

Sadowski v A.O. Smith Water Prods.

2012 NY Slip Op 32374(U)

September 7, 2012

Sup Ct, NY County

Docket Number: 190215/11

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER

PART 30

Index Number : 190215/2011
SADOWSKI, EDWARD

Justice

INDEX NO. 190215/11

vs.
A.O. SMITH WATER PRODUCTS
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

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 denied

*As per the memo
decision of 9.7.12*


FILED

SEP 13 2012

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 9.7.12

 _____, 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
EDWARD SADOWSKI and ALBERTA SADOWSKI,

Index No. 190215/11
Motion Seq. 004

Plaintiffs,

DECISION & ORDER

- against -

A.O. SMITH WATER PRODUCTS, et al.

Defendants.

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

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

BACKGROUND

Following a diagnosis of mesothelioma on May 3, 2011, plaintiff Edward Sadowski and his wife Alberta Sadowski commenced this action to recover for personal injuries allegedly caused by Mr. Sadowski’s exposure to asbestos-containing products during his career as a carpenter from 1955-1970, and as a construction superintendent from 1970-1983. Mr. Sadowski was deposed on June 20, 21 and 22 of 2011.¹ He died three months later on September 26, 2011.

From 1955-1970 Mr. Sadowski worked as a carpenter primarily for Golino Construction. In this capacity he was responsible for concrete form work for new construction and renovation projects for commercial buildings in the New York metropolitan area. Mr. Sadowski testified that

¹ Mr. Sadowski’s deposition transcripts are submitted as defendant’s exhibits B, C, and D.

other trades performed work in his presence on a daily basis during this time period (Deposition pp. 154-155):

- Q: You also mentioned doing some renovation work during the time you were at Golino Concrete. Do you recall any trades being around while you were doing renovation work?
- A: Yes.
- Q: Do you recall what type of trades?
- A: Here again, electricians, plumbers, sheet metal workers, sheetrock installers.
- Q: During the time period that you did renovation work at Golino, how frequently would you see trades on a job when you were doing renovation work?
- A: Every day.

Mr. Sadowski testified that he became a Superintendent of Construction for John Lowry, Inc., a general contractor, in 1970. In this role he supervised new construction and the renovation of various commercial buildings also in the New York metropolitan area until the company shut down in 1983. During that time he would travel throughout the buildings and oversee the other trades that worked on the project. He testified that because of his work he encountered the use of Georgia-Pacific joint compound, which created dust when sanded down in his presence and which exposed him to asbestos. (Deposition, pp. 92, 95-96, 101, 170-175):

- Q. Do you believe you were exposed to any other asbestos-containing material during your lifetime?
- A. Yes.

* * * *

- Q. Can you elaborate for me, please.
- A. I guess I mentioned the boilers, pumps. Turbines, floor covering. Roofing products, fire rated doors. Drywall products, joint compounds. More?
- Q. And whatever you recall, I'm just trying to get your best recollection.
- A. Chillers.

* * * *

- Q. You also mentioned joint compound, who manufactured the joint

compound?

A. US Gypsum, Georgia-Pacific.

* * * *

Q. And with respect to the joint compound, how do you believe you were exposed as a result of that work?

A. Well, after the joint compound dried, usually sanded it down and the asbestos in the joint compound became airborne.

* * * *

Q: Sir, you've mentioned several products and manufacturers. Am I correct you have a general recollection of these products; is that correct?

A: Yes.

Q: And you can't specifically put them at any specific site; is that correct?

A: Yes.

* * * *

Q. Now, yesterday you mentioned Georgia-Pacific joint compound. Is it fair to say that you can't place the Georgia-Pacific joint compound at a specific time and location during the course of your career?

A. I couldn't do it, no.

Plaintiff described the packaging and the nature of the Georgia-Pacific joint compound he encountered (Deposition, pp. 172, 174) and testified that Georgia-Pacific did not include information on its packaging whether its joint compound contained asbestos. (Deposition p. 175).² He said he learned about asbestos in the 1970's through other sources.

Defendant seeks summary judgment on the ground, among other things, that Mr. Sadowksi

² Q. Do you have any personal knowledge as you sit here today whether any of the Georgia-Pacific joint compound that you believe you observed actually contained asbestos?

A. It never had any markings indicating asbestos.

Q. So was that no, you don't have any knowledge?

A. I don't have knowledge of that, it was not known throughout the industry.

(*Id.* p. 175)

could not specifically identify a location or year to show when and/or where he alleged he was exposed. Georgia-Pacific bases its claim on the premise that it only placed asbestos-containing joint compound on the market for national distribution beginning in 1967, that it produced both asbestos-free and asbestos-containing all purpose joint compound from 1973 to 1977, and ceased to manufacture asbestos-containing joint compound altogether in 1977. Defendant asserts that plaintiffs can therefore only speculate whether Georgia-Pacific's joint compound exposed Mr. Sadowski to asbestos.

DISCUSSION

To obtain summary judgment, a movant must establish its cause of action or defense sufficiently to warrant judgment 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). Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate the existence of a factual issue. *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 (1986). In this respect, the plaintiff must demonstrate that there was exposure to asbestos fibers released from defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). The plaintiff is not required to show the precise causes of his damages. It need only show "facts and conditions from which defendant's liability may be reasonably inferred." *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 462 (1st Dept 1995).

Here, as in *Reid, supra*, Mr. Sadowski's testimony sufficiently identifies Georgia-Pacific's asbestos-containing joint compound being used and creating dust in his presence throughout his career as a superintendent. He also testified that other trades installed sheetrock in his presence.

In light of Georgia-Pacific's admission that all of its joint compound products manufactured from 1965 to 1973 contained asbestos, any Georgia-Pacific joint compound product that was used in his presence during his final years with Golino Construction and his first three years with John Lowry, Inc. would have necessarily contained asbestos. Combined with Mr. Sadowski's testimony that he supervised the various trades on a daily basis, including those workers who installed sheetrock and sanded dried joint compound, there are facts and conditions from which a jury might reasonably infer the defendant's liability which preclude granting summary judgement in its favor.

Accordingly, it is hereby

ORDERED that Georgia-Pacific LLC's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 9.7.12



SHERRY KLEIN HEITLER
J.S.C.

FILED
SEP 13 2012
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NEW YORK