

Gonzalez v 3 M Co.

2018 NY Slip Op 31253(U)

June 20, 2018

Supreme Court, New York County

Docket Number: 190113/16

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ

PART 13

Justice

ANGELA GONZALEZ, individually and as
Executor of the Estate of AMADO GONZALEZ,
deceased,

Plaintiff

- against-

3 M CO., et.al.,

Defendants.

INDEX NO. 190113 /16

MOTION DATE 05-23-2018

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were read on this motion by Plaintiff for partial summary judgment and cross-motion by defendant FORD for summary judgment.

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1-2

Answering Affidavits — Exhibits _____

3-4, 5-6

Replying Affidavits _____

7,8

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered that this motion by plaintiff for partial summary judgment finding defendant Ford Motor Company (hereinafter "FORD") to be the legal successor to, and liable for asbestos claims arising from Amado Gonzalez' exposure to asbestos from televisions and radios manufactured by Philco Corporation (hereinafter "PHILCO"), Philco-Ford Corporation (hereinafter "PHILCO-FORD") is granted to the extent of finding that Ford is the legal successor to Philco and Philco-Ford, and potentially liable. Defendant FORD's cross-motion for partial summary judgment finding it is not the legal successor is denied.

Plaintiff brings this action to recover for injuries sustained by decedent Amado Gonzalez as a result of his alleged exposure to asbestos from several manufacturers' televisions and radios, including Philco and Philco-Ford televisions and radios. It is alleged that decedent Amado Gonzalez was exposed to the asbestos containing components of these products while he worked as a television and radio repairman from 1965 to 2000. Plaintiff alleges that between 1965 and the mid 1980's decedent Amado Gonzalez repaired vintage Amram/shortwave frequency Philco and Philco-Ford brand radios and television sets; that some of these radios and televisions contained a white heat-shield inside the cabinets, and that this heat-shield emitted white dust when he used compressed air to clean out the cabinets. This dust, which it is alleged was later found to contain asbestos, lingered in the air around decedent Amado Gonzalez during the duration of his work on the unit. Plaintiff claims that Ford is the legal successor to Philco and Philco-Ford and therefore liable for causing decedent Amado Gonzalez' personal injuries.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Plaintiff now moves for an order granting her partial summary judgment finding that Ford is the legal successor to Philco and Philco-Ford, and liable for asbestos claims arising from decedent Amado Gonzalez' exposure to asbestos dust while repairing Philco and Philco-Ford televisions and radios. Defendant Ford opposes the motion and cross-moves for partial summary judgment finding Ford is not the legal successor to Philco and Philco-Ford, and therefore not liable for decedent Amado Gonzalez injuries resulting from exposure to asbestos from their products. Defendant GTE opposes Defendant Ford's cross-motion.

On September 13, 1961 Ford entered into an "Agreement and Plan of Reorganization" with Philco Corporation (a Pennsylvania corporation). Under that agreement Ford would acquire the assets and assume the liabilities of Philco. These assets and liabilities were to then be transferred by Ford to an entirely new entity created by Ford. The entire transaction was to be paid for with stock from Ford. After the transfer, Philco was to wind up its business and voluntarily dissolve. This agreement contained an "Article Three: Assumption of Liabilities" which in relevant part states: "...from and after the closing date, Ford shall assume, by an appropriate instrument delivered to Philco at the closing date, all liabilities and obligations of Philco of any kind, character or description, whether accrued, absolute, contingent or otherwise..."(see Exhibit. 19, page 28).

This same agreement contains an "Article Fifteen: Transfer of Assets; Parties in Interest", which in relevant part states: "...This Agreement shall not be assignable by either party hereto. Ford, however, either will direct Philco to convey, transfer, assign and deliver all the assets, properties, business and good will to be acquired under this agreement directly to a newly organized wholly owned subsidiary of Ford or Ford will convey, transfer, assign and deliver to such subsidiary all of Philco's assets, properties, business and good will to be acquired under this agreement, and, in either event, Ford will delegate, in whole or in part, the performance of its liabilities and obligations under this Agreement to such subsidiary; provided however, that Ford shall continue to be responsible for the performance of all its liabilities and obligations under this Agreement ; and, provided, further, that as between Ford and such subsidiary, the subsidiary shall agree to pay all the liabilities and obligations to be assumed by Ford under this agreement or to reimburse Ford for the cost of performing such liabilities and obligations. (See Exhibit 19, page 49 and 50).

