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| Bailen v Air & Liquid Sys. Corp. |
| 2014 NY Slip Op 30567(U) |
| March 3, 2014 |
| Sup Ct, NY County |
| Docket Number: 190318/12 |
| Judge: Sherry Klein Heitler |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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EDDIE HOWARD BAILEN and RENA
NORENE ASH-BAILEN,

Index No. 190318/12
Motion Seq. No. 013

Plaintiffs,

DECISION & ORDER

-against-

AIR & LIQUID SYSTEMS CORP., as Successor by
Merger to Buffalo Pumps, Inc., et al.,

Defendants.

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SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant Philips Electronics North American Corporation (hereinafter "Magnavox")¹ moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that plaintiffs Eddie Howard Bailen and his wife Rena Bailen have failed to produce sufficient evidence that Mr. Bailen was exposed to asbestos fibers released from a Magnavox product. For the reasons set forth below, the motion is denied.

Mr. Bailen was diagnosed with mesothelioma in or about June of 2012. He and his wife commenced this action on July 25, 2012 to recover damages for personal injuries allegedly caused by Mr. Bailen's occupational exposure to asbestos-containing products. Mr. Bailen had worked as a radio and television repairman for Rite-Way Television in Omaha, Nebraska from approximately 1962 through 1975. The complaint alleges, among other things, that Mr. Bailen developed mesothelioma as a result of his exposure to asbestos-containing radios and televisions.

¹ There is no dispute that Philips Electronics North American Corporation ("PENAC") is responsible for the Magnavox brand.

Mr. Bailen was deposed over three days in October of 2012.² His *de bene esse* videotaped deposition was taken on January 3, 2013.³ In relevant part Mr. Bailen testified that he was exposed to asbestos-containing products in connection with his work as a radio and television repairman while working at Rite-Way Television, including radios and televisions manufactured by Magnavox.⁴ (Video Deposition, pp. 94, 99-101). Mr. Bailen testified that the Magnavox radios on which he worked contained heat shields made from asbestos, and that he was exposed to asbestos particles that originated from those heat shields when he brushed and blew the dust out from inside the radios (Deposition, pp. 127-28; Video Deposition, pp. 74-75, 79, 81, 85, 94, 107-109, 112). He also testified that he was exposed from handling the heat shields while making repairs. (Deposition, pp. 255-56; Video Deposition, pp. 76, 109-111).

Pointing to his testimony that only some televisions and most radios on which he worked contained asbestos heat shields, the defendant argues that summary judgment is required because Mr. Bailen could not remember anything distinctive about working with Magnavox radios and televisions as opposed to other brands which he repaired at Rite-Way. Defendant argues that plaintiffs have failed to prove that the Magnavox products on which Mr. Bailen worked contained asbestos or that his work on Magnavox products specifically brought him into contact with asbestos-containing heat shields. Defendant cannot dispute, however, that Mr. Bailen has clearly identified Magnavox as a contributing factor to his injury.

² Copies of Mr. Bailen's deposition transcripts are submitted as plaintiffs' exhibit A ("Deposition").

³ A copy is submitted as plaintiffs' exhibit B ("Video Deposition").

⁴ Mr. Bailen also identified products manufactured by GE, Philco, Raytheon, RCA, Sylvania, Zenith, Motorola and Westinghouse. (Deposition, pp. 104-105; Video Deposition, pp. 73, 99-100).

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. *Tronlone v Lac D’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-529 (1st Dept 2002). To obtain summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant a court’s directing judgment in its favor as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Zuckerman v City of New York*, 49 NY 2d 557, 562 (1980). Should the moving defendant make a *prima facie* showing of its entitlement to judgment as a matter of law, only then must the plaintiff demonstrate that there was actual exposure to asbestos fibers released from a particular defendant’s product. *See Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this regard, the plaintiff need only 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).

The defendant does not deny that the Magnavox products at issue contained asbestos heat shields. Nor does defendant submit any evidence besides Mr. Bailen’s deposition testimony to disprove plaintiffs’ allegations. These submissions alone are not sufficient to sustain defendant’s burden in the first instance to show that the Magnavox products to which Mr. Bailen referred could not have contributed to his injuries. In this regard, the court need not consider the sufficiency of plaintiffs’ opposition. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). It is apparent to this court, however, that Magnavox’s arguments hinge on only a small portion of Mr. Bailen’s testimony. Read in its entirety, Mr. Bailen’s testimony cogently identifies the heat shields associated with Magnavox radios and televisions as a source of his exposure (Video Deposition pp. 73, 78-79, 89-90, 94, 99-100, 102, 112 objections omitted):

Q. Do you know who manufactured the radios that you repaired while working at Rite-Way?

A. A number of people. Do you want names?

Q. If you can give us the names of the manufacturers that you recall doing the radio repair work on, yes.

A. GE, Magnavox, Motorola, Philco, RCA, Sylvania, Westinghouse, Zenith, I think that's it.

* * * *

Q. Back to the heat shields, how many heat shields did you observe inside the radios that you repaired for Rite-Way?

A. Most of them had one, some had more than one.

Q. Do you know who manufactured the heat shields that you observed inside the radios?

A. Whoever manufactured the radio, they came with the radio. . . .

Q. You mentioned that you believe that heat shields were made out of asbestos?

A. Yes.

* * * *

Q. You gave the jury a list of the names of the manufacturers of the radios that you recall repairing at Rite-Way a few minutes ago ?

A. Yes.

Q. Which, if any, of those do you recall observing these heat shields in?

A. Every one of them. I don't think there is any of them that didn't have heat shields, any brand. There might have been a couple of models that didn't, but I don't remember any that didn't have heat shields. . . .

Q. It's your testimony that each of those manufacturers made radios that had heat shields; is that correct?

THE WITNESS: Yes.

Q. Do you believe you repaired radios manufactured by each of those eight manufacturers that had heat shields in them?

THE WITNESS: Yes.

Q. And do you believe you were exposed to asbestos from radios manufactured from each of those manufacturers due to the heat shields that were inside of them?

THE WITNESS: Yes.

* * * *

Q. Magnavox radios was another name you gave us, do you believe you were exposed to asbestos from the work you performed on Magnavox radios during your time at Rite-Way?

A. Yes.

* * * *

Q. . . . Do you know who manufactured the televisions that you did this repair work on while working at Rite-Way?

A. The same ones as the radios except I did a few Raytheon televisions, not a lot of them. But most of them were the same television sets as the radios, General Electric, Magnavox. Motorola, Philco, RCA, Sylvania, Westinghouse, Zenith and then I guess Raytheon I had to add onto that. . . .

Q. Okay. Do you believe you were exposed to asbestos from the work that you performed on these televisions?

THE WITNESS: Yes.

Q. Why is that?

A. Because most of these older televisions had the same type heat shields as radios did.

* * * *

Q. Do you know who manufactured the heat shields that were inside the televisions?

A. The manufacturers of the television. . .

Q. Do you know what the heat shields that you encountered in the televisions that you repaired, do you know what they were made out of?

A. Asbestos.

* * * *

Q. Do you believe you were exposed to asbestos from the heat shields inside televisions manufactured by Magnavox?

A. Yes.

Contrary to the defendant's contentions, this testimony raises a material issue of fact from which the defendant's liability may be reasonably inferred. Plaintiff has identified Magnavox and explicitly testified that he breathed in asbestos dust from its heat shields. *See Reid, supra*, at 463; *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996).⁵

In response to plaintiffs' opposition, the defendant impermissibly submits for the first time in reply (*see Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 [1st Dept 1993]) a report from

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The defendant's reliance on this court's decision in *Krameisen v Air & Liquid Systems, Corp.*, 2012 NY Misc. LEXIS 460, Index No. 190429/10 (Sup. Ct. NY. Co. Jan. 30, 2012) is misplaced. In that case, the plaintiff did not even identify the defendant as a manufacturer or supplier of any of the asbestos-containing products to which he was allegedly exposed.

Mark Durham⁶, an industrial hygienist retained by the defendant to investigate whether Magnavox radios and televisions contained asbestos. Far from resolving on this motion that Magnavox products were asbestos-free, the Durham Report merely surmises that the documents he reviewed “fail to corroborate [Mr. Bailen’s] testimony” and states that he was “not able to conclude with any certainty” whether Mr. Bailen was exposed to asbestos from a Magnavox radio or television. At most, the Durham Report is inconsistent with Mr. Bailen’s testimony, and the weight to be accorded thereto is not to be decided by the court, but by the trier of fact. *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013); *Dollas, supra*, at 321.

Accordingly, it is hereby

ORDERED that Philips Electronics North American Corporation’s motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 3. 3. 14


SHERRY KLEIN HEITLER, J.S.C.

⁶ Mr. Durham’s May 29, 2013 unsworn Report, submitted in response to plaintiffs’ opposition, is supported by a November 14, 2013 affidavit that merely states his report is based on his own expertise and personal knowledge and the foundational information referred to therein (“Durham Report”).