

Carboni v Alfa Romeo USA

2022 NY Slip Op 34397(U)

December 21, 2022

Supreme Court, New York County

Docket Number: Index No. 190328/2019

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ADAM SILVERA

PART

13

Justice

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SUSAN CARBONI,

Plaintiff,

INDEX NO. 190328/2019

MOTION DATE 10/08/2021

MOTION SEQ. NO. 003

- v -

ALFA ROMEO USA, AMCHEM PRODUCTS, INC., N/K/A
RHONE POULENC AG COMPANY, N/K/A BAYER
CROPSCIENCE INC, AUDI OF AMERICA, INC, BMW,
INC., INDIVIDUALLY, AND AS SUCCESSOR IN INTEREST
TO ROLLS ROYCE CORPORATION, BORGWARNER
MORSE TEC LLC, BUCYRUS INTERNATIONAL, INC,
CERTAINTED CORPORATION, CROWN BOILER CO.,
F/K/A CROWN INDUSTRIES, INC, FERRARI NORTH
AMERICA INC, FORD MOTOR COMPANY, GENERAL
ELECTRIC COMPANY, GENUINE PARTS COMPANY,
TRADING AS NAPA AUTO PARTS, HARSCO
CORPORATION, AS SUCCESSOR TO PATTERSON-
KELLEY COMPANY, INC., INDIVIDUALLY AND D/B/A
PATTERSON-KELLEY, HONEYWELL INTERNATIONAL,
INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, ISUZU
MOTORS AMERICA, INC, JAGUAR CARS, JAGUAR LAND
ROVER NORTH AMERICA, LLC, LEVITON
MANUFACTURING CO., INC, PEUGEOT MOTORS OF
AMERICA INC, PFIZER, INC. (PFIZER), PORSCHE INC,
ROLLS ROYCE CORPORATION, A/K/A ROLLS-ROYCE
AND BENTLEY MOTOR CARS INC, SAAB CARS USA,
INC, U.S. RUBBER COMPANY (UNIROYAL), UNION
CARBIDE CORPORATION, BMW OF NORTH AMERICA
LLC, PSA NORTH AMERICA, ROLLS-ROYCE NORTH
AMERICA INC., SAAB NORTH AMERICA, BMW OF NORTH
AMERICA LLC, PSA NORTH AMERICA, ROLLS-ROYCE
NORTH AMERICA INC., SAAB NORTH AMERICA,
BENTLEY MOTORS INC., INDIVIDUALLY, AND AS
SUCCESSOR IN INTEREST TO ROLLS ROYCE,
PORSCHE CARS NORTH AMERICA,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 145, 146, 147, 148, 149, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 207, 208

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is hereby ordered that Defendant Porsche Cars North America, Inc.'s (hereinafter referred to as "PCNA") motion for summary judgment is denied for the reasons set forth below.

The instant matter was commenced by Plaintiff Susan Carboni, as Executrix of the Estate of decedent Francesco Carboni, and Susan Carboni, individually. Plaintiff alleges decedent was exposed to ultra-hazardous asbestos as a result from his work with Porsche vehicles and Porsche replacement parts. Decedent was diagnosed with lung cancer on October 31, 2019, and subsequently passed away on March 27, 2020. Decedent was a mechanic who learned automotive repair on European vehicles in Italy. In 1969, decedent emigrated from Italy to the United States, where he became employed as a mechanic for Zumbach Sports Cars. During his 37 years working for Zumbach Sports Cars, decedent was promoted from mechanic to shop foreman, and thereafter to service manager. Decedent testified at his deposition that during his time with Zumbach Sports Cars, "he personally performed brake, clutch, exhaust / muffler, generator, and starter-motor work on Porsche vehicles," causing his exposure to asbestos. Affirmation In Opposition To Defendant Porsche Cars North America, Inc.'s Motion For Summary Judgment, p. 3, ¶ 13. PCNA moves for summary judgment, arguing that it has established its prima facie burden that decedent was not exposed to asbestos from any product ascribable to PCNA. Plaintiff opposes, arguing, *inter alia*, that PCNA has failed to meet its prima facie burden, and that genuine issues of material facts exist as to identification of Porsche products as the cause of decedent's exposure to asbestos. PCNA 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).

