

**Carboni v Alfa Romeo USA**

2022 NY Slip Op 34455(U)

January 3, 2023

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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INDEX NO. 190328/2019

SUSAN CARBONI, as the Administrator of the Estate of FRANCISCO CARBONI, and SUSAN CARBONI, INDIVIDUALLY,

MOTION DATE

MOTION SEQ. NO. 004

Plaintiff,

- 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, CERTAINTEED 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 004) 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 189, 190, 191, 192, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 270, 271, 272, 273, 274

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is hereby ordered that defendant FCA US LCC's, s/h/a "Alfa Romeo USA", (hereinafter referred to as "FCA US") 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 Alfa Romeo vehicles and Alfa Romeo 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 "performed brake, clutch, exhaust/muffler, generator, and starter-motor work on Alfa Romeo vehicles", causing his exposure to asbestos. Affirmation & Memorandum Of Law In Opposition To Defendant Alfa Romeo USA, Inc.'s Motion For Summary Judgment, p. 8, ¶ 32. FCA US is a limited liability company that "was formed on April 28, 2009, as New CarCo Acquisition LLC. On June 10, 2009, New CarCo Acquisition LLC changed its name to Chrysler Group LLC. [Thereafter o]n December 15, 2014, Chrysler Group LLC changed its name to FCA US LLC." Memorandum Of Law In Support The [sic] Motion For Summary Judgment Of Defendant FCA US LLC, s/h/a "Alfa Romeo USA", p. 3 (internal citations omitted). FCA US moves for summary judgment, arguing that decedent was not, and could not have been, exposed to asbestos from any part or vehicle for which Alfa Romeo is liable. Plaintiff opposes, arguing, *inter alia*, that FCA US has failed to meet its prima facie

burden that it was not responsible for decedent's exposure to ultra-hazardous asbestos resulting in decedent's death. FCA US 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).

Here, FCA US argues that it "did not exist prior to April 28, 2009, and could not and did not manufacture, sell, or distribute any vehicles or parts prior to April 28, 2009." Memorandum Of Law In Support, *supra*, p. 3. Conversely, Plaintiff contends that "Alfa Romeo failed to respond to discovery and first produced non-authenticated documents in support of this claim as exhibits to its motion papers." Affirmation & Memorandum Of Law In Opposition *supra*, p. 15, ¶ 54. Plaintiff has proffered evidence that demonstrates FCA US deprived Plaintiff of their right to full and fair disclosure. Specifically, FCA US answered Plaintiff's complaint as "Alfa Romeo", protested to the special master about discovery under the name "Alfa Romeo", and

appeared at three depositions as “Alfa Romeo”. However, FCA US filed its summary judgment motion as “FCA US LLC”. See Affirmation & Memorandum Of Law In Opposition, *supra*, p. 14, ¶ 48. “To avail oneself of CPLR 3212(f) to defeat or delay summary judgment, a party must demonstrate that the needed proof is within the exclusive knowledge of the moving party, that the claims in opposition are supported by something other than mere hope or conjecture, and that the party has at least made some attempt to discover facts at variance with the moving party's proof”. *Voluto Ventures, LLC v Jenkins & Gilchrist Parker Chapin LLP*, 44 AD3d 557, 557 (1st Dept 2007) (internal citations omitted). CPLR § 3212(f) states that “[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit . . . disclosure to be had and may make such other order as may be just.” Here, Plaintiff contends that FCA US failed to answer interrogatories and failed to produce documents within Defendant’s possession which address the issue of corporate history and successor liability. Thus, Plaintiff has shown that facts exist within FCA US’s possession which is relevant to the instant summary judgment motion.

Conversely, FCA US replies arguing that “by filing a note of issue the plaintiff waives the right to pursue further discovery or challenge discovery response deficiencies.” Reply Memorandum Of Law In Further Support Of Defendant FCA US LLC’s, S/H/A “Alfa Romeo USA,” Motion For Summary Judgment, p. 12. However, the Court notes that Plaintiff and moving defendant are seasoned attorneys, both of whom are adept in litigating asbestos cases in NYCAL. Here, FCA US failed to disclose routine discovery for nearly two years. Additionally, a review of the Court file reveals that FCA US filed two answers as “Alfa Romeo USA” and appeared at decedent’s deposition as “Alfa Romeo USA” without raising the entity of FCA US

while actively participating in the instant litigation. Plaintiff, having no indication that FCA US was an entity sued herein, is now substantially prejudiced and unable to oppose the instant action. Moving defendants, who are capable and proficient in litigating NYCAL cases, are fully aware that litigation by surprise is not how actions proceed. Thus, FCA US's instant motion for summary judgment is hereby denied.

Accordingly, it is

ORDERED that Defendant FCA US LLC's, s/h/a "Alfa Romeo USA" 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.

1/3/2022

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE