

SUPREME COURT OF THE STATE OF NEW YORK  
EIGHTH JUDICIAL DISTRICT

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In the Matter of the Eighth Judicial District Asbestos Litigation

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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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JAMES E. GINTER,

Plaintiff

-v-

DECISION AND ORDER  
Index No. 2010-4061

ANDERSON & VREELAND, INC., , et al.,

Defendants

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BEFORE: HON. JOHN P. LANE  
Judicial Hearing Officer

APPEARANCES: LIPSITZ & PONTERIO  
Attorneys for Plaintiff  
By: John N. Lipsitz, Esq. and Dennis P. Harlow, Esq.

DONOHUE, SABO, VARLEY & HUTTNER, LLP  
Attorneys for Defendant Borg-Warner Corporation by its  
Successor in interest BorgWarner Morse TEC Inc.  
By: Bruce S. Huttner, Esq.

SMITH ABBOTT, LLP  
Attorneys for Defendant Pneumo Abex, LLC,  
Successor to the Abex Corporation  
By: Mark D. Debrowski, Esq.

GIBSON, MCASKILL & CROSBY  
Attorneys for Defendant Ford Motor Company  
By: Paulette E. Ross, Esq.

Defendants Borg-Warner Corporation, by its successor in interest BorgWarner Morse TEC Inc.(Borg-Warner), Pneumo Abex, LLC, successor to the Abex Corporation (Abex), and Ford Motor Company (Ford) move for summary judgment dismissing the complaint and all cross claims against them in this action.

During the 1970s, friction materials such as automotive brakes and clutch facings included a resin composed in part of cashew nut oil. Plaintiff's employer, Hooker Chemical-Durez Plastics Division (Durez) was a manufacturer of this resin, which it sold to various friction manufacturers, including defendants Borg-Warner and Abex.

Plaintiff James E. Ginter contends that he was exposed to asbestos-containing products and machinery during a three year period commencing in 1979, while he was employed as a chemist at Durez, as the result of his participation in Durez's Friction Particle Project (Project) that is the subject of this motion. The purpose of the Project was to find a synthetic substitute for the expensive cashew nut oil.

The Project involved fabricating sample friction particle boards, each weighing about ten ounces using formulas obtained from Durez's customers.<sup>1</sup> Using materials from Durez's stock, plaintiff prepared the friction materials from the formulas or "recipes" for the friction particle boards,

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<sup>1</sup> Plaintiff's deposition testimony on the method of obtaining the formula varied. He stated that "We would get it from the customers we supplied the resin to" (Pl's. EBT at p 231). He personally received a formula at a meeting with either Abex or non-party Motion Control (Pl's. EBT at pp 231-232). The recipes "came down" through plaintiff's supervisor, through a phone call or at a meeting (Pl's. EBT at p 233) . The Borg-Warner recipe was handed to him from either his supervisor or an associate.(Pl's. EBT at p 234).

which included asbestos, and “baked “ or molded the material to form the board. Then plaintiff would experiment with different formulas, to find a suitable substitute for the cashew oil, so that the newly produced boards would meet benchmark data points.<sup>2</sup> Plaintiff testified that he would perform tests on the friction products using a Ford friction assessment screen test (FAST) machine. Plaintiff contends that exposure to asbestos called for in the formulas which he prepared and his use of the FAST machine caused him to contract mesothelioma.

#### BORG-WARNER AND ABEX MOTIONS

The court has considered the following papers: notice of motion for summary judgment by Pneumo Abex LLC, successor in interest to Abex Corporation , dated March 30, 2011; affirmation in support of Mark D. Debrowski, Esq. , dated March 30, 2011; notice of motion for summary judgment by Borg-Warner Corporation, by its successor in interest, BorgWarner Morse TEC Inc., dated March 31, 2011; affidavit of Bruce S. Huttner, Esq., sworn to March 31, 2011; affidavit of Dennis P. Harlow, Esq., sworn to April 14, 201; reply affidavit of Bruce S. Huttner, Esq., sworn to April 28, 2011.

Defendants Borg-Warner and Abex move to dismiss plaintiff’s complaint, which alleges causes of action against it for failure to warn, strict products liability and negligence.

