

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONTARIO

DAVID TOLAN, Individually and as Independent
Executor of the Estate of JOSEPH F. TOLAN,
deceased and HEIN TOLAN, Individually,

Plaintiffs,

NOTICE OF ENTRY

v.

Index No. 116247-2017

ALTRA INDUSTRIAL MOTION, CORP.,
Individually and as successor in interest to
Warner Electric, LLC, et al.,

Defendants.

PLEASE TAKE NOTICE that the annexed document is a true copy of a Notice of
Appeal electronically entered in the Office of the Clerk of this Court on August 3, 2018.

Dated: Buffalo, New York
August 3, 2018

PHILLIPS LYTLE LLP

By



Mary Jo Herrscher

James W. Whitcomb

Attorneys for Defendant
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONTARIO

DAVID TOLAN, Individually and as Independent
Executor of the Estate of JOSEPH F. TOLAN,
deceased and HEIN TOLAN, Individually,

Plaintiffs,

v.

ALTRA INDUSTRIAL MOTION, CORP.,
Individually and as successor in interest to
Warner Electric, LLC, et al.,

Defendants.

NOTICE OF APPEAL

Index No. 116247-2017
Hon. John J. Ark, J.S.C.

PLEASE TAKE NOTICE that Defendant The Goodyear Tire and Rubber Company (“Goodyear Tire”), hereby appeals to the Appellate Division, Fourth Department of the Supreme Court of the State of New York, from each and every part of the Decision and Order of the Supreme Court, Monroe County, Seventh Judicial District Asbestos Litigation Part (Ark, J.S.C.), dated July 23, 2018, entered in the Office of the Monroe County Clerk on July 25, 2013, attached hereto as Exhibit A, and served by Plaintiff’s counsel upon all parties via e-filing, with notice of entry, on July 25, 2013, denying Goodyear Tire’s motion for summary judgment in the above-entitled action.

This appeal is taken from each and every part of the Decision and Order, as well as from the whole thereof.

Dated: Buffalo, New York
August 3, 2018

PHILLIPS LYTTLE LLP

By Mary Jo Herrscher
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TO: MAUNE, RAICHLER, HARTLEY, FRENCH
& MUDD
Attorneys for Plaintiff
150 W. 30th Street, Suite 201
New York, NY 10001

All Defense Counsel (per attached list)

Monroe County Clerk
101 County Office Building
39 W. Main St.
Rochester, New York 14614

EXHIBIT A

(Decision and Order)

201807250261
FILED: ONTARIO COUNTY CLERK 08/03/2018 03:17 PM
FILED: ONTARIO COUNTY CLERK 08/03/2018 01:16 PM
FILED: ONTARIO COUNTY CLERK 07/25/2018 03:00 PM

INDEX #: 116247-2017
INDEX NO.: 116247-20
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INDEX NO.: 116247-20
RECEIVED NYSCEF: 08/03/2018
RECEIVED NYSCEF: 07/25/2018
RECEIVED NYSCEF: 07/25/2018
Index #: 116247-2017

NYSCEF DOC. NO. 251
201807250261

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONTARIO
_____X

TOLAN, et al

Plaintiff(s)/Petitioner(s),

NOTICE OF ENTRY

- vs -

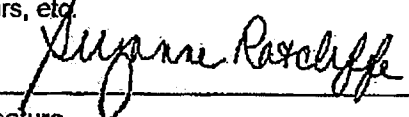
Index No.: 116247/2017

ALTRA INDUSTRIAL MOTION CORP., et al

Defendant(s)/Respondent(s).
_____X

PLEASE TAKE NOTICE that the attached is a true copy of an order judgment
in this matter that was entered in the office of the Clerk of the Supreme Court, ONTARIO
County, on the 23 day of July, 2018.

Dated: July 25, 2018

Yours, etc.


Signature

Print name and address
Suzanne M. Ratcliffe
Maune Ratcliff Hartley French & Mudd
150 W 30th Street, Suite 201
New York, NY 10001
(314) 241 2003

TO: All Defense Counsel of Record via
NYSCEF

NYSCEF DOC. NO. 251
NYSCEF DOC. NO. 250

1 STATE OF NEW YORK : SUPREME COURT
2 COUNTY OF MONROE : CIVIL TERM

3 -----X

4 JOSEPH F. TOLAN and HIEN TOLAN, : Index No(s),
5 Plaintiffs, : 116247-2
6 -vs- : 2018-152

7 :
8 ALTRA INDUSTRIAL MOTION, CORP., :
9 Individually and as successor in interest :
10 to Warner Electric, LLC, GOODYEAR TIRE & : Motions
11 RUBBER CO., et al., :
12 Defendants. :

13 -----X

14 Hall of Justice
15 Rochester, New York
16 July 10, 2018

17 BEFORE: HON. JOHN J. ARK
Supreme Court Justice

18 APPEARANCES: MAUNE RAICHLE HARTLEY FRENCH & MUDD, LLC
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21 Attorney for the Plaintiffs

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24 BY: JAMES W. WHITCOMB, ESQ.
Attorney for Goodyear Tire & Rubber Co.

25 REPORTED BY: JILL A. FLYNN, RPR
Official Court Reporter

TOLAN v. GOODYEAR, et al

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02:43:20 25

MR. WHITCOMB: James Whitcomb, Phillips Lytle
LLP for Goodyear Tire Company.
Your Honor, Goodyear has put forward in support
of this motion the following which relates to the
plaintiff having worked with gaskets, sheet gaskets,
starting in 1977 at the Army's Seneca Depo.
First of all, Goodyear stopped making
asbestos-containing gaskets in 1969. Goodyear in the
response to discovery from the Plaintiffs' counsel
provided discovery stating that it has no records of
sales of asbestos-containing gaskets to the U.S. Army,
Seneca Depot.
Plaintiff in his testimony assumed that the
gaskets he worked with contained asbestos. He did not
state it specifically contained asbestos. He was never
told they contained asbestos. He only determined later,
when he was diagnosed with mesothelioma, that he was --
may have been exposed to asbestos. But an assumption, at
least in my career, has never been sufficient to overcome
summary judgment.
Goodyear did continue to make gaskets after
1969 which did not contain asbestos and had similar
markings and logos on it. Interestingly enough, the
Plaintiffs' counsel attached a document to her responding
papers stating that the Plaintiff identified gaskets with

TOLAN v. GOODYEAR, et al

1 the Goodyear logo on it. That same logo appeared on many
2 gaskets, many of which -- none of which contained
3 asbestos after 1969.

4 Finally, Plaintiffs' counsel wants to bootstrap
02:43:42 5 an argument stating that Goodyear Canada Incorporated may
6 be responsible for Plaintiff's injuries here, and that
7 somehow Goodyear -- the Goodyear Tire & Rubber Company is
8 responsible for that particular -- those particular
9 products. Goodyear Canada is a totally separate
02:44:07 10 corporation which is -- has its principle place of
11 business in Canada. It's not sued in this case. If it
12 had been sued in this case, we would have made a motion
13 for lack of personal jurisdiction, which has been granted
14 by several judges in this state.

02:44:24 15 In any event, the Plaintiff cannot rely upon
16 the fact that Goodyear Canada after 1969 up until 1973
17 continued to manufacture asbestos-containing gaskets.
18 There is absolutely no proof in the record that any
19 Goodyear Canada product made its way to the Army Seneca
02:44:44 20 Depot.

21 For all of those reasons, your Honor, this
22 motion ought to be granted. I will cede the floor at
23 this point.

24 MS. RATCLIFFE: Your Honor, Suzanne Ratcliffe
02:45:04 25 from Maune Raichle Hartley French & Mudd on behalf of the

TOLAN v. GOODYEAR, et al

1 Plaintiff.

2 Basically what Goodyear would like you to
3 believe in this case is that they stopped manufacturing
4 asbestos-containing gaskets in 1969 or 1973, regardless
02:45:19 5 of whether it is Goodyear based in the United States or
6 based in Canada, and they simply vanished, no one worked
7 with it ever again.

8 However, they have provided absolutely no
9 evidence that there were any efforts made to remove any
02:45:35 10 of the residual asbestos-containing sheet gasket material
11 from anyplace, so why can't he still be working with it?
12 They haven't answered that. He absolutely described the
13 Goodyear asbestos-containing sheet gasket material
14 exactly the same way they do in their Answers to
02:45:54 15 Interrogatories, in their bulletins and in their
16 marketing materials, but, no, it can't be that.

17 There's a number of different decisions based
18 out of the First Department where there is longstanding
19 recognition of the residual usage of products, and that
02:46:16 20 is simply the case here. Just because they stopped in
21 1969 doesn't mean it was still not available for use in
22 1977. That's it.

23 THE COURT: Very well. I'll deny the motion.

24 (Case adjourned.)

02:46:25 25 (Matter recalled.)

NYSCEF DOC. NO. 251
NYSCEF DOC. NO. 250

TOLAN v. GOODYEAR, et al.

5

1 THE COURT: What is the reason for this?

2 (Discussion held off the record.)

3 (Conference in jury room held off the record.)

4 (End of proceeding.)

5 * * * * *

6 (Certified to be a true and accurate transcript.)

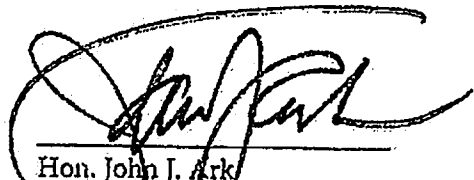
Jill A. Flynn, RPR

Jill A. Flynn, RPR
Official Court Reporter

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SO ORDERED,



Hon. John J. Ark

Date: July 23, 2018