

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

2012 NY Slip Op 32257(U)

August 27, 2012

Supreme Court, New York County

Docket Number: 190429/11

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

DeWitt, Scott

INDEX NO. 190429/11

MOTION DATE _____

- v -
A.O. SMITH WATER PRODUCTS,
ET AL.

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

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 in accordance with the
memorandum decision dated Aug 27, 2012

FILED

AUG 31 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8-27-12

[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
SCOTT DEWITT,

Plaintiff,

- against -

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

Defendants.
----- X

SHERRY KLEIN HEITLER, J.:

Index No. 190429/11
Motion Seq. 002

DECISION & ORDER

FILED

AUG 31 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

In this asbestos personal injury action, defendant Karnak Corporation ("Karnak") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that plaintiff cannot show that he was exposed to asbestos by any product manufactured or sold by Karnak. For the reasons set forth below, the motion is denied.

BACKGROUND

This action was commenced on October 21, 2011 by plaintiff Scott DeWitt to recover for personal injuries caused by his exposure to asbestos. Mr. DeWitt alleges that he contracted lung cancer due to his exposure to asbestos-containing products at several worksites during his career as a roofer's helper in Florida and as a maintenance engineer in New York, among other jobs. Mr. Dewitt was deposed on December 2, 2011, December 8, 2011, and December 20, 2011. Portions of his deposition transcripts are submitted as defendant's exhibit B ("Deposition").¹

In relevant part Mr. DeWitt testified that in or about 1976 he worked for a roofing contractor for a year in St. Petersburg, Florida, and as a maintenance engineer at the Riverhead Nursing Home in Riverhead, NY from 1988 to 2002. He testified that as a roofer's helper in Florida he helped to remove

¹ At the request of the court, defendant submitted complete copies of the transcripts on July 25, 2012.

and replace the flat roofs of commercial buildings and schools. He also testified that he worked on the flat roof of the Riverhead Nursing Home. In connection with this work, Mr. DeWitt testified that he was exposed to asbestos from Karnak roofing cement when he breathed in dust caused by the removal of twenty to forty year old flashing, flashing cement, tar paper, and insulation materials. He believes that Karnak roofing cement was one of such old materials because he observed old Karnak containers on some of the roofs. (Deposition, p. 498). Mr. DeWitt also testified that the roofs and parapet walls on which he personally worked were resurfaced mostly using Karnak liquid cement. (Deposition, pp. 500-501, 505). He indicated that the Karnak liquid roofing cement stuck to his hands and that he would ingest some of it while eating lunch. He said it would get all over his face, hands, clothes, and shoes to the extent that he had to discard his apparel afterward. (Deposition pp. 595-96).

Defendant argues that Mr. Dewitt has failed to come forward with any proof that he inhaled asbestos fibers from products manufactured by Karnak and that any allegation that he was exposed to asbestos from a Karnak product is speculative.

DISCUSSION

A party moving for summary judgment must demonstrate the absence of any material issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); CPLR 3212(b). In asbestos-related litigation, should the defendant make a *prima facie* showing of entitlement to summary judgment, the plaintiff must show facts and conditions from which the defendant's liability may be reasonably inferred. *See Reid v Georgia Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995). 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).

Defendant's point is well taken regarding Mr. DeWitt's belief that the previously installed dried roofing material he was exposed to in Florida and New York included Karnak cement. Mr. Dewitt's

speculation that he was exposed to defendant's asbestos dust because he saw old Karnak cans on some of the roofs on which he worked does not surpass the test set forth in *Cawein v Flintkote Co.*, 203 AD2d 105 (1st Dept 1994) (Plaintiff failed to create a reasonable inference that he inhaled asbestos fibers from the defendant's product where evidence merely showed that unopened bags of the defendant's product were seen in the plaintiff's workplace, with no suggestion that those bags were used by or near the plaintiff).

However, a reasonable inference may be drawn that Mr. Dewitt was exposed to asbestos from the Karnak roofing cement that he personally applied to the roofs. In this respect, Mr. DeWitt's testimony was (Deposition, pp. 83-84, 496-97, 595-602):

Q: What did you do with the rolled roofing, if anything?

A: I would take it off the truck and bring it up the ladder and put it on top of the roof. I would assist to rolling the roofing out so they could mop over it. I think it was mostly a three or four ply application. I would also mop or squeegee the liquid Karnak that was in the cans.

* * * *

Q: This material that you said was in a can, do you know the brand name, trade name or manufacturer name of that material?

A: Karnak.

Q: What, if anything, did you do with that material?

A: I squeegeed and applied with a trowel to up -- we did mostly flat roofs so you had to apply it up to the parapet wall.

* * * *

Q: Do you believe you were exposed to asbestos from using this roofing cement?

A: Yes, ma'am.

Q: And how do you believe you were exposed to asbestos from using this roofing cement?

A: I believe when we applied it and when we did the demo removing it...

Q: So, generally when you used this Karnak roofing cement, this gooey product when you applied it in the Florida weather, would it dry fast or remain gooey?

A: It would remain gooey for a while...

* * * *

Q. Can you describe what would happen physically to you when you would use that product, installing it new, what would happen to it?

A. Installing it new, it was pretty messy, you would get it pretty much all over your hands, you know, your face, your clothes, your shoes. You pretty much have to throw away your clothes afterwards.

* * * *

Q. Would you have to eat after you would do this work?

A. Oh, sure, yes.

Q. And what would happen at that point.

A. You'd be eating Karnak. Yummy.

* * * *

Q. You testified previously that you got the Karnak product that you applied all over your tools and clothes and that you would subsequently eat food after getting this product everywhere. Do you know if this Karnak product contained asbestos, sir?

A. I believe it did.

Q. And what's your basis for believing that, sir?

A. I found out later that it did.

Q. How did you find or acquire that knowledge, sir?

* * * *

A. Basically training, word of mouth usually. Trades, trades talk a lot, it's a small world.

This testimony demonstrates that the plaintiff would become personally inundated with asbestos-containing Karnak roofing cement every time he used the product to repair or replace roofs. Coupled with the foregoing testimony, the following testimony raises the question whether it would then dry on him and/or flake off around him during the course of the day (Deposition, pp. 271-72; 502):

Q: So when you testified last Friday that it was part-time that was a mistake?

A: No, she misunderstood me. It was full-time, but down in Florida it was 120 degrees in the shade, so you would work an hour on and a half hour off in the shade, you wouldn't work. So it was every day...

A: They were half days because of the heat. You had to start early in the morning, you know, for five or six hours and then you would go an hour on and then an hour off depending on the sun.

* * * *

Q: And when you performed the roofing work, do you recall the percentage of time that you would use a Karnak product when performing all the roofing work?

A: It would be all day.

Q: So, for a full day's work you would have to use the Karnak product at all times during the day?

A: Yes.

In viewing the testimony in a light most favorable to plaintiff, as courts are required to do on a motion for summary judgment, *Gronski v County of Monroe*, 18 NY3d 374 (2011), this court believes that a trier of fact could reasonably infer that the plaintiff's extensive work with Karnak roofing cement caused him to be exposed to asbestos. *See Reid, supra*. Any inconsistencies within Mr. Dewitt's deposition testimony on which the defendant might rely goes only to the weight a jury would assign to such testimony at trial. *See Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996).

Accordingly, it is hereby

ORDERED that Karnak Corporation's motion for summary judgment is denied in its entirety.

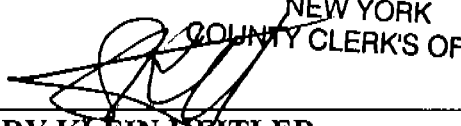
This constitutes the decision and order of the court.

FILED

AUG 31 2012

NEW YORK
COUNTY CLERK'S OFFICE

DATED: *Aug 27, 2012*



SHERRY KLEIN HEITLER
J.S.C.