

Barbarino v BASF Catalysts LLC
2022 NY Slip Op 33091(U)
September 13, 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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JOAN BARBARINO,

Plaintiff,

INDEX NO. 190072/2014

MOTION DATE _____

MOTION SEQ. NO. 020

- 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 020) 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 576, 578, 597, 600, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 740

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

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

Plaintiff Joan Barbarino brings suit both individually and as executrix of the estate of decedent Roy Barbarino for personal injuries sustained by decedent due to alleged exposure to asbestos by Bendix Corporation's (Honeywell's predecessor) product during the course of his employment at the New York City Transit Authority (hereinafter referred to as NYCTA). Mr.

Barbarino was diagnosed with mesothelioma and subsequently died as a result of his illness. 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. During Mr. Barbarino’s deposition, he testified that within his vicinity, other NYCTA workers performed engine and brake repair throughout his tenure. Deposition testimony was taken of Mr. Barbarino’s coworkers, Mr. Robert Pustarfi and Mr. Anthony Dattilo. Mr. Pustarfi testified that that he saw NYCTA mechanics work on Bendix Brakes alongside Mr. Barbarino. Furthermore, Mr. Dattilo testified that he worked with Brakes with the name “Bendix”. When asked if he knew Mr. Barbarino, Mr. Dattilo testified that he may have worked with him, but he didn’t know all of the workers since there were 200 “A” men in the shop. Honeywell moves for summary judgment pursuant to CPLR § 3212, contending there is no genuine issue of material fact regarding Mr. Barbarino’s exposure to materials containing asbestos manufactured by Bendix. Plaintiff opposes, and Honeywell replies.

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 the instant matter, Honeywell contends that “[p]laintiff has failed to show that Decedent’s bystander exposure to brake dust from Bendix brakes was a substantial factor in the development of Decedent’s mesothelioma.” Memorandum Of Law In Support Of Defendant Honeywell International Inc., f/k/a Alliedsignal Inc., As Successor-In-Interest To The Bendix Corporation’s Motion For Summary Judgment, p. 9. Honeywell relies upon the notion that Plaintiff’s experts have failed to demonstrate a causation between Mr. Barbarino’s mesothelioma and Bendix’s brake dust. Dr. Moline’s report states that Mr. Barbarino developed mesothelioma from cumulative exposure, and Dr. Compton’s report states that Mr. Barbarino’s work at NYCTA resulted in significant levels of asbestos fibers within his breathing zone. Honeywell contends this testimony does not rise to the level of causation necessary to establish liability. Strikingly, Honeywell misinterprets the standard of summary judgment pursuant to CPLR §3212. The Appellate Division, First Department in *Buckle v Buhre Ave. Foods, Inc.*, 232 AD2d 269, 270 (1st Dept 1996) detailed the burden of proof the moving party has, following the shift in burden upon the non-moving party.

In an action for personal injuries allegedly sustained when plaintiff delivered milk to defendants’ supermarket, defendants’ motion for summary judgment was properly denied. It was not plaintiffs’ burden in opposing the motion to demonstrate the negligence of defendants or the proximate cause of the accident;

rather, it was defendants' burden, as movants, to establish the absence of creation of the dangerous condition or notice thereof as a matter of law, where plaintiff submitted proof that he was struck in the head and neck by boxes of canned goods while making a delivery on defendants' premises and without having had any prior contact with the boxes." (internal citations omitted)

Similarly, Honeywell demands that Plaintiff demonstrates their prima facie case prior to trial. In particular, Honeywell asserts that Plaintiff has failed to show general and specific causation of Mr. Barbarino's exposure to asbestos by Bendix's product. However, the burden initially rests upon Honeywell to establish a prima facie entitlement to summary judgment as a matter of law. The burden would then shift to Plaintiff to demonstrate that the asbestos Mr. Barbarino was exposed to was from Bendix's product which in turn resulted in his mesothelioma. The Court opines that the burden has not yet shifted to plaintiff since Honeywell failed to make out a prima facie case that no genuine issues of material fact exists.

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 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 1995). Here, rather than proffering evidence to establish that its product could not have contributed to causation, Honeywell merely argues that Plaintiff's proof is insufficient. It is well settled that a Defendant cannot satisfy its burden by merely pointing to gaps in Plaintiff's proof. *See Alvarez v 21st Century Renovation Ltd.*, 66 AD3d 524, 525 (1st Dept 2009). As Honeywell has failed to establish entitlement to summary judgment as a matter of law, Honeywell'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.

9/13/22
DATE


ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: