

Cisler v A.O. Smith Water Products Co.

2013 NY Slip Op 31876(U)

August 8, 2013

Sup Ct, New York County

Docket Number: 190044/12

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MEITLER
Justice

PART 30

CISLER, JOHN E., ETAL

INDEX NO. 190044/02

MOTION DATE _____

- v -

A.O. SMITH WATER PRODUCTS CO.,
ETAL

MOTION SEQ. NO. 03

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED

AUG 13 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: Aug 8, 2013



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

----- X
JOHN E. CISLER and CAROL CISLER,

Plaintiffs,

-against-

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

Defendants.
----- X

Index No. 190044/12
Motion Seq. 003

DECISION & ORDER

FILED

AUG 13 2013

COUNTY CLERK'S OFFICE
NEW YORK

SHERRY KLEIN HEITLER, J.:

Defendant Union Carbide Corporation (“UCC”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that there is no evidence to show that plaintiff John Cislser was exposed to asbestos manufactured, distributed, or supplied by UCC. For the reasons set forth below, UCC’s motion is granted.

Mr. Cislser was diagnosed with mesothelioma on or about December 28, 2011. On January 25, 2012, he and his wife Carol Cislser commenced this action to recover for personal injuries allegedly caused by Mr. Cislser’s exposure to asbestos. Mr. Cislser was deposed over the course of five days between February 29 and March 12, 2012.¹ He testified that he worked as an electrician throughout New York from approximately 1959 to 1997. During his nearly forty year career he encountered a wide variety of electrical equipment, including, among other things, motor controllers, starters, electrical panels, switches, and circuit breakers. Of particular

¹ Mr. Cislser’s deposition transcripts are submitted as defendant’s exhibits 4-8.

relevance to this motion is Mr. Cisler's testimony that he was exposed to asbestos-containing phenolic molding that was incorporated into electrical equipment manufactured by Square D and Westinghouse. Plaintiffs allege that such these phenolic molding compounds were manufactured and supplied by the defendant. UCC contends there is a failure of proof on plaintiffs' part and that plaintiffs' case is based on speculation.

To obtain summary judgment, the movant must establish its cause of action or defense sufficient to warrant a court's directing judgment in its favor as a matter of law, and must tender sufficient evidence to demonstrate the absence of any material issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In asbestos-related litigation, should the moving defendant make 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). The identity of a manufacturer of a defective product may be established by circumstantial evidence but such evidence cannot be speculative or conjectural. *See Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596, 601 (1996)

It is undisputed that UCC manufactured and sold asbestos-containing phenolic molding compound under the trade name "Bakelite" until 1975. Bakelite, which has the appearance of hard plastic, was commonly used in electrical panels, insulators and switches due to its electrically nonconductive and heat-resistant properties. Although Mr. Cisler testified to being exposed to asbestos from a hard plastic material he identified as "bakelite", it is clear from his

deposition testimony that he used this term generically and not with reference to UCC's trademarked product (see defendant's exhibit 4, pp. 154-55; defendant's exhibit 7, pp. 621-22, objections omitted):

- Q. You just used the term Bakelite, what are your --
- A. Well, I call it Bakelite. It's the brown stuff that's behind or it could be white too.
- Q. Is that a generic term that's been used for that type of brown stuff, Bakelite, is that why you use that term?
- A. Well, it looks like -- it's a term I picked up, it's what it looks like.
- Q. Did you ever see any markings on it that said Bakelite or anything like that?
- A. No, no.
- Q. So it's just a trade term for --
- A. Yeah, yeah, basically, yeah.
- Q. -- that type of material?
- A. Yeah.

* * * *

- Q. And is that black plastic, that's Bakelite that you're referring to? . . .
- A. That's a term "Bakelite" we called any black plastic, even as a kid and even at home. We have a coffee pot, it has a black plastic handle and a black bottom, I even call that Bakelite.
- Q. Okay. So you understand anything that's black and looks like plastic to be Bakelite? . . .
- A. I would use it as a term. It doesn't mean it's Bakelite.

Plaintiffs nevertheless argue that UCC was the exclusive supplier of asbestos-containing phenolic molding material to Square D and Westinghouse during the relevant time period. Plaintiffs' exhibit 8 is an internal UCC memorandum dated August 17, 1972 in which a UCC representative discussing shipments of asbestos to Square D's Lexington, Kentucky plant observes that "the adherence to these seven Special Customer Requirements will go a long way towards Union Carbide's maintaining 100% of this customers [*sic*] valuable phenolic molding

material business.” Plaintiffs submit that this document shows that UCC was the exclusive supplier of asbestos-containing phenolic molding material to Square D, and that Mr. Cisler thus was exposed to UCC’s asbestos while working with Square D products. However, the August 17, 1972 memorandum refers solely to Square D’s Lexington, Kentucky facility, whereas Square D had at least four dozen plants throughout North America besides the Kentucky plant. (Defendant’s reply, exhibit 3). Plaintiffs have not shown that the asbestos-containing products manufactured by Square D in Kentucky ever supplied the New York region. In fact, Square D’s March 9, 2006 interrogatory responses filed in an unrelated case in Madison County, Illinois² show that the company purchased its phenolic molding compounds from at least seven different suppliers. Notably, UCC was not listed among them. (Defendant’s reply, exhibit 1, p. 18)

Plaintiffs’ assertion that UCC was the exclusive supplier of Westinghouses’ phenolic molding material is similarly without merit. The only evidence submitted by plaintiff in this regard is an unidentified, incomplete transcript of unknown origin which purports to show that Westinghouses’ Hampton, South Carolina plant purchased asbestos solely from UCC between approximately 1967 and 1972. (Plaintiff’s exhibit 10, p. 71). Not only does this testimony lack context, it fails to establish that such asbestos was incorporated into phenolic molding compound or that Westinghouses’ South Carolina plant supplied the New York region.

Accordingly, plaintiffs’ claims against UCC are speculative (*see Healey, supra*), and it is hereby

ORDERED that Union Carbide Corporation’s motion for summary judgment is granted; and it is further

² Submitted as exhibit 1 to UCC’s reply brief.

ORDERED that this action and any cross-claims against this defendant are severed and dismissed in their entirety; and it is further

ORDERED that the action shall continue as against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

FILED

ENTER:

AUG 13 2013

COUNTY CLERK'S OFFICE
NEW YORK

DATED:

Aug 8, 2013



SHERRY KLEIN HEITLER
J.S.C.