

Stringer v A.O. Smith Water Prods. Co.

2012 NY Slip Op 30793(U)

March 22, 2012

Sup Ct, NY County

Docket Number: 190444/10

Judge: Sherry Klein Heitler

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

PRESENT: SHERRY KLEIN HEITLER
Justice

PART 30

THOMAS STRINGER and MARCIA STRINGER,

INDEX NO. 190444/10

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 002

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

MOTION CAL. NO. _____

Defendants.

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

This motion is decided in accordance with the memorandum decision dated 3.22.12

FILED

MAR 29 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3.22.12

[Signature]
SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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

----- X
THOMAS STRINGER and MARCIA STRINGER,

Index No. 190444/10
Motion Seq. 002

Plaintiffs,

DECISION AND ORDER

-against-

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

Defendants.

----- X
SHERRY KLEIN HEITLER, J.:

FILED
MAR 29 2012
NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos-related personal injury action, defendant Crane Co. moved pursuant to CPLR 3212 for summary judgment on the ground that there is no evidence that plaintiff Thomas Stringer was exposed to asbestos from a Crane Co. product. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); CPLR 3212(b). For the reasons set forth below, the motion is granted.

Mr. Stringer was fully deposed on December 7, 2010 and December 8, 2010. Copies of his deposition transcripts are submitted as defendant's exhibit C. During his deposition, Mr. Stringer testified that he was exposed to asbestos during his nearly 40 year career as a metal latherer from the work that others performed on, among other things, boilers, pipes, valves, pumps, and gaskets. Relevant to this motion is plaintiffs' claim that Mr. Stringer was exposed to asbestos-containing dust from insulation that was applied to Crane Co. valves and pumps at the South Shore Hospital machine room in or about 1970.

Defendant contends that plaintiffs have not shown any evidence that Mr. Stringer was exposed to asbestos by any products or equipment manufactured or supplied by Crane Co. Plaintiffs argue that Mr. Stringer's deposition testimony raises an issue of fact as to Crane Co.'s

* 3]
liability sufficient to defeat this motion.

Despite plaintiffs' assertions, Mr. Stringer identified Crane Co. pumps only in respect of equipment contained in the machine rooms at the South Shore Hospital in approximately 1970 to 1971. His testimony concerning Crane Co. during two days of examination was limited to the following (Deposition pp. 167-69):

Q: Did you ever work at South Shore Hospital?

A: Yes.

Q: Do you know what year or years?

A: It was -- I'd say 1970, '71, somewhere in there.

Q: And what was your title at that site.

A: I was a foreman.

Q: And how long were you there?

A: On and off, probably six months or so.

Q: Was this new construction or renovation?

A: It was both.

Q: What were you doing?

A: That was again, it was a machine room and a couple of big machine rooms, patching them up and doing what you had to do and it was reinforced if I remember. But that's where they -- it had pumps and things like that in there, Crane pumps and whatever else. There was all kinds of things that are in machine rooms.

* * * *

A. And valves

Q: Is South Shore made up of one building or multiple buildings?

A: Multiple, I would think, I think it was, yeah.

* * * *

Q: Where were the machine rooms located?

A: In that I think, I believe it was on the first floor.

Q: And how many of them are there?

A: I only remember one big one but it might have been more.

Notably, Mr. Stringer's testimony concerning his exposure to asbestos at the South Shore Hospital is extremely vague. It certainly did not include Crane Co. pumps or valves (Deposition pp. 169-71):

Q: Did you personally handle any asbestos-containing materials at South Shore?

A: Not that I know of, no. But other trades, the same things.

Q: What other trades were present at South Shore.

A: Boilermakers or the steamfitters, whoever was there. And pipe coverers again and stuff like that.

* * * *

Q: Were the boilermakers performing any work that you believe may have caused you to be exposed to asbestos.

A: They were working there but I don't know what they were doing.

Q: Were the steamfitters performing any work in which you believe may have caused you to be exposed to asbestos?

A: Well, that I don't know again, the same answer, I couldn't specifically say.

Q: And the pipe coverers, were they covering the pipes?

A: Yeah, they were doing, that was always, they would just be doing it.

Q: And that work caused you to be exposed to asbestos, correct?

A: Oh, yeah.

Q: And do you know the brand, trade, or material of the covering that they were using at this site?

A: No, I don't

Q: Aside from the covering that the pipe coverers were using at the South Shore Hospital, is there any other way in which you believe you may have been exposed to asbestos?

A: Not really, not that I know of anyway.

Q: Have we now discussed all of the different products that you believe may have caused you to be exposed to asbestos at the South Shore Hospital?

A: Yes.

In asbestos-related litigation, once the movant has made a *prima facie* showing of its entitlement to summary judgment, the plaintiff must then demonstrate that there was exposure to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this respect, the plaintiff's burden is to "show facts and conditions from which defendant's liability may be reasonably inferred." *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995). Evidence which demonstrates that the defendant's product may have been present at the plaintiff's worksite is not sufficient to meet this burden. *Id.*

In *Cawein, supra*, as an example, the plaintiff's estate brought claims against Flintkote, a manufacturer of asbestos-containing joint compound. However, the only evidence that Flintkote products were used in the tile plants in which the decedent worked was in an affidavit by a co-worker that he had seen Flintkote bags in the plant. He did not testify that he had ever seen a Flintkote bag opened or that it was used in the decedent's presence. The Appellate Division granted Flintkote summary judgment, holding that such evidence was not sufficient to raise a triable issue of fact. Similarly, in *Foley v A.O. Smith*, Index No. 190411/10 (Sup. Ct. NY. Cty. 2011), a laborer sought to recover against defendant Oakfabco, which was responsible for boilers manufactured under the brand name Kewanee. The record showed that while Mr. Foley did recall hearing the name Kewanee during his career, he could not recall whether he worked with a Kewanee boiler, or if any of his co-workers installed or maintained a Kewanee boiler in his presence. Accordingly, this court granted the defendant's motion for summary judgment.

Mr. Stringer testified that Crane Co. pumps were present at the South Shore Hospital. But that is as far as the testimony goes. There has been no positive identification placing Mr. Stringer near Crane Co. pumps or valves while they were being insulated or gasketed with

asbestos. Mr. Stringer's testimony in this respect is limited strictly to insulation being applied to pipes. It would therefore be speculative to infer Crane Co.'s liability in this case.

Accordingly, Crane Co.'s motion for summary judgment is granted, and it is hereby

ORDERED that this action and any cross-claims related to Crane Co. are severed and dismissed in their entirety; and it is further

ORDERED that this case shall continue against the remaining defendants, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: 3.22.12



~~SHERRY KLEIN HEITLER~~
J.S.C.

FILED
MAR 29 2012
NEW YORK
COUNTY CLERK'S OFFICE