Defendants contend that plaintiff was not exposed to any asbestos-containing product that Borg-Warner or Abex manufactured or provided. They maintain that they had no involvement in

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<sup>2</sup> Borg-Warner points out that plaintiff created only one ten-ounce particle board as a benchmark from the formula it allegedly provided. From that point on, he deliberately altered the formula it provided for testing purposes.

the Project itself, or in the formulation of friction products plaintiff fabricated and tested using materials supplied by his employer, Durez, and created in its laboratory. They argue that formulas and recipes should not be considered products, that neither defendant had any control over the Project, any direct or supervisory involvement in the Project or plaintiff's work, or gave any advice on how it should be performed. Alternatively, they argue that as plaintiff was fully aware of dangers he faced in handling materials he tested, he should be treated as a "sophisticated user".

In response to this motion, plaintiff contends that defendants and Durez acted cooperatively in the Project that brought about his injuries, so both defendants are liable under the concerted action doctrine. Further, plaintiff asserts that this concerted action, to conduct a dangerous Project, benefitted Durez, Abex, Borg-Warner and other friction manufacturer customers of plaintiff's employer without providing him or other Durez employees with safety instructions or equipment to protect them from exposure to asbestos materials.

Plaintiff points out that the defendants' formulas called for the use of asbestos, but it gave no warnings concerning its use. Durez employees, such as plaintiff, produced friction materials using these recipes that typically called for asbestos as an ingredient as a part of the Project. The process plaintiff and his co-workers employed also involved abrading the material they produced using the FAST Machine to simulate long term wear and tear that friction material experiences during its useful life. Thus, plaintiff was exposed to asbestos material that caused his illness.

In its reply affidavit, Borg-Warner points out that plaintiff does not oppose dismissal of his second cause of action alleging strict product liability as there is no claim of exposure to a Borg-Warner product. Defendants assert that they were not negligent, and owed plaintiff no duty to warn

and, further that there is no evidence that a breach of their duty of care was a proximate cause of plaintiff's injury. Borg-Warner contends that it is not liable to plaintiff as any formula it provided was materially altered by him. Finally, defendants challenge plaintiff's concerted action claim as meritless and not pleaded.

It is well established in asbestos litigation that to go forward with a motion for summary judgment, a defendant must present admissible evidence showing that the complaint has no merit (*see Diel v Flintkote Co.*, 204 AD2d 53 [1994]). "As a general proposition, summary judgment should not be granted 'where there is any doubt as to the existence of factual issues . . . or where the issue is arguable' " (*Chilberg v Chilberg*, 13 AD3d 1089, 1090[2004] *quoting Onondaga Soil Testing v Barton, Brown, Clyde & Loguidice*, 69 AD2d 984, 985 [1979]). Only if a defendant moving for summary judgment meets its burden must a plaintiff come forward with facts and conditions from which defendant's liability may reasonably be inferred (*see Matter of Eighth Jud. Dist. Asbestos Litig. [Heckel]*, 269 AD2d 749 [2000]; *see also Matter of New York City Asbestos Litig. [Diedrich]*, 7 AD3d 285 [2004]; *Reid v Georgia-Pacific Corp.*, 212 AD2d 462 [1995]).

The fundamental criterion in any action based upon common-law negligence is the existence of a duty to warn owed to plaintiff by the alleged tortfeasor (*see Gilson v Metropolitan Opera*, 5 NY3d 574, 576[2005]; *Sanchez v State of New York*, 99 NY2d 247, 252 [2002]; *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232 [2001]; *D'Amico v Christie*, 71 NY2d 76, 87 [1987]; *Eiseman v State of New York*, 70 NY2d 175, 187 [1987]). In the absence of a legal duty, no liability can be imposed (*see Pulka v Edelman*, 40 NY2d 781, 782 [1976], *rearg denied* 41 NY2d 901 [1977]; *Ellis v Peter*, 211 AD2d 353, 355, *appeal dismissed* 86 NY2d 885 [1995]).

Whether a duty is owed to a plaintiff is a question of law for the court's consideration (see *Sanchez* at 252; *Eisenman* at 189) while issues of foreseeability and causation are questions of fact.

Courts traditionally “fix the duty point by balancing factors, including the reasonable expectations of the parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability”.

(*Hamilton* at 232, quoting *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 586 [2001])

“Foreseeability should not be confused with duty” (*Pulka* at 785) and foreseeability of harm” does not establish the existence of a duty” (*Eiseman* at 187).

