

Kraljic v A.C. & S., Inc.
2012 NY Slip Op 30736(U)
March 16, 2012
Supreme Court, New York County
Docket Number: 123078/01
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

Index Number : 123078/2001
CHIERCHIA, JERRY
vs.
A.C. & S.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 123078/01
MOTION DATE _____
MOTION SEQ. NO. 001

(CALANIE)

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 3.16.12

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

FILED

MAR 26 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3.16.12


_____, 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
GERTRUDE KRALJIC, as Executrix for the Estate of
JERRY CHIERCHIA, and JOAN CHIERCHIA, Individually,

Index No. 123078/01
Motion Seq. 001

Plaintiffs,

-against-

A.C. & S., Inc., et al.,

Defendants.

DECISION AND ORDER

FILED

MAR 26 2012

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

NEW YORK
COUNTY CLERK'S OFFICE

Defendant Crane Co. moves pursuant to CPLR 3211(a)(4) and (8) to dismiss the within action bearing Index No. 123078/01 (the "Within Action") as duplicative of a prior multi-plaintiff action bearing Index No. 111230/01 (the "Prior Action") pending against it in this court. Crane Co. also moves pursuant to CPLR 3212 for summary judgment on the ground that it is not liable for products that it did not manufacture, supply or specify for use with its products. Plaintiff's position is that defendant Crane Co. knew or should have known that asbestos-containing components would be integrated with its products for their intended use and had a duty to warn against same.

Crane Co.'s motion to dismiss is denied. In *Contento v A.C.&S., et al.*, Index No. 121539/01 (Sup. Ct. NY Cty. 2012), this court considered Crane Co.'s virtually identical motion to dismiss that plaintiff's complaint as duplicative of an older multi-plaintiff action. Among other things, the court held that dismissal was unwarranted because the plaintiff had been severed from the multi-plaintiff action pursuant to court direction. Here too, it appears that while the Prior Action is still active in this court, it bears no relation to the Within Action, which was severed

therefrom in 2001 and maintained separately by plaintiffs ever since.¹

Crane Co. also argues that plaintiffs were required to commence a separate action to recover for those injuries which arose from Mr. Chierchia's lung cancer. In this regard, the record shows that Mr. Chierchia was initially diagnosed with asbestosis on October 14, 2000. He then commenced the Prior Action on June 5, 2001, along with several other plaintiffs, to recover for such injuries. Later that year, he commenced the Within Action in order to pursue his claims on an individual basis. On January 3, 2006, Mr. Chierchia was diagnosed with lung cancer and unfortunately passed away soon thereafter. On February 27, 2007, his estate amended the complaint to allege new causes of action for personal injuries and for wrongful death. The amended complaint expressly provides that Mr. Chierchia was diagnosed with lung cancer before he died.²

While asbestosis and lung cancer are distinct injuries, *see Fusaro v Porter Hayden Co.*, 145 Misc 2d 911, (Sup. Ct. NY Cty. 1989), *aff'd for reasons stated* 170 AD2d 239 (1st Dept 1991), plaintiffs are not required to commence separate actions to recover for these separate, albeit related harms. *See* September 20, 1996 Case Management Order, as amended May 26, 2011, section VI(E). What is important is that plaintiffs amended the original complaint, which had alleged personal injuries arising from asbestosis, within three years of the manifestation of Mr. Chierchia's lung cancer, and within two years of his passing. *See* CPLR 214-c; EPTL § 5-4.1. Therefore, plaintiffs' claims with respect to Mr. Chierchia's lung cancer are timely and proper.

Regarding its application for summary judgment, Crane Co. argues that it is not liable for

¹ In the interests of judicial clarity, however, the formal severance of plaintiffs from the prior action bearing Index No. 111230/01 in favor of plaintiff's individual action bearing Index No. 123078/01 is hereby effectuated.

² Attached thereto are several laboratory reports which confirm said diagnosis.

products that it did not manufacture, supply or specify for use with its products. Plaintiffs' position is that defendant Crane Co. knew or should have known that asbestos-containing components would be integrated with its products for their intended use and had a duty to warn against same.

Plaintiffs produced decedent Jerry Chierchia's former co-worker, Mr. Arthur Klansky, to provide testimony concerning the decedent's work history and alleged exposure. Mr. Klansky testified that he and the decedent worked together as pipefitters at a variety of commercial sites throughout New York City from 1966 through the early 1970s. With respect to the defendant, Mr. Klansky testified that the decedent was exposed to asbestos when he installed gaskets and packing on Crane Co. valves, and when he removed asbestos-containing insulation from such valves.

This court addressed near-identical issues in *Sawyer v A.C.&S., Inc.*, Index No. 111152/99 (Sup. Ct. NY Co. June 24, 2011) and *Defazio v A.W. Chesterton*, Index No. 127988/02 (Sup. Ct. NY Co. August 12, 2011), holding in both cases that Crane Co. had a duty to warn consumers against the hazards associated with asbestos because the evidence demonstrated that Crane Co. recommended the use of asbestos-containing insulation and packing in conjunction with its products. As in those cases, the submissions on this motion show that Crane Co. designed and supplied its products with asbestos-containing gaskets, packing, insulation, and cement. Crane Co.'s assertions that its valves did not require asbestos-containing insulation or packing to operate properly and that it did not specify the use of same on its products are therefore insufficient to shield it from suit. Accordingly, for the same reasons stated in *Sawyer, supra*, and *Defazio, supra*, this court finds that Crane Co. had a duty to warn Mr. Chierchia of the hazards associated with asbestos. See *Liriano v Hobart Corp.*, 92 NY2d 232, 237 (1998); *Berkowitz v A.C. & S., Inc.*, 288 AD2d 148 (1st Dept 2001).

Accordingly, it is hereby

ORDERED that Crane Co.'s motion for summary judgment is denied in its entirety, and it is further

ORDERED that Crane Co.'s motion to dismiss this action is denied in its entirety; and it is further

ORDERED that plaintiff Jerry Chierchia is severed from the prior multi-plaintiff action bearing Index No. 111230/01 and all of Mr. Chierchia's asbestos-related claims therein are permitted to be individually pursued, as they have been, by his estate, under Index No. 123078/01, and it is further

ORDERED that the Clerk of the Court is directed to transfer any documents related to plaintiff Jerry Chierchia that are currently located in the file bearing Index No. 111230/01 into the file bearing Index No. 123078/01, and it is further

ORDERED that the multi-plaintiff action bearing Index No. 111230/01 shall continue as to all remaining plaintiffs therein.

This constitutes the decision and order of the court.

DATED: 3-16-12



SHERRY KLEIN HEITLER
J.S.C.

FILED

MAR 26 2012

NEW YORK
COUNTY CLERK'S OFFICE