

Martinez v Amchem Prods., Inc.
2020 NY Slip Op 34172(U)
December 16, 2020
Supreme Court, New York County
Docket Number: 190208/2019
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART IAS MOTION 13

Justice

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ALBA MARTINEZ, AS ADMINISTRATRIX FOR THE
ESTATE OF JAMES R. MARTINEZ, AND ALBA
MARTINEZ, INDIVIDUALLY,

Plaintiffs,

INDEX NO. 190208/2019

MOTION DATE 03/09/2020

MOTION SEQ. NO. 001

- v -

AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC
AG COMPANY, N/K/A BAYER CROPSCIENCE
INC., ARVINMERITOR, INC., INDIVIDUALLY AND AS
SUCCESSOR-IN-INTEREST TO ROCKWELL
AUTOMOTIVE, BORGWARNER MORSE TEC LLC.,
BUCYRUS INTERNATIONAL, INC, CARLISLE
INDUSTRIAL BRAKE & FRICTION, INC., CATERPILLAR,
INC, CERTAINTED CORPORATION, DANA COMPANIES,
LLC, DETROIT DIESEL CORPORATION, F/K/A
DETROIT DIESEL ALLISON (DDA), INDIVIDUALLY AND
AS A SUBSIDIARY OF PENSKE CORPORATION,,
EAST MANUFACTURING CORPORATION, EATON
CORPORATION, INDIVIDUALLY AND AS SUCCESSOR
-IN-INTEREST TO CUTLER-HAMMER, INC, FORD
MOTOR COMPANY, GATES CORPORATION, GENERAL
ELECTRIC COMPANY, GREAT DANE TRAILERS, INC,
H.O. PENN MACHINERY CO. INC, HALDEX BRAKE
PRODUCTS CORPORATION AS SUCCESSOR IN
INTEREST TO GREY ROCK BRAKES, HALE PRODUCTS,
INC., HONEYWELL INTERNATIONAL, INC., F/K/A
ALLIED SIGNAL, INC. / BENDIX, HYSTER-YALE
MATERIALS HANDLING, INC, JCB, INC., KALMAR USA
INC, KELSEY-HAYES COMPANY INDIVIDUALLY AND AS
SUCCESSOR IN INTEREST TO FREUHAUF, LIPE-
AUTOMATION CORPORATION, MACK TRUCKS, INC,
NAVISTAR, INC., A/K/A INTERNATIONAL TRUCK &
ENGINE CORP. F/K/A INTERNATIONAL HARVESTER,
INC, PFIZER, INC. (PFIZER), PNEUMO ABEX
LLC, SUCCESSOR IN INTEREST TO ABEX
CORPORATION (ABEX), SEARS HOLDINGS
CORPORATION, AS SUCCESSOR-BY-MERGER
K MART HOLDING CORPORATION, STOUGHTON
TRAILERS LLC, STRICK TRAILERS, THE HEIL CO. D/B/A
HEIL TRAILER INTERNATIONAL, U.S. RUBBER
COMPANY (UNIROYAL), UNION CARBIDE
CORPORATION, VOLVO WHITE TRUCK CORPORATION
INDIVIDUALLY AND AS SUCCESSOR TO WHITE
TRUCKS, A DIVISION OF WHITE MOTOR
CORPORATION, WABASH NATIONAL TRAILER

**DECISION + ORDER ON
MOTION**

CENTERS, INC. INDIVIDUALLY AND AS SUCCESSOR-
 IN-INTEREST TO FRUEHAUF CORPORATION A/K/A
 FRUEHAUF TRAILER CORPORATION, YALE
 MATERIALS HANDLING CORPORATION, CUMMINS,
 INC., STANDARD MOTOR PRODUCTS, INC.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 130, 131, 132, 133, 134, 135, 136, 137

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND).

Before the Court is defendant East Manufacturing Corporation's ("East Manufacturing") motion for summary judgment, pursuant to CPLR 3212, for a finding in favor of East Manufacturing on the grounds that said defendant has made a prima facie case demonstrating lack of duty; breach; or causation and to dismiss plaintiffs' Complaint and all cross-claims against East Manufacturing. Plaintiffs oppose the motion.

East Manufacturing's motion contends that plaintiffs' counsel has failed to establish that plaintiff decedent James Martinez ("Decedent") was exposed to asbestos from materials manufactured by East manufacturing. The case at issue arises from Decedent's August 2, 2019 diagnosis of lung cancer, which he died from on November 19, 2019. Here, upon motion for summary judgment, East Manufacturing alleges that it did not manufacture the asbestos product that allegedly caused Decedent's lung cancer.

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]). The elements of a common-law negligence cause of action are a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately resulting therefrom (*Jiminez v. Shahid*, 83 A.D.3d 900 [2d Dept 2011]).

The identification of a manufacturer or seller of an allegedly defective product must be proven to impose liability in tort (*Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 504 [1989]). In an asbestos action, a defendant is entitled to summary judgment in the absence of proof that the plaintiff was exposed to asbestos from that defendant's products (*Cawein v. Flintkote Co.*, 203 A.D.2d 105, 106 [1st Dep't 1994]). The plaintiff must allege facts and conditions from which the defendant's liability may be reasonably inferred; specifically, the plaintiff must provide sufficient evidence to show that he not only worked in the vicinity of the defendant's products, but also that he was exposed to asbestos as a result of the use of the defendant's product (*Comeau v. W. R. Grace & Co. – Conn.*, 216 A.D.2d 79, 80 [1st Dep't 1995][citing *Cawein*, 203 A.D.2d at 105-06]).

East Manufacturing affirms that it has never designed, distributed, or sold box van trailers, the type identified by Decedent as the East Manufacturing trailers he worked on (Mot, Exh C, ¶¶ 2-3). Further, East Manufacturing claims that it has never designed manufactured or sold any third-party aftermarket replacement brakes that could be installed in their trailers (*id.* ¶4). Defendant alleges that it had no control over the composition of any third-party manufactured aftermarket replacement brakes (*id.*). Defendant points to the Court of Appeals ruling in *Matter of New York City Asbestos Litig. [Dummit]*, 27 NY3d 765, 793 [2016][finding that “the manufacturer of a product has a duty to warn of the danger arising from the known and reasonably foreseeable use of its product in combination with a third-party product which, as a matter of design, mechanics or economic necessity, is necessary to enable the manufacturer's product to function as intended”].

Defendant argues that it had no duty to warn of the danger arising from removal of third party and after-market brake pads. Defendant submits the affidavit of East Manufacturing's Vice

President of Finance, Mr. Edmund J. Szczesny, who testified, “East Manufacturing has never engaged in the manufacture, sale, or distribution of any type of brake pad. East Manufacturing did not specify or require the use of asbestos containing brakes with its dump trailers and had no control over the composition of any third party replacement parts that may have been installed on its dump trailers after they were sold” (Mot, Exh C, ¶4). East Manufacturing avers that they produced a sound product that was then fitted with another manufacturer’s allegedly defective product. Where nothing in the record suggests that the manufacturer of a product created the dangerous condition, the manufacturer has no duty to warn about the use of its product with potentially dangerous products produced by another where the manufacturer did not contribute to the alleged defect in a product, had no control over it, and did not produce it (*Rastelli v Goodyear*, 79 NY2d 289, 298 [1992][finding that Goodyear had no duty to warn about the use of its tire with potentially dangerous rims produced by another manufacturer]).

Defendant has demonstrated that the present case is analogous to *Goodyear*. Defendant has demonstrated that East Manufacturing had no connection to, control over, or interest in the third-party-manufactured aftermarket replacement brakes and friction material at issue in this case. East Manufacturing owed no duty to warn Decedent of any of the alleged dangers of those products and cannot be held liable for any asbestos exposure from Decedent’s alleged work with or around them (*Rastelli*, 79 N.Y.2d at 298; *Hansen v. Honda Motor Co.*, 104 A.D.2d 850, 851 [2d Dep’t 1984] [motorcycle manufacturer not liable for injuries caused by subsequent modifications using a defective product, however foreseeable such modifications may have been to manufacturer]). Defendant has made a prima facie showing of entitlement to judgment as a matter of law and the burden shifts to plaintiffs to raise an issue of fact.

In opposition, plaintiffs allege that the present motion is improper as defendant has failed to respond to plaintiffs' Product Identification Interrogatories and the production of documents pursuant to the CMO. Plaintiff's aver that this Court has found that a movant's "failure to respond to Product Identification Interrogatories warrants denial of summary judgment" (*Sonia Serano et. al. v. A.O. Smith Water Products Co.*, Index No. 190246/2016, July 10, 2019 [J. Mendez]; *Frank Salzano et. al v. Air & Liquid Systems Corp. et. al.*, Index No. 190446/2014, January 7, 2020 [J. Mendez]). Thus, plaintiffs argue that defendant is ineligible to make the present motion for summary judgment.

In reply, defendant argues that it has properly responded to interrogatories dated March 5, 2020, and that said interrogatories were the only set of interrogatories it received from plaintiffs. Defendant points to plaintiffs' Exhibit 3, a copy of the request for Product Identification Interrogatories, and brings to the Court's attention the fact that said Exhibit does not include any proof of service. Defendant further argues that assuming plaintiffs had properly served defendant, East Manufacturing provided the required information within its Verified Objections and Responses to Plaintiffs' First Standard Set of Liability Interrogatories and Request for Production of Documents, which defendant served on plaintiffs on March 5, 2020 (Aff in Opp, Exh 2).

Defendant demonstrates that plaintiffs' Product Identification Interrogatories contain two requests related to East Manufacturing's business in and around Decedent's work locations, both of which are answered within East Manufacturing's interrogatory responses. Upon examination of defendant's responses to Interrogatory No. 1 and No. 2, the Court finds that defendant provided proper responses to plaintiffs' requests. Further, defendant notes that in *Sonia Serano et. al.*, the Court did not find that failure to respond to Product Identification Interrogatories,

alone, warrants denial of summary judgment, but rather failure to respond combined with inconsistent testimony and inadmissible hearsay warrants denial of summary judgment (Aff in Op, Exh 4 at 4). Similarly, defendant argues that plaintiff mischaracterizes the holding in *Frank Salzano et.al* (*id.*, Exh 5). The Court did not deny summary judgment in *Frank Salzano et.al*, for failure to respond to Product Identification Interrogatories alone but because there were also issues of fact that were not resolved as to whether plaintiff had correctly identified defendant's product. Thus, defendant has demonstrated that plaintiffs' assertion that the underlying motion is improper is unconvincing. The Court finds that defendant properly responded to plaintiffs' interrogatories.

Lastly, plaintiffs' opposition argues that contrary to defendant's claims, it is East Manufacturing that has not met its initial burden of proof to put forward a prima facie case precluding issues of fact that plaintiff was exposed to asbestos dust generated from the brake work he performed on defendant's trailers and that East Manufacturing facilitated the foreseeable use of asbestos containing brakes on its trailers. Plaintiffs allege that Decedent was exposed to asbestos from 1974 to 1976 when he performed brake jobs on East Manufacturing trailers at various garages and warehouses in New York. Plaintiffs allege that Decedent was tasked with removing brakes from East Manufacturing vehicles (Aff in Op, Exh 1 at 240, 913-914, 1293-1294). Decedent testified that he performed approximately 80 brake lining replacements on the brake pads of East Manufacturing trailers (*id.* at 1294). While working on East Manufacturing vehicles Decedent testified that he was exposed to asbestos from chiseling off friction material that was stuck to the brakes (*id.* at 1285-86; 1287-88). Decedent testified that he would remove brakes, install new brakes, and during this process would breath in visible asbestos dust (*id.* at 1290-93).

Plaintiffs argue that defendant has failed to demonstrate unequivocally that its product did not contribute to Decedent's injury (*Matter of New York City Asbestos Litig.*, 146 A.D.3d 700,700 [1st Dept 2017]; *Matter of New York City Asbestos Litig.*, 123 A.D.3d 498, 499 [1st Dept 2014]; *Matter of New York City Asbestos Litig.*, 122 A.D.3d 520, 521 [1st Dept 2014]). Plaintiffs note that because of inherent difficulties in showing injury from a specific defendant's product that occurred in a specific place and time years ago, plaintiff need only show facts and conditions from which a defendant's liability can be reasonably inferred (*Reid v Georgia-Pacific, Corp.*, 212 AD2d 462, 463 [1st Dept 1995] citing *Matter of New York City Asbestos Litig.* [*Brooklyn Nav. Shipyard Cases*], 188 A.D.2d 214, 225 [1st Dept 1993] [finding that "[t]he plaintiff is not required to show the precise causes of his damages, but only to show facts and conditions from which defendant's liability may be reasonably inferred"])).

