

Freudenberg v A.O. Smith Water Prods. Co.
2012 NY Slip Op 31246(U)
April 20, 2012
Supreme Court, Nassau County
Docket Number: 022649-2010
Judge: James P. McCormack
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**SUPREME COURT - STATE OF NEW YORK
TRIAL/TAS TERM, PART 43 NASSAU COUNTY**

PRESENT:

**Honorable James P. McCormack
Acting Justice of the Supreme Court**

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**CHARLES FREUDENBERG and PATRICIA
FREUDENBERG,**

Plaintiff(s),

Index No. 022649-2010

-against-

**Motion Seq. No.: 001
Motion Submitted: 2/3/12**

**A.O. SMITH WATER PRODUCTS CO.,
BELL & GOSSETT COMPANY,
BURNHAM, LLC
Individually, and as successor to
BURNHAM CORPORATION,
CBS CORPORATION, f/k/a VIACOM, INC. successor by
merger to CBS Corporation, f/k/a
WESTINGHOUSE ELECTRIC
CORPORATION,
CLEAVER BROOKS COMPANY, INC.,
COLUMBIA BOILER CO.,
COMPUDYNE CORPORATION,
Individually, and as successor to YORK
SHIPLEY, INC.,
CRANE CO.,
EMPIRE-ACE INSULATION MFG. CORP.
GENERAL ELECTRIC COMPANY,
INGERSOLL-RAND COMPANY,
KOHLER CO.,
OAKFABCO, INC.,
OWENS-ILLINOIS, INC.,
PEERLESS INDUSTRIES, INC.,
RAPID-AMERICAN CORPORATION,
SLANT/FIN CORPORATION,
THE MARLEY-WYLAIN COMPANY,
Individually and successor in interest to
THE WEIL-MCLAIN COMPANY, INC.,
TRANE U.S. INC., f/k/a AMERICAN STANDARD INC.,
U.S. RUBBER COMPANY (UNIROYAL),
FULTON BOILER WORKS, INC.,**

Defendant(s).

_____ x

The following papers read on this motion:

- Notice of Motion/Supporting Exhibits.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Motion by defendant A.O. Smith Water Products Co., for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint is denied.

This product liability action arises out of a claim by plaintiffs that Charles Freudenberg developed lung cancer as a result of his exposure to asbestos-containing products manufactured, supplied or distributed by defendants during the course of his work history.

Specifically, plaintiff alleges that during the course of his employment as a seaman and an oil burner mechanic, plaintiff “breathed asbestos contaminated dust that came from a variety of different asbestos containing products,” including boilers manufactured, distributed, sold and/or contracted for use by A.O. Smith. (¶ 17A of Plaintiff’s Responses to Defendant’s Fourth Amended Standard Set of Interrogatories and Request for Production of Documents). In 2010, plaintiff Charles Freudenberg was diagnosed with lung cancer.¹

Defendant moves for summary judgment claiming, *inter alia*, that plaintiff misidentified A.O. Smith as a manufacturer of oil-fired sectional boilers that caused him to be exposed to asbestos. In support thereof, defendant submits Mr. Plank’s prior trial testimony and his affidavit. Mr. Plank was employed by the A.O. Smith Water Products Company, a division of A.O. Smith Corporation as A.O. Smith’s Product Safety Manager from 1993 through 2007. In his affidavit, Mr. Plank affirms that A.O. Smith never manufactured or sold oil-fired boilers,

¹Plaintiff smoked two packs of Lucky Strike brand cigarettes per day from 1957 to 2010.

coal-fired boilers or oil burners. Rather, A.O. Smith's boilers were fueled by natural gas or propane. (*Id.* at ¶ 7). Mr. Plank also affirms that A.O. Smith manufactured only "packaged" boilers which are pre-assembled at the factory and never manufactured sectional boilers that required assembly at the jobsite. (*Id.* at ¶ 8)

In addition, defendant submits an affidavit of Patrick Moyer, the former Director, Engineering and R&D - Americas ITT Residential and Commercial Water Division. Mr. Moyer has previously testified as a corporate designee in asbestos litigation for ITT Corporation with respect to Bell & Gossett products. In his affidavit, Mr. Moyer states, in pertinent part, that:

Based upon my knowledge and review of Bell & Gossett documents, I can state without any reservation that Bell & Gossett pumps were not sold with flange gaskets made with asbestos, nor did Bell & Gossett sell or supply asbestos-containing replacement flange gaskets made with asbestos. In addition, Bell & Gossett never recommended the use of asbestos-containing flange gaskets with any of its pumps.

The type of water circulating pumps described by Mr. Charles Freudenberg were never sold with asbestos-containing gaskets, but instead utilized gaskets made of neoprene and cellulose materials. At the low temperatures of 160 to 180 degrees Fahrenheit, there would have been no need for asbestos fibers in the gaskets used with these pumps.

In summary, plaintiff could not have been exposed to asbestos fibers from any gaskets supplied by Bell & Gossett, either as original equipment or as replacement parts, for use with the type of pumps plaintiff worked on.

Defendants also submit the affidavit of Charles Blake, a Certified Industrial Hygienist.

In opposition to the motion, plaintiff submits his transcripts of testimony taken on January 13, 2011, January 18, 2011 and May 6, 2011.

Mr. Freudenberg testified that he was exposed to asbestos, among other ways, when doing "summertime cleanup" of previously installed boilers and removal of old boilers. This was a "dusty process" (¶ 13 of Daniel Blouin's Affirmation).

In particular, Mr. Freudenberg testified, in pertinent part, as follows:

Q. Can you tell me the brand name, trade name or manufacturer of the boilers you did summertime cleanups on?

A. Weil-McLain, Peerless, Slant/Fin, American Radiator, A.O. Smith, American Standard or Radiator, Burnham . . .

Q. Were these the same types of boilers that you were working with?

A. A lot of them are the same type of boilers and a lot of them are the same types of burners, but you got different burners out there, different boilers, and I can't tell you -- you know, there's no way I can give you a number of how many different boilers I worked on. I mean, you know, it's -- especially on Long Island. Everybody in different sections of town have a different boiler in it, a different burner.

Q. Can you tell me the brand name, trade name and manufacturer of the boilers you did summertime cleanups on while working for Harbor Fuel?

A. Well, the different names are Weil-McLain, Peerless, A.O. Smith, American Standard or Radiator, Burnham . . .

See Exhibit B at pg. 104, lines 6-13 and at pg. 119, line 12 to pg. 120, line 8 (emphasis added).

Mr. Freudenberg also provided a description of the specifics about the A.O. Smith boilers and how they exposed him to asbestos, testifying:

Q. Can you walk me through the process of doing this cleanup work specifically on an A.O. Smith boiler?

A. Well, it's be the same thing, but with A.O. Smith you had their -- same thing with the burner where you take it out and check the cement and everything. We also had doors that you opened up to make sure that everything and the rings would be on the doors.

Q. Now, you said that there were also rings around the doors.

A. Yeah.

Q. Where was this door on the A.O. Smith boiler?

A. On the head, right on the head.

Q. And this is how you would access the burner/

A. Right. Well, the door, the tubes to the boiler.

Q. And what would you do to this rope around the door?

A. We'd make it if it was broken.

Q. Do you believe that work caused you to be exposed to asbestos?

A. If I had to replace the rings and scrape the rings.

Q. Do you remember doing that work to an A.O. Smith boiler?

A. Yes.

See Id. at pg. 345, lines 4-12; and pg. 346, line 22 to pg. 347, line 16.

Mr. Freudenberg made it clear that the A.O. Smith boilers that exposed him to asbestos were not modern in design. Notably, these exposures were taking place in the 1960s and 1970s, decades before A.O. Smith boilers about which Mr. Plank claims knowledge were even designed.

Q. Were the A.O. Smith boilers that you encountered that you were doing this cleanup work so that I asked you about before, were they generally the same in description?

A. Well, they were the older boilers, A.O. Smiths, not the new.

Q. What do you mean by the older boilers?

A. Well, they were like, some were redone from coal boilers, but they had oil burners put into them.

Q. Do you know how old the boilers would have been?

A. No, I don't.

Q. How would you know a boiler was manufactured by A.O. Smith?

A. They had the label on the side, on the right-hand side, on the upper side, if I remember right.

Q. What did it say on the label?

A. A.O. Smith

See Id. At pg. 348, line 17 to pg. 349, line 11.

