To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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LOUIS D. CORCIONE, as Executor for the Estate of ANITA TADDEO,

Plaintiffs,

-against-

AMCHEM PRODUCTS, INC., n/k/a rhone poulencag company n/k/a bayer cropscience inc., CERTIFIED CORPORATION, FULTON BOILER WORKS, INC., GENERAL ELECTRIC COMPANY, HOFFMAN-NEW YORKER, INC., OWENS=ILLINOIS, INC., PFIZER, INC. (PFIZER), QUALITEX COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION,

Defendants.

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DECISION & ORDER
Index No. 68086/2018
Motion Sequence 4

The following papers were read on the motion (Sequence #4) for an order granted Hoffman-New Yorker, Inc. ("HNY"), summary judgment dismissing the complaint and all cross-claims and for such other and further relief this Court deems just and proper:

Notice of Motion/Affirmation/Exhibits A-L
Memorandum of Law in Support
Affirmation in Opposition/Exhibits 1-21
Memorandum of Law in Reply/Exhibit a

Factual and Procedural Background

The plaintiff-decedent, Anita Taddeo ("decedent/Taddeo"), commenced this action on October 29, 2018, seeking damages for alleged exposure to asbestos from approximately 1938 to approximately 1944, when she intermittently worked with her father at a tailor shop located at Fort Slocum, New York, and such shop contained a press machine containing press pads, which she alleges contained asbestos. Taddeo filed an amended complaint on December 3, 2018 and Hoffman interposed its answer. Taddeo died on April 20, 2019 and Louis D. Corcione was substituted as executor for the estate and a second amended complaint was filed on October 10, 2019. The decedent was

deposed on December 3, 2018, prior to her death. The parties completed discovery and the plaintiff filed the note of issue.

HNY now timely files the instant motion for summary judgment, arguing that it is not liable for any Hoffman branded product, manufactured, sold, supplied or distributed in North America, prior to February 15, 1967. HNY alternatively argues that the testimony and evidence proffered against HNY is insufficient to maintain an action against it, as there has been no evidence proffered to show that the decedent was exposed to asbestos from a product manufactured, sold, supplied, distributed, specified and/or recommended by HNY.

In opposition, the plaintiff's attorney argues that as a result of the decedent's prolonged substantial exposure to asbestos, she was diagnosed with mesothelioma in 2018, a signature illness for which asbestos exposure is the only known cause. The attorney contends that HNY's motion must be denied because it failed to present any admissible evidence, sufficient to prove that its products could not have caused the decedent's illness, thus failing to meet its prima facie burden.

The plaintiff's attorney argues that HNY has retained tort liabilities, as per the purchase agreement and the decedent consistently testified that she was regularly exposed to asbestos when workers changed the pads on Hoffman brand press machines, as well as when she swept up the resulting debris. He counters that HNY has offered no admissible evidence to rebut the decedent's sworn testimony, including no affidavit based on personal knowledge and attempts to merely point to gaps in the decedent's proof, rather than affirmatively demonstrating the merit of its defense.

In reply, HNY argues that the plaintiff's opposition does not create an issue of fact sufficient to overcome HNY"s prima facie showing. HNY asserts that the decedent's testimony contains glaring omissions, in that, she could not verify that the press machinery was manufactured by Hoffman or that any alleged pad encountered, was asbestos-containing. HNY contends that it is not required to produce someone from eighty-seven years ago, with personal knowledge, to refute the plaintiff's allegations, but can rely on the most credible evidence available regarding the decedent's exposure claims, which is her own deposition testimony confirming that she could only guess as to the manufacturer of the press and had no basis to believe that the material swept contained asbestos.

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). If a sufficient prima facie showing is made, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR 3212[b]); *see also, Vermette v Kenworth*

Truck Company, 68 NY2d 714, 717 [1986]). The parties' competing contentions are viewed in the light most favorable to the party opposing the motion. (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.,* 168 AD2d 610 [2d Dept 1990]).

HNY first asserts that it is not liable for the machinery manufactured by Hoffman International Corporation ("HIC"), since HNY did not enter into an agreement to purchase certain assets and liabilities from HIC until 1967, long after the decedent's exposure and HNY did not assume the liabilities for Hoffman branded pressing machines or any other Hoffman banded products manufactured by HIC or any other company, prior to February 15, 1967.

It is a general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor (*Schumacher v Richards Shear Co., Inc.*, 59 NY2d 239, 244 [1983]). However, "[a] corporation may be held liable for the torts of tis 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.* @ 245). There is no evidence in this case that any of these theories apply. There was no "de facto" merger, since there was no continuity of ownership of the asserts by HIC and HIC did not cease its ordinary business operations and dissolve as soon as possible after the transaction. Further, the 1967 Purchase Agreement between HIC and HNY provided for specific assets and liabilities and did not provide that HNY would assume liability for Hoffman branded products, manufactured by HIC.

In addition, the decedent's testimony did not establish either that Hoffman's products were used at the shop where the decedent worked with her father between 1938 and 1944 nor that the products were placed in the zone of the decedent's exposure (*In re New York City Asbestos Litigation*, 216 AD2d 719 [1st Dept 1995]). The decedent guessed at the brand of the pads utilized in the press and had no basis to assert that material being swept contained asbestos. The decedent's testimony was speculative at best and HNY demonstrating its entitlement to summary judgment as a matter of law, shifting the burden to the plaintiff, who did not establish any issues of fact with the evidence presented.

Accordingly, based on the foregoing, it is

ORDERED that HNY's motion for summary judgment is granted and it is further

ORDERED that the complaint and all cross-claims are dismissed as against HNY

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
September 30, 2020

HON. SAM D. WALKER, J.S.C.