

Pendolino v Air & Liquid Sys. Corp.

2015 NY Slip Op 30519(U)

March 23, 2015

Supreme Court, New York County

Docket Number: 190320/13

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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JOHN PENDOLINO and NANCY PENDOLINO,

Index No. 190320/13
Motion Seq. 004

Plaintiffs,

DECISION & ORDER

-against-

AIR & LIQUID SYSTEMS CORP., et al.,

Defendants.

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SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant The Nash Engineering Company (“Nash”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that plaintiff has not identified any Nash product as a source of his injuries.¹ Plaintiffs oppose Nash’s motion, arguing that there is enough circumstantial evidence to raise a triable issue of fact whether Mr. Pendolino was exposed to asbestos from Nash pumps. For the reasons set forth below, Nash’s motion is granted.

John Pendolino, who is now deceased,² worked as a machinist’s helper from November of 1941 through October of 1942 aboard the battleship *USS Iowa*, which at the time was docked at the Brooklyn Navy Yard. Plaintiffs allege that Mr. Pendolino was exposed to asbestos inside that ship’s boiler room and that such exposure contributed to his injuries.

Mr. Pendolino was deposed on October 9, 2013.³ It is undisputed that he did not

¹ Mr. Pendolino had been diagnosed with mesothelioma, an asbestos-related cancer.

² Mr. Pendolino died on April 26, 2014.

³ A copy of Mr. Pendolino’s deposition transcript is submitted as defendant’s exhibit A (“Deposition”).

specifically identify any Nash pump as a source of his asbestos exposure. Still, he testified that he was present while other trades insulated equipment with asbestos insulation, including pumps (Deposition pp. 136-139, 148-150), and that this work occurred primarily in the ship's boiler rooms (Deposition pp. 66-69).

CPLR 3212(b) provides 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.” In asbestos-related litigation, should the defendant establish its *prima facie* entitlement to judgment as a matter of law by demonstrating the absence of material issues of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]; *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).

The plaintiff may meet this burden through the use of circumstantial evidence. *Schneider v Kings Highway Hospital Center, Inc.*, 67 NY2d 743, 744, (1986) (quoting *Ingersoll v Liberty Bank of Buffalo*, 278 NY 1, 7 (1938) (“To establish a *prima facie* case of negligence based wholly on circumstantial evidence, “[it] is enough that [plaintiff] shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred.”)). However, there must be a sufficient link between the plaintiff and the defendant's product (*see Krepplein v Celotex Corp.*, 969 F2d 1424, 1426 [2d Cir 1992]) which cannot be established through conjecture. *Roimesher v Colgate Scaffolding Equip. Corp.*, 77 AD3d 425, 426 (1st Dept 2010).

The defendant's *prima facie* case is Mr. Pendolino's failure to identify Nash as the

manufacturer of any of the pumps at issue. In response, plaintiffs submit three documents which purportedly demonstrate the presence of Nash pumps aboard the *USS Iowa* during the relevant time period.⁴

Nash does not take issue with plaintiffs' exhibit B, a magazine printout⁵ indicating that the *USS Iowa*, *USS New Jersey*, *USS Missouri*, and *USS Wisconsin* composed the Iowa class of World War II battleships. Plaintiffs' exhibit C, which Nash asks the court to disregard in its entirety, is a 2005 affidavit from retired Navy engineer Charles Watson who states that, based on his review of Navy records, that the *USS Iowa*, *USS New Jersey*, *USS Wisconsin*, and two other ships "would have used the same pumps". Nash also disputes the relevance of plaintiffs' exhibit D, a 1982 report prepared by American Systems Engineering which provides that there were Nash "Fresh Water Priming Pumps" located aboard the *USS New Jersey*.

Plaintiffs' reliance on these documents is misplaced. The Watson affidavit was prepared almost 10 years ago, most likely in connection with another case. It constitutes uncross-examined hearsay, and specifically discusses Viking pumps rather than Nash pumps. Also, while Mr. Watson avers that the Navy records he reviewed in reaching his conclusions were annexed to his affidavit as exhibits, such records have not been submitted herein. The engineering report is even less persuasive. The mere fact that Nash pumps may have been present aboard the *USS New Jersey* in 1982 does not, even in light of plaintiffs' other submissions, establish that they were also installed on the *USS Iowa* forty years earlier. Finally, there is nothing to show that such pumps would have been insulated or that they utilized asbestos-containing components.

⁴ See, e.g., plaintiffs' exhibits B-D.

⁵ Exhibit B is purported to be a printout from a publication called "Jane's Fighting Ships".

In light of the foregoing, the court finds the alleged nexus between Mr. Pendolino and asbestos-containing Nash pumps is tenuous, at best. In other words, the defendant's liability could only be determined via surmise, not reasonable inferences logically drawn from the evidence.

Accordingly, it is hereby

ORDERED that The Nash Engineering Company's motion for summary judgment is granted; and it is further

ORDERED that this action and any cross-claims against Nash are severed and dismissed; and it is further

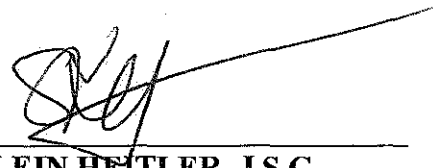
ORDERED that the remainder of this action shall continue as against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 3.23.15



SHERRY KLEIN HEITLER, J.S.C.