

Walker v ABB, Inc.

2012 NY Slip Op 32046(U)

July 26, 2012

Supreme Court, New York County

Docket Number: 190433/11

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 : 190433/2011
WALKER, MURRAY N. SR.
vs.
ABB
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 190433/11
MOTION DATE _____
MOTION SEQ. NO. 003

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 7.26.12

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

FILED

AUG 03 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7.26.12


_____, 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
MURRAY N. WALKER, SR. and BARBARA WALKER,

Index No. 190433/11
Motion Seq. 003

Plaintiffs,

-against-

ABB, INC., et al.,

Defendants.

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

DECISION AND ORDER

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos-related personal injury action, defendant Reichhold Chemicals ("Reichhold") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims against it on the ground that plaintiffs have presented no evidence of exposure to any Reichhold products. Thus, the defendant argues there are no genuine triable issues of fact with regard to plaintiff Murray Walker's exposure to asbestos. Plaintiffs oppose the motion as premature on the ground that discovery in this matter is not complete. Plaintiffs further contend that a jury could reasonably infer, based on the record now before the court, that Mr. Walker was exposed to asbestos from a Reichhold product.

Plaintiffs commenced this action on or about October 21, 2011. The complaint alleges that Mr. Walker developed mesothelioma from his exposure to asbestos-containing products manufactured or sold by the named defendants. On or about November 14, 2011, plaintiffs amended their complaint to add Reichhold as a defendant.

Mr. Walker was deposed over the course of eight days beginning on November 20, 2011,

which Reichhold attended.¹ His deposition was not completed due to his failing health. Mr. Walker died on December 27, 2011. During such eight-day period Mr. Walker testified extensively about his exposure to asbestos-containing products. Relevant to Mr. Walker's testimony that he installed electrical panel boards, plaintiffs assert such panel boards contained both asbestos blocks and phenolic plastic compounds that utilized asbestos as a filler material. On or about October 19, 2012, plaintiffs' counsel served answers to standard interrogatories which indicate that Mr. Walker was exposed to asbestos while working as an electrician from approximately 1952-1987 at various locations throughout Maine, New York, and New Jersey.

Reichhold does not dispute that it manufactured asbestos-containing products to be fit on the kinds of electrical panel boards on which Mr. Walker claims to have worked. Reichhold argues, however, that there is no specific evidence linking its products to any of the panel boards used by Mr. Walker, which he testified were manufactured by General Electric, Westinghouse, and Square D.

As it does not appear that Mr. Walker specifically named Reichhold in his testimony, it is on this ground that Reichhold has moved for summary judgment. While conceding this point, plaintiffs nevertheless contend that whether Reichhold was a source of Mr. Walker's exposure must be sought through further discovery. In this regard, the record shows that Reichhold has not produced discovery in this case, including its relevant sales records, which it claims to have transferred to another company called BTL in connection with Reichhold's sale of its phenolic molding compound division in 1986. To date, Reichhold has not provided any specific

¹ The defendant did not provide the court with a copy of Mr. Walker's deposition. However, the record contains portions of his deposition transcript, submitted as plaintiffs' exhibit A.

information regarding this sale, i.e., whether it was an asset or entity purchase and/or whether BTL assumed Reichhold's asbestos-related tort liabilities. In addition, plaintiffs claim they are in the process of scheduling the deposition of several fact witnesses, including one of Mr. Walker's former co-workers, who due to his own health issues has not yet been able to be deposed.

Reichhold asserts that even if it supplied phenolic molding compounds to General Electric, Westinghouse, or Square D, there is no amount of further discovery that could possibly show whether it supplied those materials during the relevant time period, that these particular manufacturers used Reichhold's products in their electrical panel boxes, or that the plaintiff worked on and was exposed to asbestos from his work with such equipment.

Reichhold's argument in this respect is incongruous given its failure to comply with plaintiffs' discovery requests. Before this court addresses this summary judgment motion on the merits, plaintiffs are entitled to use the discovery mechanisms provided by the Civil Practice Law and Rules and the New York City Asbestos Litigation ("NYCAL") Case Management Order ("CMO") to inquire into, among other things, how the sale of Reichhold's phenolic molding compound division was executed, whether or not it was an asset purchase, whether the buyer or the seller retained liabilities, and in whose custody, possession and control the relevant sales records are reposed. *See* CPLR 3212(f); *see generally* *Watson v Work Wear Corp.*, 202 AD2d 231 (1st Dept 1994).

Reichhold's reliance upon *Prestige Decorating and Wallcovering, Inc. v U.S. Fire Insurance Co.*, 49 AD3d 406 (1st Dept 2008), among other cases, is misplaced. Plaintiffs' desire to fully understand Reichhold's alleged asset sale to BTL does not amount to a fishing expedition. Indeed, the composition and consequences of that transaction may well dictate the

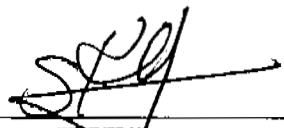
outcome of this motion.

Accordingly, it is hereby

ORDERED that Reichhold Chemicals' motion for summary judgment is denied without prejudice to renew upon completion of discovery. Plaintiffs are directed to submit demands for those items they contend are still outstanding to counsel for Reichhold within 20 days of service upon Reichhold of this decision and order with notice of entry. Any issues which may arise with respect to such discovery demands shall be raised in the first instance with the NYCAL Special Master in accordance with the CMO.

This constitutes the decision and order of the court.

DATED: 7-26-12



SHERRY KLEIN HEITLER

J.S.C.

FILED

AUG 03 2012

NEW YORK
COUNTY CLERK'S OFFICE