

Rodney v. Akebono Brake Corp.

Supreme Court of New York, New York County

August 14, 2023, Decided

Index No. 190145/2021

Reporter

2023 N.Y. Misc. LEXIS 4137 *; 2023 NY Slip Op 32823(U) **

[1]** ALMANDO D. RODNEY, Plaintiff, - v - AKEBONO BRAKE CORPORATION, AMERICAN AIRLINES GROUP INC., AMERICAN HONDA MOTOR CO., INC., BECKFORD'S AUTO SUPPLIES LIMITED, BMW OF NORTH AMERICA, LLC, BRIDGESTONE AMERICAS TIRE OPERATIONS, LLC, BRITISH AIRWAYS PLC, BURNHAM, LLC, CARIBRAKE, CARLISLE INDUSTRIAL BRAKE & FRICTION, INC., CARRIER CORPORATION, CLEAVER-BROOKS, INC. F/K/A CLEAVER-BROOKS, A DIVISION OF AQUA-CHEM, INC., CONTINENTAL MACHINES, INC., CONTINENTAL MOTORS, INC., CRANE CO., CUMMINS INC., DCO, LLC, F/K/A DANA COMPANIES, LLC, INDIVIDUALLY AND SUCCESSOR-IN-INTEREST TO VICTOR GASKET MANUFACTURING COMPANY AND SPICER PARTS, DOALL COMPANY, DOMSCO MOTORS LLC, EATON CORPORATION, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EATON ELECTRICAL, INC. AND CUTLER HAMMER, INC., FEDERAL MOGUL **ASBESTOS** PERSONAL INJURY TRUST, AS SUCCESSOR TO FELT PRODUCTS MANUFACTURING CO., FIVES GIDDINGS & LEWIS, LLC, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO KEARNEY & TRECKER CORPORATION, FMC CORPORATION, ON BEHALF OF ITS FORMER CONSTRUCTION EQUIPMENT GROUP AND ITS FORMER PEERLESS PUMP AND NORTHERN PUMP BUSINESSES, FORD MOTOR COMPANY, FORT KENT HOLDINGS, INC. F/K/A DUNHAM BUSCH, INC., AS SUCCESSOR-IN-INTEREST TO IRON FIREMAN COMBUSTION PRODUCTS, FOSTER WHEELER ENERGY CORPORATION, GENERAL CABLE CORPORATION, GENERAL ELECTRIC COMPANY, GENUINE PARTS COMPANY, GOODRICH CORPORATION, F/K/A B.F. GOODRICH COMPANY, THE GOODYEAR TIRE & RUBBER COMPANY, GOULDS PUMPS LLC F/K/A GOULDS PUMPS INCORPORATED, GRINNELL LLC, HARDINGE, INC., HOBART BROTHERS COMPANY, HOLLINGSWORTH & VOSE COMPANY,

INDIVIDUALLY AND ITS WHOLLY OWNED SUBSIDIARY H & V SPECIALTIES INC., HOLMAN PARTS DISTRIBUTION, INC., HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC., F/K/A ALLIED CORPORATION, SUCCESSOR-IN-INTEREST TO BENDIX **[**2]** CORPORATION, IMO INDUSTRIES, INC., INDUSTRIAL HOLDINGS CORPORATION F/K/A THE CARBORUNDUM COMPANY, KAISER GYPSUM COMPANY, INC., KEELER DORR-OLIVER BOILER COMPANY, KEYSTONE AUTOMOTIVE INDUSTRIES, INC., INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO REPUBLIC AUTOMOTIVE PARTS, INC., BEACON AUTO PARTS COMPANY AND GREENE MOTOR EQUIPMENT COMPANY, KEYSTONE AUTOMOTIVE OPERATIONS, INC., INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO REPUBLIC AUTOMOTIVE PARTS, INC., BEACON AUTO PARTS COMPANY AND GREENE MOTOR EQUIPMENT COMPANY, LEBLOND LTD., THE LINCOLN ELECTRIC COMPANY, LUXURY CARS OF BAYSIDE INC., MAKINO U.S.A. INC. F/K/A LEBLOND MAKING MACHINE TOOL CO., SUCCESSOR-IN-INTEREST TO R.K. LEBLOND MACHINE TOOL COMPANY, THE MARLEY-WYLAIN COMPANY, MARIO & DIBONO PLASTERING CO., INC, MATTHEWS AUTO GROUP INC., INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO SHB ASSOCIATES LLC, MBB AUTO, LLC, MERCEDES-BENZ USA, LLC ALSO MERCEDES-BENZ USA, INC., MERITOR, INC., F/K/A ARVINMERITOR, INC., INDIVIDUALLY AND AS SUCCESSOR-BY-MERGER TO ARVIN INDUSTRIES, INC. AND MERITOR AUTOMOTIVE, INC., F/K/A ROCKWELL AUTOMOTIVE, INC., SUCCESSOR TO ROCKWELL INTERNATIONAL, MIDAS INC., MINE SAFETY APPLIANCES COMPANY, LLC, MITSUBISHI MOTORS NORTH AMERICA, INC., MORSE TEC LLC, F/K/A BORGWARNER MORSE TEC LLC, AS SUCCESSOR-BY-MERGER TO BORG-WARNER CORPORATION, MOTORCRAFT CORP., NISSAN NORTH AMERICA, INC., OGDEN ALLIED BUILDING & AIRPORT SERVICES INC., OGDEN CORPORATION,

INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO OGDEN AVIATION SERVICE CORP, PEERLESS INDUSTRIES, INC. F/K/A PEERLESS HEATER COMPANY;, PNEUMO ABEX LLC, SUCCESSOR IN INTEREST TO ABEX CORPORATION;, POLY SCIENTIFIC R&D CORP., THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, PRATT & WITNEY MEASUREMENT SYSTEMS, INC., PRO PARTS INC., R.M. LUCAS CO., REVERE SUGAR CORPORATION, RHEEM MANUFACTURING COMPANY, ROCKWELL AUTOMATION, INC., AS SUCCESSOR IN INTEREST TO ALLEN-BRADLEY COMPANY, LLC, THE ROWLAND COMPANY, SAINT-GOBAIN ABRASIVES, INC., F/K/A NORTON COMPANY, SCHNEIDER ELECTRIC USA, INC. F/K/A SQUARE D COMPANY, SHB ASSOCIATES, LLC, SPIRAX SARCO, INC., INDIVIDUALLY AND AS SUCCESSOR TO SARCO COMPANY, STANDARD MOTOR PRODUCTS, INC., 3M COMPANY, TENNECO AUTOMOTIVE OPERATING COMPANY, TOYOTA MOTOR SALES, U.S.A., INC., TROPICAL BATTERY COMPANY LIMITED, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO CARIBRAKE, VALLEY **[**3]** STREAM FOREIGN CARS INC., VIACOMCBS INC. F/K/A CBS CORPORATION, A DELAWARE CORPORATION F/K/A VIACOM INC., SUCCESSOR BY MERGER TO CBS CORPORATION, A PENNSYLVANIA CORPORATION, F/K/A/ WESTINGHOUSE ELECTRIC CORPORATION, VOLVO CAR NORTH AMERICA, LLC, VOLVO CAR USA, LLC, WARREN PUMPS LLC, WATSON MCDANIEL COMPANY, WEIL-MCLAIN COMPANY, ADVANCED THERMAL HYDRONICS, LLC, F/K/A THE HYDROTHERM CORPORATION, AND AS SUCCESSOR-IN-INTEREST TO HYDROTHERM, INC., AIW-2020 WIND DOWN CORP., ARMSTRONG INTERNATIONAL, INC., AMERICAN PREMIER UNDERWRITERS INC., INDIVIDUALLY AND AS SUCCESSOR TO PCC TECHNICAL INDUSTRIES, INC., F/K/A BOILER TECHNOLOGIES, INC., INDIVIDUALLY AND AS SUCCESSOR TO HYDROTHERM, INC., BASF CATALYSTS LLC, CHIQUITA BRANDS INTERNATIONAL, INC., INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO UNITED BRANDS COMPANY F/K/A UNITED FRUIT COMPANY, AND ITS SUBSIDIARY REVERE SUGAR CORPORATION, DYNA-VEYOR, E.I. DU PONT DE NEMOURS AND COMPANY, FORD MOTOR COMPANY, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO MOTORCRAFT CORP., FULTON BOILER WORKS, INC., ITT LLC, FORMERLY KNOWN AS ITT CORPORATION, HOFFMAN SPECIALTY MANUFACTURING COMPANY, LENNOX INDUSTRIES, INC., LEVITON MANUFACTURING CO.,

INC., INDIVIDUALLY, AND ON BEHALF OF ITS AMERICAN INSULATED WIRE BUSINESS AND FOR ITS AMERICAN INSULATED WIRE PRODUCTS, MESTEK INC., INDIVIDUALLY AND AS SUCCESSOR-ININTEREST TO THE HYDROTHERM CORPORATION AND AS SUCCESSOR-IN-INTEREST TO HYDROTHERM, INC., PARTS AUTHORITY, INC., PROGRESS LIGHTING INC., SIGNIFY NORTH AMERICA CORPORATION, F/K/A PHILLIPS LIGHTING, SOUTHWIRE CO., AS SUCCESSOR-IN-INTEREST TO AMERICAN INSULATED WIRE, UNITED CONVEYOR CORPORATION, ACE HARDWARE CORPORATION, TDY INDUSTRIES, LLC, TOYOTA MOTOR NORTH AMERICA INC., ADVANTAGE TOYOTA, INC., DBA ADVANTAGE TOYOTA VALLEY STREAM, INDIVIDUALLY AND SUCCESSOR-IN-INTEREST TO MERRICK ROAD TOYOTA, AMERICAN AIRLINES, INC., NEMET MOTORS, LLC, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO NEMET NISSAN AND NEMET VOLVO, NEMET MOTORS, LLC, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO NEMET VOLVO AND NEMET NISSAN, TDY INDUSTRIES, LLC, TOYOTA MOTOR NORTH AMERICA INC., Defendant.

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

Core Terms

tissue, testing

Judges: **[*1]** PRESENT: HON. ADAM SILVERA, Justice.

Opinion by: ADAM SILVERA

Opinion

DECISION + ORDER ON MOTION

[4]** The following e-filed documents, listed by NYSCEF document number (Motion 017) 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 627, 628, 644, 647, 648, 649, 656, 657 were read on this motion to/for DISCOVERY.

Upon the foregoing documents, it is ordered that defendant Mercedes-Benz USA, LLC's ("MBUSA")

motion seeking (1) an out-of-state subpoena to obtain the tissue block taken during plaintiff Almando Rodney's ("Mr. Rodney") pleurectomy and (2) an order permitting MBUSA's expert, Timothy D. Oury, MD, PhD, ("Dr. Oury") to perform digestion studies on such tissue block, is decided in accordance with the decision below.

Here, defendant MBUSA contends that 0.2-0.3 grams of Mr. Rodney's 1.4-gram tissue sample, currently preserved at one of his treating hospitals in Florida, should be made available to Dr. Oury for purposes of further testing, upon which to base his opinion on the cause of Mr. Rodney's mesothelioma. See Affirmation in Support of MBUSA's Motion, p. 7. Plaintiff opposes the instant order to show cause, highlighting that the Note of Issue has already been filed in this action, and relying on the expert [*2] opinion of Mr. Rodney's treating oncologist, Evan Alley, MD, PhD.

Primarily, the Court notes that moving defendant's request herein does not constitute "unusual or unanticipated circumstances" justifying post-Note of Issue discovery as required by the Case Management Order dated June 20, 2017 ("CMO"). The CMO permits post-NOI discovery pursuant to the Uniform Rules for the [New York State Trial Courts §202.21\(d\)](#). See CMO, IX.O. The Uniform Rules state that "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue...which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings". [22 NYCRR §202.21\(d\)](#). Here, the lack of such circumstances is particularly egregious given that Mr. Rodney is a living mesothelioma [**5] plaintiff, and that defendant MBUSA has been "aware of [Mr. Rodney's] pleurectomy as early as August of 2021" and received "pathology materials...18 months ago." Plaintiff's Affirmation in Opposition to Mercedes Benz, U.S.A., Order to Show Cause, p. 3. Given the apparent necessity of such testing to defendant MBUSA's defense, this request should have been prioritized and made [*3] at an earlier stage.

Additionally, the Court finds that defendant MBUSA's interest in the tissue sample does not outweigh Mr. Rodney's health interests herein. As defendant has noted, the Court of Appeals held in [Koump v Smith](#) that when a plaintiff's physical condition is placed "in controversy," physical tests may be justified in certain cases. See [Koump v Smith, 25 NY2d 287, 250 N.E.2d 857, 303 N.Y.S.2d 858 \(1969\)](#). However, defendant misconstrues the caselaw and fails to meet the

appropriate standard for such tests. The facts in the instant case are vastly different from all of the caselaw relied upon by defendant. One such case, *Pettinato v EQR-Rivertower, LLC*, emphasized the need to "balance the desire for the plaintiff to be examined safely...against the need for the defendant to determine facts in the interest of truth." [Pettinato, 213 AD3d 46, 51, 182 N.Y.S.3d 64 \(1st Dep't 2023\)](#) (internal citations omitted). The court further stated that "a showing of the medial importance and safety of the particular procedure is required, as well as an explanation of the relevance and the need for the information that a procedure will yield." *Id.*

Dr. Oury's affidavit contains no such definitive showings. He indicates clear uncertainty as to the amount of plaintiff's tissue actually needed for digestion testing. See Affidavit in [*4] Support, *supra*, Affidavit of Tim. D. Oury, MD, PhD, p. 2-3 ("I will need to see the actual tissue under the microscope to make a firm conclusion about the amount of tissue needed for digestion"). Dr. Oury cites no supportive studies or any other evidence to indicate the accuracy of such testing, its common use, or any other relevant factors. It is also clear that Dr. Oury has [**6] reviewed the slides and pathology report from Mr. Rodney's surgery, and he offers no explanation as to why these, and the other records already made available to him, are insufficient upon which to base his opinion. Mr. Rodney's testimony, medical records, and other discovery previously exchanged suffices MBUSA to formulate their defense as to the extent of Mr. Rodney's exposure to their products and the likelihood of **asbestos** exposure therein.

Further, both defendant MBUSA and Dr. Oury make the unsupported assertion that testing a portion of plaintiff's tissue block would not be invasive or harmful. Mr. Rodney's treating physician clearly states otherwise. See Affirmation in Opposition, *supra*, Exh. 2, Affidavit of Evan Alley, MD, PhD, p. 1-2. It is currently unknown how much tissue Mr. Rodney may need to provide [*5] for purposes of further treatment, including clinical trials. Dr. Alley opines that it would be invasive and harmful to undergo surgery to replace the tissue again, should Dr. Oury's unspecified, extracted amount prove to exclude Mr. Rodney from such trials/treatments. See *id.* at p. 2. Unlike a massive surgical undertaking, such as Mr. Rodney's pleurectomy herein, the court in [Pettinato](#) also highlighted that a pelvic examination is a "routine practice" that a patient can undergo again. See [Pettinato, supra, at p. 54](#).

Defendant's other cited examples are similarly unconvincing and wholly inapplicable here. Defendant MBUSA fails to proffer any caselaw even remotely similar to the extenuating circumstances at issue herein—a living plaintiff with a type of terminal cancer who has undergone a massively invasive surgery to obtain a finite biological sample that may be necessary to his further treatment. See *Castrillon v City of New York*, 91 AD2d 986, 457 N.Y.S.2d 843 (2d Dep't 1983) (discussing X-rays of an injury that were taken several years prior to the request and could be designated by movants as easily as within a ten-day period, much Unlike a terminal illness and surgery); [Matter of Oliver v England](#), 48 Misc2d 335, 337, 264 N.Y.S.2d 999 (Family Ct., Monroe Co. 1965) **[**7]** (entirely irrelevant; concerning the admissibility of a blood test that was voluntarily submitted to and not court-ordered); **[*6]** [Adlerstein v South Nassau Communities Hospital](#), 109 Misc2d 158, 164, 439 N.Y.S.2d 605 (Sup. Ct. Nassau Co. 1981) (semen test was concrete and firmly decisive as to determining sterility "and painless"); *Thomas v John T. Mather Memorial Hospital*, 162 AD2d 521, 522, 556 N.Y.S.2d 720 (2d Dept 1990) (highlighted repeatability of CAT scans, plaintiff had already undergone multiple, "conventionally accepted method of determining the nature and extent" of injury at issue); [Jenny Shulman v Brenntag North America](#), 2019 NYSlipOp 30757(U), at *3 (the parties had already attempted to obtain the pathology sample prior to the Note of Issue but were prevented from doing so by procedural delays at the hospitals).

Accordingly, it is

ORDERED that defendant MBUSA's motion is denied in its entirety; and it is further

ORDERED that within 30 days of entry plaintiff shall serve all parties with a copy of this Decision/Order with notice of entry.

This constitutes the Decision/Order of the Court.

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

08/14/2023

DATE