICES LLC, MOTOR COACH INDUSTRIES INTERNATIONAL INC. (INDIVIDUALLY, DOING BUSINESS AS AND AS SUCCESSOR TO MOTOR COACH INDUSTRIES INC. AND RAPID TRANSIT SERIES), NMBFIL INC. (F/K/A BONDO CORP.), NORTHROP GRUMMAN SYSTEMS CORP. (F/K/A NORTHROP CORP. AND NORTHROP GRUMMAN CORP., INDIVIDUALLY, DOING BUSINESS AS AND AS SUCCESSOR TO GRUMMAN AEROSPACE CORP., GRUMMAN AIRCRAFT ENGINEERING CORP., GRUMMAN CORP., GRUMMAN FLXIBLE AND THE FLXIBLE CO.), PERGAMENT HOME CENTERS INC., PREVOST CAR (US) INC. (D/B/A PREVOST BUS), PNEUMO-ABEX LLC (INDIVIDUALLY AND AS SUCCESSOR TO ABEX CORP.), ROCKWELL AUTOMATION INC., ROHR INC. (INDIVIDUALLY, DOING BUSINESS AS AND AS SUCCESSOR TO FLXIBLE CO.), ROLLS-ROYCE CORP. (AS SUCCESSOR TO ALLISON

DECISION + ORDER ON MOTION

ENGINE CO.), THE GOODYEAR TIRE & RUBBER CO., UNION CARBIDE CORP., BOSTIK INC, INDUSTRIAL HOLDINGS(F/K/A THE CARBORUNDUM CO), SAINT-GOBAIN ABRASIVES INC, ALLISON TRANSMISSION INC, ALLISON TRANSMISSION HOLDINGS INC, DETROIT DIESEL CORP, 3M CO. (F/K/A MINNESOTA MINING & MANUFACTURING CO.), AMERICAN SEATING COMPANY INC., E.I. DUPONT DE NEMOURS AND CO., THE R.C.A. RUBBER CO., NORTHROP GRUMMAN OHIO CORP.,

Defendant.

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NORTHROP GRUMMAN SYSTEMS CORP. (F/K/A NORTHROP CORP. AND NORTHROP GRUMMAN CORP., INDIVIDUALLY, DOING BUSINESS AS AND AS SUCCESSOR TO GRUMMAN AEROSPACE CORP., GRUMMAN AIRCRAFT ENGINEERING CORP., GRUMMAN CORP., GRUMMAN FLXIBLE AND THE FLXIBLE CO.)

Third-Party  
Index No. 595519/2016

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 019) 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 575, 577, 598, 599, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 675, 739, 741

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is hereby ordered that Defendant Pneumo Abex LLC's (hereinafter referred to as Abex) motion for summary judgment is denied for the reasons set forth below.

In the instant matter, Plaintiff alleges that her husband Mr. Barbarino was exposed to materials containing asbestos that were manufactured by Abex during the course of his employment at the New York City Transit Authority (hereinafter referred to as NYCTA). Mr. Barbarino worked at the NYCTA from 1962 to 1987 at multiple locations. From approximately 1962 to 1963, Mr. Barbarino worked as a Bus Maintainer "B" at the Flatbush Bus Depot. During

1962 to 1964, Plaintiff worked at East New York Bus Depot as a helper/maintainer while training to be a Bus Maintainer "A". His duties as a helper/maintainer included fueling buses and changing oil. Ultimately, Mr. Barbarino was promoted to a Bus Maintainer "A" and worked at the Fresh Pond Depot from approximately 1964 to 1987. Mr. Barbarino testified at his deposition, which spanned over a five day period, as to ways he was potentially exposed to asbestos. He further testified to all the types of asbestos containing materials he was exposed to, including the brand names and the manufacturers of such materials. On behalf of the Plaintiff, two of Mr. Barbarino's co-workers, Mr. Robert Pustarfi and Mr. Anthony Dattilo, testified regarding their work environment, including the types of materials, machines, brake lining, and dust they were exposed to. Further, Mr. Albert Indelicato, a representative for Abex, testified regarding Abex's formula 80, which is an asbestos containing material designed for use on city buses. Mr. Indelicato also testified regarding Abex's production of other asbestos containing materials that were manufactured for use on city buses. Abex moves for summary judgment, contending "that Plaintiff has failed to establish a prima facie case showing that he was exposed to any asbestos-containing products manufactured, distributed, and/or sold by Abex."

Affirmation in Support of Defendant Pnuemo Abex LLC's Motion For Summary Judgment, p. 1, ¶ 2.

