

Deer v Air & Liquid Sys. Corp.
2012 NY Slip Op 32210(U)
August 21, 2012
Supreme Court, New York County
Docket Number: 190261/11
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 : 190261/2011
DEER, MAXWELL
vs.
AIR & LIQUID SYSTEMS
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 190261/11
MOTION DATE _____
MOTION SEQ. NO. 002

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 *decided as per*

the memo decision
8.21.12

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

FILED

AUG 22 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8.21.12

[Signature]
_____, 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
MAXWELL DEER AND CAROLYN DEER,

Plaintiffs,

-against-

AIR & LIQUID SYSTEMS CORPORATION, et al.,

Defendants.
----- X

Index No. 190261/11
Motion Seq. 002

DECISION & ORDER

FILED

AUG 22 2012

NEW YORK
COUNTY CLERK'S OFFICE

SHERRY KLEIN HEITLER, J.:

In this asbestos-related personal injury action, defendant Georgia-Pacific LLC ("Georgia-Pacific") moves for summary judgment pursuant to CPLR 3212(b). For the reasons set forth below, the motion is granted.

BACKGROUND

Plaintiff Maxwell Deer was diagnosed with lung cancer in March of 2011. In July of 2011 Mr. Deer and his wife Carolyn Deer filed this action to recover for personal injuries allegedly caused by Mr. Deer's exposure to asbestos. Mr. Deer was deposed on September 13-14, 2011 and on October 17-18, 2011. Copies of his deposition transcripts are submitted as defendant's exhibit B ("Deposition").

Mr. Deer testified to asbestos exposure from a number of different sources. Among other things, Mr. Deer claimed that he was exposed during the renovation of his in-laws' home at 103rd Street in East Elmhurst, New York where he and his first wife lived for five years until 1956. Mr. Deer testified to being involved with "lots of repairs" at that home, including "spackling of cracks in the walls . . . lots of painting and varnishes and things like that," but "no major" repairs. (Deposition pp. 32-33). Mr. Deer further testified that he believed the spackle and gypsum he worked with during those repairs contained asbestos.

At issue on this motion for summary judgment is Mr. Deer's purported identification of Georgia-Pacific as a manufacturer of one of the products he used during those repairs. In relevant part, Mr. Deer testified as follows (Deposition pp. 33-34):

- Q. Okay. The spackle, do you know the brand name or manufacturer of the spackle that you worked with at that location?
- A. I knew the name spackle.
- Q. Okay.
- A. It could have been Georgia-Pacific. It could have been Kaiser Gypsum. I don't know. I don't recall, I should say. I do know I worked with that type of stuff.

Georgia-Pacific was mentioned only once more during the entire Deposition, when plaintiffs' counsel revisited Mr. Deer's testimony about the 1950's home repairs (Deposition pp. 384-86, objections omitted):

- Q. Okay, Do you know who manufactured any of the dry compound that you used?
- A. I don't recall.
- * * * *
- Q. Do you know who manufactured any of the wet compound you used?
- A. I don't recall.
- * * * *
- Q. You testified that at your wife's parents house that it could have been Georgia-Pacific or Kaiser Gypsum. Do you recall that testimony?
- * * * *
- A. Yes.
- Q. Do you believe that you ever used Georgia-Pacific compound?
- * * * *
- A. At some time in my career I did.

Georgia-Pacific asserts that Mr. Deer's deposition testimony is insufficient to identify a Georgia-Pacific product as a cause of his asbestos exposure. In support of this motion, Georgia-Pacific submits an affidavit sworn to on August 23, 2010 by Howard Schutte, a 25-year veteran of Georgia-

Pacific and former Vice President, Strategy and New Product Development, Georgia-Pacific Gypsum, LLC. In his affidavit Mr. Schutte states that Georgia-Pacific's Gypsum Division neither sold nor manufactured any asbestos-containing products until late 1965 when it acquired the Bestwall Gypsum Company. He further avers that Georgia-Pacific started selling dry joint compound without asbestos in 1973 and ceased manufacturing the asbestos-containing joint compound in May 1977.

Plaintiffs claim that summary judgment should be denied because Mr. Deer's testimony that he was exposed to asbestos-containing products manufactured by Georgia-Pacific raises a genuine issue of fact and further because Georgia-Pacific admits to having manufactured asbestos-containing products as early as 1965.

DISCUSSION

To make a *prima facie* case, a party moving for summary judgment must 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, if a defendant has made a *prima facie* showing of entitlement to summary judgment, the plaintiff must then demonstrate actual exposure to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). Although a plaintiff is not required to show the precise cause of his damages, he is required to show facts and conditions from which a defendant's liability may be reasonably inferred. *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995).

The identity of a manufacturer of a defective product may be established through deposition testimony (see *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 [1st Dept 1996]), but such evidence cannot be speculative or conjectural. See *Burr v Town of Hempstead*, 23 AD3d 595, 596 (2d Dept 2005). This is especially true here where the defendant manufactured asbestos-containing products for a limited period and the plaintiffs' allegations against it are neither corroborated nor connected to such

time period. In this case, Mr. Deer could only speculate as to whether he ever used the defendant's products, and even then, only testified to any such use during the 1950's, a time when indisputably asbestos-containing Georgia-Pacific brand joint compound did not yet exist. It would thus be impossible in this case for a fact finder to reasonably infer that Mr. Deer was exposed to asbestos from the defendant's product. *Reid, supra*. Moreover, Mr. Deer's uncorroborated testimony that he did at some point in his career use Georgia-Pacific brand joint compound and that such joint compound contained asbestos is insufficient to raise a triable issue of fact to defeat this motion. *See Perdicaro v A.O. Smith Water Products*, 52 AD3d 300 (1st Dept 2008).

Accordingly, it is hereby

ORDERED that Georgia-Pacific, LLC's motion for summary judgment is granted, and this action and any cross-claims against Georgia-Pacific are hereby severed and dismissed in their entirety; and it is further

ORDERED that this action shall continue against all the remaining defendants herein; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly

This constitutes the decision and order of the court.

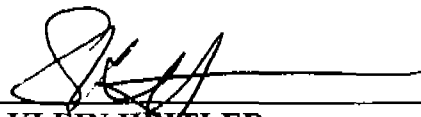
FILED

ENTER:

AUG 22 2012

NEW YORK
COUNTY CLERK'S OFFICE

DATED: 8-21-12



SHERRY KLEIN HEYTLER
J.S.C.