

Carboni v Alfa Romeo USA

2023 NY Slip Op 30064(U)

January 3, 2023

Supreme Court, New York County

Docket Number: Index No. 190328/2019

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. 190328/2019

SUSAN CARBONI,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 005

- 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 005) 161, 162, 163, 164, 165, 166, 167, 168, 169, 188, 206, 209, 262, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is hereby ordered that defendant Bentley Motors, Inc.'s (hereinafter referred to as "Bentley") 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 Bentley vehicles. Plaintiff amended their suit to include Bentley individually and as successor in interest to Rolls Royce. 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 and clutch, and generator work on Rolls Royce vehicles; removing and installing genuine Rolls Royce parts, that caused him to come into contact with asbestos." Affirmation & Memorandum Of Law In Opposition To Defendant Bentley Motors, Inc.'s Motion For Partial Summary Judgment, p. 6, ¶ 29. Bentley moves for summary judgment, arguing that plaintiff has not identified any product of Bentley which allegedly exposed decedent to asbestos. Plaintiff opposes, arguing, *inter alia*, that Bentley failed to comply with discovery such that the instant motion is premature. Plaintiff further argues that Bentley 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. Bentley 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, Bentley moves for summary judgment to dismiss the claim against it as an individual defendant. Although Bentley disputes any alleged successor – in – interest to Rolls Royce, Bentley does not seek to dismiss those claims in the instant motion. In support of its motion, Bentley argues that “plaintiffs have failed to put forth any evidence that [decedent] was exposed to asbestos fibers from asbestos-containing products that were manufactured, distributed or sold by Bentley Motors or bearing the ‘Bentley’ name.” Affirmation In Support Of Bentley Motors, Inc.’s Motion For Partial Summary Judgment, p. 4 – 5, ¶ 15 (internal emphasis omitted). Conversely, Plaintiff contends that Bentley has purposely failed to reveal its true association with Rolls Royce by failing to respond to basic discovery in order to deprive plaintiff of her right to full and fair disclosure. See Affirmation & Memorandum Of Law In Opposition, *supra*, p. 14, ¶

56. Specifically, Plaintiff argues that the fact the name “Bentley” was not mentioned at decedent’s and decedent’s co-workers’ depositions is without merit, as it ignores Bentley’s obligation to produce discovery and deprives the Plaintiff, as well as the Court, the true facts regarding Bentley’s relationship to Rolls Royce. *See id.* at p. 14, ¶ 59. “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). It is clear that discovery sought by Plaintiff is within the control of Bentley, and that Plaintiff has attempted to obtain such discovery to no avail. In fact, Plaintiff sought the intervention of the Special Master, who directed Bentley to answer standard discovery and interrogatory responses. *See* Affirmation In Opposition, Exh. 17, Correspondence with Special Master, dated October 18, 2021, p. 1. In its reply, Bentley contends that Plaintiff filed a note of issue on August 11, 2021, signifying the completion of discovery. As such, according to Bentley, Plaintiff acquiesced that no further discovery under the CMO is required. *See* Reply Affirmation In Further Support Of Motion For Partial Summary Judgment, p. 3, ¶ 6. However, “while pretrial discovery after a note of issue has been filed is generally inappropriate, it may be permitted to prevent substantial prejudice where unusual or unanticipated circumstances develop subsequent to the filing of the note of issue”. *Esteva v Catsimatidis*, 4 AD3d 210, 210 (1st Dept 2004). Here, Bentley’s failure to comply with the Special Master’s ruling, and failure to comply with standard discovery necessitates discovery post note of issue. As such, Bentley’s motion is denied without prejudice to renew at the conclusion of discovery.

Accordingly, it is

ORDERED that Defendant Bentley Motors, Inc.'s motion for summary judgment is hereby denied without prejudice to renew at the conclusion of discovery; 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:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	DENIED	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE