Gonzales v A.O. Smith Water Prods. Co.
2015 NY Slip Op 31449(U)
August 4, 2015
Supreme Court, New York County
Docket Number: 190282/2012
Judge: Peter H. Moulton

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SUPREME COURT OF THE STATE OF NEW YORK : Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK

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IN RE NEW YORK CITY ASBESTOS LITIGATION

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Index 190282/2012
Motion Seq. 001

RUSSELL GONZALES AND PATRICIA GONZALES,

Plaintiff

DECISION & ORDER

-against-

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

Defendants

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Plaintiff Russell Gonzales ("plaintiff") was diagnosed with mesothelioma in 2009. He claims that his disease stems form his alleged asbestos exposure while working with and around asbestos products, including insulation, used in conjunction with valves manufactured and sold by Defendant Crane Co. ("defendant" or "Crane"). Plaintiff passed away from complications associated with his mesothelioma before he was able to be deposed in connection with this case. Instead, plaintiff's former co-worker, Joseph Zgombic ("Zgombic"), testified that he and plaintiff handled asbestos at various sites throughout New York City during their work together in the 1970s. Specifically, Zgombic testified that he and plaintiff were responsible for insulation equipment, including valves manufactured by Crane. Zgombic further testified that he and plaintiff frequently worked around other tradesmen, some of whom worked on Crane valves in their presence, generating dust in the process that plaintiff, among others, would inhale. In short, plaintiff claims that he was exposed to asbestos-containing insulation and packing used on Crane valves.

Defendant is alleged to have manufactured and sold valves in which asbestos-containing materials were installed. Plaintiff asserts that Crane was negligent in failing to warn about the

known dangers of those products, and that Crane encouraged them to be used in conjunction with Crane valves.

Crane moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all claims and cross-claims against it. Defendant argues that plaintiff has failed to prove that he was exposed to asbestos released by a product for which Crane is legally responsible (Defendant's Mem of Law at 2). Furthermore, *citing Matter of New York City Asbestos Litig. (Konstantin)* (121 AD3d 230 [1st Dept 2014]), defendant asserts that "Crane Co. cannot be held liable for asbestos-containing products it neither made nor sold or over which it did not exercise a significant role, interest, or influence" (*id*).[1] In short, there was nothing unsafe about defendant's "bare metal" product.

Arguments

Defendant contends that it has satisfied its burden here by showing that plaintiff has failed to produce any evidence that it manufactured, supplied or otherwise placed into the stream of commerce a product that released any asbestos fibers to which plaintiff may have been exposed. Defendant further asserts that its burden has been met by plaintiff's alleged failure to produce any evidence that it exercised a role, let alone a significant role, interest, or influence, over the insulation of products that third parties applied to its valves, along with numerous other types of equipment,

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[1] *Matter of New York City Asbestos Litig.* contains a detailed analysis concerning the orbit of responsibility for a "bare metal" product. The term "bare metal" product is used to refer to a defense that the product (normally made of metal) was placed in the stream of commerce without asbestos-containing materials, i.e., was made of bare metal only (*see Matter of New York City Asbestos Litig.*, 2013 NY Slip Op 32846 (U) [New York County 2013]). The decision was appealed to the Court of Appeals (Docket Number APL-2014-00209), and will likely be argued in September or October, 2015. Briefs are available on the Court of Appeals website under https://www.nycourts.gov/ctapps/courtpass/Docket.aspx.

prior to plaintiff encountering them. Crane also stresses that because asbestos-containing materials were on other equipment, plaintiff cannot identify the defendant's valves as the source of his exposure.

To meet its prima facie case, defendant cites the testimony of Anthony Pantaleoni, its corporate representative in another asbestos litigation. He testified to the effect that boilers did not have to be insulated (although they could be) and that pumps can function with asbestos or non-asbestos gaskets or packing. In response to the question "Have you ever seen a Crane Co. document recommending asbestos insulation for use on pumps and valves?" he responded "No, just boilers." Pantaleoni also testified that it was the "customer" who would make the ultimate decision as to whether to insulate a boiler, pump, or valve.

Plaintiff opposes the motion on the basis that although Crane valves were not manufactured containing asbestos, an issue of fact is raised as to plaintiff' allegations that "Crane recommended, endorsed and specified" that asbestos products be used with its valves for "applications involving high-heat contexts" where "its valves certainly needed insulation to function in a normal and correct manner" and that Crane "endorsed and specified asbestos insulation for such contexts" (Aff In Opp ¶ 3). Further, plaintiff maintains that Crane knew or should have known of the dangers of asbestos due to its historical affiliations with, and leadership roles in, numerous safety organizations (*id.*).

To support plaintiff's argument that an issue of fact is raised regarding Crane's recommendation, endorsement and specification of the use of asbestos products with its own, plaintiff submits numerous manuals, catalogues, specifications and other documents spanning from 1925 to 1981. Plaintiff cites to the following: 1) a 1925 course study manual which explained why insulation is needed on equipment such as boilers (it cuts down on heat loss); 2) a 1938 catalogue

which recommended asbestos boiler jackets over a jacket of galvanized steel for those customers who wished for a metal casing only; and 3) an undated catalogue which touted defendant's boiler with a "handsome metal jacket" that had "a heavy corrugated asbestos insulation keeping the heat inside." In another catalogue, defendant recommended "that all Boilers be thoroughly protected by a substantial covering of asbestos" and explained how to apply asbestos cement insulation. Two other catalogs refer to an oil burning boiler which contained 1 1/2" asbestos air cell insulation that insured against heat loss. In a 1944 catalogue, Crane offered a wide array of asbestos-containing materials. Plaintiff also cites a 1946 Navy manual acknowledging the input of Crane regarding the "variety of conditions such as pressures and temperatures" affecting valves, and the benefits of insulation and a variety of asbestos products. In a 1949 brochure, Crane announced that its gas powered boilers are "fully insulated with asbestos with surrounds the boiler" while another type of boiler "also has thick air cell asbestos insulation on the front, top, side and rear, which is firmly attached to the jacket." Through the 1950s Crane sold asbestos insulation products, some for piping and equipment in office buildings. In Crane's 1964 pump manual, Crane specified the use of asbestos gaskets and packing for Crane's pumps and for the equipment used in connection with Crane pumps. Asbestos was a requirement for the "best performance and longest life for the pump." Also in 1964, Crane recommended the use of asbestos component parts for its pump products in an engineering manual. Plaintiff points to Crane's 1973 parts catalog which indicated that "Crane cast steel pressure-seal valves all use a packing that consists of a loose core of asbestos . . . and a single braided jacket of 'AAA' asbestos yarn." Further, a 1974 parts manual for Jersey Central Power & Light Company reflected a packing component sold by defendant known as "braided asbestos rings." Plaintiff points to an internal Crane memorandum dated May 24, 1976 which referenced a Crane line

of asbestos containing gaskets and packing for sale. Also cited is Crane's 1981 chart specifying the use of asbestos gaskets for flange joints for welding fittings. A 1981 internal Crane manual reflected the company's preference for asbestos with packing and gaskets due to its low cost, and indicated a reluctance to negotiate the use of non-asbestos products because "then all the valve plants are in trouble."

Plaintiff points to Crane's knowledge of the dangers of asbestos which could be inferred from Crane's extensive memberships and affiliations with safety and health organizations. Crane had a medical department in 1896 which was headed by Dr. Andrew Magee Harvey, who founded the American Association of Industrial Physician & Surgeons in 1916. Crane was affiliated with organizations starting in the early 1900s and those organizations published articles as early as the 1930s about the hazards of asbestos. Further, plaintiff cites the testimony of Antony Pantaleoni, Crane's corporate witness for the proposition that various Crane management personnel knew of asbestosis diseases as far back as the 1930s.

In reply, defendant reiterates that it is not liable for asbestos products it did not sell, and that sales of such products do not translate into Crane endorsing their use with its valves. Defendant further states that "[d]espite submitting thousands of pages of exhibits to this Court, Plaintiff did not proffer one document relevant to this case" (*see* Reply Aff. at ¶ 9). Specifically, defendant argues that "there is not one document that is remotely contemporaneous with Mr. Gonzales's work [nor is [sic] there any documents regarding any of his worksites because Mr. Zgombic could not identify any location where he and Mr. Gonzales encountered a Crane Co. valve] *id.*). Defendant makes no further argument regarding plaintiff's alleged inability to identify Crane values as a source of exposure.

Discussion

A. Duty To Warn

Generally, a manufacturer has no duty to warn "about another manufacturer's product when the first manufacturer produces a sound product which is compatible for use with a defective product of the other manufacturer" and where the manufacturer had "no control of the production . . . no role in placing that [product] in the stream of commerce, and derived no benefit from its sale" (*Rastelli v Goodyear Tire Co.*, 79 NY2d at 297-298 [1992]) [a tire manufacturer has no liability for a defective rim which exploded because the defendant did not manufacturer the rim which was later attached by a third party to its tire after the tire was sold]).

Similarly, in the asbestos context, where a defendant makes or sells a safe product, defendant does not have a duty to warn of another's asbestos-containing product "where there is no evidence that a manufacturer had any active role, interest, or influence in the types of products to be used in connection with its own product after it placed its product into the stream of commerce" (*Matter of New York City Asbestos Litig.*, 121 AD3d at 250, *supra*). However, there is such a duty "where a manufacturer does have a sufficiently significant role, interest, or influence in the type of component used with its product after it enters the stream of commerce, it may be held strictly liable if that component causes injury to an end user of the product" (*id.; see also Berkowitz v A.C. & S, Inc.*, 288 AD2d 148, [1st Dept 2001] ["While it may be technically true that its pumps could run without insulation, defendants' own witness indicated that the government provided certain specifications involving insulation, and it is at least questionable whether pumps transporting steam and hot liquids on board a ship could be operated safely without insulation, which [the defendant] knew would be made out of asbestos").

B. Summary Judgment

CPLR 3212 (b) provides, in relevant part:

> A motion for summary judgment 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 shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, 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. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

A defendant moving for summary judgment must first establish its *prima facie* entitlement to judgment as a matter of law by demonstrating the absence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Therefore, summary judgment in defendant's favor is denied when defendant fails "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 [1st Dept 1995]; *see also Matter of New York City Asbestos Litig.* (*Berensmann*), 122 AD3d 520 [1st Dept 2014]). An affidavit from a corporate representative which is "conclusory and without specific factual basis" does not meet the burden (*Matter of New York City Asbestos Litig.* (*DiSalvo*), 123 AD3d 498 [1st Dept 2014]). It is only after the burden of proof is met that plaintiff must then show "facts and conditions from which the defendant's liability may be reasonably inferred" (*Reid*, 212 AD2d at 463, *supra*). To defeat summary judgment, a plaintiff's evidence must create a reasonable inference that plaintiff was exposed to a specific defendant's product (*see Comeau v. W.R. Grace & Co.-Conn*), 216 AD2d 79 [1st Dept. 1995]). Issues of credibility are for the jury (*Cochrane v Owens-Corning Fiberglass*

Corp., 219 AD2d 557, 559-60).

In cases involving the promotion of asbestos-containing component parts on an asbestos-free product, the New York appellate courts have yet to address whether a defendant has the burden of proof on summary judgment to demonstrate that it did not have "any active role, interest, or influence in the types of products to be used in connection with its own product after it placed its product into the stream of commerce" (*Matter of New York City Asbestos Litig.*, 121 AD3d at 250, *supra*). However, in cases such as *Reid* (212 AD2d at 463, *supra*), which did not involve a "bare metal" product, the defendant was required to establish (unequivocally) that its product could not have caused plaintiff's injury. Therefore, looking at the defendant's product in isolation, the burden has been met here by Crane proffering sufficient evidence to show that its bare metal product was safe (*see O'Donnell v Crane Co.*, Index 601183/13 [Nassau County 2015] [assuming, arguendo, that Crane's boilers contained no asbestos, plaintiff raised an "issue of fact" regarding whether Crane intended that its boilers be used with asbestos-containing materials made or sold by others]).

In response to defendant's prima-facie showing, plaintiff has demonstrated that an issue of fact is raised as to whether Crane had a "sufficiently significant role, interest, or influence in the type of component used with its product after it enters the stream of commerce" (*Matter of New York City Asbestos Litig.*, 121 AD3d at 250, *supra*).[2] While some of the proffered evidence relates to products other than valves, a reasonable inference may be drawn from Crane's active role, interest, and

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[2] Defendant has failed to demonstrate that Crane products "could not have contributed to the causation of plaintiff's injury" (*Reid*, 212 AD2d at 463, *supra*). Crane submitted no evidence in this regard, and plaintiff's former co-worker, Zgombic, identified Crane valves as a source of plaintiff's exposure at his deposition. Thus, that branch of defendant's argument has not merit.

influence regarding those products to the product at issue here. Further, there is specific evidence relating to valves. The fact that certain evidence relates to periods of time that are not contemporaneous with plaintiff's work history does not mean that such evidence could not be considered by a jury for a historical or a wholistic context, or for other reasons.

Contrary to defendant's argument, the holding in *Rastelli v Goodyear Tire & Rubber Co.* (79 NY2d 289 [1992]) does not dictate a contrary result. The Court of Appeals in *Rastelli v Goodyear Tire Co.* specifically pointed out that the defendant in that case had "no control of the production . . . no role in placing that [product] in the stream of commerce, and derived no benefit from its sale" (*Rastelli v Goodyear Tire Co.*, 79 NY2d at 297-298 [1992]). The Court would not have gone out of its way to make this point if under all circumstances a manufacturer would not have a duty to warn when a known hazardous product is used in connection with its own safe product. The duty to warn arises from the balancing of various policy concerns. For instance, a manufacturer may have a duty to warn of the danger of a reasonably foreseeable unintended use or misuse of its own product which "arises from a manufacturer's unique (and superior) position to follow the use and adaptation of its product by consumers . . . Compared to purchasers and users of a product, a manufacturer is best placed to learn about post-sale defects or dangers discovered in use" (*Liriano v Hobart Corp*, 92 NY2d 232 [1998]). The duty turns "upon a number of factors, including the harm that may result from use of the product without notice, the reliability and any possible adverse interest of the person, if other than the user, to whom notice is given, the burden on the manufacturer or vendor involved in locating the persons to whom notice is required to be given, the attention which it can be expected a notice in the form given will receive from the recipient, the kind of product involved and the number manufactured or sold, and the steps taken, other than the giving of notice, to correct the

problem" (*Cover v Cohen*, 61 NY2d 261, 276 [1984]). While *Liriano* and *Cover* involved the manufacturer's product alone, the policy considerations discussed in those cases illustrate that such policies are not inapplicable merely because a product is safe when it enters the market. It is hereby

ORDERED that defendant's motion is denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated: August 4, 2015

HON. PETER H. MOULTON
J.S.C.

J.S.C.