

Halperin v Continuous Sales Co. LLC

2024 NY Slip Op 31003(U)

March 25, 2024

Supreme Court, New York County

Docket Number: Index No. 190096/2021

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

-----X

SCOTT HALPERIN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LORYN HALPERIN, SCOTT HALPERIN,

Plaintiff,

- v -

CONTINUOUS SALES COMPANY LLC,FERGUSON ENTERPRISES NY-METRO, INC. F/K/A DAVIS & WARSHOW, INC.,FERGUSON ENTERPRISES NY-METRO, INC. F/K/A THE DAVIDSON GROUP COMPANIES, INC. INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO GILMOUR SUPPLY CO. INC.,ACE PLUMBING & ELECTRIC, A.F. SUPPLY CORP., ALLIED BUILDING PRODUCTS CORP., ASBEKA INDUSTRIES OF NEW YORK, INC.,ATLAS PLUMBING HEATING SUPPLY CORP., BLACKMAN PLUMBING SUPPLY COMPANY, INC.,BLEIBERG PLUMBING SUPPLIES, INC.,CYPRESS PLUMBING & HEATING SUPPLIES, INC.,DEPENDABLE SALES & SERVICE, INC.,DURST CORPORATION, INC.,ELITE SALES & MARKETING, INC.,L & A LIQUIDATING CORP. INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO COOPER PLUMBING & HEATING SUPPLY CO., INC.,SUPREME PLUMBING & HEATING SUPPLY INC.,UTICA AVENUE PLUMBING SUPPLY CORP., W.W. GRAINGER, INC.,

Defendant.

-----X

ALLIED BUILDING PRODUCTS CORP.

Plaintiff,

-against-

GLAZER BROS., INC.

Defendant.

-----X

FERGUSON ENTERPRISES NY-METRO, INC. F/K/A DAVIS & WARSHOW, INC., BLACKMAN PLUMBING SUPPLY COMPANY, INC.

INDEX NO. 190096/2021
MOTION DATE 01/23/2024
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

Third-Party
Index No. 596015/2022

Second Third-Party
Index No. 595167/2023

Plaintiff,

-against-

GLAZER BROTHERS

Defendant.

-----X

W.W. GRAINGER, INC.

Third Third-Party
Index No. 595179/2023

Plaintiff,

-against-

GLAZER BROS., INC.,

Defendant.

-----X

UTICA AVENUE PLUMBING SUPPLY CORP.

Fourth Third-Party
Index No. 595186/2023

Plaintiff,

-against-

GLAZER BROS., INC.

Defendant.

-----X

FERGUSON ENTERPRISES NY-METRO, INC. F/K/A THE
DAVIDSON GROUP COMPANIES, INC. INDIVIDUALLY AND
AS SUCCESSOR IN INTEREST TO GILMOUR SUPPLY CO.
INC.

Fifth Third-Party
Index No. 595478/2023

Plaintiff,

-against-

GLAZER BROTHERS, INC.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 152

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that the instant motion for summary judgment seeking dismissal of this action, pursuant to CPLR §3212(b), is granted for the reasons set forth below.

Here, defendant Ferguson Enterprises NY-Metro, Inc. f/k/a The Davidson Group Companies, Inc. (“Ferguson”) moves to dismiss this action on the grounds that it is not a successor in liability to Gilmour Supply Co. Inc., named by plaintiffs as a source of asbestos-containing products contributing to the exposure at issue herein. *See* Memorandum of Law of Defendant Ferguson Enterprises NY-Metro, Inc. f/k/a The Davidson Group Companies, Inc., Individually and As Successor In Interest to Gilmour Supply Co. Inc., In Support of Motion For Summary Judgment, p. 7-10.

In opposition, plaintiff argues that there are issues of fact regarding whether moving defendant is a “mere continuance” of Gilmour Supply Co. *See* Plaintiff’s Memorandum of Law In Support of Plaintiff’s Opposition to Defendant Ferguson Enterprises NY-Metro, Inc. s/i/a Ferguson Enterprises NY-Metro, Inc. f/k/a The Davidson Group Companies Inc. Individually and as Successor in Interest to Gilmour Supply Co. Inc.’s Motion for Summary Judgment, p. 10-15.

“The 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 eliminate any material issues of fact from the case”. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. *See id.* at 853.

Additionally, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *See Zuckerman v*

City of New York, 49 NY2d 557, 560 (1980). “In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility.” *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1st Dep’t 1992), citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dep’t 1990). The court’s role is “issue-finding, rather than issue-determination”. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted).

Here, moving defendant has offered sufficient evidence to establish that it is not a successor in liability to Gilmour Supply. Specifically, defendant Ferguson did not “assume any liabilities when it acquired Davidson Pipe Supply Co., Inc.” due to Davidson’s asset-only purchase of the Gilmour Supply division. *See* Memorandum of Law in Support, *supra*, p. 11-14. A review of the United States Bankruptcy Court’s, Eastern District of New York, Order Authorizing Sale of Assets Out of the Ordinary Course of Business and Granting Related Relief, dated December 1, 1992, explicitly stated that the sale of the assets of A. Gilmour Supply, purchased by Davidson Pipe Supply Co., Inc. would be “free and clear of all liens, claims, encumbrances and security interests.” Notice of Motion, Exh. K, Bankruptcy Court’s Order dated Dec. 1, 1992, p. 5. The Order further states that “Davidson shall have no liability to any person or entity claiming under or through [Amity Plumbing & Heating Supply Corp, the seller of the assets herein] or otherwise asserting claims arising out of or in connection with the business, properties or operations of [Amity Plumbing & Heating Supply Corp.]”. *Id.* Further, moving defendant has offered evidence that Gilmour Supply Company, Inc. was not incorporated until the 1990s. *See* Memorandum of Law in Support, *supra*, at p. 10. Plaintiff’s argument that Gilmour Supply Co., Inc. was a mere continuation of A. Gilmour Supply Co. fails as Amity Plumbing & Heating Supply Corp. continued to exist following the sale of assets. As

such, the second prong of the mere continuation doctrine has not been met. See *Schumacher v Richard Shear Co.*, 59 NY2D 239, 245 (1983). Thus, the instant motion is granted.

Accordingly, it is

ORDERED that defendant Ferguson’s motion for summary judgment is granted; and it is further

ORDERED that the complaint is dismissed in its entirety against defendant Ferguson with costs and disbursement to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

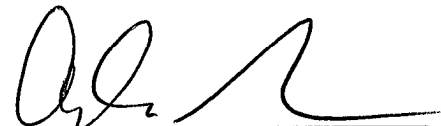
ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that within 30 days of entry defendant Ferguson shall serve all parties with a copy of this Decision/Order with notice of entry.

This constitutes the Decision/Order of the Court.

03/25/2024

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: