

Armanious v 3M Co.

2014 NY Slip Op 32256(U)

August 13, 2014

Supreme Court, New York County

Docket Number: 190566/12

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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DEBORA JEAN ARMANIOUS, as Administratrix of
the Estate of CHARLES R. NILSSON,

Index No. 190566/12
Motion Seq. 002

Plaintiffs,

DECISION & ORDER

-against-

3M COMPANY, et al.,

Defendants.

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

In this asbestos personal injury action, defendant Union Carbide Corporation (“UCC”), which sold asbestos under the trade name “Calidria”, moves pursuant to CPLR 3212 for summary judgment dismissing all claims asserted against it on the ground that plaintiff’s decedent Charles R. Nilsson did not identify any UCC product as a source of his asbestos exposure. In response plaintiff asserts that Mr. Nilsson was exposed to UCC Calidria used by Kentile Floors, Inc. (“Kentile”) to manufacture floor tiles and by National Gypsum Co. (“National Gypsum”) to manufacture “Gold Bond” joint compound.

Mr. Nilsson was diagnosed with mesothelioma in October of 2012 and commenced this action on December 6, 2012. He was deposed for four days in March of 2013 during which he discussed his alleged asbestos exposure over a lifetime of working in construction.¹ Among other things Mr. Nilsson described how he was exposed to asbestos-containing Kentile floor tiles between 1950 and 1963 while working for his father’s company, Nilsson & Sons (plaintiff’s exhibit 4, pp. 210, 211, 214-215):

¹ Copies of his deposition transcripts are submitted as defendant’s exhibit 6. Portions thereof are also submitted as plaintiff’s exhibit 4.

Q You then mentioned to me that you did interior work between 1950 and 1963 when you worked for Nilsson & Sons?

A We did some. . . .

Q . . . What do you mean by interior work exactly?

A Inside the house.

* * * *

Q Do you believe you were exposed to asbestos in any way, shape, or form in your interior work?

A Well, of course, with the compounds, for the most part, and they would be applied to cover nail holes and tape joints, and they had to be sanded, and sand always produces dust, and I think it's more through the sanding process, than the handling process per se but they were -- they were asbestos-containing materials.

* * * *

Q Did you install flooring as part of this interior work?

A During that time, yes.

Q You believe that the Kentile, floor tile that you have installed contained asbestos?

A I think so.

Although on a much less frequent basis, such exposure continued between 1965 and 1975 while Mr. Nilsson operated his own business, Cee Ray Roofing & Siding (defendant's exhibit 6, vol. 3, pp. 348, 353):

Q. Tell me about the interior work that you did for Cee-Ray Roofing between '65 and '75; what did you do?

A. We did a lot of wood paneling, which was basically four-by-eight foot plywood sheets, and there was -- along with that, we would so some times...Doing a ceiling and a floor.

* * * *

Q. What other kinds of floors did you install?

A. Asphalt asbestos tiles. Kentile was the manufacturer, I think. There were other manufacturers that made flooring products of the Congoleum and Armstrong. Whether Johns-Manville fit into that, I'm not completely certain. . . .

Q. Okay. Did you personally do the installation work of the asphalt asbestos tile?

A. I worked on that, yes.

Q. Did you also supervise that installation?

A. Of course.

Mr. Nilsson also believed that he was exposed to asbestos from National Gypsum's Gold Bond joint compound (plaintiff's exhibit 4, pp. 213-214, 357-358, 469-470, 635-636, defendant's exhibit 6, p. 617-618):

A. Are we talking up to 1963?

Q. Up to 1963. That is all we are talking about right now. . . .

Q. Let's talk about the compound. Do you know the brand name, manufacturer of the compound material that you said came in one or five gallon metal cans?

A. Well, there were a number. There was I think Gold Bond, there was Best Wall, there was U.S. Gypsum, there was Kaiser Gypsum. . . .

Q. With regard to your interior work do you believe you were exposed to asbestos in any other way besides the joint compound that you used during your jobs?

A. There were other products, and I don't know whether they were containing asbestos. There are floorings which did, because we were told, like, Kentile. I believe they were called asbestos tiles.

* * * *

Q. Could you give us the dimension of what you would consider a small bedroom that you might have done between '65 and '75?

A. Six feet by ten feet. . . .

* * * *

Q. Did you ever use National Gypsum roofing products?

A. I think so, occasionally.

Q. What products do you associate with National Gypsum? . . .

A. Tape, compounds.

* * * *

Q. Do you know on how many different occasions Cee-Ray -- my understanding is it was rare you did interior work -- on how many occasions you may have done sheet rocking jobs after 1970?

A. No.

Q. Was it more than one?

A. Yes.

- Q. For sheet rock, not paneling.
- A. Oh, sheet rock? A few times.
- Q. A few times. And among those few times, did you use the assorted brands of joint compound that you've already testified to using today?
- A. Yes, I would say, yes.
- Q. Would that include National Gypsum joint compound?
- A. I guess I was not that much concerned with brands, and we would order compound depending on where we got it, the different source would have a different compound. I do remember the name, however.

* * * *

- Q. With regard to compound, okay, remember earlier you testified concerning the purchasing of materials, and you wouldn't necessarily order by brand name. Is that the same with regard to the compounds you may have used during the course of your operation of Cee-Ray?
- A. It's possible. . . .
- Q. What about National Gypsum, do you recall using that brand of joint compound?
- A. I remember the name, and I believe I testified, but I can't say that I recall using it or just being familiar with it.

Summary judgment is a drastic remedy that should be granted only if there are no triable issues of fact. *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012). 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 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).

In asbestos-related litigation, should the defendant establish its *prima facie* entitlement to judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), 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). While 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]), the plaintiff cannot rely on conjecture or speculation. *Roimesher v Colgate Scaffolding*, 77 AD3d 425, 426 (1st Dept 2010).

Plaintiff's claims as they relate to Kentile are without merit. While UCC did sell Calidria to Kentile during the relevant time period, there is nothing to show that it was Kentile's exclusive asbestos supplier or even one of its major asbestos suppliers. As provided in its 2003 NYCAL interrogatory responses, Kentile purchased raw asbestos UCC as well as Johns-Manville Corp., Carey-Canadian Mines, Ltd., Asbestos Corporation of America, National Gypsum Co., Atlas Asbestos Co., and Asbestos Corporation Ltd.² Plaintiff seems to disregard such NYCAL interrogatory responses in asserting that Union Carbide was the exclusive supplier of asbestos to Kentile from 1966 to 1969. In support plaintiff relies exclusively on discovery responses prepared by Kentile in 1986 in an unrelated lawsuit filed in Ingham County, Michigan.³ However, as the court suggested in *Holmes v AB Volvo*, Index No. 190273/12 (Sup. Ct. NY Co. Dec. 24, 2013, Heitler, J.), such responses are outdated. Also, they do not unequivocally provide that UCC was Kentile's only asbestos supplier during this three year period.

On the other hand, the evidence clearly demonstrates that National Gypsum incorporated

² See defendant's exhibit 10, pp. 19-20.

³ Plaintiff's exhibit 5, p. 5

Calidria into all of its Gold Bond joint compound formulas as of 1969.⁴ And, contrary to UCC's assertions, Mr. Nilsson did identify National Gypsum joint compound as a source of his exposure during this time period. While his identification may have been inconsistent, this presents a credibility issue to be decided at trial, and does not entitle UCC to summary judgment. See *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 (1986); *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013); *Alvarez v NY City Hous. Auth.*, 295 AD2d 225, 226 (1st Dept 2002); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996).

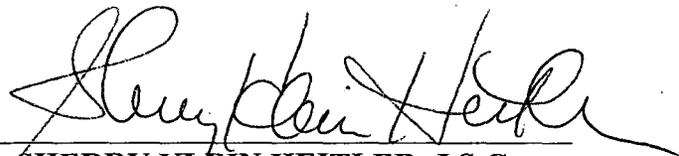
In sum, while it would be a speculative to assume that Mr. Nilsson was exposed to Calidria from Kentile floor tiles, a reasonable inference could be drawn that he was exposed to Calidria from Gold Bond joint compound. See *Reid, supra*; *Cawein, supra*.

Accordingly, it is hereby

ORDERED that Union Carbide Corporation's summary judgment motion is denied.

This constitutes the decision and order of the court.

DATED:


 SHERRY KLEIN HEITLER, J.S.C.

Aug 13, 2014

⁴ Plaintiff's exhibit 7, p. 3 ("Around 1967, National Gypsum switched to Union Carbide SG-210 fiber because the fiber's superior quality enabled National Gypsum to use less asbestos in their materials."); plaintiff's exhibit 8, pp. 2-3 ("Early in 1969 we put in major reformulations in both ready mixed and dry powder compounds, and ready mixed sales more than doubled our best previous year which had been 1966. Changes in the ready mixed formula were built around an excellent new California asbestos from Union Carbide (SG-210). Although somewhat higher in delivered cost than our own 7RF-3 asbestos, approximately half as much SG-210 is required in the formula; and it is much cleaner asbestos, essentially free of undesirable 'side effects'. We are using SG-210 exclusively in ready mixed and dry powder.")