

Sides v Advance Auto Parts Inc.
2023 NY Slip Op 30274(U)
January 23, 2023
Supreme Court, New York County
Docket Number: Index No. 190150/2021
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. 190150/2021

AGNES SIDES, AS EXECUTRIX FOR THE ESTATE OF YANIV N. SIDES, AND AGNES SIDES, INDIVIDUALLY,

MOTION DATE 06/22/2022

Plaintiff,

MOTION SEQ. NO. 001

- v -

ADVANCE AUTO PARTS INC, ALFA ROMEO USA, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC., AMERICAN HONDA MOTOR CO., INC. (AHM), AUDI OF AMERICA, INC., BENTLEY MOTORS INC., BMW OF NORTH AMERICA LLC, BMW, INC., INDIVIDUALLY, AND AS SUCCESSOR IN INTEREST TO ROLLS ROYCE CORPORATION, CARQUEST AUTO PARTS, DCO LLC F/K/A DANA COMPANIES, LLC, FEDERAL- MOGUL ASBESTOS PERSONAL INJURY TRUST AS A SUCCESSOR TO FELT PRODUCTS MFG. CO., FERRARI NORTH AMERICA INC., FORD MOTOR COMPANY, GENERAL ELECTRIC COMPANY, GENUINE PARTS COMPANY, TRADING AS NAPA AUTO PARTS, HENNESSY INDUSTRIES, INC. INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO AMMCO, HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, ISUZU MOTORS AMERICA, INC, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC., JAGUAR CARS, JAGUAR LAND ROVER NORTH AMERICA, LLC, LEVITON MANUFACTURING CO., INC., MAZDA MOTOR OF AMERICA, INC., D/B/A MAZDA NORTH AMERICAN OPERATIONS INC., MCCORD CORPORATION, MERCEDES-BENZ USA, LLC, F/K/A MERCEDES-BENZ USA, INC. AND MERCEDES-BENZ OF NORTH AMERICA, INC., MORSE TEC LLC, F/K/A BORG WARNER MORSE TEC LLC AND SUCCESSOR-BY-MERGER TO BORG-WARNER CORPORATION, NISSAN NORTH AMERICA, INC., PARKER-HANNIFIN CORPORATION, PEUGEOT MOTORS OF AMERICA INC, PFIZER, INC. (PFIZER), PNEUMO ABEX LLC, SUCCESSOR IN INTEREST TO ABEX CORPORATION (ABEX), PORSCHE CARS NORTH AMERICA, PORSCHE INC., ROLLS ROYCE CORPORATION, A/K/A ROLLS-ROYCE AND BENTLEY MOTOR CARS INC., ROLLS-ROYCE NORTH AMERICA INC., SAAB CARS USA, INC., SAAB NORTH AMERICA, STANDARD MOTOR PRODUCTS, INC., TENNECO AUTOMOTIVE OPERATING

DECISION + ORDER ON MOTION

COMPANY INC., TOYOTA MOTOR SALES U.S.A.,
 INC., U.S. RUBBER COMPANY (UNIROYAL), UNION
 CARBIDE CORPORATION, VOLKSWAGEN GROUP OF
 AMERICA, INC., WALKER EXHAUST SYSTEMS, D&R
 AUTO PARTS INC., VOLVO CARS OF NORTH AMERICA,
 VOLVO GROUP NORTH AMERICA, INC., WESTERN AUTO
 SUPPLY COMPANY INC., GOODYEAR CANADA, INC., THE
 GOODYEAR TIRE AND RUBBER COMPANY,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 144

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

Upon the foregoing documents, it is hereby ordered that Defendant Mercedes-Benz USA, LLC's (hereinafter referred to as "MBUSA") motion for summary judgment is granted for the reasons set forth below.

The instant matter is premised upon Decedent Yaniv Sides' alleged exposure to asbestos as a result of his father's work as a mechanic. Decedent was diagnosed with mesothelioma, and subsequently passed away from his illness on May 12, 2021. Decedent's father, Moshe Sides, was deposed on November 9, 10, and 15, 2021, in which he testified to the following. Mr. Sides worked at three separate service stations in New York City. More specifically, Mr. Sides started working at Jacob Malomed's garage in 1978 and worked at the garage for approximately one year. He subsequently worked at Northern Boulevard Cab Corporation. In 1983, Mr. Sides opened his own garage until he left for Israel in 1986. Mr. Sides worked as a mechanic, tasked with the maintenance and replacement of brakes from various European cars. Plaintiff alleges that decedent was exposed to asbestos dust from the clothes his father wore to each of his jobs, as well as when Decedent was physically at his father's job sites. MBUSA moves for summary judgment, arguing that "there has been no product identification of MBUSA by the witness who was the sole source of the Decedent's alleged asbestos exposure." Affirmation In Support Of

MBUSA's Motion For Summary Judgment, p. 3, ¶ 9. Plaintiff opposes, arguing, *inter alia*, that MBUSA has failed to demonstrate its burden to entitlement to judgment as a matter of law.

