

Smith v A.C. and S

2012 NY Slip Op 32633(U)

October 11, 2012

Supreme Court, New York County

Docket Number: 126765/02

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

Beatrice Smith

- v -

A.C. v A. Inc. (COURTER)

INDEX NO. 126765/02
MOTION DATE _____
MOTION SEQ. NO. 002
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 10-11-12

FILED
OCT 17 2012
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10-11-12
[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
BEATRICE SMITH, as Executrix of the Estate of
WILLIS R. GAVIGAN,

Index No. 126765/02
Motion Seq. 002

Plaintiff,

DECISION & ORDER

- against -

A.C. and S, et al.,

Defendants.

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

In this asbestos-related personal injury action, defendant Courter & Co. ("Courter") 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

FILED
OCT 17 2012
COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff's decedent Willis Gavigan is alleged to have developed asbestos-related pleural disease and laryngeal cancer as a result of his occupational exposure to asbestos-containing materials. Relevant to this motion is plaintiff's allegation that Courter steamfitters working in proximity to Mr. Gavigan at the Astoria powerhouse located in New York ("Astoria") during the early 1960's and at the Ravenswood powerhouse, also located in New York, during the mid-1970's ("Ravenswood"), contributed to such exposure.

Before he could be deposed, Mr. Gavigan passed away in March of 2009. His longtime co-worker, Mr. John Shaughnessey, was produced to testify on his behalf with regard to both

powerhouses.¹

Courter argues it is entitled to summary judgment with respect to Ravenswood because Mr. Shaughnessey was unable to specifically place Mr. Gavigan in the vicinity of Courter employees at that powerhouse. With respect to Astoria, Courter relies on Mr. Shaughnessey's testimony that steamfitters could perform their duties without releasing any asbestos-containing material into their surroundings. Courter also relies on Mr. Shaughnessey's testimony that the steamfitters and other trades did not work directly underneath Mr. Gavigan while he and Mr. Shaughnessey were welding. In opposition plaintiff points to Mr. Shaughnessey's testimony that Courter was the only steamfitter outfit at Astoria and that their activities caused asbestos dust to fill the air around them. Plaintiff argues that Mr. Shaughnessey's testimony raises a material issue of fact regarding Courter's liability sufficient to preclude summary judgment.

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, a movant must establish its cause of action or defense sufficiently to warrant judgment in its favor as a matter of law, and must render sufficient evidence to demonstrate the absence of any material issues of fact. CPLR 3212(b); *Zuckerman v City of New York*, 49 NY2d 557, 569 (1980); *Mechanical Corp. v Afgo Mechanical Services, Inc.*, 71 AD3d 493 (1st Dept 2010).

¹ Mr. Shaughnessey originally submitted an affidavit in connection with this case which was sworn to on November 28, 2011 (Plaintiff's exhibit A). By arrangement with the defendant he was later deposed on Tuesday June 5, 2012 (Plaintiff's exhibit B, "Deposition").

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 asbestos cases, the plaintiff must show that there was exposure to asbestos fibers released from the defendant's products. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept. 1994). Moreover, the plaintiff is not required to show the precise causes of his damages, but only to show facts and conditions from which defendant's liability may be reasonable inferred. *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 462 (1st Dept 1995).

Mr. Shaughnessy worked with Mr. Gavigan at Astoria in or about 1962 and at Ravenswood in or about 1976. He averred that he and Mr. Gavigan were exposed to asbestos from Courter employees (plaintiff's exhibit A, ¶ 5):

... Courter & Company employed the Steamfitters who would work on pumps and valves, scraping this asbestos insulation off and changing asbestos gasket material. The asbestos gasket material had to be cut and hammered out from sheet material to fit flanges at the connection of pipes and valves. All of this work created asbestos dust which Mr. Gavigan and I inhaled.

At his deposition, Mr. Shaughnessey confirmed that he and Mr. Gavigan were both members of boilermakers union Local 5 in New York City beginning in the early 1960's and as such worked together at various powerhouses. He testified to his belief that Courter steamfitters were present at both the Ravenswood and Astoria powerhouses during the times he and Mr. Gavigan worked there (Deposition p. 57-59, objections omitted):

- Q Other than the work we've already discussed at the Ravenswood, is there any other way that you believe Mr. Gavigan was exposed to asbestos during the time you worked there together? . . .
- A Like I said, you walked around those powerhouses, that stuff was coming down. The big steam lines are covered with it and a little vibration here and there, the

dust would be raining down, you know.

Q So am I correct what you're referring to is insulation --

A Right.

Q -- that would've been coming off of steam lines?

A Right, you walk out it would be on your clothes and stuff.

Q And that insulation would've been coming off due to vibrations from plant operations?

A No, just from people make lifts and they hit the side wall with something. There are people on scaffolds going up and down. There's always something going on.

Q The people who would've disturbed the insulation on the steam lines, were these also Thomas O'Connor boilermakers?

A They could've been steamfitter, they could've been boilermakers, you know. I don't know if Courter was in there or what. I know there was one steamfitter outfit.

Q Do you have a specific recollection of seeing Courter steamfitters at the Ravenswood powerhouse during the time you worked there with Mr. Gavigan? . . .

A I'd say yes, but then I get mixed up with Ravenswood and Astoria, because I was going back and forth. I'd say they are in both powerhouses.

* * * *

Q Can you tell me whether the Courter steamfitters were onsite specifically the time you worked there with Mr. Gavigan? . . .

A I'd say they were there.

Mr. Shaughnessey later testified that Mr. Gavigan was exposed to asbestos as a result of the work of Courter steamfitters at Astoria (Deposition p. 78-80, 149, objections omitted):

Q Other than the use of an asbestos blanket to perform the welding work, do you believe Mr. Gavigan would have been exposed to asbestos in any other way from fixing this main beam in the building? . . .

A Well, like I said, they had steamfitters working on the valves there again. Courter was there. They had electricians running around disturbing asbestos that would have been already put down.

Q Now, with regard to steamfitters you just mentioned the name Courter.

A Right.

Q Do you recall observing Courter steamfitters at the Astoria powerhouse --

A Yes.

Q -- when Mr. Gavigan was present?

A Right.

Q Do you recall seeing Courter steamfitters working in the vicinity of Mr. Gavigan at the Astoria powerhouse?

A Well, they were around us. You know, they were on the side, both sides and stuff. We were up top and they were underneath us, like, so.

Q Can you tell me how far underneath you and Mr. Gavigan the steamfitters were working?

A Twenty feet or so.

* * * *

Q Do you recall what work specifically the steamfitters were performing at the Astoria powerhouse?

A Working on valves. They got valves on every floor.

Q Can you describe for me the work that the steamfitters performed on valves at the asbestos powerhouse?

A They had asbestos gaskets they put in and they seal and took up with the bolts, the ratchet wrenches that seal them together.

* * * *

Q You stated that Bob was exposed to asbestos from the work of Courter steamfitters in Astoria?

A Well, there was a lot of fitters there working around, you know, with gaskets and stuff and asbestos was floating around the building. As I said, it would start up in the penthouse and they start laying that asbestos all over the place, on the side walls, and so it was raining asbestos.

Q I'm just focused on the Courter steamfitters. I know there was a lot of asbestos in a lot of other places, too, but as far as the work that the Courter steamfitters go [sic] at Astoria, the times that you were there, was Bob exposed to asbestos from their work?

A I would say yes.

Courter claims that for safety reasons its steamfitters could not have worked underneath

Mr. Gavigan's welding station at Astoria (see Deposition pp. 132-33). Courter further argues

that, even assuming Mr. Gavigan did work above them despite the safety hazards associated with

their work, there is no evidence that Courter employees utilized or disturbed asbestos-containing products in Mr. Gavigan's presence.

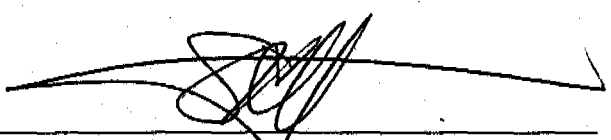
To the contrary, Mr. Shaughnessey's testimony identifies Courter as a source of Mr. Gavigan's exposure at both Ravenswood and Astoria sufficient to defeat summary judgment. While his testimony may be in conflict at times, on a motion for summary judgment the court is not to determine the witnesses' credibility, but whether there exists a factual issue requiring a trial. *Ferrante v American Lung Assn.*, 90 NY2d 623, 631 (1997); *Gulf Ins. Co. v Transatlantic Reinsurance Co.*, 69 AD3d 71, 86 (1st Dept 2009); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996).

Accordingly, it is hereby

ORDERED that Courter & Co.'s motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 10.11.12



SHERRY KLEIN HESSLER
J.S.C.

FILED
OCT 17 2012
COUNTY CLERK'S OFFICE
NEW YORK