

Juni v A.O. Smith Water Prods. Co.
2013 NY Slip Op 33441(U)
December 23, 2013
Supreme Court, New York County
Docket Number: 190315/12
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER

PART 30

Justice

ARTHUR H. JUNI JR.

INDEX NO. 190315-12

MOTION DATE _____

- v -

A.G SMITH WATER PRODUCTS

MOTION SEQ. NO. _____

MOTION CAL. NO. 010

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 12-23-13.

DEC 03 2014
STATE OF NEW YORK
SUPREME COURT

Dated: 12-23-13

[Signature]
HON. SHERRY KLEIN HEITLER 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
ARTHUR H. JUNI, JR. and MARY JUNI,

Plaintiffs,

-against-

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

Defendants
-----X

SHERRY KLEIN HEITLER, J:

Index No. 190315/12
Motion Seq. 010

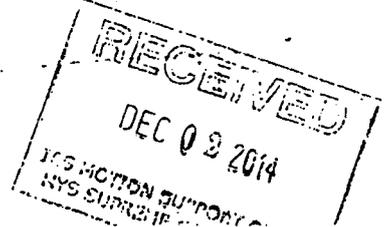
DECISION & ORDER

In this asbestos personal injury action, defendant Dana Companies, LLC (“Dana”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims against it on the ground that plaintiffs have not established that Spicer-brand clutches and Victor-brand gaskets, two products for which Dana is responsible, contributed to Mr. Juni’s asbestos exposure. For the reasons set forth below, the motion is denied.

Plaintiff Arthur Juni worked for Orange & Rockland Utilities from 1961 to 2009 as a high line crew member, courier, mechanic, and foreman. He was diagnosed with mesothelioma in or about June of 2012. Plaintiffs commenced this action on July 24, 2012. Mr. Juni was deposed over the course of four days in August of 2012.¹ He testified that from the late 1970s through the late 1980s he regularly installed new clutches in Ford vehicles that were manufactured by Spicer (Deposition pp. 129-131, 132, objections omitted):

- Q. You told me that in 1979 Orange & Rockland started using the Ford C8000 bucket trucks.
- A. Uh-huh.
- Q. Do you remember how many bucket trucks they had in the fleet at that point in time, only if you know? If you don’t know, we’ll move on.

¹ Copies of Mr. Juni’s deposition transcripts are submitted as defendant’s exhibits 3-6 (“Deposition”).



A. Sixteen to eighteen of them.

Q. Now, you told me that from '79 until the later '80s that the clutches would have to be replaced on those -- you'd be assisting with clutch jobs every other day. So are you testifying that those trucks would need new clutches every two weeks?

A. We did clutches every week.

Q. On average, you told me there was sixteen to eighteen trucks. Would the trucks be getting clutches done on each truck twice a month? Does that sound accurate to you?

A. It might not have been twice a month.

Q. If there are sixteen to eighteen trucks and you said you were doing clutches every other day, you're averaging three or four clutches, so about once a month on each vehicle. Does that sound correct?

A. Yeah, I'd say about once a month

Q. Do you know who manufactured any of the new clutches that were installed in those bucket trucks during that period of time?

A. Lipe, Spicer and original manufacturer and probably Borg-Warner.

* * * *

Q. Where did you obtain the parts from when you were a working foreman at Orange & Rockland? Did you go to the parts department?

A. Went in the parts room and picked them off the shelf. You charged them out.

Mr. Juni also testified about his work with Victor-brand manifold gaskets (Deposition pp.

119, 125, 381-82, objections omitted):

Q. What type of repair work did you actually perform as a working foreman?

A. If a guy was doing a brake job, I'd give him a hand, let's put it that way. If he was doing manifold gaskets, you know, which were manufactured by Victor, Felpro, original manufacturer, I'd give him a hand. I kept myself busy. I didn't give out any job that I couldn't do or hadn't done. . . .

* * * *

Q. You told me earlier that the manifold gaskets were manufactured by Victor and Felpro. Were those the new gaskets or gaskets that were removed the first time?

A. I think the originals were, you know, whatever the vendors -- whatever Ford put in there, but I remember we used Felpro or Victor as replacement gaskets.

* * * *

Q. Did you ever have to do anything to an asbestos gasket before you installed it?

- A. Yeah, you might have to adjust it, scrape it. You might have to grind it a little bit to make it fit. You put asbestos in the air.

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 Lac D'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-529 (1st Dept 2002). To obtain summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In an asbestos-related personal injury action, should the movant establish its *prima facie* entitlement to summary judgment, the plaintiff is then required to 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, the plaintiff need only "show facts and conditions from which defendants' liability may reasonably be 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).

The defendant asserts that Mr. Juni could not recall ever installing or removing a Spicer clutch, but could only state that they were present in the Orange & Rockland stock room. Implicit in his testimony, however, is that Spicer clutches were used interchangeably by him, and by others working in his presence, over the course of his long career with Orange & Rockland. This is sufficient evidence from which Mr. Juni's exposure to Spicer clutches may be reasonably inferred. *See Reid, supra*, at 463.

The defendant also asserts that it would be speculative to assume that the Victor gaskets Mr. Juni allegedly encountered contained asbestos because Victor manufactured both asbestos-containing

and asbestos-free gaskets during the relevant time period. In support, the defendant submits the affidavit of former Dana sales manager Marcy Duncan who claims to be personally familiar with Dana's Victor Product Division.² Among other things, Ms. Duncan avers that Victor manufactured thousands of different gaskets and that "some, but not all" of those gaskets contained asbestos. However, her assertions are unsupported by documentary evidence and therefore insufficient to form the basis of this summary judgment motion. *See Zuckerman, supra; Republic Nat. Bank of New York v Luis Winston, Inc.*, 107 AD2d 581, 582 (1st Dept 1985). In addition, while Ms. Duncan states that "it is not possible to determine if a gasket contained asbestos unless a particular part number or specific information about the application is available,"³ Mr. Juni made it very clear in his testimony that the Victor gaskets he used were automotive manifold gaskets. Ms. Duncan's affidavit is noticeably silent as to the asbestos-content thereof.

In light of the foregoing, it is hereby

ORDERED that Dana Corporation, LLC's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the Court.

DATED:

12.23.13



SHERRY KLEIN HEITLER
J.S.C.

² Ms. Duncan's affidavit, sworn to July 29, 2013, is submitted as defendant's exhibit 7.

³ *Id.* at ¶¶ 4, 6.