Lustenring v Empire Ace
2002 NY Slip Op 30178(U)
May 6, 2002
Supreme Court, New York County
Docket Number: 105155/01
Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

JOHN LUSTENRING, JOHN MATTESON and ARTHUR BARDI,

Plaintiffs,

- against -

EMPIRE ACE, JOHN CRANE, INC., THE OKONITE COMPANY and SPIRAX SARCO, INC.,

Defendants.

Index No.: 105155/01
105240/01
105713/01

DECISION/ORDER

The court's ruling on plaintiff's offer of various documents on the state of the art issue is as follows:

The documents that plaintiff seeks to introduce concern knowledge of manufacturers other than defendants as to the hazards of asbestos. The courts have repeatedly ruled that they have discretion to admit as against a defendant manufacturer documents relating to other manufacturers' knowledge of asbestos. Such documents have been admitted on the ground that the defendant "had a duty to warn about all dangers which it 'should have known to exist'." Caruolo v. John Crane, Inc., 226 F3d 46, 55 (2d Cir 2000), citing Baker v. St. Agnes Hosp., 70 AD2d 400 (2d Dept 1979); George v. Celotex Corp., 914 F2d 26 (2d Cir 1990). As held in Caruolo: "Because these documents reflected other industry members' knowledge of asbestos dangers -- dangers which plaintiffs were permitted to argue that [defendant, there Crane], as an industry member, should have known to exist -- the district court properly admitted the

documents." (Id.)

The courts have rejected arguments by defendants that it is error to admit any document that the particular defendant was not "copied on." In rejecting such arguments, they have reasoned that the defendants "had a duty to 'stay abreast' of all emerging information concerning 'damages in the product of which warning should be given to users.' " (Hamilton v. Garlock, Inc., 96 F Supp 2d 352, 355 [SDNY 2000], citing Cover v. Cohen, 61 NY2d 261 [1984].) A manufacturer's duty to stay abreast of knowledge about the dangers of its product extends to knowledge "as gained through research, adverse reaction reports, scientific literature and other available methods." (Baker v. St. Agnes Hosp., 70 AD2d at 406 [drug manufacturer].)

The state of the art concerns knowledge that was "reasonably foreseeable or scientifically discoverable at the time of plaintiff's exposure." (George v. Celotex Corp., 914 F2d at 29.) Thus, a document is not inadmissible on the state of the art because the defendant never received or saw a copy of it or because the document was not published. (Id.) Rather, if the document contains information about the knowledge of other manufacturers, it is for the jury to determine whether the defendant against whom the document is admitted "reasonably should have known of the information comprising the contents of the report, not of this one specific report itself." (Id. at 30.)

As the state of the art applies only to knowledge that was reasonably foreseeable, documents will not be admitted against a defendant on the state of the art where the documents are "secret internal memos of any one company that were not shared with others in the industry." (Hamilton v. Garlock, Inc. 96 F Supp 2d at 355.)

Documents Offered Against Okonite[1]

Applying these standards, the court rejects Okonite's objections to JM 112 (National Research Council, Proceedings of the Eighth Meeting of the Associate Committee on Asbestos, June 10, 1935); Okonite 56 & 57 (1935 and 1937 minutes of the Association of American Railroads Meetings, Medical and Surgical Section); Raybestos 467 (summary of November 23, 1933 meeting between Johns-Manville Corp. ["JM"] and Raybestos-Manhattan, Inc. ["Raybestos"], regarding an agreement between JM and Raybestos as to joint action by members of the textile group of the Asbestos Institute "looking toward standardized methods of dust control"); and Raybestos 477 (US Treasury Dept Public Health Reports, January 4, 1935, containing article on "Effect of Asbestos Dust on the Lungs of Asbestos Workers").

Okonite objects to the relevance of these documents, principally on the ground that it was not a member of the associations whose minutes are offered, that it did not receive the documents and that, if published (e.g., Raybestos 477), the documents were not made available for general distribution. On the authority cited above, these objections are without merit, as the relevance of the documents does not depend on whether Okonite had actual knowledge of the specific documents, but on whether they contained information about the knowledge of other manufacturers that Okonite "reasonably should have known" - that is, should have known had it exercised reasonable diligence.

Okonite also objects to certain of the above documents on the ground that it was not a member of the "asbestos industry"or that the documents (e.g., Raybestos 477) are irrelevant

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[1]By stipulation of plaintiffs and John Crane, these documents will be admitted against John Crane unless the objections by Okonite are sustained.
No objection is made to the authenticity of the documents.

because they relate to asbestos hazards in a textile factory. These objections are also without merit. Okonite's implicit contentions that the asbestos industry is limited to asbestos textile manufacturers as opposed to manufacturers of asbestos containing products, and that the knowledge of the textile manufacturers is irrelevant to the knowledge of the manufacturers of asbestos containing products, are unsupported by the record. Moreover, so far as appears from the record, the state of the art literature and studies rarely refer by their terms to specific asbestos containing products such as cable or gaskets and packing. It is for the jury to determine whether manufacturers of such asbestos containing products should have known of the dangers of the asbestos fiber used in their products, given other asbestos manufacturers' knowledge of the dangers of asbestos.

Okonite also objects to Raybestos 426a, 419 and 452. 426a is a letter from JM's General Attorney to Raybestos' president, dated May 3, 1939, referring to publications of Dr. Gardner of the Saranac Laboratory on asbestos and asbestosis. This letter raises a question as to whether Dr. Gardner was entitled to publish this material, given that his research was funded by a group of members of the asbestos textile industry, and that he had agreed to a proposal that "the results of these studies shall become the property of the contributors" to whom any reports "shall be submitted for approval * * * before publication." Raybestos 419 is a letter dated September 25, 1935 on the letterhead of a publication named "Asbestos" to the president of Raybestos, concerning publication of material on asbestosis, and noting that in the past: "Always you have requested that for certain obvious reasons we publish nothing, and, naturally your wishes have been respected." Raybestos 452 is a letter from JM's Secretary to Raybestos' President, dated November 3, 1941, stating that he had informed the publisher of "Asbestos" that JM and

probably Raybestos would not object to a review of a book on "Pneumoconiosis," but that he felt that a number of her subscribers would dislike an article on this subject. The letter continues: "I had in mind the ostrich-like attitude which has been evidenced from time to time by some members of the Industry. While I did not overemphasize this point with Miss Rossiter * * *, I am inclined to believe she will omit any review of the book in question."

These documents refer to or suggest the suppression of information about asbestos hazards by JM or Raybestos, and are in the nature of secret internal memos of the two companies that would not be shared with other companies. They are inadmissible on this ground.[2] In addition, as there is no claim of recklessness against Okonite (or any other defendant in this action), the prejudice from these documents, based on the concealment they suggest, outweighs their probative value.

Documents Offered Against John Crane and Spirax Sarco

John Crane and plaintiffs have stipulated as to the admission of certain documents. However, the parties have not reached agreement as to ATI 10, 11 and 12 (P's 18), and P's 19. ATI 10 is the minutes of the Asbestos Textile Institute (hereafter "ATI") Air Hygiene Committee, dated March 7, 1956. ATI 11 is the minutes of the Board of Governors of the ATI dated March 7, 1956. ATI 12 is the minutes of the general meeting of the ATI dated March 8, 1956, and P's 19 is the minutes of the General Meeting of the ATI dated February 11, 1966.

John Crane and Spirax Sarco both object to these documents on the grounds that they were

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[2]The court notes that plaintiffs submitted a ruling of this court (Moskowitz, J.) in Cardinal v. Garlock (Index No 108440/96), which admitted Raybestos 452. However, in this case, the document was admitted only against JM, which was a party to the action.

not members of the ATI and did not receive the minutes. They also object on the ground that ATI was an association of textile manufacturing companies.

For the reasons stated above in connection with the Okonite objections, these objections should be overruled. To the extent that a ruling in the Paccione/Kingsland cases (Index No. 122292/00, 123551/00) is to the contrary, the court declines to follow the ruling based on the court's further consideration of the legal standards applicable to state of the art evidence.

The documents admitted pursuant to this ruling will be admitted with a limiting instruction that they are not admitted for the truth of the statements made in the documents but on the issue of knowledge of the dangers of asbestos. This court will confer with the parties as to the proper wording of the limiting instruction, and, in the event of any dispute, will hear argument on the record on this issue.

The court agrees with Okonite that certain of the underlining in the documents is prejudicial (e.g., handwritten underlining in the last paragraph of Raybestos 467 regarding generation of regular dust count reports for use in future litigation). All documents admitted pursuant to this ruling shall have any handwritten notations or handwritten underlining redacted. In addition, the Legal Counsel Report on price discrimination will be redacted from P's 19 on request.

This constitutes the ruling of the court.

Dated: New York, New York
May 6, 2002

MARCY FRIEDMAN