

Herlihy v A.F. Supply Corp.

2013 NY Slip Op 33282(U)

December 9, 2013

Supreme Court, New York County

Docket Number: 190149/11

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

Justice

Index Number : 190149/2011
HERLIHY, ARTHUR D.
vs
A F SUPPLY CORP.
Sequence Number : 006
SUMMARY JUDGMENT

INDEX NO. 190149/11
MOTION DATE _____
MOTION SEQ. NO. 006

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 12-9-13**

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

FILED

DEC 13 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12-9-13

 _____, 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
ARTHUR HERLIHY and GAIL HERLIHY,

Index No. 190149/11
Motion Seq. 006

Plaintiffs,

FILED

DECISION & ORDER

-against-

DEC 13 2013

A.F. SUPPLY CORPORATION, *et al.*,

FILED

COUNTY CLERK'S OFFICE
Defendant(s). NEW YORK

DEC 13 2013

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

COUNTY CLERK'S OFFICE
NEW YORK

In this asbestos personal injury action, defendant A.F. Supply Corporation ("AF Supply") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that there is no evidence to show that plaintiff Arthur Herlihy was exposed to asbestos from a product distributed by A.F. Supply. For the reasons set forth below, the motion is denied.

Mr. Herlihy worked at Brooklyn Boiler Repair ("Brooklyn Boiler") as a helper, mechanic, and foreman from 1962 to 1992. On or about February 17, 2011 Mr. Herlihy was diagnosed with lung cancer. Plaintiffs commenced this action against numerous defendants, including AF Supply, on April 21, 2011.

Mr. Herlihy was deposed over the course of five days in June and July of 2011.¹ He died before his *de bene esse* deposition could be taken. Prior to his death he offered extensive testimony concerning his alleged exposure to asbestos-containing products while at Brooklyn Boiler and identified the manufacturers and suppliers of numerous types of equipment and products which he believed contributed to his injuries. He testified that he was responsible for the repair of coils, pumps,

¹ Copies of Mr. Herlihy's deposition transcripts are submitted as defendant's exhibit B ("Deposition").

steam generators, and boilers, among other types of equipment. Mr. Herlihy testified that his work required him to chisel out the asbestos-containing brick and cement inside boiler doors and replace it with new brick and cement, and that he used asbestos-containing firebrick and millboard to insulate boilers. He also testified that AF Supply was one of his employer's major equipment and material suppliers (Deposition p. 127):

Q. Do you know who supplied any of the materials that were used by Brooklyn Boiler to the shop or to the company?

A. As far as suppliers, right?

Q. Suppliers.

A. Suppliers. A.F. Supply, I believe. What's his name. I got one on 124th Street in upper Manhattan, it was H&C . . . that's it, H.C. Oswalt, something like that, H.C.

Two of Mr. Herlihy's co-workers, Dominick Pane and Alfred Sikorski, were also deposed in this matter.² Mr. Pane worked for Brooklyn Boiler from 1961 to 1980 performing general plumbing work as a helper and mechanic. He worked with Mr. Herlihy at job sites throughout New York City and in the Brooklyn Boiler shop. Mr. Sikorski worked for Brooklyn Boiler from 1962 to 1997, also as a helper and mechanic. He worked with Mr. Herlihy at numerous job sites, and specifically recalled an occasion where Mr. Herlihy removed a boiler access door that was sealed with asbestos-containing cement and rope. Mr. Sikorski testified that both he and Mr. Herlihy were exposed to asbestos from boiler block insulation and cement.

Both of Mr. Herhily's co-workers testified that Mr. Herhily was exposed to asbestos-containing products purchased from AF Supply (Pane Deposition pp. 52-53, Sikorski Deposition pp. 66-68, 125):

Q. Did Arty have to work with any asbestos materials to do that work?

A. Yes, the gaskets. . . .

Q. Did you observe Arty doing that work?

² Mr. Pane's January 19, 2012 deposition transcript is submitted as plaintiff's exhibit E ("Pane Deposition"). Mr. Sikorski's February 2, 2012 deposition transcript is submitted as plaintiffs exhibit F ("Sikorski Deposition").

- A. Yes.
- Q. How many occasions did you observe him working with valves in the shop?
- A. I don't know. Five times. . . .
- Q. Did he have to handle any asbestos containing materials to do the work on the valves?
- A. The gasket.
- Q. Why do you believe the gaskets contained asbestos on the valves?
- A. They said they're asbestos gaskets.
- Q. Who said?
- A. The supply house.
- Q. Who supplied the gaskets?
- A. A.F. Supply.

* * * *

- Q. Okay. Are there any other ways that you believe Mr. Herlihy was exposed to asbestos or came in contact with any asbestos materials in changing the handholes on this particular boiler that we haven't talked about yet?
- A. Yeah. We used to seal them up again with, with the stuff that I told you about, Stic-Tite.
- Q. Okay. And this is the dry, powdered cement material?
- A. That you mix it with water.
- Q. On that job, do you recall him mixing that or you?
- A. I did. He applied it.
- Q. Was he close by you when you mixed it up?
- A. Yes.
- Q. How far away was he?
- A. Most of the time you were working in close proximity anyway -- on these jobs, maybe two or three feet away.
- Q. This Stic-Tite material, could you just briefly tell us how you went about mixing it up?
- A. Dump it in the bucket, dust flies all over the place. And then you add water and mix it up to a consistency where it's, it's not too liquid but where it sticks on.
- Q. Okay. Now, this Stic-Tite material, why, why do you believe that contained asbestos?
- A. Everybody called it asbestos.
- Q. Are these other mechanics in the trade that you're referring to or somebody else?
- A. No. Everybody in the shop, you know, used to call it, you know, asbestos. We used to have pallets of it in the shop.

* * * *

- Q. Now you indicated that Mr. Herlihy applied the Stic-Tite cement --
- A. Yeah.
- Q. -- to the handholes after they were in place. What did he use to apply it?
- A. A trowel. Sometimes, you know, if he couldn't get the trowel in there, you used your hands.
- Q. Okay. The Stic-Tite that was in the storage area that you had mentioned, do you know where that was obtained from?
- A. Sometimes we used to get it from Oswald, Oswald Supply. And sometimes we used to get it from -- what do you call it -- A&F.

The defendant contends that Mr. Herlihy's deposition is inadmissible as against it because AF Supply was unable to cross-examine Mr. Herlihy prior to his death³ regarding the extent of his alleged asbestos exposure from products it supplied or distributed. The defendant further contends that even if AF Supply generally supplied equipment and materials to Mr. Herlihy's employer, it would be speculative to assume that such were the asbestos-containing products to which Mr. Herlihy was allegedly exposed. Plaintiffs asseert that the combined testimonies of Messrs. Herlihy, Pane and Sikorski raise a triable issue of fact whether AF Supply distributed at least some of the asbestos-containing products at issue and are therefore liable for plaintiffs' injuries.

Summary judgement is a drastic remedy that must not be granted if there is any doubt about the existence of a triable issue of fact. *Tronlone v La d'Amiante du Quebec, Ltee*, 297 AD2d 528, 528-529 (1st Dept 2002). In an asbestos personal injury action, should the moving defendant make a *prima facie* showing of entitlement to summary judgment as a matter of law, plaintiffs must show facts and conditions from which the defendant's liability may be reasonably inferred. *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995). All reasonable inferences should be resolved in the plaintiff's favor. *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dept 1990).

Even were this court to conclude that Mr. Herlihy's testimony is inadmissible against the

³ The deposition took five days and consisted of 876 pages of transcript. It is difficult for this court to accept that there was so little opportunity for the defendant to cross-examine the plaintiff considering its length.

defendant at trial, the court may nevertheless consider such evidence in opposition to a summary judgment motion so long as it does not form the sole basis for the court's determination. *See Oken v A.C.&S.*, 7 AD3d 285, 285 (1st Dept 2004). Here Messrs. Pane and Sikorski clearly corroborate plaintiffs' allegations and Mr. Herlihy's deposition testimony need not be disregarded.

The testimony of these three deponents, combined with the fact that the defendant does not deny that it regularly supplied and distributed asbestos-containing products to Brooklyn Boiler during the relevant time period, constitute facts and circumstances from which the defendant's liability may be reasonably inferred. *See Reid, supra*. As set forth above, Mr. Herlihy testified that AF Supply was one of Brooklyn Boiler's major suppliers, and both Messrs. Pane and Sikorski testified that the asbestos-containing products Mr. Herlihy worked with were purchased from AF Supply. Any perceived inconsistencies in their testimonies goes only to the weight to be accorded thereto by the trier of fact, and does not entitle the defendant to summary judgment. *See Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013); *Alvarez v NY City Hous. Auth.*, 295 AD2d 225, 226 (1st Dept 2002); *Josephson v Crane Club, Inc.*, 264 AD2d 359, 360 (1st Dept 1999); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996).

Accordingly, it is hereby

ORDERED that A.F. Supply Corporation's motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: 12 9 13


 COUNTY CLERK'S OFFICE
 NEW YORK
 SHERRY KLEIN HEITLER, J.S.C.

FILED

DEC 13 2013

COUNTY CLERK'S OFFICE
 NEW YORK