

Herman v Abex Corp.
2014 NY Slip Op 31867(U)
July 15, 2014
Supreme Court, New York County
Docket Number: 190218/12
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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ELIZABETH HERMAN and FRED HERMAN,

Plaintiffs,

Index No. 190218/12

Motion Seq. No. 018

DECISION & ORDER

- against -

ABEX CORPORATION, et al.,

Defendants.
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SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant Motion Control Industries, Inc. (sued herein as Carlisle Motion Control Industries, Inc. and Carlisle Industrial Brake & Friction) (hereinafter "Carlisle") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that there is no evidence to show that plaintiff Elizabeth Herman was exposed to asbestos from Carlisle brake linings. As more fully set forth below Carlisle's motion is denied.

Elizabeth Herman has been diagnosed with malignant mesothelioma. Mrs. Herman's claims derive from her husband Fred Herman's alleged exposure to asbestos-containing gaskets, brakes, clutches, and other products he encountered while working as a bus driver, dispatcher, and superintendent for the New York City Transit Authority ("NYCTA") between approximately 1976 and 2010. Plaintiffs assert that Mrs. Herman was exposed to asbestos while laundering Mr. Herman's asbestos-covered work uniform.

Carlisle asserts that plaintiffs have not offered sufficient evidence to create a genuine issue of material fact whether Mrs. Herman was exposed to asbestos from its brake linings. In opposition plaintiffs contend there is a triable issue of fact whether such exposure occurred during the

approximately nine month period between May 1976 and February 1977 that her husband worked as a bus driver at the NYCTA's Ulmer Park depot. During those nine months Mr. Herman worked as a bus driver as well as a "shifter" moving buses around the depot before and after repairs. While it is undisputed that Mr. Herman did not identify Carlisle brakes as a source of his exposure, he generally testified¹ that he was present in the maintenance area while mechanics performed brake jobs (Herman Deposition pp. 69-70, objections omitted):

Q With respect to the shifting position, were you only in the maintenance area as you brought the buses in and out? . . .

A No.

Q Would you bring the bus in and wait for the work to be performed?

A No.

Q So you would drop the bus off and you would leave and go do something else; is that correct? . . .

A Yeah, I'd take one bus and take care of that one and then maybe go back for a second bus, either bringing one in or taking one out. Other than that there were times when I wasn't shifting that I would be in that general area, because oftentimes they didn't have enough buses to put out on the road, so bus operators that were there were just standing by waiting for buses to become available and there were just basically -- sometimes you had ten, twenty, thirty operators sitting on the bus, usually in the maintenance area, because those were the buses that were not ready for service, they were defective, and we were waiting for buses to become available, and oftentimes some people got buses pulled out late and many times we sat there for the whole maybe three or four hours, in that area.

With respect to Carlisle, plaintiffs submit the March 21, 2013 deposition testimony of Mr. Herman's former NYCTA coworker, Mr. Sam Nahas, who was employed as a mechanic at the Ulmer Park depot between 1976 and 1980.² Mr. Nahas identified Carlisle and several other brands of brakes with which he worked during his five years at the Ulmer Park depot. Significantly, he recalled that Carlisle brakes were present during the nine-month time period at issue (Nahas Deposition pp. 60-61, 99, objections

¹ Fred Herman was deposed on August 24, 2012. A copy of his deposition transcript is submitted as defendant's exhibit D ("Herman Deposition").

² Portions of Mr. Nahas' deposition transcripts are submitted as defendant's exhibit E and plaintiffs' exhibit C. A complete copy was submitted at the court's request ("Nahas Deposition").

omitted):

- Q. When you went into the brake room to retrieve or get new blocks to put on, do you recall a specific manufacturer that was kept at the Ulmer facility, brake manufacturer? . . .
- A. Well, when they had brakes there, they had all different brands of brake shoes from different manufacturers.
- Q. What's your best recollection of the manufacturers that you may have used, brake manufacturers that you may have used while you were a B&B at Ulmer?
- A. When they changed the names vary because the TA buys on bid. They may carry Rockwell, Bendix, BorgWarner, Carlisle, Abex and maybe a couple of other different brands. I don't know all the names for sure.

* * * *

- Q. During that nine-month period that we talked about when you and Mr. Herman's employment overlapped, do you ever recall working with any Carlisle brake products while Mr. Herman was passing through to have coffee?
- A. I can tell you there was Carlisle brakes there. As far as me putting them on a bus while he was there, that brand of brake shoes, I can't answer you, I don't know what brand I was putting on.

While Mr. Nahas could not specifically recall whether he cut Carlisle brakes in Mr. Herman's presence, he testified that the NYCTA required him to cut brakes shoes on a lathe. This process took about 35-40 minutes. The dust from cutting the brakes stayed in the air for approximately half an hour to an hour. Notably, Mr. Herman walked by the lathe area every 15 to 20 minutes (Nahas Deposition pp. 128-131, 132):

- Q. All my questions are going to pertain to the Ulmer Park location during the nine-month period that we've been discussing, okay, sir, just so we're clear.
- A. Okay.
- Q. How often would you have to cut brake shoes during that time period?
- A. Every time you do a brake job you cut the drum and you cut the brake shoes. . . .
- Q. What were the conditions in the air, if any, when you cut the brake drum and shoe? . . .
- A. Everything flying all over the place. . . .
- Q. Sir, I believe that you mentioned that you would blow air over the drum; is that correct?
- A. Yes, you blow out the brake shoe dust and brake shoe drum, you blow them all out to clear all the area. If you're taking a job, if you're going to do a brake job, you take the wheel off and you blow the drum out and you blow all the brake shoes to get the dust

away from the spindle. * * * *

Q. Do you recall Fred Herman ever being present while you were working with the brake drum and lining on the brake lathe? . . .

A. Yes.

* * * *

Q. How often did Fred Herman walk past the lathe area?

A. I can't answer that question. I would have to be his bodyguard.

Q. Can you give me an estimate of time?

A. Well, he was working the tour and he's constantly moving buses. He would be walking by that brake lathe area every 15, 20 minutes maybe.

Q. How long did it take to make the cut on the brake lathe?

A. Thirty-five to 40 minutes providing you didn't have to do a second cut.

Mr. Nahas further testified that the NYCTA bought on bid, meaning that during any given time period he would mostly use whichever brand of brakes had recently been purchased (Deposition pp. 106-07):

Q. You testified that the New York City Transit would use one brand of brakes that happened to have been the lowest bid at any given time; is that correct?

A. That's correct.

Q. So that means that only one brand of brakes were at the brake room at any given time?

A. No, they'll be a multitude of brake shoes there. In other words, if they were running low and they bid on another brake company, the company will send the brake shoes to the main storeroom, the storeroom will send them back to the depot, and yet you may have brake shoes still there from the other brands. You ain't just going to have that one brand until they continue to phase out what you have in stock and then get replenished.

Q. But it would mostly be the brand that was just bidden on; is that right? . . .

A. That's correct.

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." In asbestos-related litigation, should the movant establish its *prima facie* entitlement to summary judgment (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]), the plaintiff must then demonstrate that there was actual exposure to the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this regard, the plaintiff need only

submit "facts and conditions from which the defendant's liability may be reasonably inferred." *Reid v Georgia Pacific Corp.*, 212 AD2d 462 (1st Dept 1995); *see also Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596, 602 (1996). In doing so the court views the evidence in the light most favorable to the nonmoving party and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *Angeles v Aronsky*, 105 AD3d 486, 488-89 (1st Dept 2013).

This case turns on Mr. Nahas' testimony that Carlisle brakes were present not just at some point during his five year tenure at the Ulmer Park Depot, but specifically during the nine-month period that overlapped with Mr. Herman's employment there. Taken together with Mr. Nahas' testimony that Mr. Herman often walked by the lathe area while the brakes were being cut, a reasonable inference can be drawn that Mr. Herman (and in turn his wife) were exposed to asbestos-laden dust released from Carlisle brakes. *See Reid, supra*.

Accordingly, it is hereby

ORDERED that defendant Motion Control Industries, Inc.'s motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: 7-15-14


SHERRY KLEIN HEITLER, J.S.C.