

Smalley v A.O. Smith Water Prods.

2008 NY Slip Op 30157(U)

January 17, 2008

Supreme Court, Schuyler County

Docket Number: 0000386/2006

Judge: Judith F. O'Shea

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At a Motion Term of The Supreme Court of the State of New York held in and for the Sixth Judicial District, at the Hazlett Building, in the County of Chemung, Elmira, New York, heard on the 4th day of January 2008.

**PRESENT: HON. JUDITH F. O'SHEA
SUPREME COURT JUSTICE**

STATE OF NEW YORK
SUPREME COURT: COUNTY OF SCHUYLER

William B. Smalley and Donna Mae Smalley,

Plaintiffs,

vs.

DECISION AND ORDER

INDEX #06-386
RJI # 2006-0155-M

A.O. Smith Water Products, et al.,

Defendants.

JUDITH F. O'SHEA, JSC

FINDINGS OF FACT

In a notice of motion dated November 16, 2007, Defendant Riley Power Incorporated (hereinafter "Riley") seeks summary judgment dismissing the complaint pursuant to CPLR § 3212 (b). Plaintiff's complaint seeks to recover damages due to his alleged exposure to asbestos containing products during the course of his employment at General Electric from 1956 to 1987. Plaintiff alleges that while employed as a process engineer, he primarily worked in the boiler house and was exposed to asbestos from Riley's boiler that was located at General Electric's Mt. Vernon, Indiana Plant between 1960 and 1964. The alleged exposure occurred when plaintiff came into contact with insulation and gasket materials during routine maintenance and repair activities on the boiler.

Defendant has offered the affidavit of its former employee, J. Michael Smith, who worked in various capacities at Riley in their drafting, design and engineering groups. Mr. Smith asserts that Riley is in the business of designing, engineering, manufacturing and erecting of boilers and fuel burning equipment. Upon review of Riley's business records, Mr. Smith claims

that there is no record of any sales, shipments, installation or erection of any of their boilers at the General Electric Plant in Mt. Vernon, Indiana during or prior to the period of 1960 to 1964. Mr. Smith also asserts that Riley never made, mined, manufactured or processed commercial or raw asbestos. Accordingly, Riley seeks summary judgment dismissing the complaint on the grounds that there are no facts sufficient to require a trial.

In opposition, the examination before trial testimony of plaintiff is offered. According to plaintiff, while he worked at the Mt. Vernon, Indiana Plant, he was exposed to asbestos in the boiler house, the pump house and the phosgene plant. Plaintiff claims that there were two boilers located at the plant, one that was coal-fired and manufactured by Riley, and another that was gas-fired and manufactured by Cleaver Brooks. According to plaintiff, when he arrived at the plant in 1960, the Riley Boiler was in the finishing stages of being constructed and was completely installed shortly thereafter. He maintains that he was exposed to asbestos by the Riley Boiler during start up activities, annual inspections, and through routine maintenance. In performance of his duties associated with the boiler, he had to fix leaky pipes which required him to disturb the insulation located around the pipe flanges. This apparently caused a cloud of asbestos to enter into the air. He also opines that during maintenance procedures, he had to enter the boiler into the fire chamber, which also caused the insulation to be disturbed. Plaintiff specifically identified this boiler as being manufactured by Riley, since it had a raised nameplate identifying it as "Riley Stoker." He opines that the largest physical source of his exposure to asbestos came from the Riley Boiler. Plaintiff also testified to the size and dimensions of the boiler.

Plaintiff claims that Mr. Smith does not have first hand knowledge of the facts outlined in his affidavit, since he did not begin working for Riley until 1973, which is approximately 13 years after the boiler was installed at the plant. Likewise, it is claimed that due to the discrepancies between plaintiff's testimony and Mr. Smith's affidavit concerning the existence of a Riley Boiler at the plant, this presents an issue of credibility which must be resolved by a jury. Moreover, it is argued that plaintiff's description of the size and characteristics of the boiler are consistent with boilers that Riley manufactured during this time, which are detailed in their marketing documents. Thus, plaintiff maintains that summary judgment is not warranted.

