

Friedman v A.I. Friedman, L.P.

2010 NY Slip Op 31890(U)

July 7, 2010

Supreme Court, New York County

Docket Number: 190263/09

Judge: Sherry Klein Heitler

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

PRESENT: HEITZEL
Justice

PART 30

LORI KONOPKA-SADEN

- v -

COLGATE - PALMOLIVE COMPANY

INDEX NO. 190078/08

MOTION DATE _____

MOTION SEQ. NO. 5

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 with interest

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

FILED
JUL 09 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7-7-10
~~7-7-10~~

[Signature]
Hon Sherry Ann Heitler J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SHERRY KLEIN HEITLER

PRESENT: SHERRY KLEIN HEITLER

PART 30

- Index Number : 190263/2009

FRIEDMAN, ROBERTA

VS.

A.L. FRIEDMAN, L.P.

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

-

1

INDEX NO. 190263/09

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

is 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

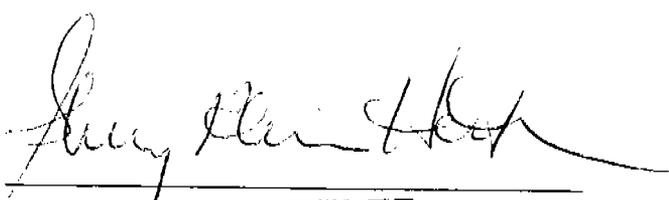
is decided in accordance with the memorandum decision dated 7-7-10

FILED

JUL 09 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7-7-10



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
ROBERTA FRIEDMAN,

Plaintiff,

vs.

A.I. FRIEDMAN, L.P., *et al.*

Defendants.

Index. No.: 190263/09
Motion Seq. 002

DECISION & ORDER

FILED
JUL 09 2010
NEW YORK
COUNTY CLERK'S OFFICE

SHERRY KLEIN HEITLER, J.:

In this asbestos-related personal injury action, defendant, United Gilsonite Laboratories (“UGL”) moves to dismiss the complaint and all cross claims asserted against it in this action pursuant to CPLR 3212, on the ground that plaintiff, Roberta Friedman (“Plaintiff”), has not demonstrated sufficient evidence that she was exposed to asbestos from an asbestos-containing product manufactured or distributed by UGL.

Plaintiff has been diagnosed with mesothelioma. Plaintiff and her mother, Renee Beer, testified that a UGL compound was used by plaintiff’s father and uncle for renovations done at the family’s residence when plaintiff was a child. The family residence was located at 56-33 Cloverdale Boulevard in Bayside, New York. These renovations were made from approximately 1956 to 1970. The UGL formula card for its joint compound product and Defendant’s Answers to Interrogatories state that it did not eliminate the use of asbestos until 1975. (Plaintiff’s Exhibit F, Exhibit G at 10, 67).

Plaintiff and her mother testified that plaintiff was present when a UGL compound was used in her home. Plaintiff helped her father clean up the product after he used it. The description of the packaging and product itself is similar to a description in a UGL brochure which was issued during the time plaintiff alleges exposure. Plaintiff testified that the UGL product was purchased

between 1956 and 1970 by her father from the *Sears* in Great Neck, Long Island.

Defendant argues that summary judgment should be granted based on the failure of plaintiff to produce any evidence that she was exposed to any asbestos-containing products or material manufactured by UGL during her lifetime. Defendant supports this motion with the Affidavit of Thomas White, President of UGL, which states that UGL never sold any products to *Sears* during or before the relevant time period (1956-1970). Defendant argues that White's affidavit demonstrates that plaintiff's testimony can be discredited since it is impossible that her father purchased UGL at *Sears*.

In response, plaintiff contends that she could have been mistaken as to where the UGL product was purchased. Plaintiff states she never saw her father actually purchase it from *Sears* but rather that is simply where she assumed it was purchased from. Plaintiff's mother testified that the joint compound products plaintiff's uncle purchased were from a paint store on Bell Boulevard off of Northern Boulevard.

Summary judgment is a drastic remedy, which must not be granted if there is "any doubt as to the existence of a triable issue." Henderson v. City of New York, 178 A.D.2d 129 (1st Dept., 1991). Here, plaintiff has presented sufficient evidence to raise a triable issue of fact concerning plaintiff's alleged asbestos exposure from a UGL product. Plaintiff testified that a UGL product was used in her home by "her uncle and his crew". (Plaintiff's Exhibit B, p. 45.) Plaintiff was able to identify the type of packaging and form the UGL product came in:

Q. What type of packaging did the UGL come in?

A. It came in a box.

Q. Do you recall how large of a box?

A. I would say probably four or five pounds.

(Plaintiff's Exhibit A, p. 55.)

Plaintiff testified that she saw UGL products all the time. (Plaintiff's Exhibit A, p. 220.)

Plaintiff described the UGL product as follows:

Q And do you know the consistency of the UGL product?

A Yeah, it was powder.

Q Okay. And do you believe you were exposed to asbestos from the UGL compound?

MS. DARGER: Objection.

A Yes.

Q Can you describe how?

A From the dust that it created. There was dust all over the product.

Q Can you describe how it was applied that created the dust?

A It had to be mixed with water, and that would create a lot of dust. And then when it was sanded, it would create a lot of dust. And then when it was cleaned up, it would create a lot, a lot of dust, as well.

(Defendant's Exhibit B, p.45-46, 1.24-26, 1-16.)

Plaintiff's mother testified that plaintiff helped her uncle whenever he was around, "because she was always curious to see what was going on." (Plaintiff's Exhibit C, p. 21.)

While plaintiff did testify that the products were purchased at *Sears*, she also testified that she did not personally see her father purchase the product at *Sears*. (Plaintiff's Exhibit B, p. 45.)

Plaintiff also testified :

Q Did your father purchase all of his products at Sears?

A I would say he purchased a lot of products from Sears. He may have purchased things, some things, from other places that I don't know. But, from what I saw, he purchased a lot of stuff from Sears.

(Plaintiff's Exhibit B, p.71.).

Plaintiff's mother testified that her brother-in-law purchased the compounds that he used at "a paint store on Bell Boulevard, and he most - - he picked up a lot of things there..." Plaintiff's mother also testified that the father purchased most of his products from Sears.

Q Do you know where the compounds that were used in the construction of the basement were purchased?

A Most likely at Sears.

Q Why do you say that?

A Because that's where my husband used to go to purchase most of his products.

(Plaintiff's Exhibit C, p. 18-19.)

Whether the plaintiff was correct or incorrect as to where the UGL compound was purchased is an issue of credibility. "The assessment of the value of a witness' testimony constitutes an issue for resolution by the trier of fact and any apparent discrepancy between the testimony and the evidence of the record goes only to the weight and not the admissibility of the testimony." (See, Dollas v. W. R. Grace & Company, 225 A.D.2d 319, 321 [1996].)

Under the facts in this case, summary judgment must be denied. Plaintiffs are not required to show a precise cause of their damages, but only to show facts and conditions from which defendant's liability may be reasonably inferred. "[T]hat is, that plaintiff worked in the vicinity where defendant's products were 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).

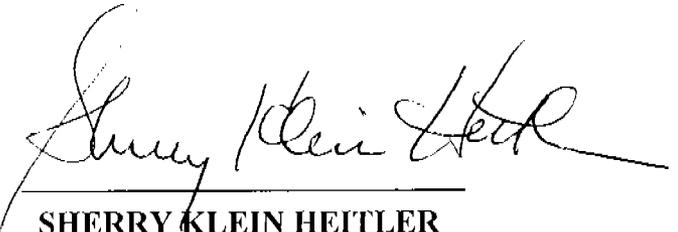
In this case, the deposition testimony of plaintiff and plaintiff's mother, in which they specifically recall plaintiff being exposed to UGL products are sufficient to raise issues of fact relative to the origin of plaintiff's exposure to asbestos. Accordingly, defendant's motion for summary judgment is denied.

Therefore, it is hereby

ORDERED that UGL's motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: JULY 7, 2010



SHERRY KLEIN HEITLER
J.S.C.

FILED
JUL 09 2010
NEW YORK
COUNTY CLERK'S OFFICE