Pursuant to CPLR 3212(b), a motion for summary judgment, "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "[T]he 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 demonstrate the absence of any material issues of fact. This burden is a heavy one and on a motion for summary judgment, facts

must be viewed in the light most favorable to the non-moving party. If the moving party meets this burden, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action”. *Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 (2014) (internal citations and quotations omitted). “The moving party’s ‘[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers’”. *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (internal emphasis omitted).

In support of its motion, Abex contends that “[a]t no time did Mr. Barbarino identify Abex as a manufacturer of brakes used at the NYCTA or testify to exposure from any asbestos-containing materials manufactured, distributed or sold by Abex.” Affirmation In Support, *supra*, p.5, ¶ 15 (internal emphasis omitted). Further, Abex notes that “when asked to identify the brand, trade or manufacturer name of the replacement brakes that the bus mechanics installed Mr. Barbarino repeatedly and consistently identified Bendix brakes, and did not identify any other brand of brake.” *Id.* at ¶ 16 (internal emphasis omitted). Abex relies upon the fact that Mr. Barbarino testified that he was employed at the Fresh Pond Depot from 1964 to 1987. However, “Mr. Pustarfi testified that he worked with Mr. Barbarino at East New York from approximately 1975 to the early 1980s.” Affirmation In Support, *supra*, p. 9, ¶ 22. Therefore, Abex contends it is impossible for Mr. Pustarfi and Mr. Barbarino to have worked together at the NYCTA. With regards to Mr. Datillo, Abex contends that “it would ‘be an impossibility’ for them to have worked together, since Mr. Datillo testified that he never worked with Mr. Barbarino.” *Id.* at p.11, ¶ 22. Thus, Abex argues that Plaintiff failed to meet his prima facie burden.

In opposition, Plaintiff relies upon the deposition testimony of Mr. Indelicato to support the contention that Abex’s products are the proximate cause of the illness suffered by Mr.

Barbarino. Mr. Indelicato testified that “Abex’s Formula 80. . . was an asbestos-containing friction material specifically designed for use on city buses.” Plaintiff’s Memorandum Of Law In Opposition to Pneumo-Abex LLC’s Motion For Summary Judgment (Seq. No. 019), p. 10. Mr. Indelicato further “testified that Abex made other heavy-duty brake block formulas-693-9D, 693-551C and 693-551D- that were manufactured, sold, and supplied for use on city buses. Abex’s brake material formula 693-9D was comprised of approximately 25% asbestos by weight.” *Id.* (internal citations omitted). Plaintiff relies upon the testimony of Mr. Pustarfi, recalling that he was “working with Roy on the ‘400 line’ repairing buses; this line was adjacent to the brake grinding machine.” *Id.* at p.7.

Preliminarily, the Court notes that on a motion for summary judgment, it is movant’s heavy burden to first establish entitlement to judgment as a matter of law. The Appellate Division, First Department, has held that on a motion for summary judgment, it is moving Defendant’s burden to “unequivocally establish that its product could not have contributed to the causation of Plaintiff’s injury.” *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dept. 1985). Here, Abex has failed to meet such burden. Abex’s Formula 80, which was comprise of approximately 25-30% of asbestos, was used at the beginning of the 1940s until the end of 1987, specifically for city buses. The onus is on the moving party to show a prima facie case and that there is no genuine issue of material fact in order to be entitled to summary judgment as a matter of law. Instead, Abex attemptes to shift the initial burden to Plaintiff. Rather than proffering evidence to establish that its product could not have contributed to causation, Defendant merely argues that Plaintiff’s proof is insufficient. However, Abex cannot satisfy its burden by merely pointing to gaps in Plaintiff’s proof. *See Alvarez v 21st Century Renovations Ltd.*, 66 AD3d 524,

525 (1st Dept. 2009). Mr. Barbarino was exposed to Abex’s Formula 80, which was primarily used on city buses for bus maintenance during the time Mr. Barbarino was a bus maintainer.

Finally, Mr. Sam Nahas who is a former Superintendent at NYCTA’s East New York Depot testified with regards to the brake blocks used for buses during his career at NYCTA. Mr. Nahas’s testimony reflects that “Abex and Bendix manufactured brake blocks that were used (a lot) on the NYCTA buses; and that these manufacturers’ brake blocks were used interchangeably on a day to day basis depending on which brake block manufacturer was the lowest bidder at the time.” Memorandum Of Law In Opposition, *supra*, p. 24. Moreover, “Mr. Nahas stated that the central storeroom at East New York bus depot supplied replacement brake blocks to all other nineteen NYCTA bus depots”. *Id* at p.23. Plaintiff was working while Abex’s asbestos-containing brake line product was still on the market. As such, Abex’s motion for summary judgment is denied.

Accordingly, it is

ORDERED that the defendant’s motion for summary judgment 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.

7/28/2022

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE