

Passanisi v A.O. Smith Water Prods. Co.

2023 NY Slip Op 31010(U)

March 30, 2023

Supreme Court, New York County

Docket Number: Index No. 190263/2020

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ADAM SILVERA PART 13
Justice

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FRANK PASSANISI,

Plaintiff,

- v -

A.O. SMITH WATER PRODUCTS CO, AMERICAN
BILTRITE INC, AMERICAN HONDA MOTOR CO., INC.
(AHM), BURNHAM, LLC, INDIVIDUALLY, AND AS
SUCCESSOR TO BURNHAM CORPORATION,
DOMCO PRODUCTS TEXAS, INC, FORD MOTOR
COMPANY, GRINNELL LLC, HONEYWELL
INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. /
BENDIX, NAVISTAR, INC., A/K/A INTERNATIONAL
TRUCK & ENGINE CORP. F/K/A INTERNATIONAL
HARVESTER, INC., NISSAN NORTH AMERICA, INC, PB
HEAT LLC, INDIVIDUALLY AND AS SUCCESSOR IN
INTEREST TO PEERLESS INDUSTRIES, STANDARD
MOTOR PRODUCTS, INC, THE B.F. GOODRICH
COMPANY, (GOODRICH CORPORATION), TOYOTA
MOTOR SALES U.S.A., INC, UNION CARBIDE
CORPORATION, WEIL-MCLAIN, A DIVISION OF THE
MARLEY-WYLAIN COMPANY, A WHOLLY OWNED
SUBSIDIARY OF THE MARLEY COMPANY, LLC,

Defendant.

INDEX NO. 190263/2020
MOTION DATE 01/17/2023
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 90, 91, 92, 93, 94

were read on this motion to/for DISMISS

Upon the foregoing documents, it is ordered that defendant PB Heat, LLC's motion to dismiss the instant action pursuant to CPLR §§ 3211(a)(7) and 3211(a)(1), as well as for monetary sanctions pursuant to 22 NYCRR 130-1.1, is hereby denied for the reasons set forth below.

Here, defendant PB Heat moves to dismiss this action on the grounds that plaintiff failed to state a cause of action and that it has a defense based upon documentary evidence. Defendant

PB Heat further moves for sanctions against plaintiff arguing that plaintiff failed to withdraw the instant complaint against defendant PB Heat even after moving defendant allegedly established that it is not a successor to Peerless Industries. Plaintiff opposes the motion, arguing that defendant PB Heat must be held responsible for the liabilities of its successor corporation, Peerless Industries. Defendant PB Heat replies.

Peerless Industries was established in 1981. From its inception to 2019, Peerless Industries' insurers defended and indemnified the company against all asbestos related lawsuits. PB Heat was formed on April 16, 2003, by the filing of the Certificate of Formation. *See* Notice of Motion, Exh. C. Shortly thereafter, Atlantic Shores Corporation acquired both assets and liabilities to a company named Peerless Heater Company on April 30, 2003. *See id.* at Exh. F. Atlantic Shores was the sole member of PB Heat at the time of this transaction. As a part of such transaction, any asbestos related liability prior to September 1997 was not assumed by Atlantic Shore, as the liability pre 1997 remained with Peerless Heater Company. Following such transaction, Atlantic Shore transferred the assets and liabilities acquired from Peerless Heater Company to PB Heat. *Id.* at Exh. J. Subsequently, Peerless Heater Company merged with Boiler Products Co., which is a subsidiary wholly owned by Peerless Industries, thus dissolving Peerless Heater Company. As a result, the pre 1997 asbestos related liability transferred to Boiler Products Co.

