

Fischer v Aerco Intl., Inc.

2013 NY Slip Op 32260(U)

September 19, 2013

Supreme Court, New York County

Docket Number: 190462/12

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

Index Number : 190462/2012
FISCHER, ARTHUR
vs.
AERCO INTERNATIONAL, INC
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT
NASH

INDEX NO. 190462/12
MOTION DATE
MOTION SEQ. NO. 002

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 9.19.13

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

Dated: 9-19-13

[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
GERTRUDE FISCHER, as Administratrix for the Estate of
ARTHUR FISCHER, and GERTRUDE FISCHER, individually

Index No. 190462/12
Motion Seq. 002

Plaintiffs,
-against-

DECISION & ORDER

AERCO INTERNATIONAL, INC., et al.

Defendants.

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

In this asbestos personal injury action, defendant Nash Engineering Company (“Nash”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims against it on the ground that plaintiffs have failed to establish that plaintiffs’ decedent Arthur Fischer¹ was exposed to any asbestos-containing product manufactured, distributed, sold, or installed by Nash. For the reasons set forth below, the motion is granted.

Arthur Fischer was diagnosed with mesothelioma on August 29, 2012. On October 4, 2012 Mr. Fischer and his wife Gertrude Fischer commenced this action to recover damages for personal injuries caused by his alleged exposure to asbestos. Mr. Fischer was deposed prior to his death on November 7 and 8, 2012² and testified that he worked as a civilian draftsman at the Brooklyn Navy Yard from 1950 until 1954. In this role, Mr. Fischer was responsible for designing the installation of radar systems and other electrical equipment aboard the U.S.S. Oriskany, U.S.S. Hornet, U.S.S. Wasp, U.S.S. Bennington, U.S.S. Lake Champlain and U.S.S.

¹Mr. Fischer passed away from his illness on December 27, 2012.

²Mr. Fischer’s deposition transcripts are submitted collectively as defendant’s exhibit C.

Antietam.

Mr. Fischer testified that the only asbestos exposure he had at the Brooklyn Navy Yard was when he was on the ships (Deposition, pp. 57-58); that his job, which was to measure and allocate the use of the spaces on the ships in relation to power distribution, took him “all over the ships” (Deposition, pp. 56, 164-65, 76; 181); that pumps were every place on the ships (Deposition, p. 83); that while he was making his measurements, which involved “flat up, down and all sides”, there was work taking place on the ships’ pumps all of the time, with people continuously disassembling them and repairing them in his presence (Deposition, pp. 76-77, 89-90), that all pumps have gaskets and that the use of asbestos was common in pump gaskets (Deposition, p. 80); and that this work continuously created dust in his presence which he breathed in. Although Mr. Fischer could not recall specifically his work on each ship and testified to such work in a general fashion, plaintiffs submit a “General Information Book” for the U.S.S. Hornet³ which shows that as of 1953 eight Nash pumps were present on that ship. In this regard plaintiffs claim that at some point between 1950 and 1954 Mr. Fischer was exposed to asbestos from Nash pumps located aboard the U.S.S. Hornet.

On this motion the defendant argues that it is entitled to summary judgment because Mr. Fischer never identified Nash as a manufacturer of the pumps he encountered despite being able to recall eleven other manufacturers of pumps he encountered throughout his career. Plaintiffs respond that the General Information Book for the U.S.S. Hornet which shows the presence of Nash pumps on that ship, taken together with Mr. Fischer’s testimony that his work took him to all areas of a ship raises a material question of fact whether Mr. Fischer was exposed to asbestos

³Plaintiffs’ exhibit “4”.

from Nash pumps. In response to plaintiffs' exhibit 4 defendant argues that nowhere does Mr. Fischer's testimony identify the ship on which he may have encountered a Nash pump in addition to which its Wayne County, Michigan interrogatory responses submitted by plaintiffs on this motion⁴ show that Nash pumps did not contain asbestos gaskets until at least 1958, four years after Mr. Fischer left his position at the Brooklyn Navy Yard.

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently 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). The mere presence of the product at the plaintiff's worksite is not a sufficient nexus to create a reasonable inference of exposure to the defendant's product. *Diel v Flintkote Co.*, 204 AD2d 53 (1st Dept 1994).

In this case the defendant has facially established its entitlement to summary judgment insofar as it has shown that Mr. Fischer never identified a Nash product as a source of his

⁴Plaintiffs' exhibit "5", p. 10.

exposure. In turn, plaintiffs have failed to meet their burden to raise a material issue of fact. In order to succeed on this motion, plaintiffs had to allege facts and conditions from which the defendant's liability may be reasonably inferred, *i.e.*, that defendant's product was used in the vicinity where plaintiff worked and that plaintiff was exposed to asbestos fibers released from defendant's product. In this regard, although Nash pumps may have been present on one of the six ships on which Mr. Fischer worked during his service at the Brooklyn Navy Yard from 1950 until 1954, the mere presence of such pumps on the U.S.S. Hornet in 1953 during Mr. Fischer's last year there, without more, is not a sufficient nexus to create a reasonable inference of exposure. There is nothing shown from which it can be reasonably inferred Nash pumps were placed in Mr. Fischer's zone of exposure. *See Cawein, supra.; Diel, supra.*

Accordingly, it is hereby

ORDERED that Nash Engineering Company's motion for summary judgment is granted, and this action and any cross-claims against Nash 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.

DATED: 9.19.13

ENTER:



SHERRY KLEIN HEITLER
J.S.C.