On October 16, 1961 Ford and Philco Corporation (a Pennsylvania corporation) entered into a "Supplemental Agreement" wherein some portions of the September 13, 1961 agreement were revised. Article Fifteen was revised to provide for the transfer by Philco of one or more parcels of its real property to Ford, and to provide that " Ford will convey, transfer, assign and deliver to [its] subsidiary all the assets, properties, business and good will of Philco acquired by Ford under this agreement, and Ford will delegate in whole or in part the performance of its liabilities and obligation under this agreement to such subsidiary; provided, however, that Ford shall continue to be responsible for the performance of all its liabilities and obligations under this agreement; and provided, further, that as between Ford and such subsidiary, the subsidiary shall agree to pay all the liabilities and obligations to be assumed by Ford under this agreement and to reimburse Ford for the cost of performing such liabilities and obligations...." (see Exhibit 19, Supplemental Agreement, Page 3).

On November 28, 1961 Ford incorporated Philco (a Delaware Corporation) a wholly owned subsidiary of Ford (see Exhibit 21). On December 5, 1961 Philco (Delaware) had its first corporate meeting (see Exhibit 22). On December 11, 1961 the transaction closed, Philco (Pennsylvania) transferred its assets to Ford, and Ford transferred the acquired assets and liabilities to Philco (Delaware). (see Exhibit F, general indenture, ¶ V, Exhibit G and Exhibit H). On October 6, 1966 Philco (Delaware) changed its name to Philco-Ford.

On October 10, 1974 Philco-Ford entered into a “Supply Contract” with GTE Sylvania Incorporated. Under this contract “Philco-Ford would sell to [GTE] sylvania its inventory of black and white and color television sets, stereo consoles, stereo component systems, home radios and parts (“Home Products”).” The Supply Contract also called for Philco-Ford, on the closing date, to sell and assign to [GTE] Sylvania “all of Philco’s rights in the trademark and trade name ‘Philco’ for use in the United States and Canada and worldwide except in countries where Philco has granted others rights to use the trademark, together with the goodwill of the ‘Philco’ trademark associated with the business.” In this Supply Contract Philco-Ford agreed “to defend, indemnify and hold harmless [GTE] Sylvania from and against any claims and demands arising out of Philco-Ford’s relationship with its home products distributors and dealers.” This transaction was scheduled to close on October 31, 1974 (see Exhibit 28, ¶ 5).

On October 16, 1974 Philco-Ford entered into a “Supply Agreement” with [GTE] Sylvania. The supply agreement encompassed the sale by Philco-Ford to GTE Sylvania of “certain finished goods inventory [color televisions, black and white televisions, console stereo equipment and home radios bearing the trademark of Philco and Ford, as well as appurtenances thereto and replacement parts and promotional items] of said products, certain products to be manufactured by Philco-Ford for GTE Sylvania, certain Appurtenances thereto and certain replacement parts therefor....”This agreement at Article E, General Provisions, paragraph 15 “Indemnity” states: “....Philco-Ford shall hold harmless, indemnify and at its expense defend GTE Sylvania, its successors and assigns...from and against any liability, or claims and demands therefor, cost, expense or damage arising out of any action or inaction of Philco-Ford which results in: (I) the death or injury to any person or damage to property, by whomsoever suffered, resulting from, arising out of or incident to the ownership, possession, use or operation by any person of products sold hereunder....”(see Exhibit L).

On October 31, 1974 Philco-Ford and GTE Sylvania entered into a License Agreement whereby Philco-Ford granted GTE Sylvania a non-exclusive license under all patents, domestic and foreign owned by Philco on October 10, 1974, except the ones filed in Mexico, Brazil and Argentina, to make, have made, use and sell black and white and color television sets, stereo consoles, stereo component systems, home radios and parts (home products)” of Philco-Ford. “The license includes a right to sub-license others to make, have made, use and sell home products under any or all of the United States patents...” (see Exhibit 1, opposition to cross-motion).

On October 31, 1974, together with the License Agreement Philco-Ford and GTE Sylvania entered into an Assignment Agreement whereby Philco-Ford assigned to GTE the trademark and trade name together with the goodwill associated with them solely to Home Products, and the trademark registration which apply only to Home Products, in all countries except Mexico, Brazil and Argentina (see Exhibit 2, opposition to cross

motion).

On January 31, 1975 Philco-Ford sold to GTE Sylvania all of the outstanding shares of capital stock in Philco-Ford Taiwan Corporation. Philco-Ford Taiwan made black and white and color television sets, and home radios. In effect under this agreement Philco-Ford sold its television and radio manufacturing division to GTE Sylvania. This Purchase and Sale Agreement at paragraph 9(B)(ii) "INDEMNIFICATION BY PHILCO" states: "...Philco hereby indemnifies, holds harmless and at its expense will defend GTE Sylvania, its parent and PFT, and each of them, from and against any liability or penalty of any nature whatsoever incurred or arising out of transactions or occurrences prior to the closing date, whether or not disclosed to GTE Sylvania, including without limitations: (a) express or implied warranty or other product liability arising out of the manufacture or sale of product by PFT (provided that nothing herein shall be deemed in any way to abrogate or modify the indemnity given by Philco to GTE Sylvania under the Supply Agreement entered into by and between the parties on October 16, 1974, specifically Article E, Paragraph 15 thereof, or the obligations of the parties with regard to a product hazard in Article E, paragraph 14 of said Agreement." (see Exhibit 3, GTE Sylvania Opposition to Cross-motion, Pages 22-23).

Under this agreement Philco-Ford transferred the assets of its Philco-Ford Taiwan Television and Radio home products division to GTE Sylvania, and agreed to defend and indemnify GTE Sylvania for claims of death or injury to persons or damage to property arising out of or incident to the ownership, possession, use or operation by any person of any of its television or radio products.

The January 31, 1975 Philco-Ford/ GTE Sylvania Purchase and Sale Agreement at Paragraph 17(I) states: " This Agreement shall be construed and interpreted in accordance with and governed by the laws of the State of New York."(Exhibit 3, Pg. 39). On April 30, 1975 in accordance with the agreements between Philco-Ford and GTE Sylvania, Philco-Ford ceased manufacturing television sets, home radios, stereo components and consoles.

Philco-Ford continued in existence manufacturing consumer products (except for home radios, stereo consoles, stereo components and television sets) and aerospace and defense systems . In March 1975 Philco-Ford changed its name to Aeronutronic Ford Corporation, continuing in the same line of business(see Exhibit Q). On December 1, 1976 Aeronutronic Ford Corporation changed its name to Ford Aerospace and Communications Corporation (FACC) (See Exhibits 38 and R).

On January 1, 1983 Ford incorporated Ford Electronics and Refrigeration Corporation. The assets of Ford Aerospace and Communications Corporation - except those of the Aerospace and Communications divisions- were transferred to Ford Electronics and Refrigeration Corporation (FERCO), a wholly owned subsidiary of Ford. (see exhibits 40 and S, Transfer Agreement). Under paragraph 3 (I) of the Transfer Agreement (FERCO) assumed all liabilities and agreed to perform the obligations of FACC relating to the non-Aero-Com business.

On August 2, 1990 Ford agreed to sell the Aero-space and Communications division of FACC to Loral Space Systems Inc., a division of the Loral Corporation (see Exhibit 41 and T). On December 21, 1998 Ford formed Ford Electronics and Refrigeration LLC and transferred the remaining consumer products of FACC to this entity. On February 1, 1999 FERCO was merged with and into Ford Electronics and Refrigeration, LLC.(See Exhibit 42 and U).

On March 30th 2000 Ford entered into a Master Transfer Agreement with Visteon Corporation (See Exhibit 43 and V). The agreement was made to separate the activities being conducted under the name Visteon Automotive Systems, an enterprise of Ford Company”, its subsidiaries and Affiliates. Under the terms of this agreement Ford transferred the assets and liabilities of Ford Electronics and Refrigeration, LLC to Visteon. Under the terms of this Master Agreement Visteon was to assume all liabilities of the transferred companies except for the liabilities specifically assumed by Ford. At Paragraph 4(b)(I) Assumed Liabilities Limitations on General Assumptions Products Liability, it states: “... All liabilities for any causes of action, however presented, alleging that parts, components or systems that have been (I) manufactured by the Business or (ii) manufactured by a third party, whether sold or otherwise supplied separately, or incorporated into components or systems of the Business (“Visteon Products”), in each case, which have been sold or otherwise supplied by the Business, have caused personal injuries, injuries to property or other damages regardless of the theory of liability on which the claim is based (“Visteon Product Claims”) to the extent such parts, components or systems were provided to Ford or Ford subsidiaries for model year 1996 and before, will be retained by Ford.....” In addition Ford retained liability for certain environmental claims caused by “Hazardous Substances” which include asbestos(see Exhibit 43 and V, Master Transfer Agreement, pages 5,6 and 7).

On the date stipulated by the parties in the Master Transfer Agreement, Ford transferred Ford Electronics and Refrigeration, LLC (FERLLC) to Visteon, and FERLLC became a Visteon direct subsidiary LLC (see Exhibit 43 Master Transfer Agreement, Exhibit 1(b)). The Master Transfer Agreement was “governed by and construed in accordance with the internal laws of the State of Michigan.”(see Exhibit 43 and V, page 15). On May 1, 2000 Ford Electronics and Refrigeration LLC changed its name to Visteon Systems, LLC (see Exhibit W).

On July 15, 2005 Visteon Formed VFH Holdings, Inc., (a Delaware Corporation). On September 12, 2005 Visteon and Ford entered into a “Visteon ‘B’ Purchase Agreement” for the purchase by Ford of the assets of VFH Holdings, Inc. In Section 5.11(a) of this agreement Ford assumed all environmental liabilities that had previously been assumed by Visteon in the Master Transfer Agreement dated March 30, 2000. The agreement is to be governed by the laws of the State of Michigan. (see Exhibit 44).

The provisions of section 5.11(a) have been referred to by Visteon on past occasions in declining to indemnify Ford for environmental claims and lawsuits. Ford has never filed a declaratory judgment action seeking a judicial determination that Visteon is liable for any personal injuries caused to third parties for their alleged exposure to asbestos from asbestos containing components in their products. Furthermore, while Ford was listed as a creditor by Visteon in its Bankruptcy proceedings, Ford has never filed a proof of claim against Visteon for damages arising from claims for personal injuries caused to third parties from their alleged exposure to

asbestos (see Exhibit 45 and 46).

Plaintiff argues that Ford is the legal successor to Philco, Philco-Ford, Aeronutronics Ford Corporation, Ford Aerospace and Communications Corporation (FACC), Ford Electronics and Refrigeration Corporation (FERCO), Ford Electronics and Refrigeration LLC (FERLLC), Visteon Systems LLC, and Visteon. Plaintiff argues that under the agreements Ford assumed the product liabilities and environmental liabilities of these entities and therefore is liable to plaintiff for the personal injuries sustained by its decedent Amado Gonzalez.

Defendant Ford cross-moves to dismiss and argues that Ford transferred all liabilities it acquired at the time it purchased the assets of Philco (Pennsylvania) to Philco (Delaware) and that Philco (Delaware) assumed all the assets and liabilities of Philco (Pennsylvania) including product liabilities. It further argues that Philco (Delaware) transferred these product liabilities to GTE Sylvania when it sold the Radio and Television sets Home Products line to GTE Sylvania.

GTE Sylvania opposes the cross-motion and argues that under the October 10 through 31, 1974 agreements between Philco-Ford and GTE Sylvania, Philco-Ford assumed the liabilities for the home products it manufactured prior to 1974, which include the asbestos containing products that decedent Amado Gonzalez came in contact with.

Defendant Ford argues that it transferred all of the assets and liabilities of Philco (Pennsylvania) to Philco (Delaware) on December 11, 1961. It further argues that under the Pennsylvania Products line exception GTE Sylvania assumed the liabilities of Philco-Ford when it essentially purchased its home products television, radio and stereo components line.

Although the general rule is that a corporation which acquires the assets of another is not liable for the torts of the predecessor corporation except where (1) the successor corporation expressly or impliedly assumes the predecessor's tort liability,(2) there is a consolidation or merger of seller and purchaser, (3) the purchasing corporation is a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations (Schumacher v. Richards Shear Co., Inc., 59 N.Y.2d 239, 451 N.E.2d 195, 464 N.Y.S.2d 437 [1983]), Under the products line exception, as articulated by the Pennsylvania Superior Court, "when one corporation acquires all or substantially all of the manufacturing assets of another corporation, even if exclusively for cash, and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in units of the same product line, even if previously manufactured and distributed by the selling corporation or its predecessor."(see Dawejko v. Jorgensen Steel Company, et.al., 290 Pa. Superior Court 15, 434 A.2d 106 [1981]). "The paramount policy to be promoted by the rule is the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them."(Dawejko, Supra).

Strict liability should be imposed on a successor corporation under this exception if three circumstances are shown: "(1) The virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original

manufacturer's risk-spreading rule, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's goodwill being enjoyed by the successor in the continued operations of the business" (Id.).

