

Contento v A.C. & S., Inc.
2012 NY Slip Op 30617(U)
March 13, 2012
Sup Ct, NY County
Docket Number: 121539/01
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

Index Number : 121539/2001
CONTENTO, ALBERT
vs.
A.C.&S.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 121539/01
MOTION DATE _____
MOTION SEQ. NO. 001

(CRANE)

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

is decided in accordance with the
memorandum decision dated 3-9-12

FILED
MAR 13 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3-9-12

_____, 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
ALBERT CONTENTO,

Index No. 121539/01
Motion Seq. 001

Plaintiff,

DECISION AND ORDER

-against-

A.C. & S., Inc., et al.,

Defendants.

FILED
MAR 13 2012
NEW YORK
COUNTY CLERK'S OFFICE

SHERRY KLEIN HEITLER, J.:

Defendant Crane Co. moves pursuant to CPLR 3211(a)(4) and (8) to dismiss this action as duplicative of another action pending against it in this court, and for lack of personal jurisdiction. Plaintiff Albert Contento asserts that defendant's concerns are academic in as much as Crane Co. was properly served as a defendant in plaintiff's prior multi-plaintiff action bearing Index No. 111234/01 (the "prior action"), which prior action was severed as to this plaintiff and transferred as an active case to Index No. 121539/01 in this court, all pursuant to court direction (the "within action").

Crane Co. also moves pursuant to CPLR 3212 for summary judgment on the ground that it is not liable for products that it did not manufacture, supply or specify for use with its products. Plaintiff's position is that defendant Crane Co. knew or should have known that asbestos-containing components would be integrated with its products for their intended use and had a duty to warn against same.

Crane Co.'s motion to dismiss because there is another action pending against it is without merit. In respect of this issue, Crane Co. submits that because there is a prior multi-plaintiff action

pending against it under Index No. 111234/01, which arises from the same set of facts and asserts the same causes of action as the within action, dismissal of the within action is required under CPLR 3211(a)(4).¹ To the contrary, if plaintiff's case against this defendant was severed from the prior multi-plaintiff action in favor of the within single plaintiff action, by reason of such severance the plaintiff's prior action would no longer be viable, eliminating the possibility of the type of conflict addressed by CPLR 3211(a)(4). In this context, it is important to note how these two actions came to be:

In 2001, together with numerous other plaintiffs, Mr. Contento sought to recover for his asbestos-related personal injuries from Crane Co. and several other defendants. As a combined multi-plaintiff group they filed a New York City Asbestos Litigation ("NYCAL") summons and complaint in this court against Crane Co. and others under Index No. 111234/01. At that time it was not uncommon for NYCAL mass tort complaints to be filed by numerous plaintiffs under one caption and one index number.² Because these multi-plaintiff actions were difficult to manage from an administrative perspective, and could cause jury confusion, the then NYCAL presiding Justice instructed the plaintiffs' bar to effect severance of all such multi-plaintiff actions. The intended effect was that the individual plaintiffs named in multi-plaintiff actions would be permitted to proceed separately in this court with their own individual actions through the purchase of separate

¹ CPLR 3211(a)(4) provides: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that...4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires...."

² Under the current NYCAL Case Management Order ("CMO"), multi-plaintiff complaints are not permitted. *See* September 20, 1996 CMO, as amended May 26, 2011, section VI(A).

index numbers.

While a formal order of severance affecting all such multi-plaintiff cases would necessarily have been recorded in the court's NYCAL master file, there is no requirement that copies of such an order must be placed in each affected case file (see CMO section IV[C]). An examination of the file of the within action indicates that was the case here. While there is no severance order in the court's file of the within action, such file does contain the pleadings originally filed in the prior action in their entirety, and a receipt for the purchase of the new index number that now attaches to the within action.³ Accordingly, notwithstanding that the prior action is still active in this court, it bears no relation to the within action, which was severed therefrom and maintained separately pursuant to the court's direction. Moreover, since defendant Crane Co. does not dispute service upon it of the pleadings in the prior action, *a fortiori* this defendant has no ground upon which to challenge service upon it of the pleadings in the within action, which were transferred without change to the index number assigned to the within action. Therefore, defendant's personal jurisdiction objection under CPLR 32211(a)(8) is also without merit. *See* CPLR 305(c); CPLR 2001; *Cruz v New York City Housing Authority*, 269 AD2d 108, 109 (1st Dept 2000). Moreover, assuming, *arguendo*, that there was a service deficiency, it has been waived by the passage of time. *See* CPLR 3211(e).

In light of all of the foregoing, however, and in the interests of judicial clarity, the severance of plaintiff from the prior action bearing Index No. 111234/01 in favor of plaintiff's individual action herein bearing Index No. 121539/01 is by this decision and order formally established in this

³ The file also contains a copy of plaintiff's supplemental summons, which was filed on August 13, 2003. However, such pleading is not relevant to the question of whether this court has personal jurisdiction over Crane Co., as it is merely served to add a new defendant (Peerless Industries, Inc.).

case. *See* CPLR 603, 1003.

Regarding its application for summary judgment under CPLR 3212, Crane Co. submits that it had no duty to warn Mr. Contento of the dangers associated with asbestos-containing products because it did not manufacture, supply, install, or place into the stream of commerce any such products to which he may have been exposed. The plaintiff asserts that Crane Co. had a duty to warn him of such hazards because it knew or should have known that asbestos-containing products would be integrated with its valves for their intended use.

To this end, Mr. Contento was deposed on September 28, 2010 and testified in relevant part that he was exposed to asbestos while working as a surveyor at several Consolidated Edison powerhouses during the late 1950s. He further testified that his duties required him to remove external asbestos insulation from Crane Co. valves in order to survey their condition.

This court addressed near-identical issues in *Sawyer v A.C.&S., Inc.*, Index No. 111152/99 (Sup. Ct. NY Co. June 24, 2011) and *Defazio v A.W. Chesterton*, Index No. 127988/02 (Sup. Ct. NY Co. August 12, 2011), holding in both cases that Crane Co. had a duty to warn consumers against the hazards associated with asbestos because the evidence demonstrated that Crane Co. recommended the use of asbestos-containing insulation and packing in conjunction with its products. As in those cases, the submissions on this motion show that Crane Co. designed and supplied its products with asbestos-containing gaskets, packing, insulation, and cement. Crane Co.'s assertions that its valves did not require asbestos-containing insulation or packing to operate properly and that it did not specify the use of same on its products are therefore insufficient to shield it from suit. Accordingly, for the same reasons stated in *Sawyer, supra*, and *Defazio, supra*, this court finds that Crane Co. had a duty to warn Mr. Contento of the hazards associated with asbestos.

See *Liriano v Hobart Corp.*, 92 NY2d 232, 237 (1998); *Berkowitz v A.C. & S., Inc.*, 288 AD2d 148 (1st Dept 2001).

Accordingly, it is hereby

ORDERED that Crane Co.'s motion for summary judgment is denied in its entirety, and it is further

ORDERED that Crane Co.'s motion to dismiss this action is denied in its entirety; and it is further

ORDERED that plaintiff Albert Contento is severed from the prior multi-plaintiff action bearing Index No. 111234/01 and all of Mr. Contento's asbestos-related claims therein are permitted to be individually pursued, as they have been, under Index No. 121539/01, and it is further

ORDERED that the Clerk of the Court is directed to transfer any documents related to plaintiff Albert Contento that are currently located in the file bearing Index No. 111234/01 into the file bearing Index No. 121529/01, and it is further

ORDERED that the multi-plaintiff action bearing Index No. 111234/01 shall continue as to all remaining plaintiffs therein.

This constitutes the decision and order of the court MAR 13 2012

FILED

DATED:

3-9-12

NEW YORK COUNTY CLERKS OFFICE

SHERRY KLEIN HEITLER
J.S.C.