

Disalvo v A.O. Smith Water Prods. Co.

2013 NY Slip Op 32136(U)

August 22, 2013

Supreme Court, New York County

Docket Number: 190109/10

Judge: Sherry 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 : 190109/2010
DISALVO, CARL A.
vs.
A.O. SMITH WATER PRODUCTS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT
(NEVES-JAMESBURG)

INDEX NO. 190109/10
MOTION DATE _____
MOTION SEQ. NO. 001

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 22, 2013

FILED
SEP 11 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: Aug 22, 2013

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

- 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
CARL A. DISALVO,

Plaintiff,

-against-

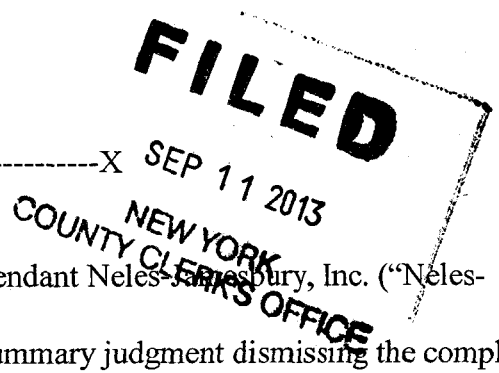
A.O. SMITH WATER PRODUCTS CO., et al.,

Defendants.

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

Index No. 190109/10
Motion Seq. 001

DECISION & ORDER



In this asbestos personal injury action, defendant Neles-Jamesbury, Inc. ("Neles-Jamesbury") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that plaintiff Carl DiSalvo has not provided any evidence to show that he was exposed to asbestos from a product manufactured, distributed, sold, or supplied by Neles-Jamesbury.

Mr. DiSalvo was diagnosed with lung cancer on December 8, 2009. On March 10, 2010 he commenced this action to recover for personal injuries allegedly caused by his exposure to asbestos-containing products. Mr. DiSalvo testified¹ that he worked as a laborer and garbage collector throughout New York City from 1959 to 1997 and that he was exposed to asbestos while assisting pipe-coverers and other trades who routinely worked with asbestos insulation and asbestos gaskets. Particularly relevant to this motion is Mr. DiSalvo's testimony that he mixed asbestos cement powder that pipe-coverers used to insulate Neles-Jamesbury valves and that he worked in the vicinity of other trades that installed, repaired and removed asbestos gaskets from Neles-Jamesbury

¹ Mr. DiSalvo was deposed over the course of four days between November 27, 2012 and December 14, 2012. Copies of his deposition transcripts are submitted as defendant's exhibit B ("Deposition").

valves (Deposition, pp. 182-184, 506-510, 605, objections omitted):

Q. What were they using on the boilers?

A. I call them mud, it was a powder that we mixed.

Q. How did that come packaged?

A. Bags, as powder. . . .

Q. And how did you mix it up?

A. In a wheelbarrow with water. . . .

Q. And then you would clean up whatever remnants were on the ground?

A. Yes.

Q. Were you exposed to asbestos dust from the mixing of the cement?

A. Yes. . . .

Q. You also mentioned valve covering.

A. Yes.

Q. What kind of covering are you referring to on valves?

A. The mud, the mud.

Q. The same stuff?

A. Yes, same thing. . . .

Q. And what did you see done with the valve covering? . . .

A. They encased the valve in the covering.

Q. With the paste?

A. Yeah.

* * * *

Q. Do you know the manufacturer of any more valves that exposed you to asbestos in this way?

A. Jamesbury.

Q. Is that the full name that you can recall right now? . . .

A. Neles-Jamesbury.

Q. Were you exposed to asbestos from external insulation on Neles- Jamesbury valves? . . .

A. Yes.

Q. You also testified about asbestos gaskets in relation to valves, correct?

A. Yes. . . .

Q. Were you exposed to asbestos from asbestos gaskets on valves? . . .

A. Yes.

Q. Did you do this work or did another trade do this work? . . .

A. Another trade.

Q. And what did their work with asbestos gaskets on valves, how did that expose you to asbestos? . . .

A. Installing the gaskets, cleaning off the old gaskets. . . .

Q. And would it matter what brand of valve that you were working around, would you have been exposed to asbestos in the same way from asbestos gaskets on those valves? . . .

A. Yes.

Q. Would it matter, is it different from valve to valve or is it the same from valve to valve?

. . .

A. The same. . . .

Q. Were you exposed to asbestos from gaskets on Neles-Jamesbury valves?

A. Yes.

* * * *

Q. Did you ever see a Jamesbury valve actually delivered to one of your work sites?

A. Yes.

Q. Okay, where?

A. Don't recall.

Q. So what is your recollection of seeing it delivered?

A. Taken off a truck.

Q. Okay. So how did you know it was a Jamesbury valve when you were taking it off the truck?

A. It's on the valve.

Q. So it was out of the packaging at that time?

A. Yes.

Q. And you just saw a valve that said Neles-Jamesbury stamped on it; is that right?

A. Yes.

Defendant argues that Mr. DiSalvo's testimony is speculative because he could not identify a particular work-site or time period during which he encountered such valves. Relying on the affidavit

of a former employee², defendant further argues that Mr. DiSalvo could not have been exposed to “Neles-Jamesbury” valves, to which he testified he encountered during the 1970’s³, because Neles-Jamesbury, Inc. did not exist until 1990.

Notably, there is no documentary evidence submitted herein to support the defendant’s assertion that “Neles-Jamesbury, Inc.” did not exist during the 1970’s when Mr. DiSalvo claimed to have been exposed to “Neles-Jamesbury” valves. At most the defendant’s arguments on this motion go to the weight to be accorded to Mr. DiSalvo’s testimony at trial by the trier of fact. *See Ferrante v American Lung Ass’n*, 90 NY2d 623, 631 (1997) (The court’s function on a motion for summary judgment is to determine whether there exist factual issues that require resolution at trial, not to assess credibility); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996) (“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.”)

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 La d’Amiante du Quebec, Ltee*, 297 AD2d 528, 528-529 (1st Dept 2002). In an asbestos personal injury action, should the moving defendant make a *prima facie* showing of entitlement to summary judgment as a matter of law, the plaintiff must then demonstrate that he was exposed to asbestos fibers released from the defendant’s product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). It is sufficient for the plaintiff to show facts and

² See affidavit of former Neles-Jamesbury employee Joseph Wright, sworn to March 6, 2013. Mr. Wright’s affidavit is submitted as part of the defendant’s moving papers.

³ See Deposition pp. 597-99, 600-06.

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).

Accordingly, it is hereby

ORDERED that Neles-Jamesbury's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: *Aug 22, 2013*

SKH

SHERRY KLEIN HEITLER
J.S.C

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