

<p>Wiacek v 3M Co.</p>
<p>2014 NY Slip Op 30210(U)</p>
<p>January 16, 2014</p>
<p>Sup Ct, New York County</p>
<p>Docket Number: 190096/12</p>
<p>Judge: Sherry Klein Heitler</p>
<p>Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u>(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.</p>
<p>This opinion is uncorrected and not selected for official publication.</p>

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTYPRESENT: HON. SHERRY KLEIN HEITLER
JusticePART 30

Index Number : 190096/2012

INDEX NO. 190096/12

WIACEK, MARIAN

vs

MOTION DATE

3M COMPANY, ET AL.

MOTION SEQ. NO. 008

Sequence Number : 008

SUMMARY JUDGMENT

(WILLSON)

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

is decided in accordance with the
memorandum decision dated 1.16.14.

FILED

JAN 27 2014

NEW YORK
COUNTY CLERK'S OFFICEMOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):Dated: 1.16.14J.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
MALGORZATA WIACEK, Individually and as Executrix
of the Estate of MARIAN WIACEK, deceased,

Index No. 190096/12
Motion Seq. No. 08

Plaintiffs,

-against-

3M Company, et al.,

Defendants.

FILED

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

JAN 27 2014

DECISION & ORDER

In this asbestos personal injury action, defendants Bacou-Dalloz Safety, Inc., Bacou-Dalloz USA Safety, Inc., Dalloz Safety, Inc., and Willson Safety (collectively, "Willson" or "Defendants")¹ move pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against them on the grounds, among others, that plaintiffs have not specifically pled any claims against Willson and that plaintiffs cannot demonstrate that any Willson product contributed to plaintiffs' injuries. For the reasons set forth below, Willson's motion is granted in part and denied in part.

BACKGROUND

Plaintiffs' decedent Marian Wiacek, now deceased, was born in Poland in 1952 and emigrated to the United States in 1986. From 1987 until approximately 1992 Mr. Wiacek worked as an asbestos handler. In this regard he abated asbestos and asbestos-containing products from, among other places, manholes, powerhouses, private apartments, and offices. He also worked in and around boilers. In or about 1992 Mr. Wiacek became a supervisor, a position

¹

There is no dispute that all Defendants are responsible for Willson.

he held until early 2012. While Mr. Wiacek was physically present at abatement sites he no longer personally performed abatement work. It is undisputed, however, that he continued to work with and around asbestos-containing products on a daily basis throughout his career.

Mr. Wiacek was diagnosed with mesothelioma in October of 2011. He commenced this action along with his wife Malgorzata Wiacek on February 24, 2012. With several exceptions², the initial verified complaint in this action broadly describes the twenty defendants named therein as manufacturers and suppliers of asbestos-containing products. The complaint was amended on June 4, 2012 to add the Defendants to this action, on February 20, 2013 to add an additional defendant, and on July 23, 2013 to reflect Mr. Wiacek's death and to add a wrongful death claim (hereinafter, the "Complaint").

Prior to his death Mr. Wiacek was deposed over the course of six days in May, July, August, and October of 2012.³ He testified that as an asbestos handler he was required to and did take several training courses. He also obtained federal, state, and New York City licenses as an asbestos handler. In particular Mr. Wiacek was trained to use personal protective equipment ("PPE"), including special shoes, protective suits, goggles, respirators, gloves, and hoods, all of which he used while working with and around asbestos products.

Mr. Wiacek's deposition focused on his use of respirators, which he referred to as masks. These masks were one of the most important pieces of equipment in terms of safety (Video

² Defendants submit a copy of the initial verified complaint as exhibit 7. Therein plaintiffs assert New York Labor Law claims (4th and 7th causes of action), a premises liability claim (8th cause of action), and a claim specifically against defendant Metropolitan Life Insurance Co. relating to health benefits (5th cause of action). None of such claims are alleged herein to pertain to the Defendants.

³ Mr. Wiacek's *de bene esse* deposition transcript is submitted as defendant's exhibit 1 ("Video Deposition"). Copies of his discovery deposition transcripts are submitted as defendant's exhibit 2 ("Deposition").

Deposition pp. 44-45):

- Q. Mr. Wiacek, when you would do this work as an asbestos handler from 1987 to 1992, what would you be wearing when you did this work?
- A. As protection?
- Q. As protection, yes?
- A. First of all, we removed all street clothes.
- Q. Yes.
- A. Hundred percent, and we put one time using, temporary only for the job, official suits, coveralls, different name, and masks, and gloves, sometimes is rubber boots, and some jobs you use helmets, some jobs we use goggles, but suits and masks was most important. We use every job.
- Q. What type of masks did you wear?
- A. We used only two types of mask, which means half face mask and full face mask.

Mr. Wiacek consistently identified Willson as one of only a few manufacturers of respirators that he used throughout his career (Deposition pp. 151, 613-14; Video Deposition pp. 47, objections omitted):

- Q. Now, you can't tell me . . . which specific masks you wore?
- A. I can say first ten years mostly I used MSA, Wilson [sic] and 3M, and last ten years mostly North. . . .

* * * *

- Q. Okay. Now, you testified several times that you believe during the course of your work with asbestos you either wore a North mask, a 3M mask, MSA mask or a Wilson [sic] mask, correct?
- A. Right.
- Q. No others, correct?
- A. I don't remember other type of mask.

* * * *

- Q. Mr. Wiacek, regardless of the description of the mask, are you sure that you used half faced masks manufactured by Willson? . . .
- A. Yes.

Mr. Wiacek wore a different respirator on every job, and sometimes several different respirators in one day. While he was unable to testify what type, brand, size, or model respirator

he wore on any single job, he recalled that most of the respirators were dark in color and had soft pink filters that screwed into the sides. He also testified that he worked with both full and half masks throughout his career and that the half masks did not provide the same protection factor as the full masks (Video Deposition pp. 47-48, objections omitted):

- Q. I'm just asking for your understanding. Is it your understanding that half face masks provide a hundred percent protection? . . .
- A. All masks have protection for us.
- Q. Right. Is the protection from the half face mask a hundred percent? . . .
- A. Of course it is.
- Q. From the half face?
- A. No, half face doesn't give us protection, half mask. The protection factor was smaller than full face.

Because of the health hazards associated with asbestos exposure, Mr. Wiacek understood the importance of obtaining a good seal between his respirator and his face. Every morning before entering a work site he performed his own fit test to make sure his respirator properly covered his face.⁴ He also obtained annual "fit test" certifications.⁵ At the end of each day Mr. Wiacek went through extensive decontamination procedures, which included passing through several rooms with airlocks between them. He then removed all of his PPE, except his mask, and passed through an area where he would shower and clean his mask before removing it. Only after disposing of his mask and filters could he enter a clean room and put on his street clothes.⁶

Mr. Wiacek was exposed to asbestos and developed mesothelioma despite strictly following all of these safety procedures. Plaintiffs assert that such asbestos exposure was solely as a result of defective masks that Mr. Wiacek used throughout his career, including those

⁴ Deposition pp. 192-93, 533-34.

⁵ Deposition pp. 136-141.

⁶ Video Deposition pp. 78-81.

manufactured by the Defendants.

DISCUSSION

The movant on a summary judgment motion must establish its defense sufficiently to warrant a court's directing judgment in its favor as a matter of law by demonstrating the absence of any material issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Should the moving party fail to present a *prima facie* case, the court need not consider the sufficiency of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Should the movant establish its *prima facie* case, the burden shifts to the opposing party to demonstrate that there is a genuine triable issue of fact. *Zuckerman, supra; see also Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986).

Willson argues that it is entitled to summary judgment because the Complaint fails to state any cognizable cause of action against it and because plaintiffs cannot show "any genuine issue of material fact on any potentially relevant cause of action, *i.e.*, strict liability, negligence, breach of warranty, that would justify a trial."⁷

I. Sufficiency of the Complaint

Pursuant to the New York City Asbestos Litigation ("NYCAL") Case Management Order ("CMO"), plaintiffs' counsel filed a set of standard complaints under the global index number for all NYCAL cases (040000/1988) which contains standard allegations generally applicable to all asbestos personal injury actions filed in this court. Generally, these standard complaints allege that the defendants manufactured, sold, or distributed asbestos-containing products to which the plaintiff was exposed. The Defendants point out that they manufacture asbestos-free respiratory

