Exhibit 12

Not Reported in F.Supp.2d, 1998 WL 1041328 (E.D.Mich.)
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United States District Court, E.D. Michigan.
Hollis and Janet POOLE, Plaintiffs,
v.
SOFAMOR DANEK GROUP, INC., Defendant.

No. 94-40191.
Dec. 9, 1998.

Sheldon L. Miller, Jeffrey S. Cook, for Plaintiffs.

Scott L. Gorland, Karl S. Dahlquist, for Defendants.

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

OMEARA, District J.

***1** This matter came before the court on defendant Sofamor Danek Group's ("SDG's") September 2, 1998 motion for summary judgment. Plaintiffs filed a response November 10, 1998; and Defendant filed a reply November 17, 1998. Oral argument was heard November 20, 1998.

BACKGROUND FACTS

Plaintiffs Hollis and Janet Poole filed this action against SDG in 1994, alleging causes of action based on product liability, warranty, negligence and negligent misrepresentation. Each of the claims is based on the implantation in plaintiff Hollis Poole's spine of a prescription medical device known as the Cotrel-Dubousset or "CD" System.

Following filing of Plaintiffs' First Amended Complaint, the case was transferred by the Judicial Panel on Multidistrict Litigation to the United States District Court for the Eastern District of Pennsylvania, where it was docketed as part of *In re Orthopedic Bone Screw Products Liability Litigation*, MDL Docket No. 1014 ("MDL 1014"). The parties conducted extensive, generic discovery applicable to all cases in which the plaintiffs alleged injury as a result of the use of orthopedic bone screws in spinal surgery. In addition to discovery on issues of general applicability, the parties, as directed by the MDL court, conducted fact and expert discovery specific to each case. In this case, the parties obtained medical records and other documents from more than 20 third parties and took the depositions of plaintiffs Hollis and Janet Poole, Dr. Graziano, and Albert Moeller, M..D. The case was remanded to this court December 16, 1997, for final pretrial matters and a determination on the merits. The court received the record from the MDL court February 9, 1998.

Defendant SDG has moved for summary judgment on the following bases: 1) SDG neither manufactured or sold the CD System, 2) there is no evidence that the CD System is defective, and 3) there is no evidence that the CD System caused Plaintiffs' alleged injuries.

STANDARD OF REVIEW

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

"A fact is 'material' and precludes grant of summary judgment if proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect [the] application of appropriate principle[s] of law to the rights and obligations of the parties." *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir.1984) (citation omitted)(quoting Black's Law Dictionary 881 (6th ed.1979)).

The court must view the evidence in a light most favorable to the nonmovant as well as draw all reasonable inferences in the nonmovant's favor. *See*

United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); *Bender v. Southland Corp.*, 749 F.2d 1205, 1210-11 (6th Cir.1984).

***2** The movant bears the burden of demonstrating the absence of all genuine issues of material fact. *See Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 861 (6th Cir.1986). The initial burden on the movant is not as formidable as some decisions have indicated. The moving party need not produce evidence showing the absence of a genuine issue of material fact. Rather, "the burden on the moving party may be discharged by 'showing'-that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party discharges that burden, the burden shifts to the nonmoving party to set forth specific facts showing a genuine triable issue. Fed.R.Civ.P. 56(e); *Gregg*, 801 F.2d at 861.

To create a genuine issue of material fact, however, the nonmovant must do more than present some evidence on a disputed issue. As the United States Supreme Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986),

> There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the [nonmovant's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

(Citations omitted). *See Catrett*, 477 U.S. at 322-23; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The standard for summary judgment mirrors the standard for a directed verdict under Fed.R.Civ.P. 50(a). *Anderson*, 477 U.S. at 250. Consequently, a nonmovant must do more than raise some doubt as to the existence of a fact; the nonmovant must produce evidence that would be sufficient to require submission to the jury of the dispute over the fact. *Lucas v. Leaseway Multi Transp. Serv., Inc.*, 738 F.Supp. 214, 217 (E.D.Mich.1990), *aff'd*, 929 F.2d 701 (6th Cir.1991). The evidence itself need not be the sort admissible at trial. *Ashbrook v. Block*, 917 F.2d 918, 921 (6th Cir.1990). However, the evidence must be more than the nonmovant's own pleadings and affidavits. *Id* .

LAW AND ANALYSIS

In order to prevail in a products liability suit, the plaintiff must prove that the product at issue was manufactured or sold by the defendant. *Caldwell v. Fox*, 394 Mich. 401, 410 (1975). In this case Plaintiffs acknowledge that defendant SDG neither manufactured nor sold the CD System. Rather, Plaintiffs argue that SDG is liable "under the theory of successor corporation liability." Plaintiffs' resp. at 6-10.

Successor liability requires a showing that "the selling corporation ceased ordinary business operation, liquidated, and dissolved soon after distribution of consideration received from the buying corporation." *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 430 (1976). In this case, however, the evidence is uncontradicted that Sofamor S.N.C. did not cease business operations, liquidate, and dissolve. To the contrary, SDG merely acquired the stock of Sofamor S.N.C., which continues to exist and operate as an independent company with its own facilities and personnel. Defendant's Ex. A.

***3** The United States Supreme Court recently noted, "It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 118 S.Ct. 1876 (1998) (citations omitted).

Under Michigan law the corporate veil "should not be pierced ... in the absence of fraud, illegality, or injustice." *Allstate Ins. Co. v. Citizens Ins, Co. of America*, 118 Mich.App. 594, 601 (1982) (citation omitted). In order to pierce the corporate veil, a plaintiff must prove that the controlling shareholder: 1) exercised 'undue domination and control'

such that the subsidiary was not a genuine entity but only a 'mere instrumentality' of the parent; 2) exercised complete control over the subsidiary's affairs in a manner that is unjust, fraudulent, or wrongful toward the plaintiff; and 3) manipulated the subsidiary's corporate form for the purpose of causing the plaintiff to suffer an unjust loss or injury. *Seasword v. Hilti. Inc.*, 449 Mich. 542, 547-48 (1995).

In this case Plaintiffs informally have failed to present any evidence that SDG exercised undue dominion and control over Sofamor, S.N.C., or that Sofamor, S.N.C. is a mere instrumentality of SDG. Nor have Plaintiffs presented any evidence of fraud, illegality, or injustice on the part of SDG. Accordingly, Plaintiffs cannot prevail on its theory of "successor liability," and defendant SDG is entitled to summary judgment.

Plaintiffs have requested leave of the court to file an amended complaint to add Sofamor, S.N.C. as a defendant. Plaintiffs filed a second amended complaint to add Sofamor, S.N.C. over two years ago. The MDL court, however, struck that pleading November 1, 1996, because of Plaintiffs' failure to obtain leave of the court and because it violated pretrial orders. Defendant's Ex. P. In the ensuing two years, Plaintiffs neither sought reconsideration of the order nor filed another motion for leave to amend. Plaintiffs' request at this late date, after discovery and on the eve of trial, would be prejudicial to any newly-named defendant. The United States Court of Appeals for the Sixth Circuit has held that "a party must act with due diligence if it intends to take advantage of [Rule 15(a)'s] liberality." *United States v. Midwest Suspension and Brake*, 49 F.3d 1197, 1202 (6th Cir.1995). "The longer the period of unexplained delay, the less will be required of the nonmoving party in terms of showing prejudice." *Phelps v. McClellan*, 30 F .3d 658, 662 (6th Cir.1994). Therefore, the court will decline to honor Plaintiffs' request for leave to amend the complaint.

ORDER

It is hereby ORDERED that Defendant's September 2, 1998 motion for summary judgment is GRANTED.

JUDGMENT

This action came before the Court, Honorable John Corbett O'Meara, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

***4** IT IS ORDERED AND ADJUDGED that defendant's motion for summary judgment is GRANTED and the case DISMISSED.

E.D. Mich.,1998.
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