

Wilson v 3M Co.

2013 NY Slip Op 33437(U)

December 2, 2013

Supreme Court, New York County

Docket Number: 190143/11

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. SHERRY KLEIN HEITLER

Index Number : 190143/2011

WILSON, CARMEN

vs

3M COMPANY, ET AL.

Sequence Number : 017

SUMMARY JUDGMENT

(American Ins. Wire)

PART 30

INDEX NO. 190143/11

MOTION DATE _____

MOTION SEQ. NO. 017

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 12-2-13.**

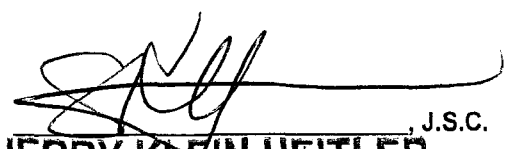
FILED

DEC 04 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 12-2-13


_____, 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

ETHEL WILSON, Individually and as Executrix of the
Estate of CARMEN WILSON,

Index No. 190143/11
Motion Seq. 017, 018

Plaintiffs,

DECISION & ORDER

-against-

3M Company, et al.,

Defendants.

FILED

DEC 04 2013

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COUNTY CLERK'S OFFICE

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

Motion sequence nos. 017 and 018 are consolidated for disposition herein.

In motion sequence 017, defendant American Insulated Wire Corporation ("AIW") moves for summary judgment pursuant to CPLR 3212 on the ground that there is no evidence that plaintiffs' decedent Carmen Wilson was exposed to asbestos from an AIW product. In motion sequence 018, defendant Leviton Manufacturing Co., Inc. ("Leviton") moves for summary judgment on the ground that Leviton did not manufacture any of the products which plaintiffs allege contributed to Mr. Wilson's asbestos exposure.

The following facts are relevant to both motions: Carmen Wilson worked as an electrician for over 50 years installing fire alarms, switches, and other fire safety equipment in public buildings, schools, and homes in and around the New York metropolitan area. He was diagnosed with mesothelioma on or about February 14, 2011. The summons and complaint herein was filed on April 20, 2011. Mr Wilson passed away on July 23, 2011 without being deposed. Carmen Wilson's son and former co-worker, Scott Wilson, testified on his father's

behalf.¹

Scott Wilson testified that he first accompanied his father to work in or about 1964 or 1965 when he was approximately seven or eight years old. He assisted his father on an as-needed basis until the mid 1980's. Among other things, Scott Wilson testified that his father routinely worked with Leviton lighting fixtures and ballasts and that his father was exposed to asbestos by virtue of this work. He specifically recalled witnessing his father install Leviton fixtures and ballasts for the Peekskill school district in the mid 1960's, Mercy College in the mid and late 1970s, and Tarrytown school district in the 1970's and 1980's (Deposition pp. 230-31, objection omitted):

Q. And do you believe based on your observations that your father was exposed to asbestos removing and installing lighting fixtures?

A. Yes.

Q. How so?

A. Well, the lighting fixtures and the wiring around the lighting fixtures were asbestos. The material when he's pulling down an old lighting fixture had asbestos on that lighting fixture, you know. I just, I believe that that was the case. . . .

Q. Can you tell us the name and manufacturer of lighting fixtures that your dad removed and installed?

A. Sure. The ones that I'm more familiar with would be Leviton and -- fluorescents and for incandescents I'm more familiar with, like, Progress high-hats.

* * * *

Q. I am talking about ballasts. . . . Am I clear that the ballast was actually connected to the Leviton fixture?

A. There are actually two things. There are ballasts that my dad would replace and then there are fixtures that my dad would replace. In some cases, the fixture didn't need to be replaced, but the ballast needed to be replaced. So, that is where he would take out the ballast that had been in the fixture and replace it with the

¹ Scott Wilson was deposed on January 27, 2012, April 20, 2013, and April 23, 2012. Copies of his deposition transcripts are submitted as Leviton's exhibits C-E ("Deposition").

Leviton ballast. . . . And then there were other occasions where my dad would completely replace and install a brand new fixture which included ballasts as part of that fixture.

Q. Were Leviton ballasts sold separately?

A. Yes, that's correct.

Q. Did your father ever purchase Leviton ballasts separately?

A. Many times.

Relying on the unsworn certification (see CPLR 2106) of its Vice President of Engineering, Mr. Steve Campolo, Leviton argues that Carmen Wilson simply could not have worked with Leviton-brand lighting fixtures.² In this regard, Mr. Campolo states that Leviton “never manufactured or distributed any type of fixture until the late 1990s, which is well beyond the years that the decedent worked as an electrician.” (Leviton’s exhibit G, ¶ 5). Mr. Campolo further states that “Leviton has never manufactured or distributed residential grade lighting fixtures” and that “Leviton first started distributing ballasts in 2012.” (*Id.* ¶¶ 4, 6).

Significantly, Leviton’s counsel asked Scott Wilson if his testimony would change at all if he were told that Leviton never manufactured lighting fixtures. He responded squarely that it would not (Deposition p. 422):

Q. If I was to tell you in Leviton’s 100 plus history, they never manufactured fixtures, does that change your testimony in any way?

A. No. I don’t recall that.

The only historical document submitted in support of Mr. Campolo’s certification is a product catalog from July of 1962 which advertises a number of Leviton electrical products, none of which are explicitly referred to as lighting fixtures.³ Putting aside the fact that this catalog

² Mr. Campolo’s March 22, 2013 certification is submitted as Leviton’s exhibit G.

³ See Leviton’s exhibit F.

predates the relevant time period, many of the pages advertise products that were clearly designed to be used as lighting fixtures. That Leviton refers to them as “lamp holders” and “sockets.” is simply a question of semantics.⁴ Of particular relevance, however, is that in a patent filed by Leviton on February 26, 1979 the company apparently used the terms “lamp holder”, “lamp fixture”, and “light fixture” in the same vein (Plaintiffs’ Leviton Opposition, Exhibit 15, at 6):

Fixtures are known in the prior art wherein a fluorescent tube is inserted into a circular channel, one pin at a time, and then rotated until it is locked in place. Such lamp holders are of questionable effectiveness in preventing a lamp from inadvertently coming out of the lamp holder and many people find it difficult to properly insert or remove a lamp from this type of lamp holder. . . . [None] of the known prior art devices provide an effective means for selectably locking and unlocking a lamp in place in a fluorescent light fixture without major and costly modification of the basic standard lamp holder design.

* * * *

Still another object of the invention is to provide a locking lamp holder having a locking device which can be mounted on the housing of a lamp holder in either of two opposite orientations for ease of access irrespective of the orientation of the lamp fixture.

Accordingly, it appears that the Campolo certification and supporting catalogue are not dispositive of the Leviton issue.

AIW’s motion also lacks merit. AIW manufactured and sold Type AF (asbestos-insulated flame resistant) Fixture Wire. It is a wholly-owned subsidiary of Leviton. In a December 1956 letter to the Underwriters Laboratory, Leviton employee Robert Kupferman wrote that AIW would be providing its Type AF Fixture Wire exclusively to Leviton (Plaintiffs’ AIW Opposition, Exhibit 8):

⁴ Leviton’s exhibit F, pp. 91-144. In further support of Mr. Campolo’s assertions, Leviton submitted for the first time in reply its catalogs from 1970 and 1979. (Leviton’s Reply, Exhibits A-B). While these catalogs should have been produced in Leviton’s motion in chief and not in reply, they nevertheless reference “lampholders” and “ceiling receptacles” that were clearly designed to be used as lighting fixtures.

“Confirming conversation with you today, we are instructing our Subsidiary, The American Insulated Wire Corporation to manufacture for us exclusively, Type AF Wire without Marker to be used in conjunction with our devices. This wire will be classified as Appliance Wiring Material, and will be tagged with AWM labels, as follows: “For use on appliances and devices manufactured by Leviton Manufacturing Co.”

The fact that AIW supplied its asbestos-containing wires for use in Leviton fixtures was confirmed by Gilbert Dubois, AIW’s Vice of President of Sales, who testified in 1995 in an unrelated action that AIW sold fixture wire to Leviton to be integrated into its various electrical products (Plaintiffs’ AIW Opposition, Exhibit 10, pp. 58-59):

- Q. Do you know the names of any of the manufacturers to whom American Insulated Wire has sold asbestos containing fixture wire?
- A. Off the top of my head I don’t. I wasn’t involved in the OEM market at the time we were making asbestos fixture wire, so I can’t tell you. I know we sold a lot to our parent company.
- Q. And that’s Leviton?
- A. Yes.
- Q. Do you know to whom Leviton would sell the asbestos-containing fixture wire?
- A. No I don’t . . . They didn’t sell the fixture wire. They were an OEM. They put it in their starters.
- Q. Do you know the brand names of any of the products that they incorporated American Insulated Wire’s asbestos-containing fixture wire into?
- A. Leviton.

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 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, 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). 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). 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 Scott Wilson's testimony that his father worked with hundreds of Leviton fixtures over the course of his career and the documentary evidence showing that Leviton manufactured lighting fixtures that incorporated AIW's asbestos-containing fixture wire, there are clearly material issues of fact that preclude summary judgment for both defendants.

Accordingly, it is hereby

ORDERED that the motions by American Insulated Wire Corporation (Seq # 017) and Leviton Manufacturing Co., Inc. (Seq. # 018) are denied in their entirety.

This constitutes the decision and order of the court.

DATED: 12-2-13



SHERRY KLEIN HEITLER
J.S.C.

FILED
DEC 04 2013
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