

Carboni v Alfa Romeo USA

2023 NY Slip Op 30215(U)

January 23, 2023

Supreme Court, New York County

Docket Number: Index No. 190328/2019

Judge: Adam Silvera

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

-----X

SUSAN CARBONI,

Plaintiff,

INDEX NO. 190328/2019

MOTION DATE

MOTION SEQ. NO. 002

- v -

ALFA ROMEO USA, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSOURCE 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.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 187, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 263, 264, 265, 266, 267, 268, 269 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is hereby ordered that Defendant Ferrari North America, Inc.'s (hereinafter referred to as "Ferrari") 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 Ferrari vehicles and Ferrari 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 Ferrari vehicles", causing his exposure to asbestos. Affirmation & Memorandum Of Law In Opposition To Defendant Ferrari North America, Inc.'s Motion For Summary Judgment, p. 7, ¶ 31. Ferrari moves for summary judgment, arguing that decedent was not, and could not have been, exposed to asbestos from any part or vehicle for which Ferrari is liable. Ferrari further argues that "Ferrari. . . did not come into existence until March 26, 1997, more than a decade after the period when Decedent alleged occupational exposure to asbestos from any source." Memorandum Of Law In Support Of Defendant Ferrari North America, Inc.'s Motion For Summary Judgment, p. 2. Plaintiff opposes, arguing, *inter alia*, that Ferrari 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. Ferrari 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).

Ferrari argues that Decedent could not have been exposed by Ferrari vehicles and products because Ferrari did not exist during the period decedent was allegedly exposed to ultra-hazardous asbestos. Specifically, “Decedent – whose occupational exposure to asbestos ended in 1985 – was not and could not have been exposed to asbestos from product for which Defendant Ferrari North America. . . is liable.” Memorandum Of Law In Support, *supra*, p. 4. Conversely, Plaintiff contends that they have “tendered sufficient evidence from which a jury may reasonably infer Defendant’s liability; that Plaintiff worked directly with and in the vicinity where Defendant’s products were utilized and was exposed to asbestos used in connection with Defendant’s products.” Affirmation & Memorandum Of Law In Opposition, *supra*, p. 12, ¶ 42. It is well settled law that “[t]he deposition testimony of a litigant is sufficient to raise an issue of

fact so as to preclude the grant of summary judgment dismissing the complaint”. *Dollas v W.R. Grace and Co.*, 225 AD2d 319, 321 (1st Dept 1996). In the case at bar, when asked whether he mentioned performing work on Ferrari, decedent testified “yes.” Affirmation & Memorandum Of Law In Opposition, *supra*, Exh. 6, Depo. Tr. Of Francesco Carboni, dated March 11, 2020, p. 151, ln. 11 – 14. When asked whether decedent received specialized training on Ferrari vehicles, decedent testified “yes.” *Id.* at ln. 15 – 17. Furthermore, although Ferrari argues that it was incorporated in 1997, Plaintiff proffers evidence that Ferrari entered into agreements with dealers across the United States as far back as 1981. *See* Affirmation & Memorandum Of Law In Opposition, Exh. 19, Arbitration and Trial Orders. “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 citations and quotations omitted). In the instant motion, the Court must determine whether the moving defendant met its burden to establish entitlement to summary judgment as a matter of law, and whether a reasonable trier of fact may conclude that issues of fact exist. Here, Ferrari has failed to proffer sufficient proof to establish that its vehicles and replacement parts could not have caused Plaintiff’s injury.

Importantly, Plaintiff argues that Ferrari’s motion for summary judgment should be denied because “it thwarted the discovery process and disregarded CMO mandates.” Affirmation & Memorandum Of Law In Opposition, *supra*, p. 14, ¶ 46. In their reply, Ferrari argues that Plaintiff’s request to respond to standard discovery “was not made until after Plaintiff filed the Note of Issue and Certificate of Readiness for Trial.” Reply Memorandum Of Law In Further Support Of Defendant Ferrari North America, Inc.’s Motion For Summary Judgment, p. 11.

(internal emphasis omitted). Such argument fails as it is well settled that a court may order post-note of issue discovery in its discretion. *See WVH Hous. Dev. Fund Corp. v Brooklyn Insulation and Soundproofing, Inc.*, 193 AD3d 523, 523 (1st Dept 2021). “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 Ferrari, and that Plaintiff has attempted to obtain such discovery to no avail. As such, Ferrari’s motion is denied.

Accordingly, it is

ORDERED that Defendant Ferrari North America’s motion for summary judgment is hereby denied; 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.

1/23/2023
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

JAN 23 2023