CONCLUSIONS OF LAW

It is well settled that "a defendant who seeks summary judgment claiming that it did not manufacture the allegedly defective product has the initial burden of establishing that, as a matter of law, it did not manufacture the product in question; the plaintiff must then rebut this showing with affirmative evidence sufficient to create a reasonable inference that the defendant's product caused the injury" (Baum v. Eco-Tec, Inc., 5 A.D.3d 842 [3rd Dept. 2004], citing Clark v. Globe Bus. Furniture, 237 A.D.2d 846, 847 [3rd Dept. 1997]; Antonucci v. Emeco Indus., 223 A.D.2d 913, 914 [3rd Dept. 1996]; Schiedel v. A.C. & S., Inc., 258 A.D.2d 751, 754 [3rd Dept. 1999]). As explained in Schiedel v. A.C. & S., Inc., *supra* at 754, once the defendant has met their initial burden, plaintiff then must demonstrate by the submission of admissible evidence, which is sufficient "to allege facts and conditions from which the defendant's liability may reasonably be

inferred, that is, that [decedent] worked in the vicinity where defendant's products were used, and that [decedent] was exposed to defendant's product" (Matter of New York City Asbestos Litig., 216 A.D.2d 79, 80 [1st Sept. 1995]; see, Cawein v. Flintkote Co., 203 A.D.2d 105 [1st Dept. 1994]).

In the case of In Re Brooklyn Navy Yard Asbestos Litigation, 971 F.2d 831, 837 (2nd Cir. 1992), the Court explained:

"...the evidence at trial established that asbestos-containing products made by the defendants were used interchangeably throughout the shipyard, and that the environment was extremely dusty with asbestos fibers. The plaintiffs proved that they or their decedents spent time at BNY and were exposed to asbestos there, that defendant's asbestos-containing products were used in the shipyard and contributed to the asbestos fibers in the air, and that they developed diseases medically linked to asbestos exposure. Because the events happened years ago, and many of those exposed to the asbestos are deceased, to require precision of proof would impose an insurmountable burden" (citing Lyons v. DeVore, 39 N.Y.2d 971, 972 [1976], "precision of proof cannot always be expected or required in death cases").

In Jamieson v. AC&S, Inc., et al., 1998 WL 635549 (S.D.N.Y. 1998), the Court explained that a plaintiff "need not make a precise identification of exposure to a particular product . . . Circumstantial evidence may be sufficient to meet this burden" (citing Kreppin v. Celotex Corp., 969 F.2d 1424 [2nd Cir. 1992]; In Re Brooklyn Navy Yard Asbestos Litigation, *supra*; O'Brien v. National Gypsum Co., 944 F.2d 69 [2nd Cir. 1987]; Johnson v. Celotex Corp., 899 F.2d 1281 [2nd Cir. 1990]). The circumstantial evidence sufficient to meet this burden includes allegations that plaintiff was "at the approximate place and approximate time during which the defendant's products were used." Id. at 3.

In the case at bar, Riley has met its initial burden in establishing entitlement to judgment as a matter of law by presenting evidence that it did not sell one of its boilers to the Mt. Vernon, Indiana Plant while plaintiff was employed there.

With the burden now shifting to plaintiff to raise a triable issue of fact, plaintiff's examination before trial testimony clearly establishes that summary judgment is not warranted. Plaintiff testified about his work surrounding his involvement with the Riley Boiler, including the assertion that it contained a nameplate identifying it as being manufactured by Riley. Likewise, plaintiff testified to the size and overall dimensions of the boiler, which are consistent with the boilers that Riley manufactured during this period of time. As plaintiff correctly points out, the divergent evidence offered by plaintiff and Mr. Smith present credibility issues, which must be resolved by a jury. See, Rosenbaum v. Camps Rov Tov, 285 A.D.2d 894 (3rd Dept. 2001).


It is therefore,

ORDERED, that defendant's motion for summary judgment is hereby **denied** in its entirety.

This shall constitute the Decision and Order of The Court.

ENTER

Dated: January 17, 2008.



Hon. Judith F. O'Shea
Supreme Court Justice