Smith v A.O. Smith Water Prods.
2015 NY Slip Op 31810(U)
September 25, 2015
Supreme Court, New York County
Docket Number: 190299/13
Judge: Sherry Klein Heitler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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ERNEST G. SMITH and CLAUDIA SMITH,

Plaintiffs,

-against-

A.O. SMITH WATER PRODUCTS, et al.,

Defendants.

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Index No. 190299/13
Motion Seq. 005

DECISION & ORDER

Sherry Klein Heitler, J.

In this asbestos personal injury action, defendant Cleaver-Brooks, Inc. ("CB") moves pursuant to CPLR 3212 for summary judgment dismissing this action in light of the First Department's recent decision in *Hockler v William Powell Co.*, 129 AD3d 463 (1st Dept 2015).[1] For the reasons set forth below, CB's motion is denied.

Plaintiff Ernest Smith worked as a plumber from 1984 to 1996 during which time, as a component of renovation work, he disassembled, removed, and replaced plumbing equipment such as boilers, pumps, and valves in buildings throughout New York City, including the Empire State Building. In July of 2013 Mr. Smith was diagnosed with mesothelioma. He commenced this action on August 22, 2013 and was deposed over three days in September of 2013. Mr. Smith testified that from 1984 to 1989 he disassembled hundreds of boilers so that they could be replaced with new ones. Many of these were CB cast-iron sectional boilers.

CB previously sought summary judgment in this case on the ground that any CB boiler Mr. Smith encountered would not have been old enough to be in need of replacement since CB only first started manufacturing cast-iron sectional boilers in September of 1985. By order dated March 9,

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[1] As set forth *infra*, the court will treat this motion as a CPLR 2221(e) motion to renew since it is premised on a perceived intervening change in the law.

2015 ("Order") I denied CB's motion,[2] explaining that CB did not supply any documentary evidence to support the claims made by its corporate representative regarding its various product lines. As such, I held that CB's argument raised a credibility issue best resolved at trial. CB did not appeal from that Order.

The Appellate Division, First Department thereafter issued its decision in *Hockler v Powell*, *supra*. In that case, Mr. Hockler had worked as a salvager for several years during the early 1980's. He alleged that he developed mesothelioma as a result of his occupational exposure to asbestos while salvaging scrap metal from equipment located in vacant buildings including asbestos-containing pumps and valves. According to his testimony some of those valves were manufactured by William Powell Company ("Powell"). Powell sought summary dismissal of Hockler's action on the ground that it owed no duty to warn Mr. Hockler of the hazards associated with asbestos since he was not a foreseeable user of its products and his activities were not a foreseeable use of its products. By order dated October 20, 2014 I denied Powell's motion, and Powell appealed therefrom to the First Department.

Noting that this particular situation "has not been squarely addressed by the courts of this State" the First Department relied on Restatement (Second) of Torts § 402A in formulating the issue presented to it in *Hockler* on appeal as "whether salvaging and dismantling constitute foreseeable uses of a product." *Hockler* at 464. In reversing my October 20, 2014 order the First Department found that Mr. Hockler's junk salvage work was not a reasonably foreseeable use of the valves manufactured by Powell and concluded that as "plaintiff did not use Powell's manufactured product in a reasonably foreseeable manner and his salvage work was not an intended use of the product, the

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[2] A copy of my Order is annexed hereto and made a part hereof.

complaint should have been dismissed." *Id.*

On the basis of *Hockler*, CB again moved for summary judgment on June 18, 2015 on the new ground that the disassembly of its boilers by the plaintiff in this case was not a reasonably foreseeable use of its product. The motion was assigned to Justice Peter Moulton of this court. By order dated August 11, 2015 Justice Moulton found that "[w]hile this motion is denominated as one for summary judgment, it is based on a perceived change in the law that would amend Justice Heitler's prior decision."[3] He accordingly transferred the motion to me. *See Dinallo v DAL Elec.*, 60 AD3d 620, 621 (2d Dept 2009) ("[a] motion for leave to renew is the appropriate vehicle for seeking relief from a prior order based on a change in the law"). I agree and hereby deem CB's current motion to be a motion to renew pursuant to CPLR 2221(e)(2), which provides, in relevant part:

> (e) A motion for leave to renew . . .
>
> 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
>
> 3. shall contain reasonable justification for the failure to present such facts on the prior motion.

The court heard oral argument on August 24, 2015. A transcript thereof is included as part of the record on this motion.

DISCUSSION

CB argues that here, as in *Hockler*, Mr. Smith's disassembly work was not a reasonably foreseeable use of its boilers. Plaintiffs respond that *Hockler* represents a unique scenario beyond the limits of foreseeability which is not present in the case at bar. Plaintiffs assert that the facts of this case are supported by settled law in New York that Mr. Smith may recover for his injuries because they are the direct result of his foreseeable use of CB's boilers. *See Hartnett v Chanel, Inc.*, 97 AD3d

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[3] A copy of Justice Moulton's decision is annexed hereto.

416, 419 (1st Dept 2012), lv. denied 19 NY3d 814 (2012).

I agree that by its very language *Hockler* is framed narrowly to shield product manufacturers from product liability claims brought by salvage workers whose interactions with their products are entirely unrelated to their intended use and functionality. While the First Department may have framed the issue broadly, i.e., "whether dismantling constitutes a reasonably foreseeable use of a product," its definitive holding was unmistakably limited, that "plaintiff's *salvage* work was not a reasonably foreseeable use *of the valves manufactured by Powell*". *Hockler*, 129 AD3d at 464-65 (emphasis added). At no point did the appellate court pronounce that plaintiffs who disassemble products during routine maintenance or in connection with renovations cannot recover from product manufacturers in strict liability.

Contrary to CB's assertions, Mr. Smith's work was not so analogous to Mr. Hockler's work as to make the *Hockler* decision controlling here. Mr. Smith was a trained plumber, not a salvager. Unlike Mr. Hockler, who apparently had no technical knowledge of the products and equipment he demolished and salvaged, Mr. Smith spent a career working with boilers and their associated parts and components. Mr. Hockler's conduct consisted of ripping, cutting, breaking, and smashing, anything he could to salvage the desired metal for his employer. "A lot of this stuff was very old stuff, covered in — what I know now is asbestos. We would rip it off, smash it off, cut it off. Any way we could get it off these valves and pumps, cut or smash, break any way we could get them out." *Hockler*, 129 AD3d at 464. Mr. Smith, on the other hand, used his plumbers tools - saws, hammers and chisels - to carefully disassemble and remove CB boilers from their existing frameworks so that they could be replaced and so that the heating systems to which they belonged could continue to function. Put another way, while Mr. Hockler's work was not even superficially related to the operation of a heating system, Mr. Smith's skillful preparation of boiler equipment for removal was

an integral, direct, necessary, and therefore foreseeable aspect of product replacement projects.

CB's claim that it could not have foreseen its boilers being dismantled in this manner are completely discredited by the testimony of its own current and former corporate representatives, Mr. John Tornetta and Mr. George Provance, both of whom were presented to have knowledge of CB's various product lines. They testified, respectively, as follows (plaintiffs' exhibit 7, pp. 131-132; plaintiffs' exhibit 9, pp. 17-18; plaintiffs' exhibit 10, pp. 821-822):

Q. . . . What's the expected life, if you will, of a Cleaver-Brooks boiler?

A. I would hate to throw a time on it. I have seen them when they are being taken out in two years, and I have seen ones that are 30 and 40 years old. [4]

* * * *

Q. By job file, what do you mean by that?

A. Every boiler that Cleaver-Brooks sells, it maintains a job file on a specific boiler.

Q. So Cleaver-Brooks maintains files on every boiler that it sold?

A. Yes. There are some exceptions, and if we were aware that a boiler was scrapped, completely destroyed, taken out of service, cut up, prior to our beginning the microfilming process, which was probably in the early '70s, that file may have been thrown away once we were notified that the boiler was scrapped . . . .

* * * *

Q. Leaving repairs aside, Cleaver-Brooks certainly knew that at the end of that boiler's life, whether it was 20 years, 30 years, or 40 years, that asbestos insulation would have to be removed to begin the process of getting that boiler out of wherever it was?

A. I don't want to disagree with you but --

Q. Well, if Cleaver-Brooks disagrees with me, then please say Cleaver-Brooks disagrees with me.

A. The removing of the insulation, so a boiler can be taken out isn't necessarily something that's done in every case, no.

Q. Nor did I say it was.

A. Okay.

Q. So let's try the question again. Cleaver-Brooks knew that external insulation which

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[4] In point of fact, this testimony contradicts the assertion made by CB on its previous summary judgment motion that its sectional boilers would have been too new for removal during the time period at issue in this case.

included the three asbestos products they specified, could be and would be disturbed on occasions where a boiler had to be removed from a site; right? They knew that would happen?

A. It could be, yes.

Q. They knew that insulation could not stay intact if you're trying to remove a boiler of this size from wherever location it was? . . .

A. It is possible, yes. Certainly boilers have been taken out of their location without removing anything but the piping attached to it and taken off the location as one piece.

Given such testimony, there can be no question that CB knew its boilers could have a lifespan of as little as two years, that its boilers would be dismantled before new ones were installed, and that asbestos would likely be disturbed during the removal process if its boilers were removed in more than one piece. It goes without saying that this work would have to be performed by individuals with experience and skill, not junk salvagers. CB even went so far as to keep records of its products' installation and dismantling. Together these facts create a material question of fact on the foreseeability issue in this case.

In utilizing Restatement (Second) § 402A the Appellate Division relied on several out-of-state cases, *Wingett v Teledyne Industries, Inc.*, 479 NE2d 51 (Ind 1985), *Kalik v Allis-Chalmers Corp.*, 658 F. Supp. 631 (WD Pa. 1987), and *High v Westinghouse Elec. Corp.*, 610 So. 2d 1259 (Fla. 1992), all of which are distinguishable from the case at bar. In *Wingett*, the plaintiff filed suit for injuries he suffered while removing ductwork which had been installed in a foundry to collect dust and sand from the foundry's machinery. Five years after the ductwork was first installed, the foundry decided to remove the ductwork and install a new reclamation system. The foundry's independent contractor hired the demolition crew which employed Wingett. As part of the demolition his job was to go out onto a segment of the ductwork, wrap a cable around it, attach the cable to a crane to support the ductwork, and cut the metal that held the ductwork up with a torch. When Wingett cut the metal he fell to the floor with the ductwork. The court held that the ductwork manufacturer owed

no duty to warn Wingett "of any risks related to his work as part of the demolition" since the "dismantling and demolition of the ductwork was not a reasonably foreseeable use of the product." *Id.* at 56. Notably, Wingett's gravity-related injury had nothing to do with the design of the ductwork or its component parts. In this case, it is alleged that Mr. Smith would not have been injured were it not for the fact that CB designed and manufactured its products to include asbestos.

In *Kalik*, owners of a scrap yard brought claims against General Electric ("GE") after PCB-contaminated oil leaked out of discarded GE electrical components onto their land. The court held that "the dismantling and processing of junk electrical components was not a reasonably foreseeable use of GE's product." *Kalik*, 658 F. Supp. at 635-36. Similarly, in *High*, a scrap salvage worker was exposed to dangerous PCB's while dismantling old electrical transformers. The court found, "under the circumstances in the instant case", that the transformers' manufacturers could not be held strictly liable for the plaintiff's injuries. *High*, 610 So. 2d at 1262.

Both *Kalik* and *High* relied upon *Johnson v Murph Metals, Inc.*, 562 F. Supp. 246 (ND Tx. 1983).[5] In *Johnson*, the defendant manufactured automotive batteries, which, after their useful life, were resold in order to recycle the lead in the batteries. During the recycling process, the batteries were destroyed, the lead was extracted, and then the lead was introduced into a smelter. The plaintiffs, who were employees of the smelting company, alleged that they were exposed to harmful lead fumes and lead dust. In dismissing the plaintiffs' claims against the battery manufacturer, the court held that it was "untenable to find that the creation of dangerous gases due to the smelting of scrap metal was a "use" of defendant's automotive batteries." *Id.* at 249.

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[5] It is important to note that *Johnson* focused on the "user" of a product in defining the limits of liability. The court explained that liability does not attach where a product is destroyed or transformed prior to the damage alleged, as opposed to a "user's" contact with the product before such transformation.

Kalik, Johnson, and *High* involved the manipulation of products in ways not envisioned by their manufacturers. The matter before the court today is a far cry from this narrow line of cases. The plaintiff here had nothing whatsoever to do with the recovery of parts or the salvaging of scrap metal. As a skilled plumber involved in renovation work, he was primarily responsible for disassembling old boilers, a task that CB was very much aware would have to be completed before new boilers could be installed in their place.

Given this distinction, the court rejects CB's position that, like *Hockler*, this case is unique. Plaintiffs have argued that there are thousands of injured laborers and skilled trade workers like Mr. Smith whose foreseeable duties required them to disassemble and remove equipment as part of routine replacement projects. I believe that the First Department intended for *Hockler* to affect the claims of salvage workers only.

Accordingly, I find that whether Mr. Smith's alleged exposure to asbestos from the CB boilers he disassembled was reasonably foreseeable is a triable issue of fact, and it is hereby

ORDERED that CB's motion is denied.

This constitutes the decision and order of the court.

DATED: 9.25.15

SHERRY KLEIN HEITLER, J.S.C.