

Seidita v A.O. Smith Water Prods. Co.

2011 NY Slip Op 33505(U)

December 22, 2011

Supreme Court, New York County

Docket Number: 190464/10

Judge: Sherry Klein Heitler

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

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

GIUSEPPE SODANA

INDEX NO. 190464/10

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

A, O. SMITH WATER PRODUCTS
COURTIER

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with memorandum decision of even date, annexed.*

FILED
JAN 04 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12.22.11 

HON. SHERRY KLEIN HEITLER *J.S.C.*

- Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
- Check if appropriate: DO NOT POST REFERENCE
- SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----- X
GIUSEPPE SEIDITA and JOSEPHINE SEIDITA,

Plaintiffs,

Index No.: 190464/10
Motion Seq. 001

-against-

DECISION AND ORDER

A.O. SMITH WATER PRODUCTS CO., et al.,

FILED

Defendants.

JAN 04 2012

----- X
SHERRY KLEIN HEITLER, J.:

NEW YORK
COUNTY CLERKS OFFICE

In this asbestos personal injury action, defendant Courter & Company, Inc. (Courter) moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all other claims against it on the grounds that plaintiffs have failed to show that plaintiff, Giuseppe Seidita, was exposed to any asbestos containing product manufactured, distributed, sold or installed by Courter. For the reasons set forth below, the motion is granted.

BACKGROUND

This action was commenced by plaintiffs Giuseppe Seidita, now deceased, and his wife Josephine Seidita, to recover for personal injuries allegedly caused by Mr. Seidita's exposure to asbestos at various powerhouses throughout New York City. Plaintiffs produced the decedent's longtime co-worker, Mr. Daniel Brady, to testify with regard to the decedent's work history and exposure.¹ He testified that the decedent worked out of the New York Local 5 Boilermakers Union from 1973 into the 1990's as a welder and, among other things, that both he and the decedent were exposed to asbestos as bystanders at various Consolidated Edison Co. of New

¹ Mr. Brady was deposed on July 21 and July 22, 2011. A copy of his deposition transcript is submitted as defendant's exhibit A ("Deposition").

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York (“Con Ed”) powerhouses by reason of work performed by other trades. With regard to Courter, Mr. Brady generally identified this defendant as a contractor that was present at several of these powerhouses.

On this motion, the defendant argues that while Mr. Brady generally identified Courter as one of the contractors who oversaw the work of steamfitters at the various powerhouses in which he and the decedent worked, there is no testimony or other evidence that the decedent was actually exposed to asbestos either from the work of Courter employees or other tradesmen that it may have supervised. Plaintiffs contend that Mr. Brady’s deposition testimony raises a triable issue of fact as to Mr. Seidita’s exposure and Courter’s liability therefor sufficient to defeat summary judgment.

DISCUSSION

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant a court’s directing judgment in its favor as a matter of law, and must tender sufficient evidence to demonstrate the absence of any material issues of fact. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); CPLR 3212(b). In an asbestos personal injury action, once the movant has made a *prima facie* showing of entitlement to summary judgment, the plaintiff must then demonstrate that he was exposed to asbestos fibers released from the defendant’s product, (*see Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994]), and that it was more likely than not that such exposure was a substantial factor in his injury (*see Diel v Flintkote Co.*, 204 AD2d 53, 54 [1st Dept 1994]). While boilerplate and conclusory allegations will not suffice, it is sufficient for a plaintiff “to show facts and conditions from which defendant’s liability may be reasonably inferred.” *Reid, supra*, 212 AD2d 462, 463 (1st Dept 1995).

While Mr. Brady identified Courter as a contractor that was present at several of the Con

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Ed powerhouses when he was there, he could not say whether Courter or any Courter-supervised employees caused the decedent to be exposed to asbestos. With regard to his time at the Waterside powerhouse facility, Mr. Brady testified as follows (Deposition p. 53-55):

Q: Okay. Let's move on to the pumps. Was Mr. Seidita personally performing the work on the pumps?

A: No.

Q: Who was performing work on the pumps.

A: Steamfitters and probably Con Ed personnel.

Q: And were the steamfitters and Con Ed personnel performing work on the pumps in Mr. Seidita's presence?

A: Yes.

Q: Do you believe the work that they were performing on the pumps caused Mr. Seidita to be exposed to asbestos?

A: That, I don't know

* * * *

Q: Now, just sticking with this first occasion, do you recall if Mr. Seidita was wearing a mask or respirator?

A: I don't recall.

Q: Was anyone else wearing a mask or respirator?

A: I really don't recall. But I know that all they would provide is paper masks like dust masks.

Q: Okay.

A: They never provided coveralls or anything like that.

Q: Who provided the paper masks?

A: The contractor we were working for.

Q: Do you know the brand of those masks?

A: Like I said, the only mask I really remember, I believe it was the 8710. It had yellow straps on it.

Q: And when you say "the contractor", is that Central Rigging --

A: That would be Central Rigging or Courter I guess was one of the fitter outfits.

