Barton v. Autozone, Inc.

Superior Court of California, County of Los Angeles

July 21, 2023, Decided

CASE NO: 19STCV19310

Reporter
2023 Cal. Super. LEXIS 45411 *

VIRGINIA BARTON, et al. v. AUTOZONE, INC., et al.

Notice: THIS DOCUMENT INCLUDES THE ORDER OF THE COURT. OTHER MATERIALS, SUCH AS LEGAL MEMORANDA, MAY HAVE BEEN INCLUDED BY THE COURT. DOCUMENTS THAT ARE COMBINED AND FILED AS ONE DOCUMENT BY THE COURT ARE PUBLISHED AS ONE DOCUMENT.

Core Terms

cause of action, products, punitive damages, summary adjudication, deposition, ***asbestos***, summary judgment motion, summary judgment, shift a burden, misrepresentation, brakes, summary adjudication motion, deposition testimony, interrogatories, exposed, malice, material fact, allegations, discovery response, present evidence, convincing, oppression, cross-examination, concealed, discovery, lawsuits, negate, separate statement, no evidence, declarant

Judges: **[*1]** Honorable Laura A. Seigle, Judge.

Opinion by: Laura A. Seigle

Opinion

NATURE OF PROCEEDINGS: 1) Hearing on Motion for Summary Adjudication of Issues for Defendant Western Auto Supply Company (Barton-19STCV19310); (2) Hearing on Motion for Summary Judgment or in the Alternative Summary Adjudication for Defendant The Pep Boys - Manny Moe & Jack of California (Barton-19STCV19310); (3) Hearing on Motion for Summary Judgment or in the Alternative Summary Adjudication for Defendant Clark's Discount Inc. (Barton-19STCV19310);

Matters are called for hearing.

The Hearing on Motion for Summary Adjudication of Issues for Defendant Western Auto Supply Company is held.

The Hearing on Motion for Summary Judgment or in the Alternative Summary Adjudication for Defendant The Pep Boys -Manny Moe & Jack of California (Barton-19STCV19310) scheduled for 07/21/2023 is 'Held' for case 19STCV19310.

The Hearing on Motion for Summary Judgment or in the Alternative Summary Adjudication for Defendant Clark's Discount Inc. is held.

The Court issues Tentative Rulings on all matters.

Counsel argue and submit on all matters. The Court places all matters under submission and LATER rules as follows:

1) Hearing on Motion for Summary Adjudication **[*2]** of Issues for Defendant Western Auto Supply Company (Barton-19STCV19310);

The Court rules as follows:

ORDER RE MOTION FOR SUMMARY ADJUDICATION (WESTERN)

Defendant Western Auto Supply company ("Defendant") filed a motion for summary adjudication of Plaintiff Kristie Eastin's third and fourth causes of action and request for punitive damages.

A defendant seeking summary judgment must "conclusively negate[] a necessary element of the plaintiff's case, or . . . demonstrate[] that under no hypothesis is there a material issue of fact that requires the process of trial." (*Guz v. Bechtel Nat. Inc. (2000) 24 Cal.4th 317, 334*.) To show that a plaintiff cannot establish an element of a cause of action, a defendant must make the initial showing "that the plaintiff does not possess, and cannot reasonably obtain, needed

evidence." (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 854*.) "The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence - as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Id. at p. 855*.) A plaintiff's deposition testimony that the plaintiff **[*3]** has no knowledge of any exposure to the defendant's products may be sufficient to shift the burden to the plaintiff to demonstrate the existence of triable issues of fact. (*McGonnell v. Kaiser Gypsum Co., Inc. (2002) 98 Cal.App.4th 1098, 1103-1104*.) The plaintiff's deposition testimony that he did not recall ever working with a product manufactured by the defendant may not be sufficient to shift the burden if the plaintiff is able to prove his case by another means. (*Weber v. John Crane, Inc. (2006) 143 Cal.App.4th 1433, 1439*.) " 'If plaintiffs respond to comprehensive interrogatories seeking all known facts with boilerplate answers that restate their allegations, or simply provide laundry lists of people and/or documents, the burden of production will almost certainly be shifted to them once defendants move for summary judgment and properly present plaintiff's factually devoid discovery responses.'" (*Id. at p. 1440*.)

A. Third and Fourth Causes of Action

In response, Plaintiff states she waives her third and fourth causes of action. Therefore, the motion for summary adjudication is granted as to these causes of action.

B. Punitive Damages

Defendant contends Plaintiffs cannot prove Defendant acted with oppression, malice or fraud.

When the motion targets a request for punitive damages, a higher standard of proof is at play. "Although **[*4]** the clear and convincing evidentiary standard is a stringent one, 'it does not impose on a plaintiff the obligation to "prove" a case for punitive damages at summary judgment [or summary adjudication.' [Citations.] Even so, 'where the plaintiff's ultimate burden of proof will be by clear and convincing evidence, the higher standard of proof must be taken into account in ruling on a motion for summary judgment or summary adjudication, since if a plaintiff is to prevail on a claim for punitive damages, it will be necessary that the evidence presented meet the higher evidentiary standard.' [Citation.]" (*Butte Fire Cases (2018) 24 Cal.App.5th 1150, 1158-1159*.) "Summary judgment or summary adjudication ' " 'on the issue of punitive damages is proper' only 'when no reasonable jury could find the plaintiff's evidence to be clear and convincing proof of malice, fraud or oppression.' " '. [Citation.]" (*Id. at p. 1159*.)

For a corporate defendant, the oppression, fraud or malice "must be on the part of an officer, director, or managing agent of the corporation." (*Civ. Code, § 3294, subd. (b)*.) That requirement can be satisfied " 'if the evidence permits a clear and convincing inference that within the corporate hierarchy authorized persons acted despicably in "willful and conscious disregard **[*5]** of the rights or safety of others." ' [Citation.]" (*Morgan v. J-M Manufacturing Company, Inc. (2021) 60 Cal.App.5th 1078, 1090*.) A plaintiff also "can satisfy the 'managing agent' requirement 'through evidence showing the information in the possession of the corporation and the structure of management decisionmaking that permits an inference that the information in fact moved upward to a point where corporate policy was formulated.' [Citation.]" (*Id. at p. 1091*.)

" '[I]ntentionally marketing a defective product knowing that it might cause injury and death is 'highly reprehensible.' [Citation.]" (*Bankhead v. ArvinMeritor, Inc. (2012) 205 Cal.App.4th 68, 85*.) Punitive damages may be available when a defendant knows the dangers of ***asbestos***, took action to protect its own employees, knew that its products were likely to pose a danger to users, and did not warn them. (Pfeifer v. John Crane, Inc. (2013) 220 Cal.Ap.4th 1270, 1300.) Such evidence "was sufficient to show malice, that is, despicable conduct coupled with conscious disregard for the safety of others." (Id. at pp. 1300-1301.)

Defendant cites Plaintiff's discovery responses. (Motion at p. 5.) In response to an interrogatory asking for all facts supporting the claim for punitive damages, Plaintiff incorporated her answer to Interrogatory No. 1, which restated Plaintiff's allegations and referred to general documents. (Undisputed Material Fact ("UMF") 24, **[*6]** 26, 27.) The response does not contain any specific evidence of Defendant's knowledge about the danger of ***asbestos*** in its products. Plaintiff's response to document requests was similarly vague. (UMF 34.) Therefore, the burden shifts to Plaintiff.

In opposition, Plaintiff cites the deposition of Danny Simmons, an employee of Defendant, from a prior case who testified he saw training videos about the hazards of ***asbestos*** in brake dust in 1986 and was not aware of

any warnings on products sold by Defendant. (Index, Ex. D at pp. 56-57, 76, 92, 108.)

Defendant objects to the deposition testimony as hearsay under *Evidence Code sections 1291* and *1292* and *Berroteran v. Superior Court (2022) 12 Cal. 5th 867*. Under those sections, evidence of former testimony is not inadmissible hearsay if the declarant is unavailable and "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing" or the party in the prior proceeding "had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered **[*7]** has at the hearing."

In Berroteran, the California Supreme Court explained that *section 1291* treats former deposition testimony differently than former trial testimony. (*Berroteran, supra, 12 Cal. 5th at p. 891*.) "The interest and motive of an opposing party at a discovery deposition is therefore often against cross-examination of the witness, in order to avoid assisting the deposing party." (*Id. at p. 892*.) Also, even if an opposing party has an interest in cross-examination, the opportunity may not be ideal if discovery is ongoing and the evidentiary record is not yet complete. (*Id. at pp. 892-893*.) However, sometimes a deposition is intended to preserve testimony for trial. (*Id. at p. 894*.) Therefore, "[t]he party seeking admission of prior deposition testimony under [*section 1291*] is free to submit evidence to the court that the deposition sought to be introduced, unlike a typical discovery deposition, featured circumstances that provided the party opponent with an interest and motive for cross-examination similar to that at trial." (*Id. at p. 894*.) "The party urging admission of deposition testimony bears the burden of rebutting the general rule by submitting appropriate information justifying the admission of designated deposition testimony." (*Id. at p. 895*.)

The Berroteran court outlined the following factors **[*8]** to consider in determining whether former deposition testimony is admissible under *section 1291*: (a) whether the parties intended at the outset that the deposition serve as trial testimony; (b) whether the parties subsequently reached agreement to use the deposition at the trial in that earlier case or in other cases; and (c) other practical considerations such as the timing of the deposition in the earlier litigation, whether a mediation or settlement conference was scheduled for after the deposition, the closeness in relationship between the opposing party and deponent, the anticipated availability of the deponent in the earlier case, whether a statutory rule such as Code of Civil Procedure section allowed the parties to use the deposition at the earlier trial, the extent of cross-examination in the deposition, the particular designated testimony, and the similarity of the lawsuits. Plaintiff did not show the witness is unavailable or provide evidence of the Berroteran factors.

At the hearing, Plaintiff's counsel stated the former testimony is admissible under *Evidence Code sections 1220* and *1222*. *Section 1220* applies to the admission of a statement of a party opponent. The witness is not a party in this case, and therefore *section 1220* does not **[*9]** apply.

Under *section 1222*, a statement is not inadmissible hearsay if it was "made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement" and there is "evidence sufficient to sustain a finding of such authority." The Law Revision Commission Comments state, "The authority of the declarant to make the statement need not be express; it may be implied. It is to be determined in each case under the substantive law of agency." The authorized admission exception applies when an agent makes a statement "within the scope of his authority." (*Bowser v. Ford Motor Co. (2022) 78 Cal.App.5th 587, 612*.)

The concerns expressed in Berroteran also arise when considering the admissibility of prior depositions of corporate representatives as authorized admissions. In particular, "a party would be unlikely to have a motive or reason at a deposition of its own witness to disprove anything. . . . [C]oncluding otherwise would substantially expand and complicate deposition practice, forcing it to take on the character of a full-blown liability trial." (*Berroteran, supra, 12 Cal.5th at p. 899*.) If the deposition of a corporate representative designated under *Code of Civil Procedure section 2025.230* was automatically admissible in future lawsuits as an authorized admission under *section 1222*, the **[*10]** party designating the representative would need to consider how the testimony could be used in yet-unfiled lawsuits for years or decades into the future. The designating party could then decide that cross-examination is necessary, not because the current lawsuit required it, but as insurance in the event some party in some future lawsuit sought to admit the testimony. Automatically allowing the admission of prior corporate representative depositions would

"substantially expand and complicate deposition practice."

Here, Plaintiff did not show the topics about which the witness was authorized to testify at the prior deposition or that Defendant had authorized the witness in the prior deposition taken in a different case to make statements to be used in unknown future lawsuits, in other words, that the witness's authority to speak for Defendant extended beyond the original deposition and original lawsuit.

Therefore, the objection is sustained. Without this former testimony, Plaintiff does not have evidence showing disputed facts about Defendant's knowledge of the dangers of ***asbestos*** and malice, oppression, and fraud in failing to warn customers.

The motion is GRANTED as follows:

The Hearing **[*11]** on Motion for Summary Adjudication of Issues for Defendant Western Auto Supply Company (Barton-19STCV19310) scheduled for 07/21/2023 is 'Held - Motion Granted' for case 19STCV19310.

The motion is GRANTED on the third and fourth causes of action and request for punitive damages.

The moving party is electronically advised to give notice.

2) Hearing on Motion for Summary Judgment or in the Alternative Summary Adjudication for Defendant The Pep Boys -Manny Moe & Jack of California (Barton-19STCV19310);

The Court rules as follows:

ORDER RE MOTION FOR SUMMARY ADJUDICATION (PEP BOYS)

Defendant The Pep Boys - Manny, Moe & Jack of California ("Defendant") filed a motion for summary judgment, and in the alternative summary adjudication, of Plaintiff Kristie Eastin's claims that David Barton was exposed to ***asbestos*** from Defendant's products.

Defendant objected to Exhibits 4-10 to the Rancilio Declaration. The court did not rely on those exhibits.

A. Summary Judgment

A defendant seeking summary judgment must "conclusively negate[] a necessary element of the plaintiff's case, or . . . demonstrate[] that under no hypothesis is there a material issue of fact that requires the process of trial." (*Guz v. Bechtel Nat. Inc. (2000) 24 Cal.4th 317, 334*.) To show **[*12]** that a plaintiff cannot establish an element of a cause of action, a defendant must make the initial showing "that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 854*.) "The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence - as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Id. at p. 855*.) A plaintiff's deposition testimony that the plaintiff has no knowledge of any exposure to the defendant's products may be sufficient to shift the burden to the plaintiff to demonstrate the existence of triable issues of fact. (*McGonnell v. Kaiser Gypsum Co., Inc. (2002) 98 Cal.App.4th 1098, 1103-1104*.) The plaintiff's deposition testimony that he did not recall ever working with a product manufactured by the defendant may not be sufficient to shift the burden if the plaintiff is able to prove his case by another means. (*Weber v. John Crane, Inc. (2006) 143 Cal.App.4th 1433, 1439*.) " 'If plaintiffs respond to comprehensive interrogatories seeking all known facts with boilerplate answers that restate their allegations, or simply provide laundry lists of people **[*13]** and/or documents, the burden of production will almost certainly be shifted to them once defendants move for summary judgment and properly present plaintiff's factually devoid discovery responses.'" (*Id. at p. 1440*.)

Defendant argues Plaintiff's case is barred by the Workers' Compensation Act because Plaintiff alleges David Barton was exposed to ***asbestos*** while working for Defendant. While the First Amended Complaint ("FAC") alleges David Barton worked for Defendant from 2001 to 2002, it also alleges he was exposed to ***asbestos*** while doing personal work on his car. (FAC, Ex. A.) Plaintiff cites testimony that David Barton did brake and clutch work from 1983 to 1991 at his mother's house and bought products during that time from Defendant. (Index, Ex. 1 at pp. 12, 13, 41-42.) Thus, Plaintiff has shown the allegations regarding Defendant are not limited to 2001 to 2002 and include Barton's personal auto work from 1983 to 1991. During that early period, David Barton was not working for Defendant, so the Workers' Compensation Act does not apply to that period.

The holding in *Melendrez v. Ameron International Corporation (2015) 240 Cal.App.4th 632* does not

require the contrary conclusion. In that case, the plaintiff was exposed to the ***asbestos***-containing products at work over **[*14]** 24 years. During those years, he took the products home from work for his personal use, thereby exposing himself at home as well. (*Id. at p. 635*.) Here, Barton was exposed in the 1980s, decades before he began working at Defendant, because he bought products from Defendant to do personal car repairs. His purchase of products from Defendant in the 1980s had nothing to do with his employment in 2001-2002. His alleged injury from exposure in the 1980s did not "occur in the course of," did not "arise out of," was not "linked in some causal fashion to," and was not "collateral to or derivative of" his employment with Defendant in 2001-2002. (*Id. at pp. 639, 642*.) And there was no evidence submitted that in 2001-2002, Defendant was exposed to any ***asbestos*** at work such that any workers' compensation is even available, unlike in Melendrez where it was undisputed the plaintiff was entitled to workers' compensation.

The motion for summary judgment is denied.

B. Summary Adjudication - Third Cause of Action

Defendant seeks summary judgment of the third cause of action for negligent misrepresentation because Plaintiff has no evidence and cannot obtain evidence of any misrepresentation from Defendant to David Barton. (Motion at p. **[*15]** 15.) The third cause of action alleges Defendant made representations to the public, purchasers, and users including David Barton that were not true. (FAC, ¶¶ 61-62.) The FAC does not describe the misrepresentations.

Defendant cites to UMF 5, 6, 8, 9 for the assertion that Plaintiff's discovery responses are factually devoid. (Motion at p. 15.) UMF 5 discusses discovery asking for all facts supporting the request for punitive damages. UMF 6 states Plaintiff stipulated she would not offer evidence identifying any product. UMF 8 states David Barton's brother was not aware of any representation from Defendant to Davide Barton. UMF 9 states the brother would not offer any product identification testimony.

In addition, Defendant attaches Plaintiff's response to standard interrogatory No. 28, which asked for the nature or substance of any misrepresentation. (Ex. 5 at pp. 26-27.) Plaintiff incorporated responses to interrogatory Nos. 18, 22, and 23. (Id. at p. 27.) Response Nos. 22 and 23 provide no information about any misrepresentation and instead incorporate responses to Nos. 17 and 18. Response No. 17 lists David Barton's jobs and does not specify any misrepresentation. (Id. at pp. 7-14.) **[*16]** Response No. 18 does not specify any misrepresentation. (Id. at pp. 15-18.) Thus, Defendant has shown Plaintiff's discovery responses are factually-devoid and shifted the burden.

In opposition, Plaintiff does not identify any misrepresentation from Defendant to David Barton. Instead, Plaintiff contends the third cause of action is actually brought under *section 402B of the Restatement Second of Torts*, even though the FAC does not mention *section 402B*. Be that as it may, as Plaintiff acknowledges, a cause of action under *section 402B* requires "false advertising," i.e., "a misrepresentation of a material fact." (Opposition at p. 15.) As set out above, the FAC and Plaintiff's discovery responses do not identify any misrepresentation of a material fact by Defendant. Even in her opposition, Plaintiff does not specify or describe any misrepresentation by Defendant. (Opposition at pp. 15-16.) Therefore, Plaintiff did not show a disputed issue of fact.

The motion for summary adjudication of the third cause of action is granted.

C. Summary Adjudication - Fourth Cause of Action

The fourth cause of action alleges fraud by nondisclosure, specifically that Defendant sold its products directly to David Barton and intentionally failed to disclose that the products were **[*17]** not safe. (FAC, ¶¶ 69, 71.)

" '[T]he elements of a cause of action for fraud based on concealment are " '(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.' " [Citation.]' " (*Bigler-Engler v. Breg, Inc. (2017) 7 Cal.App.5th 276, 310-311*.) When a fiduciary duty does not exist, a duty to disclose arises only "when the defendant had exclusive knowledge of material facts not known to the plaintiff," or "when the defendant actively conceals a material fact from the plaintiff," or "when the defendant makes partial representations but also suppresses some material facts." (*Id. at p. 311*.) This type of relationship " 'can only come into being as a

result of some sort of transaction between the parties' " and "must necessarily arise from direct dealings between the plaintiff and the defendant; it cannot **[*18]** arise between the defendant and the public at large." (Ibid.) Evidence that the defendant was involved in retail sales of the disputed product to consumers and profited from them can satisfy the Bigler requirement. (*Bader v. Johnson & Johnson (2022) 86 Cal.App.5th 1094, 1132*.)

Defendant does not cite evidence for its assertions in support of its motion on this cause of action. (Motion at pp. 16-17.) Defendant's separate statement on this cause of action just incorporates all of its other undisputed material facts (UMF 1-15), which is not at all helpful. UMF 1 through 15 do not mention this cause of action or concealment except for UMF 11, which merely states Plaintiff did not produce documents supporting this cause of action.

Because Defendant did not cite evidence showing Plaintiff does not have and cannot obtain evidence supporting this cause of action, Defendant did not shift the burden.

The motion as to this cause of action is denied.

D. Punitive Damages

Defendant contends Plaintiffs cannot prove Defendant acted with oppression, malice or fraud. When the motion targets a request for punitive damages, a higher standard of proof is at play. "Although the clear and convincing evidentiary standard is a stringent one, 'it does not impose on a plaintiff **[*19]** the obligation to "prove" a case for punitive damages at summary judgment [or summary adjudication.' [Citations.] Even so, 'where the plaintiff's ultimate burden of proof will be by clear and convincing evidence, the higher standard of proof must be taken into account in ruling on a motion for summary judgment or summary adjudication, since if a plaintiff is to prevail on a claim for punitive damages, it will be necessary that the evidence presented meet the higher evidentiary standard.' [Citation.]" (*Butte Fire Cases (2018) 24 Cal.App.5th 1150, 1158-1159*.) "Summary judgment or summary adjudication ' " 'on the issue of punitive damages is proper' only 'when no reasonable jury could find the plaintiff's evidence to be clear and convincing proof of malice, fraud or oppression.' " '. [Citation.]" (*Id. at p. 1159*.)

For a corporate defendant, the oppression, fraud or malice "must be on the part of an officer, director, or managing agent of the corporation." (*Civ. Code, § 3294, subd. (b)*.) That requirement can be satisfied " 'if the evidence permits a clear and convincing inference that within the corporate hierarchy authorized persons acted despicably in "willful and conscious disregard of the rights or safety of others." ' [Citation.]" (*Morgan v. J-M Manufacturing Company, Inc. (2021) 60 Cal.App.5th 1078, 1090*.) A plaintiff also "can satisfy the 'managing **[*20]** agent' requirement 'through evidence showing the information in the possession of the corporation and the structure of management decisionmaking that permits an inference that the information in fact moved upward to a point where corporate policy was formulated.' [Citation.]" (*Id. at p. 1091*.)

" '[I]ntentionally marketing a defective product knowing that it might cause injury and death is 'highly reprehensible.' [Citation.]" (*Bankhead v. ArvinMeritor, Inc. (2012) 205 Cal.App.4th 68, 85*.) Punitive damages may be available when a defendant knows the dangers of ***asbestos***, took action to protect its own employees, knew that its products were likely to pose a danger to users, and did not warn them. (Pfeifer v. John Crane, Inc. (2013) 220 Cal.Ap.4th 1270, 1300.) Such evidence "was sufficient to show malice, that is, despicable conduct coupled with conscious disregard for the safety of others." (Id. at pp. 1300-1301.)

Defendant cites Plaintiff's discovery responses. (UMF 5.) In response to an interrogatory asking for all facts supporting the claim for punitive damages, Plaintiff incorporated her answer to Interrogatory No. 1, which stated Defendant did not test its products for ***asbestos*** or research the hazards of ***asbestos***, knew ***asbestos*** was a risk, and received information from manufacturers that should have (but was not) passed on to customers. **[*21]** (UMF 5; Index, Ex. 22 at pp. 4-6.) Plaintiff cited evidence supporting those assertions. (Ibid.) Defendant did not show this response is factually devoid, and therefore did not shift the burden.

The motion is denied.

The motion for summary judgment is DENIED. The motion for summary adjudication is GRANTED as to the third cause of action, and DENIED as to the fourth cause of action and request for punitive damages.

The moving party is electronically advised to give notice.

3) Hearing on Motion for Summary Judgment or in the Alternative Summary Adjudication for Defendant Clark's Discount Inc. (Barton-19STCV19310);

The Court adopts the Tentative Ruling as the Final

Court Order as follows:

ORDER RE MOTION FOR SUMMARY ADJUDICATION (CLARK'S)

Defendant Clark's Discount, Inc. ("Defendant") filed a motion for summary judgment, and in the alternative summary adjudication, of Plaintiff Kristie Eastin's claims that David Barton was exposed to ***asbestos*** from Defendant's products.

A. Objections

Plaintiff's Objections to the Clark Declaration are overruled.

Defendant objects to Plaintiff's facts in Plaintiff's separate statement. That is improper. Objections are supposed to be to the evidence, not the separate **[*22]** statement.

B. Summary Judgment

A defendant seeking summary judgment must "conclusively negate[] a necessary element of the plaintiff's case, or . . . demonstrate[] that under no hypothesis is there a material issue of fact that requires the process of trial." (*Guz v. Bechtel Nat. Inc. (2000) 24 Cal.4th 317, 334*.) To show that a plaintiff cannot establish an element of a cause of action, a defendant must make the initial showing "that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 854*.) "The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence - as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Id. at p. 855*.) A plaintiff's deposition testimony that the plaintiff has no knowledge of any exposure to the defendant's products may be sufficient to shift the burden to the plaintiff to demonstrate the existence of triable issues of fact. (*McGonnell v. Kaiser Gypsum Co., Inc. (2002) 98 Cal.App.4th 1098, 1103-1104*.) The plaintiff's deposition testimony that he did not recall ever working with a product manufactured by the defendant may not be sufficient **[*23]** to shift the burden if the plaintiff is able to prove his case by another means. (*Weber v. John Crane, Inc. (2006) 143 Cal.App.4th 1433, 1439*.) " 'If plaintiffs respond to comprehensive interrogatories seeking all known facts with boilerplate answers that restate their allegations, or simply provide laundry lists of people and/or documents, the burden of production will almost certainly be shifted to them once defendants move for summary judgment and properly present plaintiff's factually devoid discovery responses.'" (*Id. at p. 1440*.)

Defendant argues Plaintiff has no evidence and cannot obtain evidence that David Barton was exposed to an ***asbestos***-containing product from Defendant. (Motion at p. 18.) Defendant cites the testimony of Plaintiff's product identification witness, Jeffrey Barton, that David Barton worked with Bendix, Wizard, ACDelco, and Raybestos brakes, worked with Sachs, LuK, and BorgWarner clutches, and shopped at Chief Auto, Pep Boys, Western Auto, Universal Auto Parts, Continental Auto Parts, Trak Auto, and Clark. (Appendix, Ex. O at pp. 37, 40, 41, 43, 45, 197.) He does not remember what brand of products David Barton bought at Defendant's store but mainly it was clutches and sometimes brakes, although he later said David Barton bought **[*24]** ACDelco and Bendix brakes from Defendant. (Id. at pp. 198-199, 893-894.) He does not know of anyone else who knows the products David Barton purchased from Defendant. (Id. at pp. 201-202.)

Thus Defendant showed Plaintiff does not have evidence of David Barton buying particular products from Defendant except for ACDelco and Bendix brakes. But Defendant did not sell ACDelco brakes and only started selling Bendix brakes in the late 1990s after the EPA had banned the sale of ***asbestos***-containing products. (Undisputed Material Fact ("UMF") 14, 18-22.) Plaintiff does not dispute these facts. (See Plaintiff's Response to Separate Statement.)

However, Defendant does not show that the brakes it sold in the 1980s into the 1990s did not contain ***asbestos***. In other words, usually a defendant provides evidence that none of its products contained ***asbestos*** or only some of its products contained ***asbestos***, and then the defendant argues that because the plaintiff cannot identify the specific product or brand obtained from the defendant, the plaintiff cannot show the plaintiff used the ***asbestos***-containing version of the product versus the non-***asbestos***-containing version. Here, Plaintiff showed David Barton **[*25]** bought clutches and brakes from Defendant's store, but Defendant did not either (1) conclusively negate the possibility those products contained ***asbestos***, or (2) show Plaintiffs have no evidence and can not obtain evidence that those products contained ***asbestos***. Without more, Defendant did not shift the burden.

Assuming Defendant shifted the burden, Plaintiff showed the existence of disputed facts. Plaintiff submits evidence that almost all after market brakes in the 1980s, including rebuilt after market brakes, contained ***asbestos***. (Ellenbecker Decl., ¶¶ 16-17.) Defendant did not respond to this evidence. Thus, Plaintiff showed the existence of disputed facts concerning whether the after market brakes Plaintiff obtained from Defendant, regardless of their brand name or lack of brand name, contained ***asbestos***.

The motion for summary judgment is denied.

C. Summary Adjudication - Third and Fourth Causes of Action

Defendant's brief states it is seeks summary adjudication of the third cause of action, but it did not mention the third cause of action in its notice of motion or in its separate statement. Therefore, this motion is defective.

Defendant's motion for summary adjudication of the fourth **[*26]** cause of action is based on the argument that Plaintiff "cannot establish that Clark's made a misrepresentation to Decedent, that Clark's intended Decedent to rely on the false representation, or that Decedent relied on the misrepresentation." (Motion at p. 20.) However, no UMF provides evidence of this assertion. For example, Defendant did not cite responses to interrogatories asking Plaintiff to state all facts and identify all evidence supporting the fourth cause of action. Therefore, Defendant did not shift the burden.

The motion as to these causes of action is denied.

D. Punitive Damages

Defendant contends Plaintiff cannot prove she is entitled to punitive damages because she "cannot identify a single ***asbestos***-containing product to which Decedent was exposed that was supplied by, or purchased from" Defendant. (Motion at p. 24.) As discussed above, this argument fails.

Defendant asserts Plaintiff cannot prove Defendant "acted in conscious disregard of the rights and safety of Decedent" and has "neither evidence of misconduct, ratification, or authorization by a Clark's officer, director, or managing agent, not circumstantial evidence that lower-level conduct moved upward to a point **[*27]** where corporate policy was formulated." (Motion at p. 26.) And Defendant contends Plaintiff has "no proof that Clark's acted with fraud, oppression, or malice." (Ibid.) But Defendant cites no evidence supporting these assertions. And Defendant's separate statement cites no evidence in support of these assertions.

Therefore, the motion is denied.

The motion for summary judgment is DENIED as follows:

The Hearing on Motion for Summary Judgment or in the Alternative Summary Adjudication for Defendant Clark's Discount Inc. (Barton-19STCV19310) scheduled for 07/21/2023 is 'Held - Motion Denied' for case 19STCV19310.

The motion for summary judgment is DENIED. The motion for summary adjudication is DENIED as to the third and fourths cause of action and request for punitive damages.

The moving party is electronically advised to give notice.

A copy of this minute order will append to the following coordinated case under JCCP4674: 19STCV19310.

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