Preliminarily, as to the portion of defendant PB Heat's motion seeking dismissal for failure to state a cause of action, such motion "assumes the truth of the material allegations and everything reasonably to be implied therefrom. ...[T]he plaintiff must be 'given the benefit of every possible favorable inference' and the motion to dismiss will fail if, 'from [the pleading's] four corners factual allegations are discerned which taken together manifest any cause of action

cognizable at law””. *Khan v Newsweek, Inc.*, 160 AD2d 425, 426 (1st Dep’t 1990)(internal citations omitted). Defendant PB Heat contends that the complaint utilizes “legal boilerplate language and lacks any factual allegations that could possibly warrant the imposition of successor liability against PB Heat.” Memorandum of Law in Support of PB Heat, LLC’s Motion to Dismiss, p. i.

After careful review of the papers herein, as well as the language of the complaint, the Court finds that plaintiff has stated a cause of action. The complaint states “[f]or any entity referenced in this Complaint...Plaintiff(s) alleges as follows: (1) the successor entity or corporation expressly or impliedly assumed the predecessor’s tort liability or liabilities described herein; (2) there was a consolidation or a de jure or de facto merger of the seller and purchaser; (3) the purchasing entity or corporation was a mere continuation of the selling entity or corporation; or (4) the transaction was entered into fraudulently to escape such liabilities or obligations.” Notice of Motion, Exh. B, Weitz & Luxenberg, P.C. Standard Complaint for Personal Injury, No. 8, Verified Complaint, ¶6. The plaintiff has set forth clear and unambiguous factual allegations that relate to successor liability. Taking the four corners of the pleading as true, a cause of action in relation to successor liability has been alleged. As such, the portion of moving defendant’s motion seeking to dismiss for failure to state a cause of action is denied.

Defendant PB Heat also moves to dismiss the complaint pursuant to CPLR §3211(a)(1), alleging that the documentary evidence proffered demonstrates that it is not a successor in interest to Peerless Industries. Pursuant to “CPLR 3211(a)(1), dismissal may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law”. *Seaman v Schulte Roth & Zabel LLP*, 176 AD3d 538, 538-539 (1st Dep’t 2019)(internal quotations omitted). Here, defendant PB Heat

contends that “[d]ispelling any suggestion that Atlantic Shores assumed any product/asbestos related liabilities from the asbestos era, the Peerless Heater Company/Atlantic Shores APA (Section 3 – Scheduled 3.1(a)(15)) expressly states that Atlantic Shores assumes ‘ [a]ny and all liabilities, whether known or unknown, now existing or as might arise hereafter, with respect to events, conditions, acts and omissions existing or occurring with respect to Peerless [Heater Company] products sold and installed after September 1997.’” Memorandum of Law, *supra*, p. xii (internal emphasis omitted). While defendant PB Heat’s documentary evidence is proffered to establish that Atlantic Shores, and thereafter PB Heat, did not assume any liability of Peerless Industries prior to 1997, such documents fail to refute each of plaintiff’s allegations regarding successor liability, such as the mere continuation doctrine which “refers to corporate reorganization, ...where only one corporation survives the transaction; the predecessor corporation must be extinguished”. *Schumacher v Richards Shear Co., Inc.*, 59 NY2d 239, 245 (1983). Plaintiff correctly argues that “[t]his doctrine is wholly applicable here, as PB Heat and PHC entered into a ‘corporate reorganization’ in 2003 where only PB Heat survived.” Affirmation in Opposition to Defendant PB Heat, LLC’s Motion to Dismiss, ¶19. Thus, PB Heat’s documentary evidence fails to utterly refute the factual allegations set forth in the complaint.

Lastly, as to sanctions, PB Heat moves for sanctions against Weitz and Luxenberg, P.C. for frivolous conduct. “[C]onduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.” 22 NYCRR 130-1.1(c). As the complaint is not without merit, contains factual allegations that

substantiate a cause of action, is not intended to prolong litigation, and refutes the documentary evidence relied upon by defendant PB Heat, the complaint is not frivolous and the instant motion to dismiss is denied.

Accordingly, it is

ORDERED that defendant PB Heat LLC's motion to dismiss is denied in its entirety; and it is further

ORDERED that defendant PB Heat LLC's motion for sanctions is denied in its entirety; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

3/30/2023
DATE


ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE