

Miceli v Anchor Packing Co.

2012 NY Slip Op 30618(U)

March 13, 2012

Sup Ct, NY County

Docket Number: 190234/09

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. SHERRY KLEIN HEITLER

PR Index Number : 190234/2009
MICELI, PHILIP J.
vs.
ANCHOR PACKING
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

PART 30

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

-v-

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, It is ordered that this motion is

is decided in accordance with the
memorandum decision dated 3-9-12

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

FILED
MAR 13 2012
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3-9-12

_____, J.S.C.

HON. SHERRY KLEIN HEITLER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

----- X
PHILIP J. MICELI and ROSE MARIE MICELI,

Index No. 190234/09
Motion Seq. 002

Plaintiff,

DECISION AND ORDER

-against-

ANCHOR PACKING COMPANY, et al.,

Defendants.

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

In this asbestos personal injury action, defendant Georgia-Pacific, LLC (“Georgia-Pacific”) renews its motion pursuant to CPLR 3212 for summary judgment dismissing the complaint and all other claims and cross-claims asserted against it. For the reasons set forth below, the motion is granted.

BACKGROUND

This action was commenced by plaintiffs Philip Miceli, now deceased, and his wife Rose Marie Miceli, to recover for personal injuries caused by Mr. Miceli’s alleged exposure to asbestos-containing products while, among other things, performing renovations at his 74 Sycamore Street, Massapequa, New York, residence¹. Relevant to this motion is plaintiffs’ claim² that Mr. Miceli was exposed to asbestos from Georgia-Pacific joint compound while installing sheetrock in the living room, dining room, kitchen, and bedroom at this address after he

¹ Mr. Miceli resided there until his death on November 29, 2010.

² Mr. Miceli was deposed on November 12, 2009. A copy of his deposition transcript is submitted as defendant’s exhibit B.

moved there in 1969.

On March 4, 2010, the parties conducted a site inspection at the Miceli home during which an engineer extracted numerous joint compound samples from the walls on which plaintiffs claim Mr. Miceli used Georgia-Pacific brand joint compound. Dr. Drew R. Van Orden, an engineer and scientist employed by R.J. Lee Group, Inc of Monroeville, Pennsylvania, later tested these samples and concluded that they did not contain asbestos fibers.

Georgia-Pacific moved for summary judgment on the ground that the joint compound Mr. Miceli used to renovate his home did not contain asbestos and therefore could not have caused his injuries. On October 14, 2011, this court denied Georgia-Pacific's motion without prejudice to renew because its expert's report was unsworn and therefore *prima facie* insufficient to serve as the basis for its motion.

Defendant now renews its motion for summary judgment on the same grounds, and in accordance with this court's October 14, 2011 order submits a sworn affidavit to accompany its expert's report. Plaintiffs argue, as they did in their original motion, that the reliability of Georgia-Pacific's expert's findings are questionable given the method used to collect the samples.

DISCUSSION

To obtain summary judgment, the defendant 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 issue of fact. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980) CPLR § 3212(b). In asbestos-related litigation, once the movant has made a *prima facie* showing of its entitlement to summary

judgment, the plaintiff must then demonstrate that there was exposure to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this respect, the plaintiff's burden is to "show facts and conditions from which defendant's liability may be reasonably inferred." *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995). Mere boilerplate or conclusory allegations will not suffice.

Georgia-Pacific purports that the joint compound used to renovate Mr. Miceli's home in 1969 did not contain asbestos, and in support relies on the results of a CPLR 3120 inspection the parties conducted of the Miceli residence on March 4, 2010. Present at the inspection were the decedent Philip Miceli, Jason Kaufman, Esq. (counsel for Georgia-Pacific), Anthony Cappello (an investigator hired by plaintiffs' counsel), David Sundell (an engineer who collected the wall samples), and Charles Cocchiola (a general contractor who assisted Mr. Sundell and who repaired the walls after the samples were taken). The samples were tested by Dr. Van Orden to determine their chemical composition, and in particular, to determine their asbestos content. His report, submitted herein as defendant's exhibit E, provides that seven wall samples were analyzed using polarized light microscopy, transmission electron microscopy, and x-ray powder diffraction.³ Based on these tests, Mr. Van Orden concluded that the samples did not contain any asbestos fibers.

Significantly, plaintiffs did not collect their own samples during the inspection or conduct any independent tests. In addition they did not submit a rebuttal expert report as noted by the court in its October 14, 2011 order. Instead, plaintiffs merely contend that the methods used to collect the samples are flawed and, accordingly, that Dr. Van Orden's conclusions are unreliable.

³ Mr. Van Orden attested to the veracity of his report on October 13, 2011.

However, neither the deposition testimony nor the scientific studies submitted by plaintiff in opposition to this motion are sufficient to call Dr. Van Orden's conclusions into question. As such, plaintiffs have not met their burden of proof, *see Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994), and summary judgment is appropriate.

Accordingly, it is hereby

ORDERED that Georgia-Pacific, LLC's motion for summary judgment is granted, and that this action and any cross-claims related to this defendant are severed and dismissed; and it is further

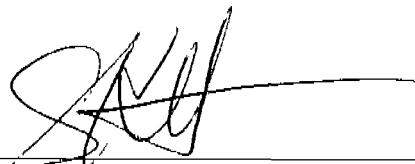
ORDERED that the remainder of the action shall continue as against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

DATED:

3-9-12



SHERRY KLEIN HEITLER
J.S.C.

FILED
MAR 13 2012
COUNTY CLERK'S OFFICE
NEW YORK