Superior Court of Connecticut.

Gail S. Aquarulo, Executrix of the Estate of Hannibal Saldibar and Eleanor Saldibar et al. v. A.O. Smith Corp. et al.

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CV095024498S

-- December 30, 2011

MEMORANDUM OF DECISION RE MOTION FOR SUMMARY JUDGMENT (Motion 194.00)

FACTS

On April 29, 2009, the plaintiffs, Gail S. Aquarulo, executrix of the estate of Hannibal Saldibar, and Eleanor Saldibar, surviving spouse of Hannibal Saldibar, filed their original complaint, and, on August 4, 2010, they filed a sixth amended complaint in four counts against various defendants. The complaint arises from Hannibal Saldibar's alleged exposure to asbestos-containing products while employed as a petty officer in the Navy from 1943 to 1946, and as a tile setter from 1946 to 1979.

The plaintiffs allege a violation of the Connecticut Products Liability Act, General Statutes § 52–572m et seq., and a violation of Connecticut's wrongful death statute, General Statutes § 52–555. In addition, they allege that the defendants' conduct was grossly negligent, wilful, wanton, malicious and/or outrageous because, since 1929, the defendants allegedly possessed medical and scientific data studies and reports indicating that asbestos-containing products were hazardous. Despite the existence of this information, the

defendants allegedly failed to acknowledge or publish this information. Finally, the plaintiff's allege a loss of consortium on behalf of Eleanor Saldibar.

One of the defendants, Tile Council of North America (Tile Council), filed a summary judgment motion on January 19, 2010, on the basis that, as a trade association, it does not fall within the definition of a product seller for purposes of Connecticut's Products Liability Act, i.e., a product manufacturer, wholesaler, distributor or retailer. On June 10, 2011, the plaintiffs filed a memorandum in opposition to the defendant's motion for summary judgment, arguing that the Connecticut Products Liability Act includes an entity not otherwise a manufacturer that holds itself out to be a manufacturer and that Tile Council held itself out to be a manufacturer. On August 18, 2011, the defendant filed a reply brief to the plaintiffs' opposition to the defendant's summary judgment motion, reiterating that it never held itself out as a manufacturer.[1]

DISCUSSION

"Practice Book § 17–49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Internal quotation marks omitted.) Brooks v. Sweeney, 299 Conn. 196, 210, 9 A.3d 347 (2010). "The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law." (Internal quotation marks omitted.) Id. "Only evidence that would be admissible at trial may be used to support or oppose a motion for summary judgment." (Internal quotation marks omitted.) Great Country Bank v. Pastore, 241 Conn. 423, 436, 696 A.2d 1254 (1997).

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue." (Internal quotation marks omitted.) Ramirez v. Health Net of the Northeast, Inc., 285 Conn. 1, 10–11, 938 A.2d 576 (2008).

Here, the defendant has moved for summary judgment, accordingly, "the burden is on [that] defendant to negate each claim as framed by the complaint . It necessarily follows that it is only [o]nce [the] defendant's burden in establishing [its] entitlement to summary judgment is met [that] the burden shifts to [the] plaintiff" to demonstrate the existence of a

genuine issue of fact that would justify a trial. Gianetti v. United Healthcare, 99 Conn.App. 136, 141, 912 A.2d 1093 (2007).

The defendant argues that it is a trade association, dedicated to the promotion of ceramic tile use, and that it never processed, made, distributed, sold, shipped, or re-branded any asbestos-containing products. The defendant contends that, although it had obtained technology patents concerning characteristics of ceramic tile adhesives, and developed formulas by which the adhesive characteristics could be met, it did not formulate any products or have any control over the ingredients utilized by manufacturers.

The plaintiff's counter that, under the Connecticut Products Liability Act, a "product seller" includes an entity that, although not otherwise a manufacturer, holds itself out as a manufacturer. Here, the plaintiffs observe, the defendant held a patent on a product, dry-set mortar, and held itself out as a manufacturer in various ways and controlled how this product was manufactured, marketed and sold. The plaintiffs explain that the defendant licensed the manufacture and sale of asbestos-containing dry-set mortars to certain suppliers and retained tight control over the formulation, manufacture, packaging, marketing and research of its asbestos-containing products.

To prevail on its summary judgment motion, the defendant must establish that no issue of material fact exists concerning whether the defendant comes within the sphere of Connecticut's product liability statute. In support of its summary judgment motion, the defendant has attached an excerpt from the plaintiffs' interrogatories and requests for production to its memorandum in support of its motion. In response to a query requesting a description of the defendant's involvement "in the sale, formulation, manufacture and/or distribution of asbestos and/or asbestos containing products," the defendant responded that "[Tile Council] is a trade association dedicated to the promotion of the use of ceramic tile. It does not process, make, distribute, sell, ship or re-brand any asbestos-containing products. It has obtained patents on technology for achieving specified results with respect to the characteristics of ceramic tile adhesives. These patents were licensed to various adhesive manufacturers. [Tile Council] developed formulas by which the adhesive characteristics could be met. However [Tile Council] did not formulate any actual products or have any control over the ingredients used by manufacturers. Individual manufacturers determined what ingredients would be used in their products." The defendant's response to the plaintiffs' interrogatories appears to remove it from the realm governed by the Connecticut Products Liability Act. Accordingly, the defendant has met its burden on its motion for summary judgment.

Both parties rely upon the case of Burkert v. Petrol Plus of Naugatuck, Inc., 216 Conn. 65, 579 A.2d 26 (1990), to support their respective positions. That case involved an indemnification action brought by the distributor of an allegedly defective product against the licensor of the trademark under which the defective product was marketed. The trademark owner/licensor, GM, did not participate in the production, marketing or distribution of the product. Although the third-party plaintiff had not pleaded the Connecticut Products Liability Act, the trial court instructed the jury to determine whether

GM was a product seller under the act. The jury found in favor of GM on all counts. On appeal, the third-party plaintiff argued that the trial court should not have sent the issue of whether GM was a "product seller" under the Products Liability Act to the jury, rather, the jury should have been instructed as a matter of law that GM was liable under the statute. GM also argued that this issue should not have been treated as a question of fact for the jury to decide, but that, as a "mere trademark licensor, it did not fit within the statutory definition of a product seller." Id., 72. The Connecticut Supreme Court agreed that, as a matter of law, GM was not a product seller under the statute.

While Burkert v. Petrol Plus of Naugatuck, Inc., supra, 216 Conn. 65, instructs that the issue of whether a defendant is a "product seller" is determinable as a question of law, this court recognizes that there may be questions of fact underlying such a legal determination. Therefore, in the context of this summary judgment, the burden now shifts to the plaintiffs to establish whether any such issues of fact exist concerning whether the defendant is considered a "product seller" within the meaning of the product liability statute.

The plaintiffs here argue that the defendant has failed to establish the nonexistence of all genuine issues of material fact. They observe that the defendant held a patent on a product—dry-set mortar. They emphasize that the defendant held itself out as a manufacturer and controlled how the product was manufactured, marketed and sold. The plaintiff's cite to Burkert v. Petrol Plus of Naugatuck, Inc., supra, 216 Conn. 65, to support their position.

When setting forth the facts of the case, the court in Burkert emphasized the unusually limited role played by GM, the trademark licensor, in operating its licensing program. The court explained that GM exercised no control over the formulations of its automatic transmission fluids used by its licensees, GM was unaware of the composition of its various licensees' formulations, and, significantly, it received "no royalties or other financial benefits from the licensing program." Burkert v. Petrol Plus of Naugatuck, Inc., supra, 216 Conn. 68. Further, GM, after granting a license, had little supervision over the production and distribution of the product, and it "did not require its licensees to submit samples or test data to determine whether the transmission fluid being marketed . met GM's performance specifications ." Id., 68, 69. In addition, GM "did not undertake to warn buyers of potential problems with the product." Id., 69. Ultimately, the court agreed that GM, "was not, as a matter of law, a product seller under the [Connecticut] Products Liability Act ." Id., 72.

In the present case, the evidence submitted includes the following evidence. Dr. Herman B. Wagner, the defendant's director of chemical research, invented a product—a dry-set mortar. Dry-set mortar is a gap-filling adhesive used to install ceramic tile, and the rights to this product were assigned to the defendant. The plaintiffs' evidence, consisting of various exhibits and deposition testimony, establishes that the present defendant's involvement with its patented product was more extensive than that evidenced by GM, the trademark licensor in the Burkert case. For example, the plaintiff's offered the deposition testimony of Robert Wayne Broos, a corporate representative of H.B. Fuller, for the

proposition that the defendant "had developed a market for these products, based upon their formulas, based on their trademarks and hallmark, if you will, of an assurance that if you buy products that contained this logo, you can be sure that it did work."

In supervising its patented product, the defendant set forth detailed specifications governing all aspects involving its product, including the percentage of asbestos to be used and directing the use of a designated grade of "Canadian Chrysotile Asbestos Fibre" to be purchased from a particular supplier. Broos, the corporate representative referenced above also testified that the defendant was "very specific about following their recipes, and they also had an in-house requirement of testing on a periodic basis the batches of material produced by each licensee to make sure that the batches fell within the parameters of their patents and requirements." Packaging and labeling also fell within the purview of the defendant, and each bag displayed the defendant's trademark number. Further, the product was marketed with the defendant's name prominently displayed on a "new triangular trademark, and articles were published, featuring the defendant, that targeted the flooring industry. Licensing fees were also involved in relation to the defendant's product. Yet another point of departure with Burkert v. Petrol Plus of Naugatuck, Inc., supra, 216 Conn. 69, and the present case is that the defendant here appears to have undertaken the issuance of warnings concerning its product. In a memorandum dated October 21, 1976, the defendant recognized "[t]he possibility of exposure of persons mixing [Tile Council] licensed Dry–Set mortars . to higher levels of airborne asbestos fibre than are considered permissible by OSHA ." As a result, the defendant recommended that "all bags of mortar containing asbestos should be labeled: "DANGER CANCER HAZARD CONTAINS ASBESTOS FIBERS AVOID CREATING DUST." [2]

The Connecticut Products Liability Act defines "manufacturer" as including a "product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer." (Emphasis added.) General Statutes § 52–572m(e).[3] The court finds that the plaintiffs have presented evidence to demonstrate that there exist disputed factual issues as to whether this defendant retained sufficient control, actual distribution, and marketing or manufacture of its patented product to fall within the ambit of the product liability statute. Accordingly, for the reasons set forth above, the defendant's motion for summary judgment is denied.

By the Court,

Bellis, J.

FOOTNOTES

1. FN1. Based-upon the ground raised by the defendant the court will treat this summary judgment as a motion against count one, only. In addition, on February 1, 2010, the defendant filed a supplemental motion for summary judgment (# 203), which appears to be identical in all respects to its original motion for summary judgment. The defendant referenced motion for summary judgment # 194 during oral argument on October 3, 2011.

The plaintiff's filed a supplemental memorandum in opposition on June 21, 2011, for the purpose of providing the court with copies of deposition testimonies.

2. FN2. The plaintiffs maintain that the defendant was aware of the dangers of asbestos exposure as early as 1966.

3. FN3. In a reply brief, dated August 18, 2011 (# 324) to the plaintiffs' opposition to its summary judgment motion, the defendant invokes the case of Iragorri v. United Technologies Corp., 285 F.Sup.2d 230 (D.Conn.2003), vacated in part on other grounds, 314 F.Sup.2d 111 (D.Conn.2004). It cites this case for the proposition that a parent company cannot be held liable as a product seller under the Connecticut Products Liability Act, regardless of the amount of control the parent exercised over its patents and trademarks when that parent did not manufacture, distribute or market the product.In Iragorri v. United Technologies, Corp., supra, 285 F.Sup.2d 230, an individual died after falling down an empty elevator shaft in Cali, Columbia. The decedent's surviving spouse, in several capacities, sued United Technologies Corporation and Otis Elevator under various theories, including the Connecticut Products Liability Act.The defendants moved for summary judgment, in part, on the basis that Otis was not a "product seller" under the statute. In that case, however, the court, Arterton, J., emphasized that the "plaintiffs have presented no evidence to support their contention that Otis [the parent/trademark licensor] placed the elevator in the stream of commerce, or to counter defendants' evidence that the elevator in question was manufactured by Otis Brazil (Otis' Brazilian subsidiary), with additional components manufactured either by OTESA (installed the elevator involved in the incident), or elsewhere locally in Columbia ." (Emphasis added.) Id., 236.Finding the plaintiffs' argument that Otis was a product seller unpersuasive the court explained that "without more, the fact that the Otis trademark was on the elevator in question is not sufficient to turn Otis into a seller of the product." Id., 237. Comparing the facts of Iragorri to the facts in Burkert v. Petrol Plus of Naugatuck, supra, 216 Conn. 65, the court, in the Iragorri case, concluded that "[l]ikewise, here, [p]laintiffs offer no additional evidence that Otis was engaged in the actual manufacture, distribution, or marketing of the elevators," or that the agreements "gave Otis a role in such matters." Id., 237.In the present case, the plaintiffs have offered sufficient evidence to establish genuine issues of material fact. There exist issues of fact concerning the defendant's control, distribution, marketing, and other aspects indicative of this defendant otherwise holding itself out as a manufacturer within the purview of the Products Liability Act.

Bellis, Barbara N., J.