

Diamond v A.C. & S., Inc.

2012 NY Slip Op 31362(U)

May 17, 2012

Sup Ct, New York County

Docket Number: 104308/02

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

Index Number : 104308/2002
DIAMOND, JERRY
vs
A.C.&S.
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. 104308/02
MOTION DATE _____
MOTION SEQ. NO. 001

(MAREMONT)

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 *decided as*
per the memo decision
of **FILED**
MAY 21 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 5.17.12

Sherry Klein Heitler
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
JERRY DIAMOND and JOANN DIAMOND,

Index No. 104308/02
Motion Seq. 001

Plaintiffs,

DECISION AND ORDER

-against-

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

Defendants.

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

In this asbestos-related personal injury action, defendant Maremont Corporation (“Maremont”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all other claims against it.

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. *See Tronlone v Lac d’Aminate du Quebec, Ltee*, 297 AD2d 528, 528-29 (1st Dept 2002). To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant a court’s directing judgment in its favor as a matter of law, and must tender sufficient evidence to demonstrate the absence of any material issues of fact. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); CPLR 3212(b).

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 context, the plaintiff need only show “facts and conditions from which the defendant’s liability may be reasonably inferred.” *Reid v Georgia-Pacific Corp.*, 212

AD2d 462, 463 (1st Dept 1995).

Plaintiff Jerry Diamond was deposed on August 3, 2010. A copy of his deposition transcript is submitted as plaintiff's exhibit 1 ("Deposition"). His testimony is that during his employment as a mechanic between 1954 and 1961 he worked with Maremont mufflers. He plainly testified that he was exposed to asbestos from such activity (Deposition pp. 328-30):

Q: Do you specifically recall ever removing a Maremont muffler from any vehicles during your professional career?

A: Yes.

Q: How would you know it was a Maremont muffler that you were removing?

A: To the best of my recollection, okay, the Maremont muffler, some Maremont mufflers had asbestos around them, okay, heat shields, to the best of my recollection.

Q: How do you know that it was asbestos lining that was around the Maremont muffler?

A: It's common knowledge, you know, that's what was around the mufflers.

* * * *

Q: Can you describe for me how there was dust during the removal process of the muffler?

A: There was dust from the rust, okay. And if it was a muffler that had a shield on it, okay, there was a lot of dust that came out of that asbestos from the muffler.

* * * *

Q: Did you actually see the asbestos?

A: Yes.

Q: How could you tell it was asbestos as opposed to non-asbestos wrapping?

A: Because you just knew that it was asbestos. It was like a, like batting with speckles in it and you know that that was for the heat, that's what kept the heat off the bottom of the car.

Q: Do you recall ever seeing any writing on a Maremont muffler?

A: Not to my recollection. I'm sure I read it at some point but I don't remember when.

Defendant's position is that the Maremont mufflers described by Mr. Diamond simply

could not have contained asbestos. The defendant also asserts that, since they were encapsulated, even if Mr. Diamond had worked with asbestos-containing Maremont mufflers he could not have been exposed to asbestos therefrom. In support the defendant relies entirely on the affidavit of former Maremont employee Carl Liggett, sworn to January 30, 2012 (“Defendant’s Exhibit D”).

Mr. Liggett served as Maremont’s Vice President of Operations for its friction product division at its Tennessee and Ohio manufacturing facilities from 1973 to 1977. In his affidavit, Mr. Liggett avers that all asbestos-containing Maremont mufflers were visibly stamped with the words “Asbestos Wrapped” to reflect this feature. Defendant’s exhibit D, ¶ 4. Defendant argues that since Mr. Diamond did not testify to seeing any such phrase on the mufflers he worked with, they necessarily did not contain asbestos. Mr. Liggett also avers that all Maremont mufflers which contained asbestos paper would have been completely covered by an outer metal shell. In this respect, Mr. Liggett concludes that Mr. Diamond simply could not have seen asbestos fibers “sticking out” of a Maremont muffler. *Id.* ¶ 5.

Defendant’s reliance on Mr. Liggett’s affidavit is misplaced. For one, the fact that Mr. Diamond did not recall seeing writing on the mufflers at issue is not dispositive. Indeed, he explicitly testified that he observed actual asbestos fibers emanating from same. In addition, while Mr. Liggett’s conclusions are stated to be based in part on his review of corporate documents, the defendant has not submitted a single catalog or specification to accompany the Liggett affidavit, thus rendering the defendant’s assertions on this motion conclusory. *See Ayotte v Gervasio*, 81 NY2d 1062 (1993). In reality, the most that Mr. Liggett’s affidavit does is to create conflict with Mr. Diamond’s testimony. As such, the court is essentially left with questions of credibility which cannot be determined as a matter of law. The weight of the

evidence to be given to Mr. Diamond's testimony in light of Mr. Liggett's affidavit presents a triable issue of material fact which can only be decided by the trier of fact. *See Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996).

Accordingly, it is hereby

ORDERED that Maremont Corporation's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: *May 17, 2012* 

SHERRY KLEIN HEITLER
J.S.C.

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