PCNA first contends that decedent did not work on any Porsche brand vehicles or products distributed by PCNA. Namely, that decedent did not work on any Porsche vehicles after 1981 or 1982, which was before PCNA was incorporated. *See* Memorandum Of Law In Support Of Porsche Cars North America, Inc.’s Motion For Summary Judgment, p. 7. PCNA proffers the affidavit of Erich Metzler, who currently serves as PCNA’s Director, After Sales Product Quality and Support. Mr. Metzler attests that “[f]rom August of 1984 to the present, PCNA has acted as an importer and distributor of Porsche-brand vehicles in the United States.” Affidavit Of Erich Metzler, Dated October 4, 2021, p. 2, ¶ 5. Conversely, Plaintiff contends that “[t]he Metzler affidavit, submitted in support of Porsche’s motion, fails to demonstrate the affiant’s personal knowledge of the facts relevant to this matter.” Affirmation In Opposition, *supra*, p. 11, ¶ 38. The Appellate Division, First Department has held that the personal knowledge requirement of affidavits for summary judgment motions cannot be satisfied where the affiant’s knowledge has been gained “from unnamed and unsworn employees or from unidentified and unproduced work

records.” *Republic Nat’l. Bank of New York v. Luis Winston, Inc.*, 107 AD2d 581, 582 (1st Dept. 1985). In the case at bar, PCNA has failed to produce any authenticated documents to support the statements by the affiant, as no evidence has been proffered by PCNA in support of Mr. Metzler’s affidavit or in support of the instant motion. In fact, the only evidence proffered by PCNA in support of its motion for summary judgment are excerpts from decedent’s deposition transcript. “[B]are conclusory assertions. . . by. . . defendants. . . do not establish that the cause of action has no merit so as to entitle defendants to summary judgment”. *Winegrad v N.Y.U. Med. Ctr.*, 64 NY2d 851, 853 (1985). As such, Mr. Metzler’s affidavit is insufficient to demonstrate that Decedent was not exposed to asbestos by a product manufactured or made by Porsche.

Furthermore, Plaintiff asserts that assuming *arguendo* the affidavit of Mr. Metzler is true, according to decedent’s testimony, “there is at least a year of overlap between when Porsche was incorporated and when [decedent] asserted that he believed he was no longer exposed to asbestos at Zumbach.” Affirmation In Opposition, *supra*, p. 15, ¶ 50. However, in their reply, PCNA emphasizes Mr. Metzler’s affidavit, which states that “prior to 1984, and since October 1, 1969, Porsche brand automobiles were imported exclusively into the United States by Volkswagen of America, Inc.” Affidavit Of Erich Metzler, *supra*, p. 2, ¶ 8. “It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues; issue-finding, rather than issue-determination, is the key to the procedure”. *Birnbaum v Hyman*, 43 AD3d 374, 375 (1st Dept 2007) (internal quotations and citations omitted). In the case at bar, Plaintiff proffers the testimony of Decedent, who stipulated that 1985 was the year decedent’s exposure to asbestos ended. *See* Affirmation In Opposition, *supra*, Exh. 5, Depo. Tr. Of Francesco Carboni, dated March 10, 2020, p. 89, ln. 21 – 25. Here,

decident's testimony raises issues of fact which preclude summary judgment. As such, PCNA's motion for summary judgment is denied.

Accordingly, it is

ORDERED that Defendant Porsche Cars North America, Inc.'s motion for summary judgment is hereby denied in its entirety; and it is further

ORDERED that, within 21 days of entry, plaintiffs shall serve a copy of this decision/order upon all parties, together with notice of entry.

This constitutes the decision/order of the Court.


ADAM SILVERA, J.S.C.

12/21/2022
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
 REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: