

Baruch v Baxter Healthcare Corp.

2014 NY Slip Op 30337(U)

January 24, 2014

Sup Ct, NY County

Docket Number: 190372/12

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

Index Number : 190372/2012
BARUCH, ESTER
vs
BAXTER HEALTHCARE CORPORATION
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. 190372/12

MOTION DATE _____

MOTION SEQ. NO. 003

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 1.24.14

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1.24.14.


_____, J.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
ESTER BARUCH and NERYE BARUCH,

Index No. 190372/12
Motion Seq. 003

Plaintiffs,

DECISION & ORDER

-against-

BAXTER HEALTHCARE CORP., et al.,

Defendants.
-----X

SHERRY KLEIN HEITLER, J:

In this asbestos personal injury action, defendant Baxter Healthcare Corporation (“Baxter” or “Defendant”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it. Baxter, which is responsible for American Scientific Products (“American Scientific”), argues that plaintiff Ester Baruch’s claim that she was exposed to asbestos-containing American Scientific laboratory gloves is merely conjectural. As more fully set forth below, the Defendant’s motion is denied.

In or about January 24, 2012 plaintiff Ester Baruch was diagnosed with mesothelioma. On August 16, 2012 Ms. Baruch and her husband commenced this action to recover for personal injuries alleged to be caused by her occupational exposure to asbestos. Ms. Baruch was deposed on December 11, 2012.¹ Relevant to this motion is Ms. Baruch’s testimony that she was exposed to asbestos while working as a lab technician. She testified that from 1994 through 1999 she interchangeably used two old pairs of asbestos gloves while performing tests for the Shiel Medical Laboratory serology department, that one such pair of gloves was manufactured by American

¹ A copy of Ms. Baruch’s deposition transcript is submitted as Defendant’s exhibit D (“Deposition”).

Scientific, and that she was exposed to asbestos therefrom (Deposition pp. 144-45, 146, 151, 157-58):

- Q. Do you have any information regarding who would have purchased them?
- A. I don't know. Maybe ten or 15 years came before me, so I don't know when they came.
- Q. When you say ten to 15 years, what are you basing that on?
- A. They were old. They looked old. They were dusty and old, old.
- Q. Was there anything written on the gloves indicating when they were manufactured?
- A. Yeah. There was a label on one pair was Fisher Scientific asbestos gloves and another was American Scientific asbestos gloves.

* * * *

- Q. You mentioned there was a tag on the gloves?
- A. Inside, yes.
- Q. Inside the glove?
- A. Yes.
- Q. And you are saying that one of them said Fisher Scientific and the other one said American Scientific?
- A. Yes.
- Q. Did it say anything else on the gloves?
- A. Asbestos gloves.
- Q. It said asbestos gloves on it?
- A. Yes.

* * * *

- Q. . . . What is the basis of your belief that the American Scientific gloves that you used at the Shiel Lab contained asbestos?
- A. Because it's written asbestos gloves.
- Q. Is there any other reason, independent knowledge that you have, that those gloves contained asbestos other than reading that tag?
- A. No. I just know we call it asbestos and everybody call it asbestos. That is why I remember it is asbestos.

* * * *

- Q. What is it about just using the gloves to transfer your specimen from the incubator to the reader caused you to believe you were exposed to asbestos?

- A. Because it was dusty. I feel like dust. I saw the dust and I feel it on my arms like a dust. I didn't realize at that time. I didn't know anything about it. . . .
- Q. How many times a day would you use the gloves?
- A. About five, six times. Every time I have to take out my specimens.

The Defendant asserts that plaintiff's testimony is incredible as a matter of law. In support it submits an affidavit by Jason Maxwell², Vice President and Associate General Counsel for Cardinal Health, Inc., a corporate entity with a successor relationship to American Scientific. Mr. Maxwell states that American Scientific was merely a product distributor and any asbestos-containing product offered for sale in its catalogs necessarily would have been manufactured by another company. Mr. Maxwell also states that he reviewed the eleven product catalogs published by American Scientific from 1952 to 1985 and that there were no American Scientific branded asbestos-containing gloves among the products offered for sale therein.

The Defendant also submits, for the first time in reply, an affidavit by former American Scientific Marketing Manager Craig Rothman. Mr. Rothman offers that in 1979 the Defendant's predecessor added the term "American" to each of its divisions' names so that "Scientific Products", as it was then known, became "American Scientific Products." Mr. Rothman continued, in relevant part (Defendant's reply exhibit A, ¶¶ 8, 10)³:

The appearance of the new ASP name on any private-label products or packaging, if at all, began no earlier than 1980. Based upon my review of [] all of the SP and ASP catalogs, which contained any and all products offered for sale by SP and ASP at any given time, no SP or ASP private-labeled asbestos-containing gloves or mittens were ever offered for sale Between 1979 and 1985, the only asbestos-containing gloves offered for sale by SP and the new ASP were manufactured by Racine Glove."

² Mr. Maxwell's affidavit, sworn to August 13, 2013, is submitted as Defendant's exhibit E.

³ Mr. Rothman's affidavit is sworn to October 30, 2013.

Neither the Maxwell nor the Rothman affidavit is sufficient to form the basis for the Defendant's motion. With respect to Mr. Maxwell, it appears he has no personal knowledge of American Scientific's business practices other than what he was able to glean from its catalogs,⁴ only a few of which indicate that the Defendant sold gloves manufactured by other companies, and none of which indicate whether they had inside tags. Moreover, only the barest excerpts of the catalogues are submitted, and apart from what appears to be a Bates Stamp type label on such excerpts, it is unclear precisely what year they were published and whether there were other portions thereof that describe similar products. These omissions are not clarified by Mr. Maxwell.

Mr. Rothman's affidavit should not be considered insofar as it was submitted for the first time in reply. See *Batista v Santiago*, 25 AD3d 326, 341 (1st Dept 2006); *Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 (1st Dept 1993); *Dannasch v Bifulco*, 184 AD2d 415, 417 (1st Dept 1992). Nevertheless, the Rothman affidavit focuses almost exclusively on the time period between 1978 and 1985 even though, as submitted by Mr. Maxwell, American Scientific sold medical equipment as early as 1952. The Defendant also fails to advise what companies, if any, manufactured the asbestos gloves sold by American Scientific prior to 1978. Most important, there is no information submitted by the Defendant on those products which were privately-branded. In essence, the Defendant's submissions raise more questions than they answer.

Summary judgment is a drastic remedy that must not be granted if there is any doubt about the existence of a triable issue of fact. *Tronlone v La d'Amiante du Quebec, Ltee*, 297 AD2d 528, 528-529 (1st Dept 2002). In moving for summary judgment a defendant is required to make a *prima facie* showing "that its product could not have contributed to the causation of plaintiff's

⁴ Excerpts of American Scientific's catalogues are annexed to Mr. Maxwell's affidavit.

injury” *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 462 (1st Dept 1995). The failure to make sure a *prima facie* case requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). All reasonable inferences should be resolved in the plaintiff’s favor. *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dept 1990).

The essence of the Defendant’s motion is that Ms. Baruch’s testimony is incredible as a matter of law because American Scientific never sold asbestos-containing gloves with a tag affixed to the inside bearing the American Scientific name. At most this argument goes to the weight to be given to Ms. Baruch’s testimony at trial. See *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013); *Josephson v Crane Club, Inc.*, 264 AD2d 359, 360 (1st Dept 1999); *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).

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

Accordingly, it is hereby

ORDERED that Baxter Healthcare Corporation’s motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED:

1-27-14


SHERRY KLEIN HEITLER, J.S.C.