

<b>Berensmann v 3M Co.</b>
2013 NY Slip Op 33137(U)
December 9, 2013
Sup Ct, New York County
Docket Number: 190472/12
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 : 190472/2012
BERENSMANN, WILLIAM
vs
3M COMPANY, F/K/A MINNESOTA
Sequence Number : 003
SUMMARY JUDGMENT (Georgia Pacific)

INDEX NO. 190472/12
MOTION DATE
MOTION SEQ. NO. 003

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 12-9-13.

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

Dated: 12-9-13

[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  
WILLIAM BERENSMANN and MADELYN  
BERENSMANN,

Index No. 190472/12  
Motion Seq. 003

Plaintiffs,

**DECISION & ORDER**

-against-

3M COMPANY, et al.,

Defendants.  
----- X

**SHERRY KLEIN HEITLER, J.:**

In this asbestos personal injury action, defendant Georgia-Pacific, LLC (“GP”) moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all other claims asserted against it on the ground that plaintiff William Berensmann testified that the GP product he may have been exposed to did not contain asbestos. As more fully set forth below, the motion is denied.

Mr. Berensmann has been diagnosed with mesothelioma. He spent the majority of his career working as an architect and then as a college professor. In or about 1974 or 1975 Mr. Berensmann personally renovated his loft on 13<sup>th</sup> Street in Manhattan. He designed and for the most part constructed the entire space himself which included the installation of sheetrock and concomitant use of joint compound. Mr. Berensmann testified<sup>1</sup> that such joint compound was manufactured by US Gypsum and GP. He did not recall how the GP joint compound was packaged nor did he believe that it contained asbestos (Deposition pp. 111-112, 113, 114):

Q. Do you recall the brand or manufacturer of the joint compound that you used when you were building out your loft?

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<sup>1</sup> Mr. Berensmann was deposed in January and February of 2013. Copies of his deposition transcripts are submitted as defendant’s exhibit B (“Deposition”). His *de bene esse* deposition was given on June 14, 2013 (plaintiffs’ exhibit 2).

- A. I recall US Gypsum white -- is a white tub. I may have used other brands as well, depending on what was on sale at the time.
- Q. Aside from the US Gypsum, do you recall the brands of any of the products you may've used?
- A. It might've been Georgia-Pacific. I'm trying to think of the other company. No, I can't remember. No, I can't remember.
- Q. As you sit here today and you look back, do you recall using Georgia-Pacific joint compound during that loft project, because you said you might have?
- A. I would have to say it's likely that I did, but that's the best I could do. . . .
- Q. How did the Georgia-Pacific joint compound that you likely used come packaged?
- A. It was also a paste in a tub, but I don't recall the appearance of that tub.
- Q. Do you recall the size or any colors of the Georgia-Pacific?
- A. No. It was the same kind of beige color and the tubs were usually one or five gallons.
- Q. Do you believe that the Georgia-Pacific joint compound that you used at the loft contained asbestos?
- A. No

\* \* \* \*

- Q. Do you recall if the USG or US Gypsum joint compound came packaged in the five-gallon tubs, the one-gallon tubs or both?
- A. Both.
- Q. How about the Georgia-Pacific, was that five-gallon, one-gallon or both, if you recall?
- A. I don't recall.

Based solely on Mr. Berensmann's belief that the GP product he used to construct his loft did not contain asbestos, GP's position is that plaintiffs have not made case against it and summary judgment dismissing the action is warranted. In opposition, plaintiffs argue that during Mr. Berensmann's exposure period all of GP's joint compound products contained asbestos. In support, plaintiffs rely on the October 14, 2003 deposition testimony in an unrelated asbestos personal injury action of C. William Lehnert, GP's former manager for research and development.<sup>2</sup> Significantly,

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<sup>2</sup>

Mr. Lehnert's deposition transcript is submitted as plaintiffs' exhibit 5 ("Lehnert Deposition").

Mr. Lehnert testified that all of GP's five-gallon joint compound buckets contained asbestos until approximately 1977, and that GP first marketed and sold an asbestos-free one-gallon bucket to individual consumers some time prior to 1976 (Lehnert Deposition pp. 106-07, 36-37):

Q. Okay. So excluding those formulas of Ready Mix made at Akron that were asbestos-free from September 1970 through May 4, 1977, virtually all formulas of Ready Mix made at that facility contained some Calidria asbestos? . . .

A. Yes.

Q. . . . So based on your review of the records back in 2001 when you had taken the time to go through all available records related to the formulas of Ready Mix available to you, you concluded, based on that review, that from September 1970 to May 4, 1977, that all available formulas of Ready Mix from the Akron, New York plant contained some Calidria-brand asbestos SG-210?

A. Yes. That's what it says here.

\* \* \* \*

Q. Now, the -- of course, we've talked about that. That was a wet product. In other words, it came pre-mixed with water. And according to the interrogatories we've reviewed, that first became asbestos-free -- in other words, the first asbestos-free formula was available in about 1976?

A. I don't remember the exact date. I'm sure we manufactured test shipments and maybe shipments that were to certain areas. And, also, we furnished one-gallon pails at an earlier date that were asbestos-free.

Q. Okay. So at some earlier date, a small percentage of the Ready Mix that was -- prior to 1976, the Ready Mix that had contained asbestos, there was available, to some markets, one-gallon pails and maybe some special orders of asbestos-free Ready Mix prior to 1976?

A. Yes.

Q. Now, do you know what special areas received asbestos-free Ready Mix?

A. I don't, but there were probably more than one. There were probably several where they shipped it at a request or at perhaps in an area that was very sensitive about asbestos-containing products. And, of course, the one-gallon pails went everywhere.

Q. Okay. Well, the one-gallon pails were distributed largely for consumer use; correct?

A. Yes.

In this light, practically speaking, the fact that Mr. Berensmann believed the GP product which he used was asbestos-free is not dispositive of this motion. While it appears that an asbestos-

free variety became available some time in or prior to 1976, GP has not submitted anything on this motion to show exactly when such product was first made available, and specifically whether it was available in Manhattan in 1974 and 1975. It is therefore questionable whether Mr. Berensmann could have even worked with an asbestos-free GP joint compound product during his exposure period.

Summary judgement 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 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 plaintiff's favor. *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dept 1990).

In light of the foregoing, it is hereby

ORDERED that Georgia-Pacific LLC's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED:

12.9.13

  
SHERRY KLEIN HEITLER  
J.S.C.