

Wilkinson v Air & Liquid Sys. Corp.

2013 NY Slip Op 30590(U)

March 26, 2013

Supreme Court, New York County

Docket Number: 190091/12

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

WILKINSON, CLAUDE ALFRED

INDEX NO. 190091/12

- v -

AIR + LIQUID SYSTEMS CORP.,
(KOHLEK) ETAL

MOTION DATE _____

MOTION SEQ. NO. 02

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

FILED

MAR 27 2013

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the
memorandum decision dated 3.26.13

NEW YORK
COUNTY CLERKS OFFICE
MAR 27 2013

FILED

Dated: 3.26.13

[Signature]
HON. SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

NOT FULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

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

-----X
CLAUDE WILKINSON,

Index No. 190091/12
Motion Seq. 002

Plaintiff,

DECISION & ORDER

- against -

AIR & LIQUID SYSTEMS CORP., *et. al.*,

Defendant(s).

FILED

MAR 27 2013

**NEW YORK
COUNTY CLERKS OFFICE**

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

In this asbestos-related personal injury action, defendant Kohler Co. ("Kohler") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it. For the reasons set forth below, the motion is denied.

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'Aminate du Quebec, Ltee*, 297 AD2d 528, 528-529 (1st Dept 2002). In asbestos-related litigation, once the moving defendant has made a *prima facie* showing of entitlement to judgment as a matter of law, the plaintiff must then demonstrate that there was actual exposure to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this regard, it is sufficient for the plaintiff to 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).

Plaintiff Claude Wilkinson commenced this action on or about February 21, 2012. The amended complaint alleges that he was exposed to asbestos containing products manufactured, distributed, or sold by Kohler, among others. Mr. Wilkinson was deposed on April 11, 2012, April 18,

2012, and April 19, 2012. Copies of his deposition transcripts are submitted as defendant's exhibit F ("Deposition"). Mr. Wilkinson testified that from 1955 to 1959 he worked with his father as an apprentice repairman. He identified Kohler among other brands of boilers that he encountered during this time period and testified that he was exposed to asbestos therefrom (Deposition pp. 61, 66, 123-126, objections omitted):

Q What type of work did Crotty Boilermakers do?

A They repaired and made boilers.

Q When you say they made boilers, what did that entail?

A Well, sometimes -- well, I never seen them actually make a boiler from start to finish. Sometimes they would have to cut a part off and reweld another part on or something like that, but, you know, like I said, they repaired. Most of the time I seen them do was repair work.

Q And what types of sites did Crotty Boilermakers do these repairs at?

A Apartment buildings, a couple of theaters I remember and that was it. Mostly apartment buildings and theaters.

* * * *

Q Do you remember who made any of the boilers that you worked on with your father for Crotty Boilermakers?

A. Oh, American Standard, Kohler, I think Kewanee, Weil-McLain and Burnham. One or two others, but I can't think of their names right now.

* * * *

Q Mr. Wilkinson, you told us yesterday that -- you told us the names of some of the boilers yesterday you recalled working around during the period of time you worked for Corotty. Do you recall that? . . .

Q . . . Is it fair to say you have a general recollection that you have in [sic] working around those boilers?

A Yes. . .

Q . . . Can you tell me generally what your job duties were when you worked for Corotty?

A Mostly I was like a helper or apprentice.

Q And who did you help?

A My father and his partner, a guy by the name of Rudy.

Q What type of work did they do?

A Well, they mostly did repairs, if something was broke or something needed to be

replaced, they had to replace it and that was it . . .

Q . . . And when you asked yesterday whether or not you were exposed to asbestos as a result of work that was performed while you were with Corotty, you said yes. Can you tell us how you believed you were exposed to the asbestos?

A Because sometimes they had to remove certain insulations around the pipe in certain areas in order to get that part or replace the part they needed to replace.

Q So you said around the, I think you said, pipes in certain areas. Right?

A Uh-huh.

Q Would the certain areas include the exterior of the boilers?

A Yes.

Q And when they removed the asbestos insulation from the exterior of the boilers, what did the atmosphere look like?

A You got a certain amount of dust and debris.

Q And did you breathe that dust?

A I guess so, yes.

Q And the work that you just described that was performed on boilers, would those have been the boilers that you testified -- withdrawn. You told us how you believe you were exposed to asbestos as a result of work performed on boilers. Would those have been the same boilers that you spoke about yesterday? . . .

Q . . . And it would include Kohler. Correct?

A Yes.

The defendant does not dispute that its boilers contained asbestos during the relevant time period. Instead, defendant cites to portions of Mr. Wilkinson's testimony on cross-examination for the proposition that his allegations are speculative and inconsistent. In this regard, the defendant argues that while Mr. Wilkinson generally recalled encountering Kohler boilers, he had no specific recollection of ever working on or around same (Deposition p. 109, objections omitted):

Q Sir, I believe you previously testified that while working with your father while he was employed by Crotty you encountered a Kohler boiler; is that correct? . . .

A . . . I can't remember that.

Q Do you ever recall working on or around a Kohler boiler?

A No.

Q Do you believe you were ever exposed to asbestos in any way from a Kohler boiler?

A I've seen the name, but I can't remember exactly where or how.

Q Other than seeing the name, do you have any other information with regard to a Kohler boiler?

A No.

Q Do you believe you were exposed to asbestos from a Kohler boiler?

A I couldn't tell you that.

While Mr. Wilkinson's answers to this line of questioning conflicts with his direct testimony, such a discrepancy merely illustrates that there are issues of fact that must be determined by a jury. *See Ferrante v American Lung Assn*, 90 NY2d 623, 631(1997) (The court's function on a motion for summary judgment is not to determine a witness' credibility, but to determine whether there exist factual issues that require resolution at trial); *see also 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); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996).

What is important for purposes of this motion is that Mr. Wilkinson's testimony sufficiently identifies the defendant as a source of his asbestos exposure. *See Reid, supra*. The weight to be given to such testimony is a question for the jury. *See Asabor, supra*.

Accordingly, it is hereby

ORDERED that Kohler Co.'s motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

FILED

MAR 27 2013

DATED: 3-26-13

NEW YORK
COUNTY CLERKS OFFICE
SHERRY KLEIN HEITLER
J.S.C.