Mr. Brady then testified that he generally remembered steamfitters employed by Treadwell and

Courter being present at the powerhouses. His testimony in this respect arose when cross-examined by counsel for Warren, a pump manufacturer (Deposition p.189-192, objections omitted):

Q: When you say you remember seeing Warren pumps at some of the job sites, how did you know or how did you remember that it was a Warren pump?

A: I remember pumps being delivered to the job and I remember seeing name tags of Warren Pumps. I mean, like I said, I'm not a steamfitter. I never worked with Warren pumps but I remember them being on site.

Q: Did Mr. Seidita ever work with Warren pumps?

A: Not that I know.

Q: Did he ever work with any pumps?

A: Not that I know of.

Q: Did you ever work with any pumps?

A: No, not really.

* * * *

Q: Do you remember which contractors would have employed the men working on these pumps?

A: The only thing I remember is steamfitters were employed by Treadwell. They were employed by Courter. But which ones on what sites, you're talking a long time ago. You're talking 30 years ago.

* * * *

Q: Do you believe that you or Mr. Seidita were exposed to asbestos by virtue of being near Warren pumps?

A: That I couldn't say. I don't know what the Warren pump consisted of. I don't know who manufactured it. I don't know -- I just know that they were on site. Their function -- like I said, I'm not a steamfitter. Most of these pumps -- this is not my work. These are just apparatuses or equipment that's been on a job and we've worked around with the trades.

* * * *

Q: Regarding work on pumps generally, do you believe you were exposed to asbestos when Mr. Seidita was exposed?

A: In that time period, certain works on pumps I believe we were exposed.

Q: How so?

A: By removal of flanges, old flanges. They had to wire brush the flanges off the face that the pump was being connected to.

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Plaintiffs allege that defense counsel had an affirmative duty to further cross-examine Mr. Brady with regard to Courter. Indeed, while a failure to question a witness in sufficient detail may on its face require a court to deny summary judgment (*see Green v A.O. Smith Water Products*, Index No. 102707/07, 2010 NY Slip Op 33285U [Sup. Ct. NY Cty. Nov. 23, 2010]), such action was not necessary here in as much as Mr. Brady plainly stated that he did not know whether this defendant's activities caused the decedent to be exposed to asbestos.

Plaintiffs also submit the affidavit (sworn to August 11, 2005) and logbook of Mr. John Fee, who worked as a Courter superintendent from 1955 to 1989. While Mr. Fee averred that Courter was present at several Con Ed powerhouses, he makes no reference to either Mr. Brady or the decedent. In fact, this court has previously ruled in an unrelated matter that this very affidavit was insufficient to defeat Courter's summary judgment motion. *See Hauser v. A.W. Chesterton Co.*, Index No. 190052/09 (Sup. Ct. NY Cty May 18, 2010, Heitler, J., at 5) ("Similarly, regarding Courter, while the affidavit of Mr. Fee alleges that Courter was present at Ravenswood, Astoria, and East River Powerhouses, it does not establish that Courter used asbestos-containing products at these powerhouses in Mr. Hauser's presence.") Also, while Mr. Fee's logbooks may show that Courter was present at these powerhouses from 1963 to 1967, this too is insufficient to establish Courter's liability in this case. As stated in *Matthews v A.C. & S.*, Index No. 118368/01 (Sup. Ct. NY Cty. Dec. 6, 2002, Freedman, J., at 1), the "mere presence of a representative of a general contractor who has no supervisory role or control" over the plaintiff does not render the contractor liable where there is no evidence to show that the defendant contractor was present "at the exact time plaintiff was present." *Id.*

While plaintiffs are not required to show the precise causes of their damages, they are required to show facts and conditions from which Courter's liability may be reasonably inferred.

Reid v Georgia-Pac., Corp., 212 AD2d 462, 463 (1st Dept 1995). Here, neither the testimonial evidence nor the documentary evidence establish anything more than that Courter may have been present at some of the powerhouses in question. However, critically absent from the record is any thing to show that the decedent was exposed to asbestos by reason of the work of Courter or Courter-supervised employees.

Accordingly, it is hereby

ORDERED that Courter & Company, Inc.'s motion for summary judgment is granted, and this action against Courter, and any cross-claims related to Courter are hereby severed and dismissed; and it is further

ORDERED that the remainder of this action shall continue as against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

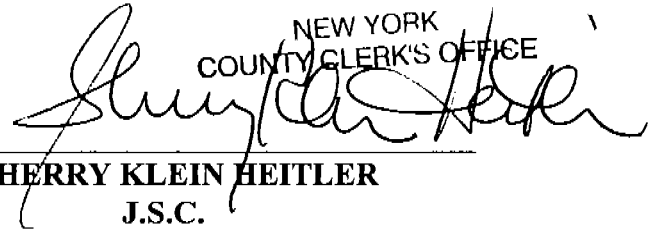
This constitutes the decision and order of the court.

FILED

JAN 04 2012

ENTER:

NEW YORK
COUNTY CLERK'S OFFICE



SHERRY KLEIN HEITLER
J.S.C.

DATED: December 22, 2011