Defendants owed no duty to plaintiff. There is no evidence that either defendant requested or directed Durez to undertake the Project that Durez designed and controlled. Furthermore, the formulas provided to Durez were not themselves products. “A product is tangible personal property distributed commercially for use or consumption”(Restatement of Torts [Third] [Product Liability, Section 19[A]]). Similarly, a science book that described an experiment which injured a student when performed was not “mechandise” and its publisher was not liable to plaintiff under strict products liability. (*Walter v Bauer*, 109 Misc 2d 189 [1981, aff'd 88 AD2d 787[1982]) Moreover, the transactions between defendants and Durez were not placements of a product into the chain of commerce. Even if the formulas could be somehow characterized as products, their delivery to Durez did not constitute a sale as distinguished from a casual or one-time providing of information to plaintiff's employer (see *Sukljian v Charles Ross & Co., Inc.*, 69 NY2d 89, 97 [1986]).

Finally , while plaintiff's complaint does allege that defendants engaged in concerted action to hide the dangers of asbestos (¶¶ 28 and 29 of the complaint) , it is arguable whether those allegations are sufficient to state a cause of action and in any event, the record fails to support such a claim (see *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 295-297 [1992]) .

In this case, there is no liability based upon strict products liability or common law negligence. Since those causes of action are dismissed, any claim for concerted action, even if made out here, is untenable as there is no independent basis in tort therefor ( see *Brenner v American Cyanamid*, 288 AD2d 869, 870 [2001]). Defendants' motions for summary judgment are granted.

#### FORD MOTION

The court has considered the following papers: notice of motion for summary judgment by Ford Motor Company dated March 30, 2011; affidavit of Paulette E. Ross, Esq., sworn to March 30, 2011; affidavit of Dennis P. Harlow, Esq., sworn to on April 20, 2011; reply affidavit of Paulette E. Ross, Esq., sworn to May 2, 2011.

The motion by defendant Ford for summary judgment dismissing the complaint is based on its assertion that plaintiff lacks proof that it manufactured, distributed or sold the FAST machine that plaintiff used while employed by Durez during the relevant time period (see affd of Paulette E. Ross ¶19). Ford claims that it did not manufacture or produce such a machine for use by anyone other than Ford . In addition, Ford argues that it was not a friction customer of Durez, did not supply any formulas to Durez, and that if plaintiff was harmed by asbestos dust from a FAST machine, it was Durez' fault because they supplied the asbestos and instructed plaintiff to use it. Thus, the court is faced again with a motion by a defendant for summary judgment dismissing a plaintiff's complaint

based upon alleged weaknesses in his case.

According to plaintiff, he spent three years of his twenty-seven year career as a chemist at Durez working with the FAST machine which he testified was obtained from Ford . The machine was used to grind down friction material, like that used in automobile brakes and clutches, to simulate the wear and tear to which this material would be exposed during its expected lifetime. He contends that a majority of those materials contained asbestos and that the process caused dangerous asbestos fibers to be released into the air to which he was exposed, and that Ford specified the use of asbestos products in the operation and maintenance of FAST machines.

Plaintiff testified that the machine was obtained from Ford and his interrogatories state that the FAST machine was “supplied to by Ford”.

Ford relies on its witness Ford employee, Design Analysis Engineer Mark Taylor, who was deposed on December 16, 2010. Taylor stated that Ford was not in the business of manufacturing vehicles, not testing equipment. However, he admitted that Ford may have produced prototypes of a FAST machine, seeming to agree that Ford was in possession of a prototype (Taylor’s . EBT at p 45) or provided specifications for a FAST machine to suppliers but if it did, it was exclusively for Ford’s use.

In support of its motion , Ford supplied : an article from Ford’s scientific research staff , entitled “A New Laboratory Friction and Wear Test.” concerning the FAST machine and use of it to test brakes ; a Durez laboratory report dated February 20, 1970 concerning Ford’s FAST test ; and an “Instruction Manual for FAST Machine” with a Ford logo on the front. Ford maintains that the manual proves only that the FAST machine was conceived and developed by Ford’s scientific

research staff , not that it was manufactured, produced, distributed or sold by Ford.

Plaintiff argues that Taylor's testimony, that he could find no documents at Ford concerning sale of the FAST machine ,does not prove that Ford never sold such a machine.