Plaintiffs contend that defendant does not dispute that Decedent was exposed to asbestos while performing break work on East Manufacturing trailers. Plaintiffs concede that a manufacturer does not have a duty to warn unless a third-part product, "as a matter of design, mechanics or economic necessity, is necessary to enable the manufacturer's product to function as intended" (*Dummit*, 27 NY3d at 793). However, plaintiffs state that the First Department addressed the situation in which a manufacturer, "knew or should have known that its product would likely be combined with an inherently defective material for its intended use," and opined that in such a case there is a duty to warn (*Defazio v. Chesterton*, 32 Misc. 3d 1235(A), 938 N.Y.S.2d 226 [Sup. Ct. 2011], citing, *Berkowitz v. A.C. & S., Inc.*, 288 A.D.2d 148 [1st Dept 2001] [finding that while defendant manufacturer's pumps might be able to run without asbestos insulation, it was questionable whether defendant's pumps could be operated safely without it and therefore and manufacturer was liable]).

Plaintiffs argue that here, “Mr. Martinez’s use of asbestos-containing brakes on East trailers was foreseeable as asbestos was a key component of most, if not all, brake linings during the relevant years, and, as a matter of design, brakes with high heat resistant lining, such as asbestos, were essential for East tractors to function properly” (Aff in Opp, ¶36). Plaintiffs allege that defendant has admitted to the use of asbestos containing brake pads on its trailers during the relevant years plaintiff worked on East Manufacturing trailers; however, the court notes that defendant has merely conceded that brake pads manufactured by other companies may have been used on its dump trailers (Aff in Opp, Exh 2 at 9). Defendant’s knowledge of potentially dangerous products produced by another manufacturer did not create duty to warn about the use of its trailers with potentially dangerous products produced by another where East Manufacturing did not contribute to the alleged defect in the asbestos containing brakes, had no control over it, and did not produce it (*Rastelli*, 79 NY2d at 298).

Plaintiffs have failed to demonstrate that defendant’s trailers, such as the defendant in *Berkowitz v. A.C. & S., Inc*’s pumps, could not be operated safely without asbestos brakes. Defendant has demonstrated that it’s vehicles function and were designed without asbestos brakes. The mere possibility that a party could replace East Manufacturing’s brakes with a third-party manufactured asbestos brake does not expose defendant to liability. Thus, the Court finds that there is no evidence that Decedent was exposed to asbestos from a product manufactured by East Manufacturing or from a product for which East Manufacturing is responsible. Therefore, defendant’s motion for summary judgment, pursuant to CPLR 3212, for a finding in favor East Manufacturing on the grounds that said defendant has made a prima facie case demonstrating lack of duty; breach; or causation and to dismiss plaintiffs’ Complaint and all cross-claims against East Manufacturing is granted.

Accordingly, it is

ORDERED that defendant’s motion for summary judgment, pursuant to CPLR 3212, for a finding in favor East Manufacturing on the grounds that said defendant has made a prima facie case demonstrating lack of duty; breach; or causation and to dismiss plaintiffs’ Complaint and all cross-claims against East Manufacturing is granted; and it is further

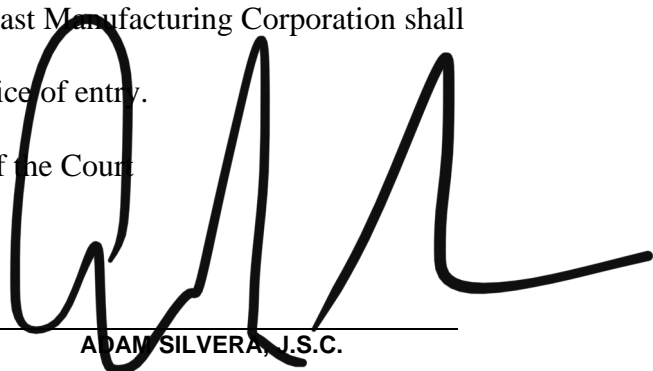
ORDERED that the Complaint is dismissed in its entirety as against defendant East Manufacturing Corporation with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

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 East Manufacturing Corporation shall serve a copy of this Decision/Order upon all parties with notice of entry.

This Constitutes the Decision/Order of the Court



12/16/2020
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE