

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

2014 NY Slip Op 33127(U)

December 1, 2014

Sup Ct, New York County

Docket Number: 190405/13

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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EUGENE SOWA and MARY LOUIS SOWA,

Plaintiffs,

- against -

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

Defendants.

----- X

SHERRY KLEIN HEITLER, J.:

Index No. 190405/13
Motion Seq. 002

DECISION & ORDER

In this asbestos personal injury action, defendant American Biltrite, Inc. (“Defendant”) 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 it contributed to plaintiff Eugene Sowa’s injuries. As more fully set forth below, the motion is denied.

Mr. Sowa worked as a laborer for the Concrete and Cement Union from 1969 to 1975. Plaintiffs allege that he sustained bystander exposure to asbestos during this time period while cleaning up debris left behind by other trades. Relevant to this motion, Mr. Sowa testified¹ that he was exposed to asbestos from “Amtico” floor tiles. The Defendant concedes that it is responsible for the Amtico line of products.

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.” The moving papers “shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it

¹ Mr. Sowa was deposed on February 11, 2014. Copies of his deposition transcripts are submitted as defendant’s exhibit D (“Deposition”).

shall show that there is no defense to the cause of action or that the cause of action or defense has no merit.” *Id.* 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. *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957).

The Defendant’s primary contention is that Mr. Sowa only knew the name Amtico “through the tile industry” and has no personal knowledge whether the tiles he encountered were actually manufactured by Amtico as opposed to another tile company (Deposition pp. 252-55):

- Q. Would you agree with me that you couldn’t tell who made a tile just by looking at the tile itself?
- A. No.
- Q. No, you couldn’t?
- A. No, I couldn’t
- Q. So, then, how is it that you could tell that a tile was made by Amtico?
- A. Could I tell how?
- Q. A tile was made by Amtico?
- A. Amtico in comparison to what?
- Q. Anybody else’s tile, Kent Tile, Armstrong, Congoleum?
- A. No, I couldn’t. No. I couldn’t. I wasn’t that familiar with it, no. Just that they came to the job, and I -- I never really gave it a second thought.
- Q. Because you were focused on your work, not the work of others; correct?
- A. I was what?
- Q. Focused on your work, not somebody else’s work?
- A. Exactly.
- Q. So, how is it that you know the name Amtico?
- A. How is it that I --
- Q. You know the name. How do you know the name?
- A. Through the tile industry.
- Q. But you never worked in the tile industry, did you?

A. No, but I can read, and I can ask or, you know, personally, people put that stuff down that I know of.

Q. Did you ever see any packaging related to Amtico at any of the job sites that you worked at?

A. If I did, they're either cardboard or in boxes.

Q. Do you know one way or the other whether you did? You said "if I did." I'm trying to find out one way or the other if you can recall seeing the packages or not.

A. Unless they were marked, I couldn't tell.

Q. That's not exactly my question. So, do you remember seeing boxes that you associated with Amtico on job sites that you worked at?

A. No. Only if it said on there.

MR. JACOBS: But that's what he's asking you.

THE WITNESS: Huh?

MR. JACOBS: That's what he's asking you. Did you see the name on anything? That's what he's asking you.

THE WITNESS: Oh. Did I see the name on anything? . . .

Q. On job sites. Not at a construction -- not at a hardware store or a catalog. Did you see it on the job site?

A. Now I understand. Okay. No.

Although this small portion of testimony arguably calls plaintiffs' claims into question, Mr. Sowa's deposition must be examined in its entirety. Prior to being cross-examined by counsel for the Defendant, Mr. Sowa was more definitive in his identification of Amtico as a source of his exposure (Deposition pp. 91-93, 134):

Q. What work were the others doing that you believe may have exposed you to asbestos?

A. Cement pipe covering, compound plastering, vinyl tile, electrical panels, things of this sort. Now, they all had names to them, you know, or -- what am I trying to say? Like pipe coverings was Well, on the pipe covering, it was Kaylo and Johns Manville. On the compound plaster, the outfits were Georgia Pacific, Gold Bond, and U.S. Gypsum. Now, on the floor tiling asbestos was Amtico, Amtico. There was a couple more, if you give me a second. Amtico, Gold Bond, and U.S. Gypsum. . . .

* * * *

Q. What work did you see floor tile layers doing in office buildings during your career as a laborer?

A. Laying tile.

- Q. What about their work, if anything, do you believe exposed you to asbestos?
- A. Well, the stuff that was broken, busted, or whatever it was, after they laid it, I cleaned it up with a shovel, broom, or scraper or whatnot, and disposed of it in buckets or whatever, into dumpsters.
- Q. Do you know who made any of the floor tiles that you saw used in office buildings during your career as a laborer?
- A. Do I -- say again.
- Q. Who made the floor tile in the office buildings?
- A. Who made them?
- Q. Yes.
- A. Armstrong, Amtico, and and [sic] Kentmore.

Also worth noting is Mr. Sowa's testimony that he has hearing difficulties (Deposition p. 9):

- Q. Can you hear me okay?
- A. I'm very hard of hearing and understanding. I can hear but can't understand.
- Q. Okay.
- A. So, forgive me.

Taking Mr. Sowa's hearing issues into consideration, and giving plaintiffs the benefit of all reasonable inferences that can be drawn from the evidence (*Angeles v Aronsky*, 105 AD3d 486, 488-89 [1st Dept 2013]), there remains a triable issue of fact whether the plaintiff has personal knowledge that the tiles he encountered were manufactured by the Defendant. *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996) ("The deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaintThe assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact, and any apparent discrepancy between the testimony and the evidence of record goes only to the weight and not the admissibility of the testimony."); see also *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).

The Defendant further asserts that it manufactured both asbestos-containing and asbestos-free

floor tiles during the relevant time period, and that even if the court were to credit plaintiffs' contention that Mr. Sowa encounter Amtico floor tiles, it would be pure speculation to assume that they contained asbestos.

While the court will not presuppose that Mr. Sowa was exposed to an asbestos-containing Amtico tile, the only evidence submitted by the Defendant herein to show that it even manufactured asbestos-free tiles are its Answers to Plaintiffs' First Set of Liability Interrogatories filed in connection with an unrelated NYCAL action² which are silent regarding many of the issues that are particularly relevant to this case. For example, such responses do not provide the percentage of Amtico tiles manufactured during the relevant time period that were asbestos-free or describe what such asbestos-free tiles may have looked like.³ Equally important, they do not provide whether Amtico's asbestos-free tiles were even available in the New York market. As such the defendant has failed to "unequivocally establish that its product could not have contributed to the causation of plaintiff's injury." *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 946 (1st Dept 1995).

Accordingly, it is hereby

ORDERED American Biltrite, Inc.'s motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: 12-1-14



 SHERRY KLEIN HEITLER, J.S.C.

² *Derogatis v 3M Company, et al.*, Index No. 190150/11.

³ The court notes that Mr. Sowa was able to tell the difference between an asbestos-containing and asbestos-free tile based on its thickness. Deposition p. 252.