

Kofler v Chesteron

2009 NY Slip Op 32025(U)

September 2, 2009

Supreme Court, New York County

Docket Number: 190014/08

Judge: Sherry Klein Heitler

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: SHERRY KLEIN HEITLER
Justice

PART 30

FRANK KOFLER and
IRENE KOFLER,

Plaintiffs,

- v -

A. W. CHESTERTON, et. al.

Defendants.

INDEX NO. 190014/08
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

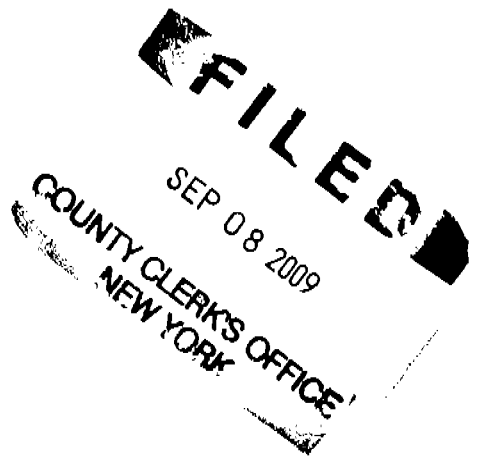
	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, It is hereby

ORDERED that this motion is decided in accordance with Memorandum / Decision dated SEPTEMBER 2, 2009.

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



Dated: 9-2-09

SKH
SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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

-----X

FRANK KOFLER and
IRENE KOFLER,

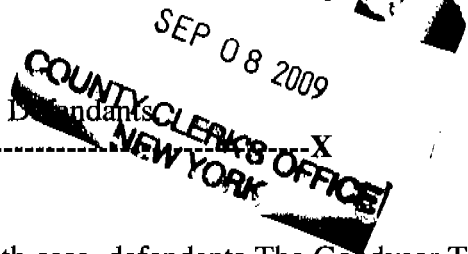
Index No. 190014/08

Plaintiffs,

DECISION AND ORDER

-against-

A.W. CHESTERON, *et. al.*,



Defendants

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

In this asbestos wrongful death case, defendants The Goodyear Tire & Rubber Company and Goodyear Canada Inc. ("Goodyear") move for summary judgment on the ground that plaintiffs Frank ("decedent") and Irene ("plaintiff") Kofler have not demonstrated that decedent was exposed to Goodyear's asbestos-containing products. Plaintiffs oppose this application.

Decedent testified that he worked at Lank Machine and Tool ("Lank") from 1973 to 1998 and purchased Goodyear asbestos-containing gaskets from local suppliers throughout his employment. He also testified that the gasket sheets, packaged in 6 inch by 6 inch boxes marked "asbestos gasketing material," came in rolls which were stocked in a back room at Lank. Decedent mentioned that "one roll like that [of gasket material] lasted a while." (Deposition of Frank Kofler dated Oct. 8, 2008, p. 382). Further, decedent revealed that he was exposed to asbestos while working on repairs, which included adding Goodyear gaskets to bottling machines, and that this asbestos exposure contributed to his development of mesothelioma. Decedent died of mesothelioma on January 17, 2009, six months after he was diagnosed with this disease.

On September 24, 2008, plaintiffs filed a summons and complaint, naming, among others, Goodyear as a defendant. Goodyear filed a motion for summary judgment on the ground that there is

no evidence of decedent's exposure to a Goodyear asbestos-containing product. The plaintiffs oppose this application.

Goodyear argues that summary judgment should be granted because decedent's Social Security Earning Printout ("social security record") indicates that decedent worked at Lank from 1977 through 2001, and Goodyear Tire & Rubber Company and Goodyear Canada Inc. ceased manufacturing asbestos-containing gasket material in 1969 and 1973 respectively. Goodyear's General Counsel asserts that Goodyear stopped manufacturing asbestos-containing gaskets before 1974. (Responses to Plaintiffs' First Standard Set of Interrogatories by G. W. Barnes, dated April 1, 1999, A28). As such, Goodyear contends that decedent could not have worked with a Goodyear asbestos-containing gasket. To support their argument, Goodyear provides an affidavit from E. W. DeMarse, who worked in the Industrial Products Department of Goodyear from 1952 to 1983. Mr. DeMarse states that Goodyear terminated the production of asbestos sheet gaskets in 1969 and that Goodyear Canada Inc. stopped manufacturing same in 1973. To the best of his knowledge he stated that Goodyear never manufactured or sold compressed asbestos sheet gasket material in packaging measuring six inches wide, nor did it ship its gaskets in cardboard boxes marked "asbestos gasketing material." Additionally, Goodyear claims that plaintiffs' contention that Goodyear asbestos-containing gaskets continued to be distributed and used in the marketplace residually after Goodyear stopped manufacturing these gaskets is speculative and not admissible evidence. Goodyear also argues under *Bona v. Amchem Products*, Index No. 104800/07 (Sup. Ct. N.Y. Co. 2007) that summary judgment should be granted. In that case, summary judgment was granted in favor of Goodyear and against plaintiff Bona, whose earliest possible asbestos exposure occurred in 1972 and 1973, years after Goodyear stopped manufacturing asbestos-containing gaskets in the United States. In that case, plaintiff Bona was a carpenter's apprentice and his alleged exposure was secondary as he did not work with the products.

Plaintiffs argue that summary judgment should be denied because decedent identified Goodyear sheet gaskets as the cause of his asbestos exposure while working at Lank and testified that he was able to see and breathe in the dust that resulted from working with the Goodyear gaskets. Plaintiffs also contend that decedent's testimony conflicts with the April 23, 2009 affidavit of E.W. DeMarse, who stated that Goodyear never manufactured or shipped gaskets in boxes marked "asbestos gasketing material" and was not capable of cutting sheet gasket material to 6 inch widths (Affidavit of E.W. DeMarse dated April 23, 2009, p. 2-3), creating a triable issue of fact.

Plaintiffs contend that the discrepancy between decedent's deposition testimony and decedent's social security record creates another triable issue of fact as to whether decedent began working at Lank in 1973 or 1977. Plaintiffs argue under *Taylor v. A.C.&S., Inc., et. al.*, 304 A.D.2d 403, 404-05 (1st Dept. April 2003) that even if this court accepts the fact that Goodyear stopped manufacturing asbestos products by 1974, Goodyear's summary judgment motion must be denied because it is possible that Goodyear's asbestos-containing gaskets continued to be sold and used in the marketplace for months or years after Goodyear stopped manufacturing these gaskets, and that decedent purchased and worked with these asbestos-containing gaskets.

For the reasons set forth below, the motion for summary judgment is 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." In order for the court to grant summary judgment, the defendant must, without relying on "mere conclusions, expressions of hope or unsubstantiated allegations or assertions," make a prima facie showing that its product could not have contributed to the causation of the plaintiff's injury. (*Comeau v. W.R. Grace & Co. Conn.*, 216 A.D.2d 79 (1st Dept., 1995); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).) Plaintiff must allege facts and conditions from which defendant's liability may

reasonably be inferred, that is, that plaintiff worked in the vicinity where defendant's products were used and that plaintiff was exposed to defendant's product in order to defeat the defendant's application for summary judgment. (See, *Comeau v. W.R. Grace & Co. Conn.*, *supra*, at 79.) The court finds that plaintiffs have met this standard.

In *Taylor v. A.C.S., Inc.*, 306 A.D.2d 202, 202 (1st Dept. June 2003), where the plaintiff claimed that he began working at his first job one year prior to the year of employment provided by his social security records, and that he began working at another job seven years prior to what his social security records provide, the court held that "The motion court erred in granting summary judgment dismissing the complaint against AO [defendant manufacturer] since the direct evidence identifying AO's asbestos products was sufficient to create a triable issue of fact, notwithstanding the inconsistencies in decedent's testimony." *Id.* The court in that case also held for the nonmoving party, because even though AO stopped manufacturing asbestos products prior to the plaintiff's employment as indicated by plaintiff's social security records, "AO failed to proffer any evidence in rebuttal that its asbestos products were not being used residually in the marketplace by various companies in the 1980s and 1990s, after it ceased manufacturing and selling such products." *Id.* at 202-03.

Similarly, here, decedent's testimony that he began working five years prior to the years of employment provided by his social security record creates a triable issue of fact. In addition, Goodyear, like AO, provided no evidence showing that asbestos-containing products were not being sold and used residually in the marketplace after the last date of the manufacture of such products.

Decedent's and DeMarse's conflicting testimony regarding the size and labeling of the gasket materials' packaging creates another issue of fact, a question of credibility, which must be tried. *Reid v. Georgia-Pacific Corp.*, 212 A.D.2d 462, 463 (1st Dept. 1995) (plaintiff's identification of defendant's specific brand of asbestos products was enough of a showing of facts from which defendant's liability

could be reasonably inferred).

Finally, although Goodyear relies on *Bona v. Amchem Products*, *Bona* is distinguishable from the case at bar because the plaintiff in *Bona* "did not work with the products." *Bona*, Index No. 104800/07. In addition, the court in *Bona* found that there was no evidence that the gaskets containing asbestos were shipped to plaintiff's place of business. Here, in response to being asked the brand name of gasketing material that he used while working at Lank, decedent answered "*Goodyear was one of them. We had dies, and we punched out the gaskets for the machines.*" (Deposition of Frank Kofler dated Oct. 2, 2008, p. 72, emphasis supplied).

Therefore, it is hereby

ORDERED, that defendants' motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: SEPTEMBER 2 , 2009

Sherry Klein Heitler

SHERRY KLEIN HEITLER
J.S.C.

FILED
SEP 08 2009
COUNTY CLERK'S OFFICE
NEW YORK