MBUSA 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, moving defendant seeks to dismiss plaintiff's complaint arguing that plaintiff failed to produce any evidence to link moving defendant's products with plaintiff's asbestos exposure. In support, MBUSA proffers the deposition transcript of Mr. Sides, and contends that "during the three days of testimony, Moshe Sides, Decedent's father, did not identify any work on a Mercedes-Benz vehicle during his career to which the Decedent may allegedly have been exposed." Affirmation In Support, *supra*, p. 5, ¶ 16. Furthermore, "Plaintiffs have not offered any admissible evidence that Decedent was ever exposed to asbestos from a product sold,

supplied, or distributed by MBUSA.” *Id.* Conversely, Plaintiff contends that “Moshe Sides testified that throughout his career working on brakes, he worked on European cars such as Mercedes Benz among other things.” Affirmation In Opposition To Defendant Mercedes Benz USA’s Motion For Summary Judgment, p. 6, ¶ 17. According to the Appellate Division, First Department, it has been held that the non-moving party opposing a motion for summary judgment “must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. . . expressions of hope or unsubstantiated allegations or assertions are insufficient.” *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). A review of such documents reveals that Mr. Sides never identified any products manufactured, sold, or distributed by moving defendant which exposed plaintiff to asbestos. Thus, MBUSA established entitlement to summary judgment of dismissal on the ground that it did not contribute to, or cause plaintiff to, be exposed to asbestos, and, thus, is not liable for any injury or harm suffered by plaintiff as a result of asbestos exposure.

As MBUSA has met its prima facie burden, the burden shifts to plaintiff to establish triable issues of fact. Plaintiff argues that “MBUSA’s motion should be denied because it is premature as the complaint in this FIFO case was filed less than a year ago, discovery is certainly ongoing and the case has not been clustered in a FIFO group.” Affirmation In Opposition, *supra*, p. 1, ¶ 3. In their reply, MBUSA argues that since the issue has been joined as to MBUSA on November 21, 2021, the Case Management Order dated June 20, 2017 (hereinafter referred to as the “CMO”) cannot supersede the express terms of the CPLR as to when a motion for summary judgment may be filed. *See* Reply Affirmation In Further Support Of Motion For Summary Judgment, p. 3, ¶ 8. CPLR 3212(a) states that “[a]ny party may move for summary judgment in any action, after issue has been joined.” Here, the Court notes that the CMO explicitly states that

“[t]he Civil Practice Law & Rules. . . together with the express provisions of this CMO, shall govern all proceedings herein. Where this CMO’s provisions differ from the CPLR’s, the CMO shall control.” CMO, § VI. Rules Of Procedure. The CMO states that “[n]o summary judgment motion shall be made unless discovery is complete on the issue(s) that are the subject of the motion.” *Id.* at XXI. Summary Judgment Motions. Although the Note Of Issue has not been filed herein, there is no indication that additional discovery, as to moving defendant, would yield facts sufficient to affect the decision herein. As MBUSA has met its prima facie burden, no triable issues of fact have been raised, and to promote judicial economy, MBUSA’s motion for summary judgment is granted. Defendants are warned that all future motions must strictly comply with the CMO.

Accordingly, it is

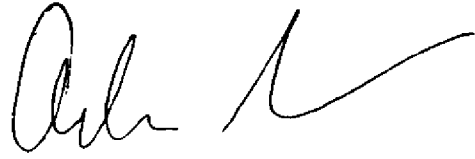
ORDERED that Defendant Mercedes-Benz USA, LLC’s motion for summary judgment to dismiss this action is granted, and this action is dismissed as to Defendant Mercedes-Benz USA, LLC only; and it is further,

ORDERED that the Clerk of the Court shall enter judgment in favor of Defendant Mercedes-Benz USA, LLC dismissing the claims and cross-claims made against it in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and amend the caption to remove Defendant Mercedes-Benz USA, LLC only; and it is further,

ORDERED that the said claims against the remaining Defendants are served and the balance of the action shall continue; and it is further,

ORDERED that within 30 days of entry, defendant Mercedes-Benz USA, LLC shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the decision 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

APPLICATION:

CHECK IF APPROPRIATE: