

**Beltrami v A.O. Smith Water Prods. Co.**

2009 NY Slip Op 32022(U)

September 3, 2009

Supreme Court, New York County

Docket Number: 103965/08

Judge: Sherry Klein Heitler

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

PRESENT: HEITZEL  
Justice

PART 30

RAYMOND BELTRAMI  
- v -

AND SMITH WATER PRODUCTS Co.

INDEX NO. 103965/08

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 12

MOTION CAL. NO. \_\_\_\_\_

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

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided as per the memo decision of 9.3.09*

**FILED**

SEP 08 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 9.3.09

[Signature]  
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: PART 30

-----X  
RAYMOND BELTRAMI and NOREEN BELTRAMI

Plaintiff(s),

Index No. 103965/08

-against-

DECISION AND ORDER

A.O. SMITH WATER PRODUCTS CO. <sup>SEP 08 2009</sup>

**FILED**  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
In this asbestos wrongful death case, defendant Gorman-Rupp Company ("Gorman") moves for summary judgment on the ground that plaintiffs Raymond Beltrami ("decedent") and Noreen Beltrami ("plaintiff") have not demonstrated that decedent was exposed to asbestos-containing products manufactured or distributed by Gorman. Specifically, Gorman contends it did not supply decedent's employer in the City of Holly Hill Florida with asbestos-containing gaskets or packing, and that the Davco pumps used at decedent's place of employment did not use packing but rather mechanical seals.

Defendant Water Applications Distribution Group, Inc. ("Water Applications"), the surviving entity of Davco (a division of Davis Water & Waste), cross-moves for conditional summary judgment against Gorman for common law indemnification on the ground that the Davco pumps used at the City of Holly Hill Water Treatment Facility where the decedent worked were manufactured by Gorman, and Water Applications was not actively negligent in modifying any Gorman product. Water Applications also partially joins in Gorman's summary judgment motion on the ground that Gorman's

gaskets and pumps did not contain asbestos and therefore the Gorman gaskets and the Davco pumps complained of could not have been the cause of decedent's asbestos related injury.

Decedent testified that he worked at the City of Holly Hill Water Treatment Facility in Florida ("Holly Hill") from 1978 to 1993 as a water treatment plant operator and that he became a utility supervisor there in 1993. He testified that as an operator, he performed maintenance and repairs on pumps and that his utility supervisor ordered, bought and obtained the materials that he used in his employment. Decedent further testified that while he was not responsible for ordering materials until 1994, his supervisor ordered parts from both Gorman and Davco. Decedent noted that he had gasket material which came from Gorman in packages with a "big GR on it" (Beltrami deposition dated April 16, 2008, pp. 348-349). He also noted that he worked with Davco pumps on which appeared Davco nameplates consisting of "a separate piece of metal" which "looked like it was riveted on" (Beltrami deposition dated April 17, 2008, p. 732). Decedent testified that "pretty much all our can stations [in Holly Hill] are DavCo", consisting roughly of 12 or 13 can lift stations with each station having two pumps, half of which had mechanical seals and half of which had packing (Beltrami deposition dated April 15, 2008, pp. 309-311). He also identified Gorman and Davco as suppliers to Holly Hill of asbestos-containing packing and gaskets manufactured by Klinger.

Decedent testified that he breathed in dust and was exposed to asbestos several hours a day in the course of his employment at Holly Hill which included repairing pumps and the removal and replacement of asbestos containing packing and gaskets thereon. Decedent's biopsy of January 17, 2008 resulted in a diagnosis of mesothelioma.

Gorman argues that summary judgment should be granted because there is no evidence that decedent was exposed to asbestos fibers released from a Gorman product. Gorman contends, based upon its reply papers which for the first time on this motion contains an affidavit of its Vice President and General Manager Mark Kreinbihl, sworn to June 18, 2009, that Gorman never bought or supplied asbestos-containing Klinger gaskets and/or packing, nor had it ever assembled a pump with packing or gaskets manufactured by Klinger, and that plaintiff's counsel's assertion that decedent's utility supervisor bought Klinger gaskets from Gorman based on decedent's testimony alone is mere speculation. Gorman relies *inter alia* on *Perdicaro v. A.O. Smith Water Products*, 52 A.D.3d 300, 301 (1st Dept. 2008) in support of this proposition. Gorman further contends that based on documentary evidence (Exhibits E-G to Order to Show Cause), the Holly Hill Davco pumps did not use packing, but rather non-asbestos containing mechanical seals because the material to be pumped was sewage.

In response to Water Applications' cross-motion, Gorman argues that decedent identified Davco pumps, not Gorman pumps, as the source of decedent's asbestos exposure. Gorman further argues that certain MSDS sheets and a 1986 form letter sent to Gorman from Cooper Manufacturing (Exhibit B to reply papers) are not evidence that Gorman purchased any Klinger products or, for that matter, any Cooper products..