In addition, plaintiff points to a series of Ford intra-company communications dating in the mid-1960's which refer to the "Ford FAST" machine, or to FAST testing at various Ford vendors.

The following are examples: a 1967 Ford memo concerning revision of the FAST manual and discussions about FAST tests with Durez Chemical's technical representatives and the aforementioned 1970 Durez laboratory report stating in part : " Ford has developed and utilized a test designated the [FAST ] test ... the Durez laboratory has acquired such a machine".

As this court has noted numerous times, it is well established in asbestos litigation that to go forward with a motion for summary judgment dismissing a complaint, a defendant must present admissible evidence showing that the complaint has no merit (*see Diel v Flintkote Co.*, 204 AD2d 53 [1994]), or affirmatively establish the merit of its defense (*see Higgins v Pope*, 37 AD3d 1086 [2007]; *Refermat v A. C. AND S., Inc.*, 15 AD3d 928 [2005]; *Root v Eastern Refractories Co., Inc.*, 13 AD3d 1187 [2004]; *Matter of Eighth Jud. Dist. Asbestos Litig. [Takacs]*, 255 AD2d 1002 [1998]; *Reid v Georgia-Pacific Corp.*, 212 AD 2d 462 [1995]). A party moving for summary judgment cannot meet its burden by simply noting gaps or weakness in its opponent's proof (*see Allen v General Elec. Co.*, 32 AD3d 1163, 1165 [2006], *citing Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980 [1995]; *Edwards v Arlington Mall Assocs.*, 6 AD3d 1136 [2004]). Moreover, to shift the burden to a plaintiff in asbestos litigation, a defendant seeking summary judgment must make a prima facie showing that its products could not have contributed to the causation of plaintiff's

illness (*see Reformat, Root, Matter of Eighth Jud. Dist. Asbestos Litig. [Takacs]*, 255 AD2d 1002 [1998]). Clearly, Ford has not met this standard.

Assuming that Ford had met the standard, its motion is denied for the reasons that follow.

Plaintiff stated he worked with a Ford FAST machine and detailed his exposure to asbestos as a consequence. He testified concerning use of a manual for its operation and, as stated, Ford has produced such a manual.

The instruction manual for the FAST machine (Exhibit K, Harlow affidavit) is labeled "Scientific Research Staff, Ford Motor Company" and bears the number 004639". As plaintiff points out, the manual specifies how to unload and install the FAST machine, how to service and maintain it and what to do when the asbestos contained in the machine flakes off.

In that regard, the manual at page 25 provides, in part:

2. After exceptionally long use, the asbestos insulating layer, around the periphery of the FRICTION DISC, tends to darken, and indicates flaking off at the front edge. If the insulation loss progresses to the excess of 1/16", it should be removed, and a new layer inserted and bonded with high temperature epoxy.

It is clear that the machine not only was designed to test asbestos-containing products, but itself contained asbestos. The installation and maintenance sections of the manual could be read to indicate distribution or sale to customers. Further, the documents produced by Ford lend credibility to plaintiff's claim. Ford's defense, that it never sold or distributed the machine outside of Ford, may be presented to the jury, but clearly its own submissions and document production create questions of fact.

It is also well established in New York that "[a] manufacturer has a duty to warn against

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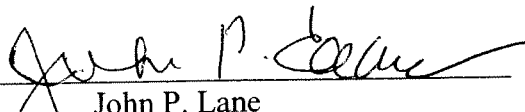
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latent dangers resulting from foreseeable uses of its products of which it knew or should have known” (*Liriano v Hobart Corp.*, 92 NY2d 232, 237 [1998] citing *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 297 [1992]). “A manufacturer also has a duty to warn of the danger of unintended uses of a product provided those uses are reasonably foreseeable” (*Liriano at 237*, citations omitted). Furthermore, “[a] manufacturer or retailer may . . . incur liability for failing to warn concerning dangers in the use of a product which come to his attention after manufacture or sale . . .” (*Cover v Cohen*, 61 NY2d 261, 274 [1984]). The manual provided no warnings.


Defendant Ford’s motion is denied.

SO ORDERED

Dated: Buffalo, New York  
June 3, 2011

  
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John P. Lane  
Judicial Hearing Officer

**GRANTED**

JUN 03 2011  
BY   
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PATRICIA A. AIELLO  
COURT CLERK