# *O'Sullivan v Borg-Warner Corp.*

Supreme Court of New York, New York County

December 29, 2021, Decided

INDEX NO. 190180/2012

**Reporter**
2021 N.Y. Misc. LEXIS 6858 *; 2021 NY Slip Op 32870(U) **

**[**1]** ANTHONY O'SULLIVAN, AS ADMINISTRATOR FOR THE ESTATE OF PATRICK O'SULLIVAN, BRIGID O'SULLIVAN, Plaintiff, - v-BORG-WARNER CORPORATION, CBS CORPORATION, F/K/A VIACOM INC., CUMMINS ENGINE COMPANY, INC., DANA COMPANIES, LLC, FORD MOTOR COMPANY, FREIGHTLINER CORPORATION, GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC, HONDA OF AMERICA MFG., INC, HONEYWELL INTERNATIONAL, INC., INGERSOLL-RAND COMPANY, INTERNATIONAL TRUCK AND ENGINE CORPORATION, MACK TRUCKS, INC, MAREMOUNT CORP, NISSAN NORTH AMERICA, INC, OWENS-ILLINOIS, INC, PERKINS ENGINES, INC, PNEUMO ABEX LLC, SUCCESSOR IN INTEREST TO ABEX CORPORATION (ABEX), RAPID-AMERICAN CORPORATION, STANDARD MOTOR PRODUCTS, INC, THE GOODYEAR TIRE AND RUBBER COMPANY, TOYOTA MOTOR SALES, U.S.A., INC, TRANE U.S. INC., F/K/A AMERICAN STANDARD INC, U.S. RUBBER COMPANY (UNIROYAL), AMERICAN HONDA MOTOR CO., INC. (AHM), AMERICAN HONDA MOTOR CO INC (AHM), BORG WARNER MORSE TEC INC, CBS CORP F/K/ A WESTINGHOUSE ELECTRIC CORP, HONEYWELL INTERNATIONAL INC F/K/A ALLIED SIGNAL INC/BENDIX, UNION CARBIDE CORP, Defendant.

**Notice:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

## Core Terms

summary judgment, misapprehended, prior decision, prior motion, reargue, brand, manufactured, renew

**Judges:** **[*1]** HON. ADAM SILVERA, J.S.C.

**Opinion by:** ADAM SILVERA

## Opinion

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172 were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, it is ordered that plaintiff's motion to reargue is granted. Here, plaintiff seeks to reargue a prior motion, made by defendant Nissan North America (hereinafter referred to as "defendant Nissan") for summary judgment to dismiss the complaint. Defendant Nissan opposes and plaintiff

replies.

**[**2]** In a prior decision dated January 4, 2021 (hereinafter referred to as the "Prior Decision"), the Court granted defendant Nissan's motion for summary judgment dismissing the complaint as against it on the grounds that defendant Nissan was distributing Datsun vehicles at the time of exposure and plaintiff did not explicitly identify Datsun vehicles, rather, plaintiff identified Nissan vehicles. *CPLR 2221(d)(2)* permits a party to move for leave to reargue a decision upon a showing that the court misapprehended the law in rendering its initial decision. "A motion for leave to reargue pursuant **[*2]** to *CPLR 2221* is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." *William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22, 27, 588 N.Y.S.2d 8 (1' Dep't 1992)*, *appeal denied in part, dismissed in part 80 NY2d 1005 (1992)* (internal quotations omitted).

Plaintiff argues that this Court misapprehended the law and the facts, as it was well known to individuals such as plaintiff, who had specialized knowledge in auto-mechanics, that Nissan manufactured Datsun such that plaintiff's deposition testimony that he worked with Nissan products from the 1970s to the 1990s contradicts defendant Nissan's arguments. In opposition, defendant Nissan avers that the Court did not misapprehend the law or facts in the Prior Decision, and further argues that plaintiff raises new facts here which were not made in the prior motion in contravention of *CPLR 2221(d)*. Defendant Nissan states that the only facts from the prior motion that plaintiff refers to herein is plaintiff's deposition transcript. Preliminarily, the Court notes that such argument fails as even if the Court were to only reconsider arguments, facts, and the law made by the parties during the prior motion, the **[*3]** Court did overlook and misapprehend the facts. Defendant Nissan further argues that the Court should not convert the instant motion to a motion to renew as plaintiff did not offer an excuse for the omission of **[**3]** evidence in the prior motion. However, such argument also fails. The Appellate Division, First Department clearly and explicitly states that:

> [a] motion for leave to renew is intended to bring to the court's attention new or additional facts which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore, not brought to the courts' attention. This requirement, however, is a flexible one and the court, in its discretion, may also grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made. Indeed, we have held that even if the vigorous requirements for renewal are not met, such relief may be properly granted so as not to defeat substantive fairness".

*Tishman Constr. Corp. v City of New York, 280 AD2d 374, 376-377, 720 N.Y.S.2d 487 (1st Dep't 2001)*(internal citations and quotations omitted). *CPLR§2221(e)* permits a party to move for leave to renew a decision to assert "new facts not offered on the prior motion that would change the prior determination or...demonstrate that **[*4]** there has been a change in the law that would change the prior determination". *CPLR §2221(e)*. Here, plaintiff has established that the court misapprehended the facts in its prior decision such that the instant motion is granted and the Court will reconsider the prior motion for summary judgment.

Turning to the substance of the prior motion, defendant Nissan argued that the complaint must be dismissed as to them as defendant Nissan established that Nissan brand cars did not contribute to plaintiff's alleged ***asbestos*** exposure. Defendant Nissan further argued

that Nissan brand vehicles were not distributed by defendant Nissan North America until approximately three years prior to plaintiff's last date of exposure to such vehicles such that defendant Nissan could not be responsible for the plaintiffs exposure to ***asbestos***.

Plaintiff correctly argues that the Court misapprehended the facts in the Prior Decision. Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *Alvarez v Prospect Hosp., 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986)*. "The proponent of a summary judgment motion must make a prima facie **[**4]** showing of entitlement to judgment as a matter of law, tendering sufficient **[*5]** evidence to eliminate any material issues of fact from the case". *Winegrad v New York University Medical Center, 64 NY2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985)*. Additionally, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *See Zuckerman v City of New York, 49 NY2d 557, 560, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980)*. "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." *Garcia v J.C. Duggan, Inc., 180 AD2d 579, 580, 580 N.Y.S.2d 294 (1st Dep't 1992)*, citing *Dauman Displays, Inc. v Masturzo, 168 AD2d 204, 562 N.Y.S.2d 89 (1st Dep't 1990)*. The court's role is "issue-finding, rather than issue-determination". *Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404, 144 N.E.2d 387, 165 N.Y.S.2d 498 (1957)* (internal quotations omitted). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *Ugarriza v Schmieder, 46 NY2d 471, 475-476, 386 N.E.2d 1324, 414 N.Y.S.2d 304 (1979)*.

Here, reviewing all the prior papers, the Court finds that defendant Nissan's heavy reliance on the specific words "Nissan brand" vehicles lead the Court to misapprehend the facts of the case. This Court's Prior Decision misapprehended the facts in that the Prior Decision focused solely on Nissan branded vehicle. A careful review of plaintiff's deposition transcript reveals that plaintiff specifically testified that he worked on every make of car and that he "just know[s he has] done brake jobs on Nissan's, and Ford's and everything. **[*6]** I don't recall any specific car". Original Notice of Motion dated, Exh. C, Depo. Tr. of Anthony O'Sullivan, p. 239. When asked what brand or manufacturer of clutches plaintiff removed from Nissan vehicles, plaintiff testified that "[i]t depends on the mileage on the car, if it had a lot of mileage, to be the original." *Id.* at p. 140-141. When asked about removing specific clutches from a Nissan vehicle, plaintiff testified that he "guess[es] they were Nissan". *Id.* at 141. Plaintiff also **[**5]** explicitly stated that he recalled using original clutches and brakes manufactured by Nissan. *Id.* at 302. Thus, plaintiff testified not only with regards to Nissan brand vehicles, but also to different parts of the vehicles which were manufactured by Nissan. Thus, an issue of fact exists as to whether plaintiff was exposed to ***asbestos*** through products, either parts or vehicles, manufactured by defendant Nissan. As an issue of fact exists, summary judgment is precluded. Thus, plaintiff's motion to reargue is granted and the original motion for summary judgment is denied.

Accordingly, it is

ORDERED that plaintiffs motion to reargue is granted and, upon reargument, the Court vacates its prior decision, **[*7]** dated January 4, 2021; and it is further

ORDERED that the original motion for summary judgment seeking to dismiss this action as against defendant Nissan is denied in its entirety; and it is further

ORDERED that, within thirty days of entry, plaintiffs shall serve a copy of this order upon all parties, together with notice of entry.

This constitutes the Decision/Order of the Court.

12/29/2021

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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