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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION
PAUL J. MARINELLO

INDEX NO. 190277/2016

Plaintiff(s),

- against -

ABB INC., *et al.*,

Defendants.

MOTION DATE 5/15/2019
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on Rain Bird Corporation's motion for summary judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1- 3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	

Cross-Motion: Yes X No

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

Upon a reading of the foregoing cited papers, it is Ordered that defendant Rain Bird Corporation's (hereinafter, "Rain Bird") motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiff's complaint and all cross-claims against it, is granted.

Plaintiff commenced this action in the Supreme Court, State of New York, New York County, against several defendants, including the Hammond Valve Corporation, on September 12, 2016 (Aff. in Supp., Exh. A). Plaintiff later filed a Supplemental Summons and Amended Complaint on February 23, 2017 (Aff. in Supp., Exh. B). Plaintiff filed a Supplemental Summons and Second Amended Complaint on August 16, 2017 (Aff. in Supp., Exh. C). On September 1, 2017 Rain Bird filed its Acknowledgement of Receipt and Adoption of Standard Answer Pleading (Aff. in Supp., Exh. D).

Plaintiff-Paul Marinello testified over the course of two days on August 23 and 24, 2017 (Aff. in Supp., Exh. E). Mr. Marinello worked as a maintenance man for "We're Associates" from 1982 to 2016 (*id.* at 72:13-73:17, 76:5-20). He alleged that he was exposed to asbestos from several products while performing maintenance on equipment at various locations throughout Long Island, New York (*see generally id.*). When Mr. Marinello first started working for We're Associates in 1982, he worked in the boiler room of the Huntington Quadrangle building (*id.* at 72:13-73:8). Mr. Marinello's alleged exposure to asbestos from a Hammond valve arose from work performed in the boiler room of the Huntington Quadrangle (*id.* at 112:13-113:21, 424:21 426:8). The Huntington Quadrangle was built in 1970, and Mr. Marinello believed that all of the valves, steam traps, cooling towers, and boilers he worked on there were installed at that time (*id.* at 175:20-21, 310:1-13, 363:3-6, 402:20-25, 403:15-21).

When Mr. Marinello started work at Huntington Quadrangle in 1982, all the Hammond valves there were already in-service, and Mr. Marinello, again, believed all of them had been installed during the facility's initial construction in 1970 (*id.* at 176:20-21, 402:20-25, 403:20-21, 414:19-24). Mr. Marinello recalled there being twenty-five Hammond valves in the Huntington Quadrangle boiler room and he alleged being exposed to asbestos from removing and replacing flange gaskets as well as packing during repairs on these valves (*id.* at 90:17-91:3, 402:17-19, 409:18-412:7, 413:22-414:8, 414:25-415:5). Mr. Marinello did not testify to having

installed new Hammond valves at the Huntington Quadrangle (*see generally id.* at 402:3-427:20). Mr. Marinello simply testified to having worked with the twenty-five Hammond valves that had already been installed (*see generally id.*). Plaintiff now claims that Rain Bird is liable for Mr. Marinello's personal injuries as the alleged successor to Hammond Valve Corporation.

Defendant-Rain Bird purchased Hammond Valve Corporation in 1984 via an Asset Sale and Purchase agreement (Aff. in Supp., Exh. G). Per the agreement, Rain Bird ultimately purchased the following specific assets from Hammond Valve Corporation: "Property, Plant and Equipment" (*id.* at ¶ 1.a), "Inventory" (*id.* at ¶ 1.b), "Accounts Receivable (*id.* at ¶ 1.c), "Intangibles" (*id.* at ¶ 1.d), "Other Assets" (*id.* at ¶ 1.e), "Leases (*id.* at ¶ 1.f), and "Contractual Obligations" (*id.* at ¶ 1.g). Under the Asset Purchase and Sale Agreement, Rain Bird and its subsidiary, "HVC Acquiring" did not purchase any tort liabilities of the seller (*see generally id.*). In fact, Rain Bird and HVC Acquiring specifically agreed to not assume successor liability for torts claims under the language of the Asset Sale and Purchase agreement (discussed further *infra*, *see id.* at ¶ 5.8]).

Defendant now moves for summary judgment, arguing that it cannot be held responsible for injuries resulting from defective Hammond Valve Corporation products manufactured before defendant acquired the company in 1984. Plaintiff opposes the motion claiming that Indiana law governs the tort claims in the instant case and that the Indiana Product Line Successor Rule should apply to make defendant liable for the products liability claims at issue.

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*, 81 NY2d 833, 652 NYS2d 723 [1996]). It is only after the burden of proof is met that the burden switches to the nonmoving party to rebut that prima facie showing, by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

Summary judgment is a drastic remedy that should only be granted if there are no triable issues of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13, 965 NE2d 240 [2012]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party by giving the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]).

Defendant-Rain Bird argues that it did not assume liability for products manufactured by Hammond Valve Corporation before 1984. Rain Bird also argues that none of the exceptions to successor liability under New York law (discussed, *infra*) are satisfied such as to render it potentially liable for plaintiffs' tort claims in this case.

Plaintiff argues that Indiana state law governs the successor tort-liability issues arising from Rain Bird's 1984 acquisition of the Hammond Valve Corporation. In other words, plaintiff contends that the asset purchase agreement at issue contains an explicit choice of law clause which would call for this court to apply Indiana law in determining whether the plaintiff's tort claims may proceed against Rain Bird. Upon applying Indiana law, plaintiff maintains that Rain Bird could be held liable for plaintiff's injuries under Indiana's Product Line Successor Rule.

The Asset Sale and Purchase agreement (through which Rain Bird ultimately acquired Hammond Valve Corporation) contains the following choice of law provision:

> 22. Construction. This Agreement shall be construed and enforced in accordance with the laws of the State of Indiana.

(Aff. in Supp., Exh. G at ¶ 22, *emphasis added*)

This language only specifies that contractual disputes (i.e., breach of contract claims) amongst the parties to the "agreement" will be governed by Indiana law. The above language does not, however, go so far as to state that tort claims not arising directly out of the contract and the parties thereto are also governed by Indiana law.

Therefore, this court will apply New York law to determine issues of successor liability in this case. In New York, a corporation that acquires the assets of another is not liable for the torts of its predecessor (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 464 NYS2d 437, 451 NE2d 195 [1983]). There are four exceptions to New York's general rule on successor liability, as the successor may be "held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations" (*id*).

New York declined to "adopt the product line exception" to the rule that a corporation that purchases another corporation's assets is not liable for the seller's torts since "extending liability to a 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 justification for strict products liability (*Semenetz v Sherling & Walden, Inc.*, 7 NY3d 194, 818 NYS2d 819, 851 NE2d 1170 [2006]).

The "De facto merger" and the "mere continuation" theories generally overlap and as a consequence, "no criteria can be identified that distinguish them in any useful manner" (*Lumbard v Maglia, Inc.*, 621 F. Supp. 1529 [SDNY 1985]). "A transaction structured as a purchase-of-assets may be deemed to fall within this exception as a "de facto" merger, even if the parties chose not to effect a formal merger, if the following factors are present: (1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation" (*Van Nocker v A.W. Chesterton, Co. (In re N.Y.C. Asbestos Litig.)*, 15 AD3d 254, 789 NYS2d 484 [1st Dept. 2005]).

The Asset Sale and Purchase agreement also contains the following provision concerning successor liability:

> 5.8 General Warranty Against Liabilities
>
> Except as specifically set forth herein, there are no liabilities, responsibilities, debts or obligations, known or unknown, liquidated or unliquidated, fixed or contingent, related to Seller or Condec or their operations (including claims based upon express or implied product warranties) to which Buyer or HVC shall succeed or become subject by reason of the transactions contemplated hereby.

(Aff. in Supp., Exh. G at ¶ 5.8)

This provision indicates that Rain Bird expressly agreed to not assume successor liability for torts claims under the language of the agreement.

In light of the contractual provisions above, it is evident that the Asset Sale and Purchase agreement does not expressly provide for the assumption of successor liability and does not indicate that Indiana law shall govern the tort claims at issue here. Plaintiff has failed to rebut defendant's prima facie entitlement to summary judgment because it has not shown that any of the exceptions to New York's general successor liability rule apply here such as to render defendant liable. Therefore, summary judgment is granted.

Accordingly, it is ORDERED that defendant Rain Bird Corporation's motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiff's complaint and all cross-claims against it, is granted, and it is further

ORDERED that the complaint and all cross-claims against defendant Rain Bird Corporation are severed and dismissed, and it is further

ORDERED that the clerk of court enter judgment accordingly.

ENTER: MANUEL J. MENDEZ J.S.C.

Dated: May 20, 2019

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION x NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE