

Acevedo v A.O. Smith Water Products Co.

2013 NY Slip Op 31874(U)

August 8, 2013

Sup Ct, New York County

Docket Number: 116194/02

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

Index Number : 116194/2002
ACEVEDO, LUIS
vs.
A.P. GREEN INDUSTRIES
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 116194/02
MOTION DATE _____
MOTION SEQ. NO. 002

(CRANE)

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the memorandum decision dated Aug 8, 2013

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

AUG 13 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: Aug 8, 2013


HON. SHERRY KLEIN HEITLER J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
 - 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

----- X

LUIS ACEVEDO and SUSAN ACEVEDO,

Plaintiff,

Index No. 116194/02
Motion Seq. 002

DECISION & ORDER

- against -

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

Defendants.

FILED

AUG 13 2013

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SHERRY KLEIN HEITLER, J.:

COUNTY CLERK'S OFFICE
NEW YORK

Defendant Crane Co., alleging it is incorrectly sued herein as “Pacific Valves, Individually and as a Subsidiary of Crane Co.” (“Crane”)¹, moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all other claims asserted against it on the ground that plaintiffs have not shown that plaintiff Luis Acevedo was exposed to asbestos from working on or around any products manufactured by Crane or the Pacific boilers of which plaintiffs complain. Crane also moves for summary judgment on the ground that it is not liable for asbestos containing products that it did not manufacture, supply or specify for use with its products. Plaintiffs’ position is that Mr. Acevedo’s testimony raises a material issue of fact whether he was exposed to asbestos from dried insulation that flaked off the Pacific boilers that he encountered throughout his career. Plaintiffs also argue that Crane knew or should have known that asbestos containing insulation would be integrated with Pacific boilers for their intended use and had a duty to warn against same.

¹ Crane does not deny that it is responsible for Pacific Boilers, which is the subject of this motion.

Plaintiff Luis Acevedo was deposed on May 22, 2012.² He testified that from 1968 to 2006 he was exposed to a myriad of asbestos-containing products while working as a Consolidated Edison general utility worker and mechanic. Among other things, he testified that he handled asbestos-containing gaskets associated with pumps and valves, worked with asbestos-lined wires, and encountered asbestos-containing pipe covering.

The defendant argues that plaintiffs' claims against it are speculative because there is no evidence to show that Mr. Acevedo removed, installed, or handled asbestos-containing materials associated with Pacific boilers. In this regard, defendant asserts that Mr. Acevedo never personally performed or observed other trades perform work on Pacific boilers, and that his sole alleged exposure therefrom came from dust emanating from the floor and from a lining on the inside of the boiler doors.

With respect to Pacific boilers, Mr. Acevedo testified as follows (Deposition pp. 56, 116-17, 134-35, 140-41):

Q. Other than the dust that was created from the asbestos that was on the pipes --

A. Yeah.

Q -- do you believe that there was anything else that caused you to be exposed to asbestos when you worked around the boilers or have you told me everything?

A. Well, the boiler itself, I would think some of them were lined with asbestos on the inside and that could've been frail and dry.

* * * *

Q We talked about all of the occasions that you worked throughout your career near boilers.

A Right.

Q And you say that you believe that there were a few occasions where when you walked in a basement there were actually two boilers in place, correct?

² A copy of his deposition transcript is submitted as defendant's exhibit D ("Deposition").

A Yes. . . .

Q Is there any way that you can give me the manufacturer of those two or three times, given the list of manufacturers you offered earlier? . . .

A Let's see, I think Pacific was in there. I think Pacific was one of them and, what else, and Superior, I think it was.

* * * *

Q What were you doing when you came upon the Pacific boiler? What was your task?

A I had to go make repairs on the gas lines. . . .

Q What about this boiler leads you to believe you were exposed to asbestos?

A Just walking around there -- sometimes I'd just walk around -- just walking through the floor, the dust just keep coming off the floor.

Q So the dust was coming off the floor?

A Right.

Q That you inhaled?

A Yeah, inhaled. You could see it coming off the door, the material coming off the door.

* * * *

Q Okay. Do you believe you were exposed to asbestos while working with these other Pacific boilers?

A Yes.

Q Is it in the same fashion as to the other boiler we talked about before?

A Yes.

Q Okay. Is there anything else about these boilers that leads you to believe you were exposed to asbestos other than what we talked about before for that first boiler?

A Yes.

Q What is that?

A The doors.

Q Okay, so basically --

A Yes, the lining, the linings from the doors

Summary judgment is a drastic remedy that must not be granted if there is any doubt as to the existence of a triable issue of fact. *Tronlone v Lac d'Amiante du Quebec, Ltee*, 297 AD2d 528,

528-529 (1st Dept 2002). In asbestos-related litigation, should the moving defendant make a *prima facie* showing of entitlement to judgment as a matter of law, plaintiffs 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 plaintiffs 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 plaintiffs' favor. *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204,205 (1st Dept 1990).

Cognizant of these standards, I find that Mr. Acevedo's deposition testimony raises a material question of fact whether he was exposed to asbestos fibers released from the Pacific boilers around which he worked, and as to this issue Crane's summary judgment motion is denied. *See Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996) ("The deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaint. . . . The assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact . . ."); *Missan v Schoenfeld*, 95 AD2d 198, 207 (1st Dept 1983) ("On a motion for summary judgment, the court is not to pass on the credibility of the witnesses, but rather must determine whether material issues of fact exist. The function is issue finding, not issue determination.")

Crane's argument that it is not liable for plaintiffs' injuries because neither it nor Pacific manufactured the asbestos allegedly used in conjunction with Pacific boilers is also without merit. This court has addressed Crane's duty to warn in respect of boilers in *Benchimol v A.O. Smith Water Products, et al.*, Index No. 190320/10 (Sup. Ct. NY Co. Nov. 15, 2011). In that case I held

that Crane had an affirmative duty to warn consumers against the hazards associated with asbestos because the evidence demonstrated that it recommended the use of asbestos-containing products in conjunction with Crane boilers.

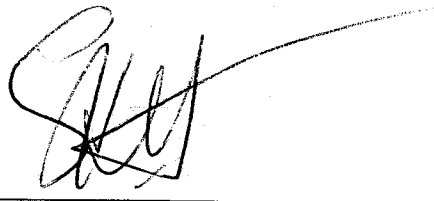
Here, Mr. Acevedo identified Pacific boilers as a source of his exposure. Importantly, none of Crane's submissions in this matter specifically support its view with regard to Pacific. By such failure Crane has not made out a *prima facie* case for purposes of this summary judgment motion. It is noteworthy, however, that several of plaintiffs' submissions indicate that Pacific specified that their boilers be insulated with asbestos (see plaintiffs' exhibits C - E).

Accordingly, it is hereby

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

This constitutes the decision and order of the court.

DATED: Aug 8, 2013



SHERRY KLEIN HEITLER
J.S.C.

FILED

AUG 13 2013

COUNTY CLERK'S OFFICE
NEW YORK