

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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RAYMOND FINERTY and MARY FINERTY,

In Re: NYCAL
Index No. 10/190178

Plaintiffs

-against -

**RECOMMENDATION
OF THE SPECIAL
MASTER**

ABEX CORPORATION,
f/k/a American Brake Shoe Company ,et. al.

Defendants.

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The Plaintiff, Raymond Finerty, in the above captioned matter, was diagnosed with mesothelioma and commenced a suit against various defendants, including Ford Motor Company for damages.

By way of brief background, Plaintiff alleges that in the 1970s and 1980s, he worked as a mechanic in Ireland and was exposed to asbestos from working on various Ford cars, tractors, and replacement parts. Defendant Ford Motor Company (hereinafter "Ford USA") has denied responsibility for Ford cars, tractors, and replacement parts that were sold in Ireland. Ford USA claims that it is a separate and distinct company from Henry Ford & Sons Ltd. a/k/a Ford Ireland (hereinafter "Ford Ireland"), and that it is not responsible for the products that Plaintiff claims that he used in Ireland. On the other hand, counsel for Plaintiff contends that based on their initial investigation, Ford USA may be one global company and that Ford Ireland is a division of Ford USA. Counsel for Plaintiff claims that based on the controlling case law and their initial investigation, Ford USA may have sufficient control over Ford Ireland and/or the Ford products sold in

Ireland to be liable, and/or that Ford USA played a role in placing the asbestos-containing products that Plaintiff alleges that he was exposed to, into the stream of commerce.

At the end of 2010, Defendant Ford USA asked Plaintiff to execute a No Opposition Summary Judgment Motion (“No Opp”) based on their contention that Ford Ireland is a separate company and that Ford USA has no responsibility for the products to which Plaintiff claims he was exposed. In support of its position, Ford USA provided affidavits from three Ford USA employees, John Sullivan, Corey Macgillvray, and Mark K. Taylor. Each affidavit addressed a separate issue, namely Ford cars sold in Ireland, Ford Tractors sold in Ireland, and the corporate structure of Ford Ireland and Ford USA. Upon receipt of the No Opp and three affidavits, Plaintiff served deposition notices for all three affiants. Defendant objected to all three deposition notices and requested a conference with the Special Master.

A telephonic conference was held in December 2010. At the conference the Special Master directed that Plaintiff be permitted to take a deposition of a corporate representative from Ford USA on the issue of whether Ford USA was liable for Ford products sold in Ireland. Plaintiff was permitted to inquire into the corporate structure of Ford USA and Ford Ireland, the relationship between Ford USA and Ford Ireland, ultimate control of the companies and operations, marketing activities, and how Ford USA and Ford Ireland relate and interact with each other. Plaintiff was permitted to start with a deposition of one individual, rather than the three as originally requested, and it was established if there was some reason why Plaintiff believed that a further deposition was needed, Plaintiff would have to explain to the Special Master why the initial deposition was insufficient.

Following the conference call, and prior to any deposition taking place or documents being turned over by the Defendant, and contrary to the Special Master's ruling, Ford USA moved for summary judgment in this matter. In support of its Motion for Summary Judgment, Ford USA included and relied upon the three affidavits of their employees, Mr. Sullivan, Mr. Macgillvray, and Mr. Taylor.

As discussed in the initial conference call, and at the request of defense counsel, Plaintiff provided Defendants with an additional notice of deposition for a corporate representative and document request tailored to the issue of whether Ford USA is liable for Ford products sold in Ireland. Defendant Ford USA thereafter objected to this deposition notice and document request and requested a second conference call on this matter.

The conference call was held on May 11, 2011. During the conference, defendant Ford USA admitted that in order to make their case for summary judgment, they needed to submit and rely on all three affidavits since they deal with different factual areas, and that each of these areas corresponds to the exposure claimed by the plaintiff.

Plaintiff's counsel explained that under the controlling case law, the issue of whether Ford USA was liable for Ford products sold in Ireland included but was not limited to the question of corporate structure, but also encompassed questions regarding actual control, the interaction and relationship between Ford USA and Ford Ireland, trademark licensing practices, and Ford USA's potential role in the design, approval, manufacturing, assembly, marketing, distribution, sale, and warranty of Ford products sold in Ireland. As a consequence of receiving this additional information about the

controlling law, the Special Master expanded her ruling to permit the depositions of all three affiants.

It is axiomatic and standard practice in NYCAL that when a defendant moves for summary judgment and relies on an affidavit to support its position, Plaintiff must have an opportunity to depose the affiant. Said deposition is akin to cross-examination, rendering the testimony upon which defendants rely tantamount to “admissible” evidence. Since the defendant relied on three affidavits to make their case for summary judgment, Plaintiff is entitled to depose all three affiants. Moreover, Plaintiff is entitled to discovery and to inquire into all areas which may render Ford USA liable for Ford products sold in Ireland. As discussed on the conference call, this does not mean that Plaintiff will necessarily be able to prove their case ultimately, but they are entitled under the CMO and the CPLR to full discovery on these issues.

Accordingly, the Special Master directed that Ford USA produce all three affiants for deposition, as well as all documents responsive to Plaintiff’s document request. Further it was made clear that if the three affiants do not have sufficient knowledge regarding all pertinent areas of inquiry, Defendant Ford USA may be required to produce additional deponents. Plaintiff was instructed to limit the time period of questioning to the period of Plaintiff’s exposure (and several years prior) to the present. However, Plaintiff is able to inquire about the founding and establishment of the Ford entities. Counsel for Ford requested that the Special Master direct Plaintiff’s counsel to agree to the time limitation in writing. The Special Master refused to do so, stating that such agreements are entered into routinely, she trusts the attorneys to abide by them and that if

the agreement were breached counsel for Ford could call the Special Master from the deposition.

During the call, defense counsel raised the issue of filing a protective order pursuant to the CPLR. The Special Master explained to defense counsel that under the CMO the proper procedure is not a motion to the judge, but an application to the Special Master.

Counsel for Ford requested nearly unlimited time to produce the requested documents. As no trial date has yet been set for this case, Ford is to be given a reasonable amount of time to produce documents (45 days). Ford USA is to withdraw its pending motion for summary judgment without prejudice, and produce all responsive documentation. The depositions of the three affiants are to occur following production of the documents, and the defendant may re-submit their summary judgment motion following the completion of the depositions. All parties understood the ruling and were in agreement.

A few hours after the conference call, defense counsel sent an email to the Special Master and counsel for Plaintiff stating that despite being told that it was improper under the CMO, they intended to file a motion for a protective order in this matter. Counsel for Ford further stated that the Special Master had “refused” to put her ruling in writing. The Special Master had not been asked for a written recommendation. Rather she had been asked to direct Plaintiff’s counsel to agree to the time limitation in writing. In response, the Special Master replied to the email, corrected defense counsel’s misrepresentations, and told counsel that a written Recommendation would be provided and that the proper

procedure was to appeal the Recommendation and not file a motion for a protective order.

Based on the foregoing, defendant Ford USA is directed to:

1. produce all documents that are responsive to plaintiff's deposition notice and document request rider within 45 days of this Recommendation; and

2. produce for deposition the affiants John Sullivan, Corey Macgillvray, and Mark K. Taylor and a corporate representative that is competent to testify regarding the areas outlined in Plaintiff's Notice of Deposition; and

3. withdraw its pending motion for summary judgment, without prejudice, until such time as the discovery has been produced by Ford and the depositions are complete.

Dated: May 15, 2011

/s/
Laraine Pacheco
Special Master