

[**1] **IN RE: NEW YORK CITY ASBESTOS LITIGATION Index No.: 190209/14; JAY A. GAYOSO and SHARON R. GAYOSO, Plaintiffs, -against- AMERICAN HONDA MOTOR CO., INC. (AHM), et al, Defendants.**

**190209/14**

**SUPREME COURT OF NEW YORK, SUFFOLK COUNTY**

***2015 N.Y. Misc. LEXIS 2375*; *2015 NY Slip Op 31144(U)***

**July 6, 2015, Decided**

**NOTICE:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

**JUDGES:** [*1] Peter H. Moulton, J.S.C.

**OPINION BY:** Peter H. Moulton

**OPINION**

PETER H. MOULTON, J.S.C.:

In this action, plaintiff alleges that he was exposed to asbestos while working at a gas station and as a mechanic at an automobile service station in the late 1970s, performing brake and clutch repairs, including on Fiat automobiles. He was diagnosed with mesothelioma in May, 2014.

Defendant Fiat USA, Inc. ("defendant" or "Fiat USA") moves to dismiss the action and all claims and cross-claims against it on the basis that it is not a proper party. Defendant asserts that it did not design, manufacture, sell or distribute automobiles in the United States during the relevant time period. Defendant further asserts that it did not assume or acquire the liabilities of any Fiat entity that sold or distributed cars in the United States during the relevant period. Plaintiffs oppose the motion and [**2] cross-move for discovery.

Background

Defendant attaches myriad corporate documents in support of its motion. The documents reflect the following information. Nonparty Fiat Auto USA, Inc. ("FAUSA") was incorporated in Delaware on March 14, 1984, in connection with the reorganization of a New York corporation Fiat Motors of North America, [*2] Inc. ("FNMA"). FNMA was the company that, through its predecessors Fiat-Roosevelt Motors, Inc. (which later changed its name to Fiat Distributors, Inc.)[1] sold cars in the United States beginning in the late 1950s. FMNA came into existence through a merger of Fiat Distributors, Inc. with Fiat Motor Company, Inc. in June 1976.[2]

1 FNMA was originally incorporated in New York on December 29, 1965 under the name Fiat-Roosevelt Motors, Inc. Fiat-Roosevelt Motors, Inc. changed its name to Fiat Distributors, Inc. on January 2, 1975.

2 On June 1, 1976, Fiat Distributors, Inc. merged with Fiat Motor Company, Inc. (which originally was incorporated in 1955 under the name Servofide, Inc. to sell ship motors). The surviving corporation of the June 1, 1976 merger bore the name Fiat Distributors, Inc.

As part of the reorganization, effective March 30, 1984, FMNA transferred all of its assets and liabilities of

Fiat/Lancia and Ferrari automobiles, including outstanding shares of Fiat Auto Canada Limited (but excluding assets and liabilities of the Canadian Division of FNMA) to FAUSA, in exchange for shares of stock of FAUSA. On April 2, 1984, in a General Assignment and [**3] Assumption Agreement, FAUSA agreed [*3] to assume all obligations and liabilities of FNMA defined as the Automobile Business Liabilities (including but not limited to those liabilities listed in Exhibit B to the agreement). A memorandum regarding the reorganization indicates that the reorganization resulted "in the change of FNMA's function to that of an administrative and holding company under the new name 'Fiat U.S.A., Inc.'"

Approximately two weeks thereafter, on April 13, 1984, defendant Fiat USA, Inc., a New York corporation incorporated on December 6, 1971 originally under the name Fiat U.S. Representative, Inc. (a company that did not sell or distribute automobiles in the United States)[3] was merged into FMNA. FMNA as the surviving corporation, changed its name to "Fiat USA, Inc." (the defendant herein).

3 Fiat U.S., Representative, Inc. changed its name to Fiat U.S.A., Inc. pursuant to a certificate filed with the New York Secretary of State on April 2, 1979.

FAUSA (the entity that assumed the automobile liabilities in 1984) authorized its dissolution on November 18, 1999 as reflected by a Certificate of Dissolution of Fiat Auto USA, Inc., dated November 19, 1999.[4] The reasons for dissolution are not explained.

4 On December [*4] 1, 1998, FAUSA merged with Ferrari Group North America, Inc., and the surviving company bore the name Fiat Auto U.S.A., Inc.

As a matter of interest, Fiat automobiles have recently made a come back in the United States through FCA US LLC, whose parent [**4] company is Fiat Chrysler Automobiles NV. In June 2009, the company known as Chrysler emerged from bankruptcy with Fiat SpA as an owner. On December 15, 2015, Chrysler Group LLC was renamed FCA US LLC, to reflect a Fiat-Chrysler merger.[5]

5 In 1998, Chrysler merged with Daimler-Benz AG to form DaimlerChrysler but the merger proved contentious with investors and Chrysler was sold to Cerberus Capital Management and renamed Chrysler LLC in 2007.

Arguments

Based on the above, defendant asserts that "when Fiat U.S.A., Inc. subsequently merged with FMNA in 1984, all assets and liabilities of FMNA related to the sale and distribution of Fiat cars in the United States had already been transferred to another party, Fiat Auto U.S.A., Inc." (Weinholtz Aff in Support ¶ 11). Additionally, "Fiat U.S.A., Inc. did not agree to assume any liabilities for the pre-1984 sale or distribution of Fiat cars in the United States." (*id.*). Further, defendant is merely [*5] an administrative company whose corporate purpose is to liaise with regulatory agencies and assist with sales distribution (*id.* at ¶¶ 14, 29). FAUSA, defendant contends, is the company who expressly assumed the liabilities of FMNA, but it was dissolved in 1999.[6] Defendant concludes that it is not a proper party because FAUSA (which no longer exists) is the entity to which all automobile assets and liabilities in the United States were transferred (*id.* [**5] at ¶ 43).

6 The Board of Directors of FAUSA included the famous Massimo Ferrari.

Plaintiffs cross-move for discovery, maintaining that "it is clear that each of the entities, Fiat USA, Inc., Fiat Auto USA, and Fiat Motors of North America are related, but what is not clear is to what extent" (Ratcliffe Aff in Opp. and in Support ¶ 6). Plaintiffs state that without further discovery, which is in the sole possession of defendant, they cannot rule out the application of any of the exceptions in *Schumacher v Richards Shear Co. (59 NY2d 239 [1983])*. Accordingly, summary judgment is premature and should be denied under *CPLR § 3212 (f)*.

Defendant counters that plaintiffs' cross-motion is untimely because plaintiffs' papers were due on March 23, 2015, but were not served until April 15, 2015. Even if the cross-motion [*6] is not rejected as untimely, defendant asserts that plaintiffs fail to explain why additional discovery is needed (i.e., what essential facts may exist to provide a basis to oppose the motion) or why defendant's presentation of corporate history in its moving papers presents an "incomplete picture."

**DISCUSSION**

On a motion to dismiss pursuant to *CPLR 3211*, the

pleading should be liberally construed, the facts alleged by the plaintiff should be accepted as true, and all inferences should be drawn in the plaintiff's favor (*Leon v Martinez, 84 NY2d 83 [1994]*). However, "[a]llegations consisting of bare legal conclusions ... [**6] are not presumed to be true [or] accorded every favorable inference" (*Biondi v Beekman Hill House Apt. Corp., 257 AD2d 76, 81 [1st Dept 1999], affd 94 NY2d 659 [2000]*).

In *Schumacher v Richards Shear Co, 59 NY2d 239, supra* the court noted four exceptions to the general rule that a corporation, which acquires the assets of another, is not responsible for the liabilities of the predecessor:

> (1) it [the acquiring corporation] expressly or impliedly assumed the predecessor's ... 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. at 245*).[7]

> 7 Although *Schumacher* concerned the obligations [*7] of a purchasing corporation with respect to the tort liabilities of the acquired company, courts have applied the same principles to contractual obligations when a company's assets are acquired by another entity (*see Burgos v Pulse Combustion , 227 AD2d 295 [1st Dept 1996]*).

Successor liability may also be predicated under the doctrine of a de facto merger.

> A transaction structured as a purchase-of-assets may be deemed to fall within [the above-noted] 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 [**7] for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation.

(*Matter of New York City Asbestos Litigation, 15 AD3d 254, 256 [1st Dept 2005]*).

Further, a corporate veil may be pierced, even in the absence of fraud, where one corporation "has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called [*8] the other's alter ego" (*Campone v Pisciotta Services, Inc., 87 AD3d 1104, 1105 [2d Dept 2011]* [internal quotation marks and citations omitted]). Factors that indicate alter ego status include the use of essentially the same name by both companies, overlap of employees, ownership, facilities and equipment, the degree of discretion demonstrated by the allegedly dominated corporation and whether dealings between the entities are at arm's-length (*see Commissioners of State Ins. Fund v Ramos, 80 AD3d 447 [1st Dept 2011]*; *Crespo v Pucciarelli, 21 AD3d 1048 [2d Dept 2005]*).

Fiat USA's motion for summary judgment is denied with leave to renew after the completion of discovery limited to the relationship between defendant and FAUSA, for the period of time from March 14, 1984 through 90 days after the dissolution of FAUSA. Plaintiffs' cross-motion is granted despite untimeliness given that no prejudice resulted from plaintiffs' brief delay in submission. [**8] Defendant had the opportunity, and did, submit opposition to the cross-motion.

Although defendant asserts that the reorganization was supported by sufficient consideration (paid by FAUSA to FNMA) in the form of 1000 shares of FAUSA common stock, and that FAUSA received assets in addition to liabilities in connection therewith, the amount of assets versus liabilities has not been quantified. Further, in one of the few cases involving [*9] defendant, the court noted "[i]ntercompany loans and transfers of idle cash for investments were made on the average of five or six times per month in amounts ranging from $1 million to $10 million between FAUSA and Fiat U.S.A., the New York corporation and parent of FAUSA" (*Vendetti v Fiat Auto S.p.A. (802 F Supp 886*

*[WDNY 1992])*. The court further noted overlap between a director and chief executive officer of defendant and FAUSA, as well as other common officers and directors (*id. at 891-92*). While the court ultimately found that these factors were unpersuasive in establishing New York personal jurisdiction over FAUSA (a Delaware corporation) and while the court found that the transactions were "routine inter-corporate transactions" plaintiffs should have an opportunity for limited discovery in this action (*see also Cullens v A.O. Smith Water Prods. Co., 2013 NY Slip OP 30393* (U) [Sup Ct., New York County 2013] [discovery necessary where plaintiff alleged successor liability); *Wexler v A. O. Smith Water Prod. Co.*, 2012 NY Slip Op [**9] 31796 (U) [Sup Ct., New York County 2012] [same]; *compare Matter of New York City Asbestos Litigation, 15 AD3d 254*, *supra* [summary judgment on successor liability granted in favor of company that paid $1 million dollars for the assets of another company which manufactured asbestos products]).

It is hereby

ORDERED that the motion for summary judgment [*10] is denied with leave to renew after the completion of discovery limited to the relationship between defendant and FAUSA, for the period of time from March 14, 1984 through 90 days after the dissolution of FAUSA; and it is further

ORDERED that the cross-motion is granted to the extent that the parties shall engage in the discovery described above.

Dated: July 6, 2015

ENTER:

/s/ Peter H. Moulton

Peter H. Moulton, J.S.C.