

Bobrowich v A.O. Smith Wate Prods. Co.

2011 NY Slip Op 33011(U)

November 14, 2011

Sup Ct, NY County

Docket Number: 106318/02

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT. HON. SHERRY KLEIN HEITLER

PART 30

Index Number : 106318/2002

BOBROWICH, STEPHEN

INDEX NO. 106318/02

vs.

A.C. & S.

MOTION DATE _____

SEQUENCE NUMBER : 001

MOTION SEQ. NO. 001

SUMMARY JUDGMENT

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *denied as*

*per the memo decision
of 11.14.11.*

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

FILED

NOV 17 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11.14.11

 _____, J.S.C.

HON. SHERRY KLEIN HEITLER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

----- X

STEPHEN BOBROWICH,

Plaintiff,

-against-

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

Defendants.

----- X

SHERRY KLEIN HEITLER, J.:

Index No. 106318/02
Motion Seq. 001

DECISION AND ORDER

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

BACKGROUND

This action was commenced by plaintiff Stephen Bobrowich to recover for personal injuries allegedly caused by his exposure to asbestos during his career as a sheet metal worker at various locations throughout New York City. Mr. Bobrowich testified¹ that from approximately 1970 until 2003 he worked as a sheet metal worker for Local 28 sheet metal workers union in the McGraw Hill Building, the World Trade Center, the AT&T Building, and the Morgan Guaranty Bank, among others.

As a sheet metal worker, Mr. Bobrowich's primary responsibilities revolved around heating, ventilation, and air conditioning systems. He testified that he was exposed to asbestos by cutting and installing asbestos-containing gaskets in connection with his work on boiler

¹ Mr. Bobrowich was deposed in this action on January 6, 2011. His deposition transcript is submitted as defendant's Exhibit D ("Deposition").

breeching. Additionally, Mr. Bobrowich testified he was exposed to asbestos from the work of steamfitters, insulators, and plumbers who covered boilers with asbestos block in his vicinity.

Peerless argues that while Mr. Bobrowich had initially testified that Peerless was present at many of the buildings in which he worked, upon cross examination he admitted he did not know if Peerless was present at any of the buildings. In opposition, plaintiff contends that Mr. Bobrowich's deposition testimony raises issues of fact as to Peerless' liability sufficient to preclude summary judgment.

DISCUSSION

CPLR § 3212 (b) provides, in relevant part, that a motion for summary judgment "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." However, summary judgment is a drastic remedy that must not be granted if there is any doubt about the existence of a triable issue of fact. *Tronlone v Lac d'Aminate du Quebec, Ltee*, 297 AD2d 528, 528-29 (1st Dept 2002); *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 462 (1st Dept 1995). As set forth in *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980), "one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form"

In an asbestos personal injury action, a plaintiff must demonstrate that he was exposed to asbestos fibers released from a defendant's product, (*see Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994]), and that it was more likely than not that this such exposure was a

substantial factor in his injury, (*see Diel v Flintkote Co.*, 204 AD2d 53, 54 [1st Dept 1994]).

While boilerplate and conclusory allegations will not suffice, it is sufficient for a plaintiff “to show facts and conditions from which defendant’s liability may be reasonably inferred.” *Reid, supra*, 212 AD2d 462, 463 (1st Dept 1995).

On this motion, defendant contends that since plaintiff does not recall any specific work he performed on a Peerless boiler, summary judgment is appropriate. In this regard, defendant relies exclusively on that portion of the record in which plaintiff testified that he is unable to place specific manufacturers of boilers at specific locations where he had worked. (Deposition pp. 161, 174-75, 180-81, 190-91):

Q: Is it fair to say that as you sit here today, you don’t know who the manufacturer of the boiler or boilers was at that building?

A: Yes, ma’am.

Q: So, that’s fair to say, you don’t know.

A: That’s correct ma’am.

* * * *

Q: World Trade Center, you stated, you named several boilers that you believed that you associated with the World Trade Center. Sir, you don’t have a specific recollection of who manufactured a boiler that was located at the World Trade Center, do you?

A: No, I don’t, ma’am.

* * * *

Q: Sir, you mentioned several boiler manufacturers earlier when you were testifying about this site. Do you know who specifically manufactured the two to four boilers that were at this site?

A: No, ma’am.

* * * *

Q: Sir, you don’t remember who specifically manufactured the boiler or boilers at this location, correct?

A: That’s correct ma’am.

In opposition, plaintiff argues that defendant's transcript is sufficient to withstand summary judgment, and that any discrepancies therein go to issues of plaintiff's credibility, which is not within the courts purview on a summary judgment motion. Indeed, plaintiff's inability to recall the particular details of defendant's boilers does not negate his testimony implicating Peerless in his asbestos exposure in the first place. Significantly, plaintiff testified on direct examination that he worked on a variety of boilers throughout his career, some of which were manufactured by Peerless. (Deposition pp. 46, 57, 69, 93):

Q: Do you recall who manufactured any of the boilers?

A: There was a group of boilers that I worked on- not MacLain Stevenson- Weil-McLain, Peerless, Burnham and the others I can't remember offhand.

* * * *

Q: Do you recall who manufactured any of these boilers?

A: The same as I mentioned before; Burnham, McLain, Peerless, Kewanee.

* * * *

Q: Do you know who manufactured any of the boilers at this particular site?

A: The same that I listed before, I'm not too sure.

Q: When you say the same, sir -

A: Weil-McLain, Peerless, Burnham, Kewanee, those.

* * * *

Q: ... Do you know who manufactured the new boiler installed?

A: It was Weil-McLain or Peerless or Kholer or one of the ones I mentioned before.

In considering a summary judgment motion, "the court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521-22 (1st Dept 1989) (citations omitted). Here, there are plainly triable issues of fact sufficient to preclude summary judgment. *See Henderson v City of*

New York, 178 AD2d 129 (1st Dept 1991). Critical to this motion is that plaintiff clearly identified Peerless as a source of his exposure throughout his career. *Reid, supra*, 212 AD2d at 462. The weight to be given to such claims in light of his testimony on cross-examination must be left to a jury. *See Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996) (“The assessment of the value of a witness’s testimony constitutes an issue for resolution by the trier of fact, and any apparent discrepancy between the testimony and the evidence of record goes only to the weight and not the admissibility of the testimony.”).

Accordingly, it is hereby

ORDERED that Peerless Industries, Inc.’s motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: November 14, 2011



SHERRY KLEIN HEITLER
J.S.C.

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