

Convery v A.O. Smith Water Prods., Inc.

2009 NY Slip Op 30899(U)

April 15, 2009

Supreme Court, New York County

Docket Number: 107171/08

Judge: Sherry Klein Heitler

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

PRESENT: HON. SHERRY KLEIN HEITLER

PART 30

Index Number : 107171/2008

CONVERY, JOSEPDH

vs.

A.O. SMITH WATER PRODUCTS

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. 107171/08

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*is decided
as per the memo
decision of 4.15.09.*

FILED
APR 21 2009

Dated: 4.15.08

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X

JOSEPH CONVERY and
CONSTANCE CONVERY,

Plaintiffs,

-against-

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

Defendants.

-----X

SHERRY KLEIN HEITLER, J.:

Index No. 107171/08

DECISION & ORDER

FILED
APR 21 2009
CLERK OF THE COURT

In this personal injury action, the defendant, Treadwell Corporation (hereinafter "Treadwell") seeks an order dismissing plaintiffs' complaint and all cross-claims against it in this action. Plaintiffs oppose this application.

Plaintiff, Joseph Convery, had a long career working at various sites for plumbing contractors. In May of 2008, he was diagnosed with mesothelioma. He was deposed on June 3rd, 4th and 5th of 2008. Mr. Convery testified that he worked as a welder's helper at the Ravenswood Powerhouse for approximately three to four months between 1962 and 1966. He claims that he worked in the same immediate work area as workers who were insulating pipes associated with the cooling system. Plaintiff contends that he knew the insulation contained asbestos because they were covering heating pipes and only asbestos was used to prevent people from getting burned at that time. He also stated that the atmosphere during the installation of the covering was quite dusty. Mr. Convery identified the individual insulators as employees of Treadwell or Keasby and recalled that Treadwell maintained a toolbox on the Ravenswood site. Specifically, plaintiff testified to the following:

Q. Now, these insulators, were they wearing uniforms or anything that identified what company they worked for?

A. No, not that I know of, not that I can remember.

Q. Did they have a shanty?

A. Yeah. They had the box, they had the shanty boxes, you know, where they put all their tools.

Q. They had a toolbox?

A. Yeah, they had a toolbox there.

Q. And was the name of the company on the toolbox?

A. As far as I can remember.

Q. As you sit here today, do you have a specific recollection of seeing the name of the insulation company on the toolbox?

A. I think it was Keasley and, what is it, Treadwell. There was a couple of insulators on the job. I don't know if some were working on the other side of the plant, some were working on our side of the plant.

(See, Plaintiffs' Exhibit A, Page 438, Lines 2-23.)

He also testified as follows:

Q. Well, the insulators that were working in your presence, could you identify who they were?

A. I think either Treadwell or Beasley or Treadwell, either one.

Q. Well, earlier you testified that you knew that Treadwell was at Ravenswood because you saw the name toolbox; is that correct?

A. Beasley I seen, I seen. Beasley or Treadwell, I think they were both there, I couldn't swear to it.

(See, Plaintiffs' Exhibit A, Page 473, Lines 2-11.)

Plaintiff also testified that he knew asbestos was being used to insulate the pipes because he could see the material and knew it contained asbestos based on the color. As such, the following information was elicited at the deposition:

- Q. If I were holding in one hand a piece of insulation material that contained asbestos and in my other hand a piece of insulation material that didn't, would you be able to tell the difference?
- A. Almost, absolutely.
- Q. How would you do that?
- A. How would I do it? Because asbestos, the asbestos was sort of a grayish material as far as I know, it's like a light gray. The other material would be, like, totally white which would have nothing to do as far as I know. If you show me two pieces of covering, I would pick out the asbestos covering for you.

(See, Plaintiffs' Exhibit A, Page 440, Lines 15-25; Page 441, Lines 1-2.)

Defendant asserts that plaintiff failed to identify Treadwell with any specificity as the proximate cause or as a substantial factor of his injuries and thus this action should be dismissed. In support of its motion, Treadwell argues that under Perdicaro v. A. S. Smith, 52 A.D.3d 300 (1st Dept. 2008), summary judgment must be granted because plaintiff has failed to raise a factual issue as to whether he was present at the same location at the same time as Treadwell, nor did he raise an issue as to whether the insulation he worked near contained asbestos.

The court does not agree. In Perdicaro v. A. O. Smith, (52 A.D.3d 300, 1st Dept. [2008], supra), the court found that the plaintiff offered no factual support that would reasonably suggest that the insulation he saw in use was asbestos-based. In the case at bar, although plaintiff was not able to definitively identify individual insulators as working for Treadwell, he knew that they worked for either Treadwell or Keasby. He also testified that he worked in the immediate work area as workers

who were insulating pipes and using insulation that contained asbestos.

In Joseph Casale v. A. O. Smith (Sup. Ct., NY Cty, July 23, 2007, Freedman, J., Index No. 104299/06), the court denied summary judgment to a defendant when plaintiff identified two gasket manufacturers but could not identify which gasket he specifically used at an exact location. The court held that if plaintiff mixed up the names of the manufacturers, at most it would go to the weight and probative value of his testimony but would not result in his case being dismissed. Further, in Knce v. A. W. Chesterton Co., 52 A.D.3d 355 (1st Dept., 2008), the court denied summary judgment based on issues of fact raised by testimony that decedent was exposed to asbestos from gasket material while working in the Brooklyn Navy Yard.

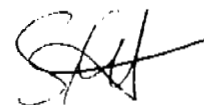
The court finds that plaintiff's testimony raises issues of fact that preclude granting defendant, Treadwell, summary judgment. As the court held in Reid v. Georgia-Pacific Corp., 212 A.D.2d, 462, at 463 (1st Dept., 1995), "the plaintiff is not required to show the precise causes of his damages, but only to show facts and conditions from which defendants' liability may be reasonably inferred."

Accordingly, defendant's motion is denied.

This shall constitute the decision and order of the court.

DATED: APRIL 21, 2009

FILED
APR 21 2009
COUNTY CLERK'S OFFICE
NEW YORK



SHERRY KLEIN HEITLER
J.S.C.