Defendant Ford argues that since the Supply Agreement is to be interpreted and the rights of the parties to be determined by Pennsylvania law, this court should apply the products line exception and relieve Ford of liability. Plaintiff and Co-defendant GTE Sylvania argue that neither Pennsylvania law nor the products line exception should be applied. They argue that the factors under which this exception can be applied are absent and that this court should apply New York Law, which does not recognize the product line exception (see In re New York City Asbestos Litigation, 15 A.D.3d 254, 789 N.Y.S.2d 484 [1st. Dept. 2005] and Semenetz v. Sherling & Walden, Inc., 7 N.Y.3d 194, 851 N.E.2d 1170, 818 N.Y.S.2d 819 [2006]). The products line exception has been adopted by a minority of jurisdictions, New York not being one.

This court finds that although the contract between Philco-Ford and GTE is to be governed by the laws of Pennsylvania, the product line exception does not apply. At the time GTE Sylvania acquired the rights to the trademark, trade name and licenses to Philco-Ford patents to its Television, home radio and stereo components products the corporation was not dissolved. It continued to operate under the Philco-Ford name and to manufacture home products, although no longer televisions, home radios and stereo components. Furthermore, the Supply Agreement states that Philco-Ford assumed the liabilities for death, injury, or property damage caused by its home products to any person, resulting from, arising out of or incident to the ownership, possession, use or operation by any person of the products sold under the Supply Agreement.. Finally, as stated by the New York Court of Appeals in Semenetz, "extending liability to the corporate successor places responsibility for a defective product on a party that did not put the product into the stream of commerce [which] is inconsistent with the basic justification for products liability."

"A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms, without reference to extrinsic materials outside the four corners of the document"(Goldman v. White Plains Center for Nursing Care, LLC, 11 N.Y.3d 173, 896 N.E.2d 662, 867 N.Y.S.2d 27 [2008]). "An agreement is unambiguous when its words have a definite and precise meaning, unattended by danger of misconception in the purport of the contract itself, and concerning which there is no reasonable basis for a difference of opinion "(Vintage LLC, v. Laws Const. Corp., 13 N.Y.3d 847, 920 N.E.2d 342, 892 N.Y.S.2d 286 [2009]). "The Construction of a plain contract is for the court. The intention of the parties is found in the language used to express such intention. If the court finds as a matter of law that the contract is unambiguous, evidence of the intention and acts of the parties plays no part in the decision of the case. Plain and unambiguous words, undisputed facts, leave no question of construction except for the court. The conduct of the parties may fix a meaning to words of doubtful import. It may not change the terms of a contract." (Nau v. Vulcan Rail & Construction Co., 286 N.Y.188, 36 N.E.2d 106, 50 U.S.P.Q. 484 [1941]).

A reading of the 1961 agreements shows that Ford transferred all the assets and liabilities of Philco (Pennsylvania) to Philco (Delaware). A reading of the October 1974 agreements shows that Philco-Ford assumed liability for death or injury to any person or damage to property resulting from, arising out of or incident to the

ownership, possession, use or operation by any person of its products. Under the Master Transfer Agreement between Ford and Visteon, Ford assumed all products liabilities and liability for environmental claims. These included claims for hazardous substances which includes asbestos. Furthermore, under the Master Transfer Agreement dated March 30, 2000 and the Ford/ Visteon 'B' Purchase Agreement dated September 12, 2005, Ford re-assumed all liabilities from Visteon and its subsidiaries for all environmental claims.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

Plaintiff has made a prima-facie case of entitlement to partial summary judgment finding that defendant Ford is the legal successor to Philco and Philco-Ford, and potentially liable for plaintiff's claims herein. Defendant Ford has failed to raise an issue of fact requiring a trial of this issue. Similarly defendant Ford has failed to make a prima facie case entitling it to partial summary judgment finding that it is not the legal successor and not liable for plaintiff's claims herein.

Accordingly, it is ORDERED that plaintiff's motion is granted, and it is further


ORDERED that plaintiff is granted partial summary judgment and Ford Motor Company is found to be the legal successor to Philco and Philco-Ford, and potentially liable to plaintiff for the Personal injuries decedent Amado Gonzalez sustained as a result of his exposure to asbestos from the asbestos containing products manufactured by Philco and Philco-Ford, and it is further

ORDERED that defendant Ford Motor Company's cross-motion for partial summary judgment finding that it is not the legal successor to Philco-or Philco-Ford and not liable for the personal injuries sustained by decedent Amado Gonzalez as a result of his exposure to asbestos from the asbestos containing products manufactured by Philco and Philco-Ford is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: June 20, 2018


Manuel J. Mendez
J.S.C.

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