

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

2012 NY Slip Op 32006(U)

July 23, 2012

Sup Ct, NY County

Docket Number: 105917/04

Judge: Sherry Klein Heitler

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

JOHNSON, JOAN, ET AL.

INDEX NO.

105917/04

MOTION DATE

MOTION SEQ. NO.

04

MOTION CAL. NO.

A.O. SMITH WATER PRODUCTS CO.,
ET AL.

- v -

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*is decided as
per the decision of
7.23.12.*

FILED

JUL 30 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7.23.12

[Signature]
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
JOAN JOHNSON, Individually and as Executrix for the
Estate of CHARLES F. JOHNSON,

Index No. 105917/04
Motion Seq. 004

Plaintiff(s),

DECISION & ORDER

- against -

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

FILED

Defendants.

JUL 30 2012

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

NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendant Dana Companies, LLC ("Dana") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it. For the reasons set forth below, the motion is denied.

BACKGROUND

On April 15, 2004, plaintiff's decedent Charles F. Johnson and his wife Joan Johnson commenced this action to recover damages for personal injuries allegedly caused by Mr. Johnson's exposure to asbestos-containing products. Mr. Johnson was deposed on June 1, 2011 and July 13, 2011.¹ He testified that he worked as a truck mechanic for various companies and at various sites in New York City and Long Island from the late 1960's until 2002. One of his primary duties was to remove old engine gaskets and replace them with new gaskets. Plaintiff alleges that this process caused asbestos-containing dust to be released into his vicinity to which Mr. Johnson was exposed.

¹ Copies of Mr. Johnson's deposition transcripts are submitted as defendant's exhibits 3 and 4 ("Deposition").

Relevant to this motion is the process by which Mr. Johnson installed new head gaskets and exhaust manifold gaskets, including Victor-brand gaskets.² Dana filed the instant motion for summary judgment on the ground that Mr. Johnson did not testify that he was exposed to asbestos from this process. In this regard, Dana relies on Mr. Johnson's testimony that he handled gasket materials very carefully. In opposition, plaintiff contends that summary judgment should be denied because Mr. Johnson sufficiently identified Victor gaskets as a source of his asbestos exposure.

DISCUSSION

Summary judgment is a drastic remedy that must not be granted if there is any doubt about the existence of a triable issue of fact. *See Tronlone v Lac d'Aminate du Quebec, Ltee*, 297 AD2d 528, 528-29 (1st Dept 2002). To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant a court's directing judgement in its favor as a matter of law, and must tender sufficient evidence to demonstrate the absence of any material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); CPLR 3212(b). The failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993).

Mr. Johnson could not identify the brand(s) of gaskets that he removed from old vehicles. He testified that "[The gasket] usually falls apart when you take the unit apart" (Deposition p. 250). It is undisputed, however, that Mr. Johnson testified to having replaced these used gaskets with new Victor-brand gaskets throughout his career (Deposition pp. 178, 251-252, 254):

² It is undisputed that Victor gaskets were manufactured, sold, and distributed by Dana during the time period at issue.

- Q. Do you associate with gasket materials that you might have worked with any names of manufacturers?
- A. You got Victor, 3M's another one. Now, which one I worked on, I have no idea, or what truck or what company. I'm sure there's more out there on it.

* * * *

- Q. Did you ever work with any gaskets that you personally took directly out of its original packaging?
- A. Yeah, I had to open the box up....
- Q. Can you describe for me what any of these original boxes looked like?
- A. Cardboard, thin cardboard. Long. Flat. You take a Victor box, it would be, if my memory is correct, that would be for the gaskets for both up against the head or the block. For your exhaust intake, that would be a longer one. That's a six cylinder. It's a shorter one if it's an eight cylinder. And then you got gaskets that come in intake manifold gaskets. That's usually a pan or something like that. So that would be a bigger box where it came in. Head gaskets, the same thing. They come in the package, and it would be a little bit wider than what the unit is.

* * * *

- Q. Can you tell me any specific vehicle you recall using a Victor gasket on....
- A. A small vehicle like a pick up or car, Ford, Chevy. Chevys, I don't know much about it. It's a small unit, not these big ones.

He later described the process by which he typically installed new gaskets in great detail

(Deposition pp. 258-261):

- Q. Now, you mentioned that, you used the words "lay down" for the gasket, you mean you just placed it on?
- A. This is the block, okay? Here's the gasket. Everything is set in place hole for hole and everything else. Here's your head. You drop it down nice and easy to level it off. You don't do one of these with the head. It has to be precise. Anything short of that, you're going to lose it.

* * * *

- Q. By "precise," I take it you had to be very careful how you handle the gaskets; am I correct?
- A. Mm-hmm.
- Q. You didn't want to bend or damage them in any way?

A. No....

Q. You never cut it, correct....

A. No. No. No. You'd defeat the purpose.

* * * *

Q. And you never drilled any holes in the exhaust manifold gaskets, correct?

A. Put extra holes in them, no.

Q. And you never drilled any holes into any of the head gaskets, correct?

A. That's a no, no. If you got to cut them and drill holes, you got the wrong parts. Simple as that.

Dana argues that such evidence is insufficient to show that Mr. Johnson was exposed to asbestos from Victor-brand gaskets. In this respect, Dana relies on Mr. Johnson's testimony that he performed his work mindfully and precisely. However, it is error to infer that such testimony necessarily referred to a fear of asbestos, or that his work did not cause asbestos dust to be released into his vicinity. The obvious tenor of the testimony is that Mr. Johnson strove to achieve the best results by doing his work properly. As Mr. Johnson himself stated, "You have to take pride in what you do." (Deposition p. 260).

Ultimately determinative of this motion, however, is that during his deposition it was not elicited from Mr. Johnson whether his work on Victor gaskets caused him to be exposed to friable asbestos fibers. Nor has the defendant submitted evidence that its product could not have been the cause of the injury. These omissions give rise to a material issue of fact that must be presented to a jury. *See, e.g., Romanowski v Yahr*, 5 AD3d 985 (4th Dept 2004); *Feldman v Dombrowsky*, 288 AD2d 605 (3rd Dept 2001); *see also Moran v A.O. Smith Water Products, et al.*, Index No. 190433/09 (Sup. Ct. NY Co. Mar. 17, 2011). Thus, the defendant has not *prima facie* established its entitlement to summary judgment as a matter of law. In this regard, the court need not address or even consider the sufficiency of plaintiff's opposition. *Ayotte, supra*, at 1063,

see also Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985).

Accordingly, it is hereby

ORDERED that Dana Companies, LLC's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

FILED

JUL 30 2012

 NEW YORK
COUNTY CLERK'S OFFICE

DATED: 7.23.12

SHERRY KLEIN HEITLER
J.S.C.