In addition, plaintiff relies upon engineering/design specifications generated by A.O. Smith which indicate that A.O. Smith utilized asbestos-containing insulation in connection with the manufacture of its boilers up until 1973, thereby corroborating the accuracy of Mr. Freudenberg’s testimony as to working with A.O. Smith boilers that had been installed years previously.

Based upon plaintiff’s testimony identifying exposure to asbestos from A.O. Smith boilers and A.O. Smith specification documents, plaintiff maintains that defendant is not entitled to summary judgment.

On a motion for summary judgment, it is incumbent upon the movant to make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The failure to make that showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*Mastrangelo v Manning*, 17 AD3d 326 [2nd Dept 2005]; *Roberts v Carl Fenichel Community Servs., Inc.*, 13 AD3d 511 [2nd Dept 2004]). Issue finding, as opposed to issue determination is the key to summary judgment (*see Kriz v Schum*, 75 NY2d 25 [1989]). Indeed, “[e]ven the color of a triable issue forecloses the remedy” (*Rudnitsky v Robbins*, 191 AD2d 488, 489 [2nd Dept

1993]).

In an asbestos personal injury action, a plaintiff must demonstrate that he was exposed to asbestos fibers released from 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 exposure was a substantial factor in his injury (*see Diel v Flintkote Co.*, 204 AD2d 53, 54 [1st Dept 1994]; *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308 [1985]). Plaintiff must demonstrate that his injury was proximately caused by defendant's asbestos and submit evidence identifying defendant's product as being a factor in his injury. *Hymowitz v Eli Lilly & Co.*, 73 NY2d 487 [1989], *cert denied*, 493 US 944 [1989]; *Farrell v National Gypsum Co.*, 1991 WL 89632 (S.D.N.Y.) While boilerplate and conclusory allegations will not suffice, plaintiff may "show facts and conditions from which defendant's liability may be reasonably inferred." *Reid v Georgia-Pacific*, 212 AD2d 462, 463 [1st Dept. 1995]; *Blenkensopp v A.O. Smith Water Products Co.*, 2011 WL 5825882, 2011 NY Slip Op 32965 (U).

In considering a motion for summary judgment, the court must view the evidence in the light most favorable to plaintiff. (*Fundamental Portfolio Advisors, Inc. v Tocqueville*, 7 NY3d 96, 106 [2006]; *Mosheyev v Pilevsky*, 283 AD2d 469 [2nd Dept 2001]; *De Los Santos v Amsterdam Apartments Managers*, 85 AD3d 648 [1st Dept 2011]). Here, accepting the plaintiff's pleadings as true, there are plainly triable issues of fact sufficient to preclude summary judgment. *Blenkensopp v A.O. Smith Water Products Co.*, *supra*.

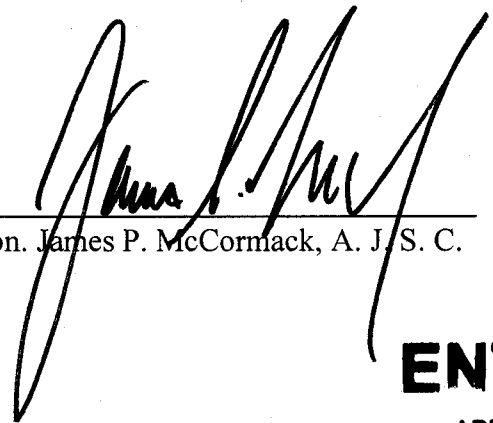
Critical to this motion is that plaintiff identified A.O. Smith as a source of his exposure throughout his career. *Reid v Georgia-Pacific*, *supra*, at 462; *Bobrowich v A.O. Smith Water Products Co.*, 2011 WL 5892806 (N.Y.Sup.) 2011 N.Y. Slip Op 32965(U). The weight to be

given to plaintiff's testimony as well as documentation should be left to a jury. *See Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 [1st Dept 1996]; *Bobrowich v A.O. Smith Water Products Co.*, *supra*. "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 record goes only to the weight and not the admissibility of the testimony." *Dollas v W.R. Grace & Co.*, *supra*.

In view of the foregoing, the motion is **denied**.

This constitutes the Decision and Order of the Court.

Dated: April 20, 2012
 Mineola, N.Y.



Hon. James P. McCormack, A. J. S. C.

ENTERED
 APR 30 2012
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE