

Hauser v A.W. Chesterton Co.
2010 NY Slip Op 31243(U)
May 18, 2010
Supreme Court, New York County
Docket Number: 190052/09
Judge: Sherry Klein Heitler
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5-21-10

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

HAUSER, GEDRGE K.

INDEX NO. 190052/09

A.W. CHESTERTON
(TREADWELL)

MOTION DATE _____

MOTION SEQ. NO. 006

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

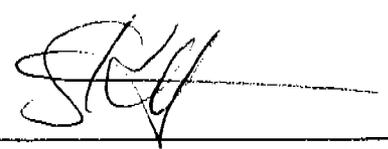
PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the memorandum decision dated 5-18-10

FILED
MAY 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5-18-10



HON. SHERRY KLEIN HEITLER *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30**

-----X

GEORGE K. HAUSER and
MARCELLA HAUSER,

Plaintiffs,

Index No. 190052/09
M.S. 006/007

-against-

DECISION AND ORDER

A.W. CHESTERTON COMPANY, et al.,

Defendants.

-----X

SHERRY KLEIN HEITLER, J.:

In this asbestos wrongful death case, defendants Treadwell Corporation (“Treadwell”) and Courter & Company Inc. (“Courter”) move separately for summary judgment on the ground that plaintiff has not demonstrated that decedent, George Hauser (“Mr. Hauser”), was exposed to any asbestos-containing products supplied, installed, or specified by Treadwell or Courter. These motions are consolidated for disposition. Plaintiff opposes each application.

Mr. Hauser worked for Con Edison as a draftsman and designer from 1963 to 1967. Throughout his employment with Con Edison, Mr. Hauser worked at the Ravenswood Powerhouse, the East River Powerhouse, and the Astoria Powerhouse. Mr. Hauser also worked for Ebasco as a senior designer from 1968 to 2007, during which time he recalled working at the Homer City Powerhouse, the Somerset Powerhouse, the Astoria Powerhouse, and the East River/14th Street Powerhouse (Deposition of George Hauser dated March 5, 2009 [“Hauser Deposition”], pp. 83-84). Mr. Hauser suffered from mesothelioma, and died on November 13, 2009.

Defendants claim that over three days of testimony by Mr. Hauser, plaintiff has presented no evidence that Mr. Hauser was exposed to any asbestos-containing products supplied, installed, or specified by Treadwell or Courter. Mr. Hauser testified that he believed he was exposed to asbestos at the Ravenswood Powerhouse from work being done on the

interconnecting piping of the turbines and boilers. He also testified to asbestos exposure at the East River Powerhouse as a result of work being done on the piping and boilers (Hauser Deposition, pp. 85-89, 100-101). However, Mr. Hauser was unable to state with any specificity at which location he worked at any given time. For example, when asked about his work at the Ravenswood Powerhouse, he stated that he was there on "a few occasions," between 1963 and 1967 (Hauser Deposition, p. 105). Additionally, when asked to identify who employed the contractors who worked at these powerhouses, Mr. Hauser identified only Con Edison and Westinghouse at the East River Powerhouse, and GE at the Homer City Powerhouse (Hauser Deposition, pp. 99, 143-144). Defendants argue that Mr. Hauser's inability to specify when he worked at any given powerhouse, coupled with his failure to identify either Courter or Treadwell is insufficient to raise a triable issue of fact.

Plaintiff asserts that Mr. Hauser's testimony creates a reasonable inference that Mr. Hauser was exposed to asbestos at the Ravenswood and East River/14th Street Powerhouses, while he worked in the vicinity of Treadwell and Courter employees. Plaintiff sets forth evidence that Con Edison contracted with Treadwell to install or repair boilers, condensers, precipitators and turbo generators at the East River and Ravenswood Powerhouses (Treadwell Motion, Plaintiff's Exhibit C, pp. 1-2, 7). Additionally, Con Edison's records specify the use of asbestos-containing materials at all Con Edison stations throughout New York, including East River and Ravenswood Powerhouses (Treadwell Motion, Plaintiff's Exhibit D, p. 12). Plaintiff argues that this evidence of Treadwell's presence at the East River and Ravenswood Powerhouses and their alleged use of asbestos-containing materials at these locations raises a reasonable inference that Mr. Hauser's alleged asbestos exposure at East River and Ravenswood Powerhouses, occurred in the vicinity of Treadwell employees. Plaintiff points to the depositions of Kenneth J. Harkin and Peter Conlon as well as correspondence between Treadwell

and Robert A. Keasby Co., to further illustrate Treadwell's use of asbestos-containing products at the East River and Ravenswood Powerhouses. Mr. Harkin testified that as a Treadwell employee he personally cut asbestos-containing gaskets at the Ravenswood Powerhouse in the 1960s (Deposition of Kenneth J. Harkin, pp. 33, 36). Mr. Conlon testified that when he worked as a boiler maker for Treadwell in 1965 or 1966, there was asbestos on the pipe joints of Unibestos pipe covering at the Ravenswood Powerhouse (Deposition of Peter Conlon, pp. 13-17). Furthermore, the invoices and correspondence between Treadwell and Robert A. Keasby Co. show that during the early 1960s asbestos-containing products were used by Treadwell at the East River and Ravenswood Powerhouses (Treadwell Motion, Plaintiff's Exhibit E). Plaintiff argues that this evidence is sufficient to raise a reasonable inference that Mr. Hauser was exposed to asbestos while working in the vicinity of Treadwell employees.

Plaintiff sets forth an affidavit by Mr. John Fee, and the testimony of Mr. James J. Ross to show that Courter was present at the East River and Ravenswood Powerhouses during the 1960s. Mr. Fee worked as the superintendent of Courter from 1955 to 1989. During this time, he kept logbooks for each year which detail where Courter steamfitters were employed (Affidavit of John Fee sworn to August 11, 2005, p.1). These logbooks show that Courter was present at the Ravenswood, Astoria, and East River Powerhouses from 1963 to 1967 (Courter Motion, Plaintiff's Exhibit D). Additionally, Mr. James J. Ross testified that he worked for Courter as a supervisor for steamfitters at the Ravenswood Powerhouse from 1963 to 1966 (Courter Motion, Plaintiff's Exhibit E. p.1-2). Plaintiff argues that this evidence is sufficient to raise a reasonable inference that Mr. Hauser was exposed to asbestos while working in the vicinity of Courter employees.

For the reasons stated below, the court grants defendants' motions for summary judgment:

For the court to deny a summary judgment motion, a plaintiff must allege facts and conditions from which a defendant's liability may reasonably be inferred, that is, proof that plaintiff did work in the vicinity where defendant's product was used and that plaintiff was exposed to defendant's product. (*Comeau v. W.R. Grace & Co. Conn.*, 216 A.D.2d 79, 80 [1st Dept., 1995]). The plaintiff has the "ultimate burden" of proving the identity of the product that was the alleged source of his injury (*Aetna Cas. & Sur. Co. v. Ashraf*, 239 A.D.2d 449, 450 [2d Dept., 1997]). Notwithstanding that both Treadwell and Courter have been shown to have been onsite during the years Mr. Hauser worked for Con Ed, in this case, plaintiff has presented no evidence that creates a reasonable inference that Mr. Hauser came into contact with any asbestos-containing products supplied, installed, or specified by either of them. Mr. Hauser could not state with any specificity where he worked at any given time, and he did not identify either Treadwell or Courter as the source of his asbestos exposure. Moreover, evidence of a defendant having ordered an asbestos-containing product in connection with a certain site is "purely speculation," when there is no testimony that plaintiff observed the use of such products at that site (*Perdicaro v. A.O. Smith Water Products*, 52 A.D.3d 300, 301 [1st Dept. 2008]). Here, Mr. Hauser never testified that he observed Treadwell or Courter employees using asbestos-containing products at any particular site.

While plaintiff's evidence shows that several contractors were present at the powerhouses where Mr. Hauser worked, it does not establish that Treadwell worked at a certain site at a time when Mr. Hauser was present. And while the correspondence and invoices between Robert A. Keasby Co. and Treadwell show that Treadwell performed work at the East River and Ravenswood Powerhouses, they do not establish that Treadwell used asbestos-containing products in Mr. Hauser's presence. The depositions of Kenneth J. Harkin and Peter Conlon similarly make no reference to Mr. Hauser working in the vicinity of Treadwell

employees using asbestos-containing products. Similarly, regarding Courter, while the affidavit of Mr. Fee alleges that Courter was present at Ravenswood, Astoria, and East River Powerhouses, it does not establish that Courter used asbestos-containing products at these powerhouses in Mr. Hauser's presence.

Therefore, under the circumstances of this case, plaintiff has failed to present any evidence to establish a reasonable inference that either Treadwell or Courter exposed Mr. Hauser to asbestos-containing products.

Accordingly, it is hereby

ORDERED that Treadwell's motion for summary judgment is granted and this action and any counter-claims against Treadwell are severed and dismissed; and it is further

ORDERED that Courter's motion for summary judgment is granted and this action and any counter-claims against Courter are severed and dismissed; and it is further

ORDERED that this case shall continue against any 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.

DATED: MAY 18, 2010

FILED
MAY 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:
Sherry Klein Heitler
SHERRY KLEIN HEITLER
J.S.C.