⁷

See Defendant's Memorandum of Law, p. 13-14. Plaintiffs do not oppose that branch of Willson's motion which seeks dismissal of plaintiffs breach of warranty claim. Accordingly, Willson's motion is granted in that respect.

protection equipment, not asbestos-containing products, and that the Complaint incorrectly identifies them as manufacturers and distributors of asbestos-containing materials. The Defendants further point out that the Complaint only expressly identifies 3M masks as having been defectively designed.⁸ The Defendants thus argue that plaintiffs have failed to plead a cause of action against them and that they would be prejudiced should the court afford plaintiffs an opportunity to cure at this stage of the proceedings. Plaintiffs tacitly acknowledge that the Complaint may have been inartfully drafted with respect to the Defendants, but argue that under New York's liberal pleading requirements of CPLR 3026⁹ it is sufficient to maintain defective design and failure to warn claims against them.

Bearing CPLR 3026 in mind, I find that any purported defects in the Complaint do not prejudice the Defendants. *See Busler v Corbett*, 259 AD2d 13 (4th Dept 1999) (a showing of prejudice requires the demonstration of an impairment of a party's ability to defend on the merits). It is evident that the Defendants knew or should have known that plaintiffs were pursuing design defect and failure to warn claims against all of the defendants in this case that manufactured respiratory protection no later than the first day of Mr. Wiacek's deposition.¹⁰ Thus, the Defendants were on constructive notice of the basis for plaintiffs' claims against them at the very latest in May of 2012, over one year prior to filing this motion. At this stage of the proceeding, with discovery in full swing and plaintiffs having requested that this matter be

⁸ Complaint ¶ 40.

⁹ CPLR 3026 provides: "Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced."

¹⁰ See Patrick M. Connors, Practice Commentaries, *McKinney's Cons Laws of NY*, Book 7B, CPLR C3026, at 297 (If a defect prejudices no one, it must be ignored. . . . In considering whether prejudice is avoidable, it is permissible today to consider other sources within the litigation from which the party may derive, or indeed may have already obtained, whatever is now sought from the other side's pleading. Frequently, the bill of particulars and the disclosure devices can avoid any prejudice.)

assigned to a trial judge, the Defendants' claim of prejudice is untenable.

II. Design Defect Claim

"A party injured as a result of a defective product may seek relief against the product manufacturer . . . if the defect was a substantial factor in causing the injury." *Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 41 (2003); *see also Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 110 (1983). "A strict products liability cause of action may be premised on a defect in the manufacturing process, a defect in the design or a failure by the manufacturer to provide adequate warning or instructions." *Perazone v Sears, Roebuck & Co.*, 128 AD2d 15, 17-18 (3d Dept 1987) (citing *Voss, supra*, at 106-107); *see also Liriano v Hobart Corp.*, 92 NY2d 232, 237 (1998). "To establish a *prima facie* case in a strict products liability action predicated on a design defect, a plaintiff must show that the manufacturer marketed a product which was not reasonably safe in its design, that it was feasible to design the product in a safer manner, and that the defective design was a substantial factor in causing the plaintiff's injury." *Gonzalez v Delta Int'l Mach. Corp.*, 307 AD2d 1020, 1021 (2d Dept 2003). The plaintiff "must use an expert to show a feasible alternative design and to meet its *prima facie* case." *Bruno v Thermo King Corp.*, 2008 NY Misc. LEXIS 7718, at *11 (Sup. Ct. Queens Co. Jan. 30, 2008), *aff'd* 66 AD3d 727 (2d Dept 2009); *see also Lessard v Caterpillar, Inc.*, 291 AD2d 825, 826 (4th Dept 2002); *Rypkema v Time Mfg. Co.*, 263 F. Supp. 2d 687, 692 (SDNY 2003).

In this regard plaintiffs merely submit an attorney's affirmation which states in a conclusory manner that the Defendants' masks must have been defectively designed because Mr. Wiacek used them throughout his career yet still contracted mesothelioma. Plaintiffs have not designated a single expert witness to opine on the issues surrounding the design of, and regulations applicable to, respirators used for asbestos abatement. In the absence of such expert

opinion, plaintiffs' design defect claims cannot survive summary judgment. *See Bruno, supra.*

III. Failure to Warn Claim¹¹

The National Institute for Occupational Safety and Health ("NIOSH") develops recommendations on workplace safety practices to prevent injuries. As part of any respiratory safety program, employers use NIOSH-certified respirators and provide their employees with specific types of NIOSH-certified respirators when they are exposed to certain contaminants, including asbestos. See, e.g., 29 CFR 1910.134.¹² NIOSH closely monitors a proposed respirator's design specifications; performance inspection, and testing results, as well as proposed user instructions, manuals, packaging, and labeling. See 42 CFR 84.11, 42 CFR 84.12, 42 CFR 84.40, 42 CFR 84.41.

The Defendants argue that plaintiffs' failure to warn claims must be dismissed because their masks were approved by and complied with all government regulations. In this regard, the Defendants submit the affidavit of Bacou-Dalloz Safety, Inc's former Vice President James P. Kline,¹³ who states that all Willson respirators were reviewed, approved, and certified by NIOSH, including their warning and labeling requirements, and that Willson performed all of the NIOSH's tests internally to assure that their respirators satisfied all regulatory performance requirements.¹⁴ However, the Defendants have not submitted copies of any government approvals, certifications, citations, reports, labels, packaging, warning, advertisements, or

¹¹ Where liability is predicated on a failure to warn, New York views negligence and strict liability claims as equivalent. *See Wolfgruber v Upjohn Co.*, 72 AD2d 59, 62 (4th Dept 1979), *aff'd* 52 NY2d 768 (1980).

¹² Respirators are also regulated by the Occupational Health and Safety Administration ("OSHA"). With regard to asbestos, OSHA requires that persons "entering a regulated area shall be supplied with and required to use a respirator" (29 CFR 1910.1001(e)(4)) and that the respirator must be a "tight-fitting, powered, air-purifying respirator." (29 CFR 1910.1001(g)(2)(ii)).

¹³ Mr. Kline's affidavit, sworn to July 27, 2013, is submitted as defendant's exhibit 8.

¹⁴ *Id.* at ¶ 6, 8.

marketing materials to indicate how the Defendants' products were approved, marketed and sold to the public. There is no evidence whatsoever to corroborate Mr. Kline's assertions that the Defendants complied with NIOSH's regulations. Thus it would be improper for this court to find that the Defendants discharged their duty to warn as a matter of law.

Defendants contend that the prominence and adequacy of their warnings are immaterial because Mr. Wiacek was trained how to properly operate the respirators he used throughout his career and was fully aware of the risks associated with his trade. *See Liriano, supra*, at 241 (“courts could as a matter of law decide that a manufacturers' warning would have been superfluous given an injured party's actual knowledge of the specific hazard that caused the injury”); *Reis v Volvo Cars of No. Am., Inc.*, 73 AD3d 420, 423 (1st Dept 2010) (“it is immaterial how prominent or conspicuous any warning in the owner's manual might have been because it is undisputed that [the plaintiff] did not read the manual and would not have been likely to read it because he was familiar with how cars operated.”)

It is equally axiomatic, however, “that in all but the most unusual circumstances, the adequacy of a warning is a question of fact” *Polimeni v Minolta Corp.*, 227 AD2d 64, 67 (3d Dept 1997); *see also Morrow v Mackler Prods.*, 240 AD2d 175, 176 (1st Dept 1997); *Nagel v Brothers Intl. Food, Inc.*, 34 AD3d 545, 547-48 (2d Dept 2006). In this case, it is evident that Mr. Wiacek was highly familiar with respirator safety protocols and was generally aware of the hazards associated with asbestos. As plaintiffs point out, however, Mr. Wiacek testified that he saw no warnings on the masks themselves (as opposed to the packaging), that he would not have used half masks had he known they did not offer 100% protection, and that on occasion he found the need to tighten his mask while working (Video Deposition pp. 48-50, 103-06, objections omitted):

Q. On the half masks, and I want you to listen to my question carefully, on the half masks, on the mask itself, okay, did you see any writing that stated that the mask did not give you a hundred percent protection? . . .

