SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Peter H Moulton **PART** 50
Justice

Index Number : 190409/2014
MONTANEZ, IVETTE
vs.
AMERICAN HONDA MOTOR CO. INC.
SEQUENCE NUMBER : ~~004~~ 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided per attached

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

Dated: 2/8/17

HON. PETER H. MOULTON J.S.C.
SUPREME COURT JUSTICE

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK : Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK

----------X Index 190409/2014

IN RE NEW YORK CITY ASBESTOS LITIGATION

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IVETTE MONTANEZ and PETER MONTANEZ,

Plaintiffs SEQ 003

-against-

AMERICAN HONDA MOTORS CO., INC. et al

Defendants

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In this asbestos action, plaintiff Ivette Montanez alleges that she developed malignant mesothelioma as the result of washing her brother's laundry. As is relevant to this motion, Ms. Montanez's brother, Eliud Hernandez, Jr., testified that he worked on Beck/Arnley brakes at a friend's automobile repair shop in Puerto Rico when he was 15-17 years old. Defendant Beck/Arnley Worldparts, Inc. moved for summary judgment on several grounds. The primary ground was defendant's assertion that it is not the successor to Beck/Arnley Worldparts Corp. (which later changed its name to CDG Parts Distribution Corp.).

By Decision and Order dated September 14, 2016, I held defendant's motion for summary judgment in abeyance pending further submissions on the issue of the ownership element for a de facto merger and I denied plaintiffs' cross-motion to strike defendant's reply affirmation. In various emails to the court, plaintiffs reiterated their objection to defendant's supplemental submission of the affidavits of Max Dull and Louis Juneau. Pending further submissions, defendant also agreed

to plaintiffs' request to depose Max Dull and Louis Juneau.[1] Plaintiffs deposed both individuals, but complain that defense counsel improperly instructed Mr. Dull not to answer numerous questions.[2]

As noted in my September 14, 2016 decision, the central issue of successor liability turned on whether any of the seller's owners acquired a direct or indirect interest in the buyer under an asset purchase where no stock was exchanged. Plaintiffs maintained that although defendant's motion should have been denied because defendant failed to carry its burden of proof, "triable issues of fact remain regarding the 'continuity of ownership' of an indirect owner of the sole shareholder of BAWC and that person's subsequent ownership in BAWI" (Humphrey Reply Affirm In Support of Cross Motion ¶ 14).[3] That person was ultimately revealed to be Max Dull, who, along with Richard Crawford and Patrick Greene (through a company known Heritage Equity Group, Inc.) owned Beck/Arnley Worldparts Corp.

Plaintiffs' Affirmation in Further Support (NYSCEF 381) demonstrates that counsel's

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[1]Plaintiffs never sought any discovery on the successor liability issue until the court requested further briefing in connection with defendant's motion for summary judgment.

[2]While counsel who practice in New York City Asbestos Litigation typically work well together, there has been an issue in this case. Because neither plaintiffs' nor defendant's counsel could agree on the parameters of the depositions, the court attempted to work with them to reach a mutually agreeable resolution. By email dated December 8, 2016, the court noted that the parties could proceed to deposition "as long as you are in agreement as to the scope (which you appear to be)." Instead of alerting the court to any disagreement, the parties inexplicably proceeded to the deposition. When issues came up at the deposition, the parties contacted the Special Master, but defense counsel (at least initially) refused to recognize her authority. In defendant's Supplemental Reply (NYSCEF 409), counsel states that the Special Master ultimately made a ruling in defendant's favor. There is no need for me to determine whether in fact a ruling was made because my decision is independent of any ruling.

[3]Plaintiffs avoided laying bear their proof as to what triable issues of fact existed, and apparently presumed that the motion would be denied based on defendant's failure to meet its burden of proof.

approach to the successor liability claim has been unfocused. In the face of Mr. Dull's recent affidavit, which states that he never owned shares or had a direct or indirect ownership interest in defendant, or owned shares in Uni-Select USA Holdings, Inc. (who owned defendant) or Uni-Select Inc. (the ultimate Canadian publically traded parent), plaintiffs retreat from their argument that "triable issues of fact remain regarding the 'continuity of ownership' of an indirect owner of the sole shareholder of BAWC and that person's subsequent ownership in BAWI" (Humphrey Reply Affirm In Support of Cross Motion ¶ 14).[4]

Instead, plaintiffs' additional briefing maintains that a more flexible standard should apply to de facto mergers "in the context of tort actions." Plaintiffs assert that summary judgment should be denied even in the absence of issues of fact regarding ownership, because defendant received a "continuing benefit" from the asset purchase through the hiring of, and activities of, Mr. Dull, and because defendant intended to "absorb and continue" Beck/Arnley Worldparts Corp. (later CDG Parts Distribution Corp.). Plaintiffs discuss the import of then-Circuit Judge Sonia Sotomayor's comment in *State of New York v National Serv. Indus., Inc.* (460 F3d 201 [2d Cir 2006]), which I cited in footnote 3 of my September 14, 2016 decision. Plaintiffs highlight then-Circuit Judge Sotomayer's analysis of successor liability under New York common law and her statement that "[t]his does not mean, however, that the court might not read those standards flexibly in tort cases and that other indicia of control over or continuing benefit from the sold assets might not be sufficient to satisfy the continuity of ownership factor" (*id.* at 215 n 5). They also note her citation to *Keen Laundry & Dry Cleaning Servs, Inc. v Total Waste Mgmt. Corp.* (817 F Supp 275 [Dist. Ct.

[4]As noted by defendant in its Supplemental Reply (NYSCEF 409), Mr. Dull also testified that his wife never owned stock in Uni-Select, Inc. (the ultimate Canadian publically traded parent).

NH 1993]), a case where the court rejected defendant's claim that plaintiff failed to establish a de facto merger in the absence of stock exchange because the purchase agreement required the purchaser to retain the president of the seller as a consultant and to pay a $ 60,000 annual consulting fee. Plaintiffs attempt to diminish the authority of *Matter of New York City Asbestos Litig. v A.W. Chesterton Co.* (15 AD3d 254 [1st Dept 2005]) by referring to it as a "rather conservative decision."

Thus, in their most recent submission, plaintiffs point to evidence which they assert is sufficient to establish a de facto merger under the flexible approach they urge. Plaintiffs highlight that as part of the asset purchase, defendant hired Mr. Dull as Vice President and General Manager of defendant commencing "on the closing of the Acquisition."[5] Plaintiffs point to his duties with respect to the "day-to-day operations of [BAWI], assisting in the orderly transition of the businesses of Sellers to [BAWI] and assuming the responsibility of product management and sourcing, including customer and supplier relationships, cataloguing, centralized purchasing and value line." Plaintiffs note that Mr. Dull was also Vice President and Member of the Management Committee of Uni-Select, the parent of defendant. Plaintiffs point to Mr. Dull's compensation of (1) an annual base salary of $150,000.00; (2) a bonus of 40% of his base salary; (3) a bonus of $8,000.00 to $10,000.00 per year based on BAWI maintaining sales to existing customers; (4) all employee benefit plans and programs of BAWI; (5) reimbursement of necessary out-of-pocket costs including travel; and (6) a car allowance of $964.00 per month. They further point to the fact that the three Heritage Group investors also received cash payments, and Mr. Dull testified that he received

[5]Mr. Dull continued in that position for four years.

approximately $1,000,000.00.[6] Further, plaintiffs highlight that on December 20, 2012, Mr. Dull entered into a termination agreement with BAWI where he received a severance package, which included: (a) two payments of approximately $86,000.00 dollars; (b) one year of car allocation totaling approximately $12,000.00 dollars; and (c) one year of COBRA premiums. Plaintiffs also maintain that because Mr. Dull did not remember whether CDG Parts Distribution Corp. received compensation from the sale, that translates to an issue of fact as to whether the transaction was in fact a stock purchase.

In its Supplemental Reply (NYCSEF 409), defendant asserts that even under their flexible analysis, plaintiffs cannot prevail. Defendant highlights that as a Vice-President Mr. Dull reported to others. Nor was he a director, officer, or a Canadian securities reporting insider of Uni-Select, Inc. Moreover, the case cited by Judge Sotomayor in *State of New York* for the application of a more flexible successor liability standard involved a seller who had only one owner. Here, of the three indirect shareholders of Beck/Arnley Worldparts Corp. (Max Dull, Patrick Greene and Richard Crawford), only Mr. Dull received employment and wages from defendant. In any event, defendant notes that the case cited by Judge Sotomayor involved the federal Comprehensive Environmental Response, Compensation, and Liability Act. By contrast, defendant points out that this action involves New York state common law. Further, defendant distinguishes *Tap Holdings LLC v Orix Finance Corp.* (109 AD3d 167 [1st Dept 2013), which was cited by plaintiffs, because in that case plaintiffs alleged common ownership between the seller and the purchaser (defendants owned 100 percent of the seller and 80 percent of the purchaser).

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[6]Defendant explains in its Supplemental Reply (NYSCEF 409) that the point is that Beck/Arnley Worldparts Corp. received cash for the asset purchase, and it is of no import that the total amount paid to the company was nearly 5 million dollars.

Discussion

The motion for summary judgment is granted. Defendant met its burden to demonstrate that there was no continuity of ownership. Plaintiffs failed to raise an issue of fact concerning that issue.[7] "It is the 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.*, 59 NY2d 239, 244 [1983] [citations omitted]). There is an exception to this rule where there has been "a consolidation or merger of seller and purchaser" (*id.* at 245). 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 (*see Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 574 [2001]).

While there may be good reasons for adopting a different test for successor liability in the context of an asbestos case, the law, as it presently exists, requires that the proponent of a de facto merger demonstrate a continuity of ownership. Under New York law, continuity of ownership is "the touchstone of the [de facto merger] concept" and "thus a necessary predicate to a finding of a de facto merger" (*Matter of TBA Global, LLC v Fidus Partners, LLC*, 132 AD3d 195, 210 [1st Dept 2015] [internal citations omitted] [there was no continuity of ownership between seller and buyer which would require the buyer to arbitrate because it was undisputed that none of seller's owners

[7]It is unnecessary to reach defendant's alternative grounds for summary judgment.

acquired a direct or indirect interest in the buyer as a result of the transaction]). This concept has been applied in an asbestos case (*Matter of New York City Asbestos Litig.*, 15 AD3d 254, *supra* [buyer was not liable for seller's torts given that two of the four factors required for a de facto merger finding were lacking: continuity of ownership and dissolution]). While this might be unfair in instances where, as here, plaintiffs submitted evidence that (1) Beck/Arnley Worldparts Corp. did not continue to exist in a meaningful way after the asset purchase (having been stripped of any way to generate income) and (2) defendant knew of asbestos lawsuits and Beck/Arnley Worldparts Corp. failed to set aside sufficient monies to pay for them,[8] any finding that other indicia could substitute for continuity of ownership must come from the appellate courts.[9]

Plaintiffs' complaint about counsel's improper limitation of questions put to Mr. Dull at his deposition is also unpersuasive. While defense counsel instructed Mr. Dull not to answer certain questions (such as his prior knowledge of asbestos in the automobile industry), the purpose of the deposition was to address the issue of continuity of ownership issue. Questions concerning issues of cessation of ordinary business of the predecessor; assumption of necessary and ordinary liabilities for continued business; and continuity of management, personnel, location, assets and operations

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[8]In the deposition of Derek Adolf, the corporate representative for CDG Parts Distribution Corp. (originally Beck/Arnley Worldparts Corp.) admitted that Beck/Arnley Worldparts Corp. had no means of making money after the asset sale. Further, Mr. Adolf admitted that at the time of the sale, Beck/Arnley Worldparts Corp. was faced with 12 asbestos lawsuits. He further admitted that a few hundred thousand dollars was set aside with regard to these lawsuits, but was earmarked for defense costs, not victim compensation, and nothing was done to forecast future liability. Moreover, he conceded that Uni-Select knew of these lawsuits and future potential asbestos lawsuits. As of 2012, Mr. Adolf admitted that there was less than $10,000 to satisfy claims.

[9]The appellate court would also likely consider the reasons why the product line exception was rejected by the Court of Appeals in *Semenetz v Sherling & Walden, Inc.* (7 NY3d 194 [2006]) and how those reasons may or may not apply to asbestos actions.

(elements to establish defacto merger) were not at issue, and plaintiffs already submitted sufficient evidence on those factors. However, to the extent that Mr. Dull's deposition should be ordered for reasons unrelated to this defendant, plaintiffs may move for further discovery before the Special Master.

It is hereby

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

ORDERED that defendant Beck/Arnley Worldparts, Inc. is entitled to a judgment dismissing the complaint and any cross-claims as against it, without costs and disbursements.

This constitutes the Decision and Order of the Court.

Dated: February 8, 2017

J.S.C.

HON. PETER H. MOULTON
SUPREME COURT JUSTICE