In opposition plaintiff argues that summary judgment should not be granted because the decedent's express testimony and the documentary evidence in this case show that Davco supplied the lift stations where decedent worked, the pumps in the Davco lift stations were manufactured by Gorman, Gorman supplied Holly Hill with asbestos-containing gaskets manufactured by Klinger, or they looked like Klinger

gaskets, and decedent used asbestos containing packing sold by Gorman to Holly Hill in its own packaging, manufactured by Klinger. The documentary evidence shows that Gorman pumps used in wastewater applications contained asbestos gaskets, and decedent testified that asbestos containing gaskets were used on Gorman pumps at Holly Hill. The documentary evidence shows that Klinger's gasket products were asbestos containing. Further, Gorman has failed to show that every single Gorman pump at Holly Hill had mechanical seals rather than packing.

Water Applications argues that Gorman must indemnify Water Applications because Davco did not manufacture pumps, and the "Davco pumps" as to which decedent testified were in fact manufactured by Gorman. Citing to *Olivier v. Kirby & Allen, Inc., et al.*, 2007 WL 3118763, at 1 (N.Y. 2007) among others, Water Applications further argues that even if Davco sold Gorman pumps to decedent's employer, a seller, though strictly liable, is entitled to common-law indemnification from the one highest in the chain of distribution. Water Applications claims that Davco did not alter the pumps it received from Gorman and asserts there is no evidence that Davco or any related entity altered such pumps. Water Applications contends that the pumps received from Gorman were received with the Davco nameplate.

For the reasons set forth below, the motion for summary judgment is denied and the cross-motion for common-law indemnification is also denied.

CPLR 3212 (b) provides in relevant part: "Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." An issue of fact is created when a litigant's deposition testimony conflicts with evidence in the record. *Dollas v. W.R. Grace Co.*, 225 A.D.2d

319, 321 (1st Dept. 1996). Further, in determining whether a summary judgment motion should be granted or denied, all reasonable inferences must be drawn in favor of the party against whom summary judgment is sought. *See, e.g., Millerman v. Georgia Pacific Corp.*, 214 A.D.2d 362, 363 (1st Dept. 1995).

Here, decedent's testimony that his utility supervisor ordered asbestos-containing gaskets from Gorman conflicts with the Kreinbihl affidavit submitted with Gorman's reply papers, which represents that Gorman never bought, assembled or sold asbestos-containing packing or gaskets manufactured by Klinger. Documents produced by plaintiff indicate that certain of Gorman's wastewater pumps used asbestos gaskets. These discrepancies create issues of fact as to whether Gorman supplied decedent's utility supervisor with asbestos-containing gaskets and packing between 1978 and 1993. In addition, Gorman's argument that the actual pumps at issue used mechanical seals and not packing conflicts with decedent's express testimony that about half of the pumps at the Holly Hill lift stations used packing and the other half used mechanical seals, giving rise to still another issue of fact as to the actual nature of all of the Holly Hill pumps on which decedent worked. These factual issues preclude Gorman's motion for summary judgment from being granted.

Water Applications' cross-motion for conditional summary judgment seeking common law indemnification is also denied. In order to recover common law indemnification, a party must prove "that it was not guilty of any negligence beyond the statutory liability." *Correia v. Professional Data Management, Inc.*, 259 A.D.2d 60, 65 (1st Dept. 1999). Water Applications has not proven that it was not guilty of any negligence because there remains an issue of fact as to whether Davco supplied the

asbestos containing gaskets and packing that decedent testified was used in the pumps he worked on throughout his employment which bore Davco's name. Nevertheless, despite the fact that nameplates with Davco's name appeared on the pumps, Water Application should not be precluded from seeking common-law indemnification if it is found at trial that Davco was not guilty of any negligence beyond the statutory liability. *See, Godoy v. Abamaster*, 302 A.D.2d 57, 59 (2d Dept. 2003) (where metal plate showing the name of a party lower in the chain of distribution appeared on a defective product, and this party was not at all involved in the manufacture or design of the product, summary judgment was granted to this party on its cross claim for indemnification as against a distributor higher in the chain).

Accordingly, it is hereby

ORDERED, that the motion by Gorman-Rupp Company for summary judgment dismissing the complaint and all cross-claims against it is denied; and further

ORDERED, that the cross motion by Water Applications Distribution Group, Inc. for summary judgment against defendant Gorman for common-law indemnification is also denied without prejudice to renew at trial; and further

ORDERED, that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: 9.3.09



SHERRY KLEIN HEITLER  
J.S.C.