A. The mask had no signs on this.

Q. No signs on the masks?

A. Masks had signs only size mask, and approval, by whom approval.

Q. If you had read on the mask that it did not give you a hundred percent protection, would you have used the mask?

A. No. . . .

Q. Your answer to that question was no?

A. My answer is no.

Q. Mr. Wiacek, when you did you find out that the masks didn't give you a hundred percent protection? . . .

A. Last year when doctor says I have mesothelioma. After five years on job.

* * * *

Q. Are you ready Mr. Wiacek?

A. Okay.

Q. Good. When you would be working as an asbestos handler, wearing the half mask, okay, would you be standing perfectly still when you were doing your work or would you be moving around?

A. Could you repeat, please?

Q. When you were doing your job as an asbestos handler would you be standing still or would you be moving around?

A. No, it's not standing job. Asbestos handler, he is using by hand, hanging above his head, asbestos. Let's say from say, back, from ceiling, and he has to move, if he say, on a ladder, but mostly on scaffold. It's some spaces is easy access, it's entire deck, but some spaces like between there it's like small spaces, especially on side, and around the walls, where you have to -- where you don't have access with his head, you can put only in hands, you have to move head. So you move your head left, right, up, down. Is situation where I'm not sure mask -- that mask we are using is enough for that kind of job. I think it's better if you have mask, including -- when I go to equipment mask, from top to bottom, inside of mask and gloves, it gives us more protection.

Q. Is that because when you are moving your head from side to side that you were describing --

A. Yes.

Q. -- that the seal that the lawyers for the mask companies just asked you about doesn't stay on your face the same way it does when you are trying it out without doing

- work?
- A. It feels okay, but if I am working or moving I have to . . . tighten it. . . .
- Q. Did you ever raise that issue, this moving around issue, with your employer?
- A. I don't understand. . . .
- Q. Did you ever raise an issue about your mask not sealing with your employer?
- A. I didn't say mask not sealing. I didn't say like this, but I said the mask does like trap dust. If I moving head, left, right, up, down. So, sometimes the straps makes loose. The reason why we have to control workers, supposed to have control of the mask, and check and see, just make stronger straps.

In light of the foregoing, this court cannot find as a matter of law that Mr. Wiacek would not have heeded any of Defendants' warnings were they to be given, or that any such warning would have been adequate in the circumstances. As such there remains a triable issue of fact concerning the adequacy of the warnings provided by the Defendants in respect of its respirators used for asbestos abatement.

CONCLUSION

The court has considered Defendant's remaining contentions and finds them to be without merit.

Accordingly, it is hereby

ORDERED that this motion for summary judgment by defendants Bacou-Dalloz Safety, Inc., Bacou-Dalloz USA Safety, Inc., Dalloz Safety, Inc., and Willson Safety is granted in part and denied in part; and it is further

ORDERED that the branch of this motion which seeks to dismiss the Complaint for failure to state a cause of action is denied; and it further

ORDERED that plaintiffs' second cause of action for breach of warranty as against Bacou-Dalloz Safety, Inc., Bacou-Dalloz USA Safety, Inc., Dalloz Safety, Inc., and Willson Safety is hereby severed and dismissed in its entirety; and it is further

ORDERED that to the extent that plaintiffs allege a manufacturing or design defect claim

against Bacou-Dalloz Safety, Inc., Bacou-Dalloz USA Safety, Inc., Dalloz Safety, Inc., and Willson Safety such claim is dismissed for failure of proof; and it is further

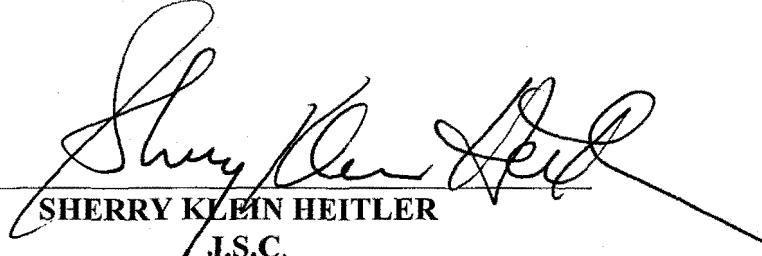
ORDERED that to the extent that plaintiffs allege a failure to warn claim against the Defendants this motion for summary judgment is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 1.16.14


SHERRY KLEIN HEITLER
J.S.C.

FILED

JAN 27 2014

NEW YORK
COUNTY CLERK'S OFFICE

13. 1. 1973

13. 1. 1973

13. 1. 1973