

Carlucci v A.W. chesterton Co., Inc.

2013 NY Slip Op 33283(U)

December 9, 2013

Supreme Court, New York County

Docket Number: 190486/11

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

CARLUCCI, DANIEL T., ETAL.
- v -
A.W. CONSTRUCTION Co., INC., ETAL
(UNION CARBIDE)

INDEX NO. 190486/11
MOTION DATE _____
MOTION SEQ. NO. 11
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 12-9-13.

FILED

DEC 13 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12-9-13



HON. SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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
DANIEL T. CARLUCCI and BARBARA CARLUCCI,

Index No. 190486/11
Motion Seq. 011

Plaintiffs,

DECISION & ORDER

-against-

A.W. CHESTERTON CO., INC., et al.,

FILED

Defendants.

DEC 13 2013

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

COUNTY CLERK'S OFFICE
NEW YORK

Plaintiffs Daniel Carlucci and his wife Barbara Carlucci commenced this action to recover for personal injuries allegedly caused by Mr. Carlucci's occupational exposure to asbestos. Defendant Union Carbide Corporation ("UCC") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint against it on the ground that Mr. Carlucci could not have been exposed to asbestos from a UCC product. As more fully set forth below, the motion is denied.

Mr. Carlucci worked as a truck driver from 1953 to 1990. He was generally responsible for picking up and delivering goods to locations throughout New York and New Jersey. During the time period from 1955 through the third quarter of 1963 Mr. Carlucci worked for Johnson Brothers, a trucking outfitter. On this job, Mr. Carlucci testified¹ that he personally loaded and transported hundreds of fifty-pound bags of a white powdery substance labeled "Union Carbide" and "asbestos" from UCC's Bound Brook facility to other facilities (Deposition pp. 54-55):

- Q. Okay. Now what did those bags contain while you were working for Johnson while at Bakelite Bound Brook?
- A. They were all bags of asbestos.

¹ Mr. Carlucci's discovery and *de bene esse* depositions were taken in January and April of 2012. Copies of his deposition transcripts are submitted as defendant's exhibits 4-7 ("Deposition" and "Video Deposition").

- Q. Okay. How do you know what those bags contain?
- A. Most of the time it said it. It said Union Carbide and it said asbestos.
- Q. It said asbestos right on the bag?
- A. Um-hmm
- Q. How heavy were those bags?
- A. 50 pounds.
- Q. What were those bags made of?
- A. Paper.
- Q. What color were those bags.
- A. Tannish with print on them, you know.
- Q. Do you recall the color of the print, sir?
- A. I am colorblind. I guess black or blue, something like that.

Mr. Carlucci explained that every time he went to UCC's Bound Brook facility to pick up a shipment at least one of these bags broke open (Video Deposition pp. 29-30, objection omitted):

- Q. How often would you encounter broken bags of Union Carbide asbestos when you would load during your time at Johnson [sic] Brothers; do you remember?
- A. Every single load there was always a bag broken.
- Q. Would there be multiple bags broken? . . .
- A. Sometimes. At least two or three.
- Q. Were you --
- A. Sometimes they would split open on the bottom and go all over the floor and all in your hair, your eyes and your nose and your clothes. Even though we wore aprons to protect our clothes, we didn't wear anything else.

UCC contends that the products described by Mr. Carlucci could not have been UCC's own asbestos fiber, which it sold under the trade name Calidria, because it did not sell Calidria during the time Mr. Carlucci worked for Johnson Brothers. In support, UCC submits the affidavit of former UCC employee John Walsh, who avers that Calidria was first sold to a company in Alabama on November 1, 1963 and that there were no sales of Calidria within the State of New Jersey prior to

April of 1964.² It is interesting to note, however, that by UCC's own words "Calidria Asbestos was initially sold as Union Carbide Asbestos."³ This earlier trade name precisely comports with Mr. Carlucci's testimony identifying it as such.

Plaintiffs contend that whether or not Calidria was available before 1963 it is clear that UCC utilized other kinds of asbestos at its Bound Brook facility during the entirety of Mr. Carlucci's employment with Johnson Brothers. Specifically, plaintiffs highlight the fact that UCC manufactured asbestos-containing phenolic molding compounds to be used in Bakelite, an early form of plastic. Plaintiffs submit UCC purchase records which document the sale of hundreds of thousands of pounds of asbestos to the Bound Brook facility during the relevant time period⁴ as well as the March 21, 2008 deposition testimony in several unrelated asbestos personal actions of a UCC corporate representative who testified that UCC utilized asbestos from the 1940's through the 1970's.⁵ Plaintiffs also submit UCC's 1989 disclosures to the Environmental Protection Agency in which the company admits that it "manufactured and sold Bakelite which contained asbestos from approximately 1939 until mid-1974."⁶

Without giving credence to Mr. Carlucci's testimony that he is color blind, UCC claims that the white powdery product identified by Mr. Carlucci could not have been a phenolic molding compound because UCC's phenolic molding compounds were inherently dark colored.⁷ Therefore,

² Mr. Walsh's affidavit, sworn to June 7, 2013, is submitted as defendant's exhibit 9.

³ Plaintiffs' exhibit 9, p. 1.

⁴ Plaintiffs' exhibit 10.

⁵ Plaintiffs' exhibit 5, p. 27-29.

⁶ Plaintiffs' exhibit 9, p. 3

⁷ In this respect, UCC relies on the affidavit of polymer-science engineer Dr. John Moalli, sworn to June 4, 2013 (defendant's exhibit 11). Dr Moalli avers that "phenolic molding compounds are inherently dark colored materials that are unlikely to be produced in a white-colored form." He further states, based on his review of UCC's internal documents and trade literature, that UCC

UCC argues that it is entitled to summary judgment because Mr. Carlucci's description of the product he encountered is incorrect. However, this argument merely goes to the weight to be afforded to Mr. Carlucci's testimony by the trier of fact, which should not be determined by this court on a summary judgment motion. *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

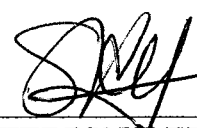
ORDERED that Union Carbide Corporation's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

FILED

DEC 13 2013

COUNTY CLERK'S OFFICE
NEW YORK



SHERRY KLEIN HEITLER
J.S.C.

DATED: 12-9-13

"never manufactured or sold a white phenolic molding compound." *Id.* ¶ 6.