

Fallon v Fulton Boiler Works, Inc.

2014 NY Slip Op 32296(U)

August 26, 2014

Supreme Court, New York County

Docket Number: 190156/13

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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RICHARD FALLON,

Plaintiff,

- against -

FULTON BOILER WORKS, INC., et al.,

Defendants.
-----X

SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant Fulton Boiler Works, Inc. (“Fulton”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all other claims asserted against it on the grounds that plaintiff Richard Fallon failed to identify any product manufactured, sold, supplied, or installed by Fulton as a source of his asbestos exposure and that it had no duty to warn Mr. Fallon of the hazards associated with asbestos manufactured by third-parties. For the reasons set forth below, Fulton’s motion is denied.

Mr. Fallon worked as an electrician and construction worker during the 1960’s and 1970’s at commercial construction sites throughout New York City. He was diagnosed with lung cancer on December 29, 2013 and commenced this action on April 19, 2013. With respect to the defendant Mr. Fallon testified¹ that he sustained bystander asbestos from boilers manufactured by Fulton and several other companies while working at the World Trade Center construction site during the early 1970’s. Mr. Fallon recalled being exposed to asbestos from the “shells” which surrounded such boilers (Deposition pp. 242, 741-42, objections omitted):

Q. You also mentioned that you saw boilers in the loading area. What work was being performed on the boilers in the loading area?

¹Mr. Fallon was deposed in June and July of 2013. Portions of his deposition transcripts are submitted as defendant’s exhibit D and plaintiff’s exhibit 3 (“Deposition”)

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- A. They were doing installation.
- Q. Do you recall the brand name, trade name or manufacturers' names of the boilers that were being installed in the loading area of the World Trade Center?
- A. Kohler, Fulton, Peerless, Rheem.

* * * *

- Q. And were you exposed to asbestos from residential boilers at other sites than the ones that we've discussed at the deposition?
- A. Yes. . . .
- Q. How were you exposed to asbestos from the industrial or commercial boilers? . . .
- A. Same as the residential boilers, broken shells, dust and we'd breathe the dust in?
- Q. How was that dust created? . . .
- A. By breaking, what do you call it, the cover around the boiler, and it would be on the floor, people would be work walking on it, we'd walking [sic] on it, dust would rise and we'd start breathing it. . . .
- Q. Were you exposed to asbestos from boilers at the World Trade Center? . . .
- A. Yes.
- Q. How?
- A. Boilers that were installed could be broken or, you know, and you could be breathing the dust from that, just as the other ones.

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); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). 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).

The defendant argues that it had no duty to warn Mr. Fallon of the hazards associated with asbestos because its boilers came packaged with their own refractory insulation underneath the outer jacket and because it did not manufacture, supply, or recommend that external

insulation be applied to its boilers post-sale. In support the defendant submits three Fulton Boilers instructions manuals from 1965, 1970, and 1972² and an affidavit by Fulton President and CEO R. Bramley Palm, Jr., who claims to be knowledgeable regarding the design, manufacture, and branding of its boilers.³ Therein Mr. Palm states that Fulton boilers have a “poured refractory (concrete-like) insulation which is wrapped with an outer metallic skin. . . . The interior insulation material (refractory) . . . acts as a combination insulator and structural supporting element for our outside jacket.”⁴ He further states that Fulton “manufactured vertical tubeless packaged boilers that were delivered to locations already assembled and were not put together on site. . . . Our manuals did not specify the use of additional asbestos insulation material on the outside of the boilers as it was unnecessary. Our products were complete, packaged boilers and any additional insulation material could cause damage to the boilers.”⁵

Plaintiff questions the accuracy and completeness of the Palm Affidavit and to that end submits deposition testimony⁶ taken from Mr. Palm on September 30, 2010 in connection with an unrelated NYCAL action. Therein Mr. Palm admits that he has virtually no first-hand knowledge of Fulton’s pre-1979 product lines (Palm Deposition, pp. 51, 52; objections omitted):

- Q. Prior to 1979, you had limited knowledge regarding the design specifications of a Fulton boiler. Would you agree with that?
- A. Yes.
- Q. Prior to 1979, did you have any personal knowledge regarding the asbestos use at Fulton boilers?
- A. No.

* * * *

² Defendant’s exhibits G-I, respectively.

³ Defendant’s exhibit E (“Palm Affidavit”).

⁴ Palm Affidavit ¶ 5-6.

⁵ Palm Affidavit ¶ 9-10.

⁶ Plaintiff’s exhibit 5 (“Palm Deposition”).

Q. So any testimony that you give about asbestos or asbestos use in Fulton boilers prior to 1979 would have to be based upon something that has been told to you or something that you have read; is that correct?

A. Yes.

Plaintiff additionally points out that the 1965 instruction manual submitted by Fulton to show that its products did not require asbestos very plainly demonstrates just the opposite; Fulton sold asbestos gaskets and an asbestos-containing thermal refractory cement called "Panelag" to be used as aftermarket products.⁷ The court notes that Panelag appears to be the exact component described by Mr. Palm as the cement used to insulate and support Fulton's boiler jackets.⁸ Notably, Mr. Palm does not opine, and perhaps cannot opine, that this cement was asbestos-free.

Mr. Palm also admitted that Fulton's boiler manuals called for the use of asbestos-containing Panelag for maintenance purposes (Palm Deposition, pp. 293, 294-96, 298-99; objections omitted):

Q. Can you explain to me why Fulton offered five-pound bags and one-hundred-pound bags of Panelag as a replacement part?

A. I don't know.

* * * *

Q. Is it possible that end-users . . . and owners of Fulton boilers would use Panelag as a refractory product on the outside of Fulton's boilers?

A. I don't know how you would hold it there.

Q. Is it possible that end-users . . . and owners of Fulton boilers like . . . would use asbestos containing refractory cement to service, maintain and repair Fulton boilers?

A. I don't know why.

Q. Okay. For instance, upon removing a hand hole plate, are you aware that some people used refractory cement to seal the area over the hand hole plate?

A. Yes.

Q. Are you aware that asbestos-containing refractory cement was often used to seal

⁷ Defendant's exhibit G, pp. 29-32.

⁸ Palm Affidavit ¶ 5-6.

the area over the hand hole plate on a Fulton boiler?

- A. I don't know that.
- Q. Is there anything about the design of a Fulton boiler which would prevent an end-user, service technician or owner of a Fulton boiler from using an asbestos-containing cement to seal the area over a hand hole plate on a Fulton boiler?
- A. I have no idea.
- Q. Is it possible that end-users, owners of Fulton boilers would use asbestos-containing cements to seal the area around the cover, the top cover of a Fulton boiler? . . .
- A. I don't know.
- Q. Did Fulton specifically tell its users in its instruction manual to use furnace cement during semiannual maintenance?
- A. Probably.

* * * *

- Q. My question to you is, Mr. Palm, did Fulton, as a company, know that people who bought Fulton's boilers were going to need to buy products to service, maintain and repair Fulton's boilers?
- A. Yes. . . .
- Q. Okay. So it wasn't outside the realm of foreseeability, then, that people were going to use asbestos products to service maintain and repair Fulton boilers, right?
- A. Yeah.
- Q. Yeah, I'm right or, yeah, it was outside the realm of possibility to foresee that people were going to use asbestos products to service, maintain and repair Fulton boilers?
- A. I think it's a fact that a lot of people chose to purchase asbestos products and use them from 1940s on for a variety of applications.

Fulton's response is that Mr. Fallon's exposure was caused by external insulation sold by third-parties, not Panelag. Even assuming that this were true, the extent to which Fulton supplied and/or recommended the use of aftermarket asbestos in connection with its boilers, including external insulation, has not been resolved. As such it would be inappropriate to award Fulton summary judgment. Moreover, a manufacturer which has a "sufficiently significant role, interest, or influence in the type of component used with its product after it enters the stream of commerce . . . may be held strictly liable if that component causes injury to an end user of the product." *Matter of New York City Asbestos Litig.* [Dummit], 2014 NY App. Div. LEXIS 4964

(1st Dept July 3, 2014). Mr. Palm's testimony and the Fulton instruction manuals raise a triable issue of fact in this regard.

Accordingly it is hereby

ORDERED that Fulton Boiler Work, Inc.'s motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED:

Aug 26, 2014



SHERRY KLEIN HEITLER, J.S.C.