

Babravich v A.O. Smith Water Prod. Co.

2014 NY Slip Op 31271(U)

May 14, 2014

Sup Ct, New York County

Docket Number: 104028/00

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 : 104028/2000
BABRAVICH, RICHARD

INDEX NO. 104028/00

vs
A.C. & S.
Sequence Number : 001
SUMMARY JUDGMENT

MOTION DATE _____

MOTION SEQ. NO. 001

(GOODYEAR) _____

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

FILED

MAY 19 2014

COUNTY CLERK'S OFFICE
NEW YORK

is decided in accordance with the
memorandum decision dated 5.14.14.

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

Dated: 5.14.14

[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
RICHARD BABRAVICH and BONNIE BABRAVICH,

Plaintiffs,

-against-

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

Defendants.
----- X

SHERRY KLEIN HEITLER, J.:

Index No. 104028/00
Motion Seq. 001

DECISION & ORDER

FILED

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NEW YORK

In this asbestos personal injury action, defendants the Goodyear Tire & Rubber Company (“Goodyear Tire”) and Goodyear Canada Inc. (“Goodyear Canada”, collectively “Defendants”) move pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against them on the ground that plaintiff Richard Babravich’s claim that he suffered bystander asbestos exposure from Goodyear-brand gasket material is entirely conjectural.

CPLR 3212(b) provides, in relevant part, that a motion for summary judgment shall be granted if “the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” However, 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 (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]) and all reasonable inferences are to be resolved in the plaintiff’s favor. *See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dept 1990). In deciding a summary judgment motion the court’s role is to determine if any triable issues exist, not the merits of any such issues. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). In asbestos-related litigation, should the defendant satisfy its *prima facie* burden, 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 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 plaintiff cannot however rely on speculation. *Roimesher v Colgate Scaffolding*, 77 AD3d 425, 426 (1st Dept 2010).

Mr. Babravich worked as a machinist at the General Electric plant in Schenectady, New York from 1972 to 2011. He testified¹ that he was exposed to asbestos during the early 1970's from his work with plumbers who replaced gaskets on the various machines he operated. Mr. Babravich specifically identified Goodyear as one of several manufacturers of gasket material with which these plumbers worked. He described how they scraped out old gaskets and cut new ones from large sheets in his presence (Deposition pp. 69-71, 74, 129-131, 360):

Q. You told me that at times the plumbers would have to scrape gaskets from pumps, correct?

A. Yeah.

Q. And you said they would use a wire brush and an air hose, correct?

A. Yeah, sometimes. What they would do is, basically, if they're replacing any type of gasket on a machine, whether it was an oil ring gasket or whatever they're working on, they would go to the stockroom, which there are stockrooms all over, open almost like a chain-link fence, and they would have rolls of this stuff, whether it was made by Garlock, Goodyear or whatever, and they would cut the piece they need

Q. Do you know the brand or are you able to tell me the brand or manufacturer of the gaskets that were being removed from the old pump -- the old gaskets that were being removed?

A. The only thing I could tell you is -- the only reason I could state names of gaskets is them signoff sheets. You know, when they used to go get the gasket, they would cut a piece of gasket, whether it was burnt orange color, whether it was gray like Goodyear, whether it was blue like some of the Garlock things that they cut on the roll

* * * *

Q. You told us you recalled Goodyear, Garlock, and Victory gaskets.

A. Yes.

¹ Copies of Mr. Babravich's deposition transcripts are submitted as Defendants' exhibit B ("Deposition").

* * * *

Q. Do you believe that the new gasket material that was being used in the motor department contained asbestos?

A. Yeah.

Q. Why do you believe that?

A. Because basically everything they used down there had asbestos in it, because of the heat, you know. . . .

Q. Do you believe that the sheet material that was used to make gaskets in the motor department contained asbestos?

A. Yes, I do.

Q. Why do you believe that?

A. Basically 'cause that's what everybody said.

Q. When you say everybody, are you referring to specific people?

A. I'm talking about the maintenance people I mean, the word asbestos was mentioned on a lot of things, but I'm only say it [sic], I can't specifically give you names, but did the maintenance people talk about the gasket material being asbestos, yes.

Q. Do you ever recall a time when the gasket material no longer contained asbestos?

A. I would say somewhere around the mid '80s, maybe.

* * * *

Q. Do you recall the first time you saw a plumber working with sheet material used to make gaskets at GE?

A. In the seventies.

The Defendants assert that the Goodyear-brand sheet gasket material Mr. Babravich alleged that he was exposed to must have been asbestos-free. In this regard, the Defendants contend that Goodyear Tire shipped the equipment necessary to manufacture asbestos-containing sheet gasket material to Goodyear Canada in 1969, that Goodyear Canada only produced asbestos-containing sheet gasket material from 1969 to 1973, and that all of the asbestos-containing sheet gaskets Goodyear Canada shipped into the United States were branded "Durabla" for the Durabla Manufacturing Company in Pennsylvania. The court notes that the only proofs submitted by the Defendants with respect to these claims are a 2004 uncross-examined affidavit from Goodyear corporate representative E.W. DeMarse

and a transcript from his January 14, 1998 deposition.²

In opposition, plaintiffs submit an October 26, 1972 document prepared by the United States Navy entitled "Qualified Products List of Products Qualified Under Military Specification MIL-A-17472 Asbestos Sheet, Compressed (Gasket Material)" which demonstrates that the Navy approved for use three styles of "Goodyear"-brand asbestos-containing sheet gaskets which Goodyear Tire manufactured out of a Goodyear Canada facility. This document plainly raises a triable issue of fact whether Goodyear Canada did in fact distribute "Goodyear"-brand gaskets to customers in the United States during the early 1970's, and also calls the Defendants' overall theory - that Mr. Babravich must have worked with asbestos-free Goodyear gaskets - into question.

Moreover, even if Goodyear Tire did halt production of asbestos-containing sheet gasket material in 1969, it is nevertheless possible that such material continued to exist within the stream of commerce and that it was utilized in industrial applications throughout the relevant time period. There was certainly no evidence submitted on this motion to show otherwise. *Taylor v A.C.&S*, 304 AD2d 403, 404 (1st Dept 2003).

Accordingly, it is hereby

ORDERED that the motions by the Goodyear Tire & Rubber Company and Goodyear Canada Inc. for summary judgment are denied in their entirety.

This constitutes the decision and order of the court.

FILED

MAY 19 2014

COUNTY CLERK'S OFFICE
NEW YORK



SHERRY KLEIN HEITLER, J.S.C.

DATED: 5.14.14

² See Defendants' exhibits C & E.