

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

2011 NY Slip Op 31805(U)

June 29, 2011

Sup Ct, NY 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: HON. SHERRY KLEIN HEITLER
Justice

PART 30

ROBERTA FRIEDMAN

- v -

A.I. FRIEDMAN, L.P.

INDEX NO. 190263/09

MOTION DATE _____

MOTION SEQ. NO. 4

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
FILED
JUL 05 2011

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the
memorandum decision dated

6.29.11

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

Dated: 6-29-11

HON. SHERRY KLEIN HEITLER *V.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
COUNTY OF NEW YORK: PART 30

----- X
ROBERTA FRIEDMAN,

Plaintiff,

-against-

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

Defendants.
----- X

SHERRY KLEIN HEITLER, J.:

Index No. 190263/09
Motion Seq. 004

DECISION AND ORDER

FILED

JUL 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendant DAP, INC. ("DAP") moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all other claims and cross claims asserted against it. For the reasons set forth below, the motion is denied.

BACKGROUND

This action was commenced by Roberta Friedman to recover for personal injuries allegedly caused, among other things, by her exposure to asbestos-containing caulking products that were manufactured, sold and distributed by the defendant, DAP. Plaintiff was deposed on December 22, 2009, January 20, 2010 and January 27, 2010. Her deposition transcript of January 20, 2010 is submitted as defendant's exhibit C ("Deposition"). Excerpts of plaintiff's other deposition testimony and her *de bene esse* transcript are submitted as plaintiff's Exhibits A and B, respectively. Plaintiff testified that she was diagnosed in April 2009 with mesothelioma. Plaintiff alleges that her cancer developed, in part, due to her prior use of defendant's asbestos-containing caulking products.

The moving defendant contends that there is insufficient evidence that plaintiff was exposed to asbestos or to asbestos-containing products manufactured or distributed by DAP. While defendant

concedes that some of its caulking products contained asbestos, it submits that plaintiff's claim is speculative at best. Defendant argues that plaintiff has provided no factual basis for her position that the caulk she used contained asbestos and that her testimony that "a lot of products back then had asbestos" (Deposition p. 257) is pure conjecture. In opposition, plaintiff contends that the caulk she described as the product she used matches DAP's own brochure description of its asbestos-containing caulk, which raises issues of fact sufficient to preclude summary judgment in defendant's favor.

DISCUSSION

For a defendant to succeed on its motion for summary judgment it "must make a *prima facie* showing that its product could not have contributed to the causation of plaintiff's injury," (*Comeau v W.R. Grace & Co.-Conn.* 216 AD2d 79, 80 [1st Dept 1995]), and must do so by tender of evidentiary proof in admissible form." *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.* 46 NY2d 1065, 1067 [1979]; CPLR §3212(b). Should defendant make a *prima facie* case, the plaintiff must then provide "facts and conditions from which defendant's liability may reasonably be inferred." *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995]. In other words, plaintiff must submit evidence that would permit the trier of fact to infer that she was exposed to asbestos fibers from the defendant's product. *See Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994].

Defendant argues that plaintiff has no factual basis to support her belief that the caulk she used contained asbestos. In support defendant submits the affidavit of Ward Treat, sworn to March 1, 2011. Mr. Treat, an employee of DAP from 1973 to approximately 1990, concedes that DAP did produce during the relevant time period caulk that contained asbestos. However, he attests that DAP also made several non-asbestos caulks, some of which were made for sealing around windows, sinks and for other bathroom and kitchen applications. Further, Mr. Treat asserts that DAP made no asbestos-containing products after 1978.

However, plaintiff's testimony, combined with the plaintiff's documentary evidence produced on this motion, is sufficient to raise material issues of fact. Ms. Friedman testified that she used DAP caulking products throughout her life. As a child, she lived with her parents on Cloverdale Blvd, in Queens NY, from 1956 to 1970. During the late fall of each year, her father applied DAP caulk around the windows of the family home. For about a decade, Ms. Friedman assisted her father with the application of the caulk. She testified that the caulk would leave a residue on her hands and that, to remove the residue, she would scrub her hands with a brush and then wash them with soap and water. She stated that when she was cleaning the dried caulk from her hands it would create dust and particles would be released into her vicinity. Plaintiff was unable to name the specific type of caulk she used but testified that it came in a 12 inch tube on which "DAP" was written and that the caulk was applied using a caulking gun.

Plaintiff also used DAP caulk in 1970 when she moved into an apartment at 178 West Houston Street in Manhattan. The three tubes (two opened, one unopened) of the DAP caulk she used there came from her parents' Cloverdale Boulevard house. Using a screwdriver and her bare hands, she applied the caulk to four windows and to her bathtub. Plaintiff testified that the projects took her approximately two weeks to complete.

Plaintiff used DAP caulk most recently in 2006 at her current residence at 2917 Weatherby Street in Yorktown, NY. Plaintiff purchased the DAP caulk in 2006 which she provided to a remodeler who used it on renovation projects in her kitchen and her bathroom.

In prior interrogatory answers in an unrelated case, DAP has conceded that, from 1960 to 1978, it manufactured asbestos-containing caulking products (Plaintiff's Exh C at 21). Of these, the DAP caulk products Blacktite, Rely-On, Painter's, Butyl-Flex Caulk, Architectural Caulk, and Butyl Gutter & Lap Sealer were packaged and made to be utilized in the manner described by plaintiff,

namely in a tube with a caulking gun (Plaintiff's Exh D at 25; Plaintiff's Exh E). The evidence is that at that time the only asbestos-free caulks that DAP manufactured either were not applied with a caulk gun or was of a type which would be used in conjunction with latex paint. Plaintiff testified that she used a caulk gun and did not use the caulk in conjunction with latex paint.

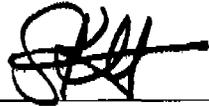
Plaintiff's testimony is that she used caulk manufactured and sold by DAP during the period that DAP manufactured asbestos-containing products. Plaintiff's description of the caulk she used matches DAP's description of the asbestos-containing caulk manufactured by it. In addition, her description of the DAP caulk she used coincides with the images in the DAP brochure of its asbestos-containing caulk. In the circumstances of this case, plaintiff has set forth sufficient evidence to create a reasonable inference that she was exposed to asbestos from defendant's product and hence raises a triable issue for the trier of fact. *See Penn v Amchem Products*, 73 AD3d 493, 494 [1st Dept 2010]; *Cawein*, supra, 203 AD2d at 106.

Accordingly, it is hereby

ORDERED that DAP Inc's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: June 29, 2011



SHERRY KLEIN HEITLER
J.S.C.

FILED

JUL 05 2011

NEW YORK
COUNTY CLERK'S OFFICE