

Lane v A.W. Chesterton Co.

2009 NY Slip Op 32704(U)

November 13, 2009

Supreme Court, New York County

Docket Number: 190090/08

Judge: Sherry Klein Heitler

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

PRESENT: Herman
Justice

PART 30

BENSONY LAND
- v -

NEW CRESTVIEW CO

INDEX NO. 190090/08
MOTION DATE _____
MOTION SEQ. NO. 001
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 denied

As per the decision of 11.13.09

FILED
NOV 18 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11.13.09

[Signature]
J.S.C.

HON. SHERRY KLEIN HEITLER

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
BEVERLY E. LANE and
SHARON A. LANE,

Plaintiffs,

Index No. 190090/08
M.S. 001

- against -

A.W. CHESTERTON COMPANY, et al.
(HOMASOTE COMPANY)

Defendants.

DECISION & ORDER

FILED
NOV 18 2009
NEW YORK
COUNTY CLERK'S OFFICE

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

In this asbestos matter, defendant, Homasote Company ("Homasote"), moves for summary judgment requesting dismissal of the complaint and all cross-claims against it on the ground that plaintiffs have failed to establish that Beverly E. Lane was exposed to any asbestos-containing products manufactured, rebranded, sold, shipped, installed or distributed by Homasote. The plaintiffs oppose this application.

Plaintiff testified that he was exposed to asbestos while employed by his brother's company, Lane Plumbing, from 1968 to the mid-1970's. As part of his employment he installed heating systems in commercial and residential buildings. He recalled using Homasote boards behind boilers to protect the walls from catching fire. He described the boards as having silver paper or tinfoil glued to the outside of the board.

The defendant contends that plaintiffs have failed to establish that Mr. Lane was exposed to asbestos from a Homasote product. In support of their motion for summary judgment, defendants provide a transcript from Joseph Bronsard, a former Chief Engineer of Homasote from 1968 to 2002. He states that Homasote did not manufacture asbestos-containing products during his employment

from 1968 to 2002 and that the boards used at that time were made of recycled newspaper or wood fibers. Another defense witness, Andrew Miele, a former Homasote employee from 1950 to 1991, testified that Homasote purchased and restored a product called "Sote board" from 1951 to 1966. Mr. Miele stated that the Sote board was loose, without any packaging. Defendant contends that Mr. Miele's description of the Sote board is contrary to what Mr. Lane describes. Further, defendant argues that as Mr. Lane's employment began after 1966, he could not have used an asbestos-containing product distributed by Homasote.

In moving for summary judgment, defendant Homasote has the burden of producing evidence demonstrating there is no issue of material fact that requires the determination of a factfinder (see, DiMenna & Sons, Inc. v. City of New York, 301 N.Y. 118 [1950]). To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (see, Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 [1957]). Homasote has not met this burden.

Mr. Lane testified that he was exposed to asbestos from fireproof boards manufactured by Homasote. Specifically, he stated:

Q. Do you believe you were exposed to asbestos from that work?

A. From the Homasote board would be the only way.

(See, Defendant's Exhibit A, p.269, l.6-9.)

Q. Where did these boards go?

A. Behind the boiler, right next to the wall.

Q. So that's like a buffer between the wall and the boiler?

A. Yes, but it would be nailed, screwed right to the wall, itself.

Q. Is it your testimony you believe you were exposed to asbestos just from the board?

[* 4]

A. Yes. We had to cut the board sometimes.

Q. What did you use to cut the board?

A. Skill saw.

Q. Do you know the brand, trade or manufacturer of this board?

A. Homasote is the only thing I know.

(See, Defendant's Exhibit A, p.270, 1.8-23.)

It is not disputed that these boards were used in conjunction with the installation of boilers. Further, although defendant does not concede that the Sote board contained asbestos, plaintiff provides the court with an advertisement for a product called "Sote Asbestos Board".

In this case, defendant's assertion that the Sote board was not packaged and Mr. Lane's identification of defendant's packaging, creates a triable issue of material fact for the factfinder to determine. In Dollas v. W.R. Grace and Company, 225 A.D.2d 319 (1st Dept., 1996), the First Department stated that "[t]he deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaint." The assessment of the value of a witness' testimony constitutes an issue for resolution by the trier of fact and any apparent discrepancy between the testimony and the evidence of record goes only to the weight and not the admissibility of the testimony. Dollas, supra, at 321.

Finally, even if defendant ceased distributing Sote board in 1966, it is not determinative of whether or not Mr. Lane used this product. It is well established that products may be warehoused and not used for years. In Taylor v. A.C.S., Inc., 306 A.D.2d 202, 202 (1st Dept. 2003), the court 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

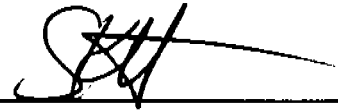
proffer any evidence in rebuttal that its asbestos products were not being used residually in the marketplace by various companies in the 1980s and 1990s, after it ceased manufacturing and selling such products." *Id.* at 202-03.

Therefore, it is hereby

ORDERED that the defendant's motion for summary judgement is denied.

This shall constitute the decision and order of the court.

DATED: NOVEMBER 13, 2009



SHERRY KLEIN HEITLER
J.S.C.

FILED
NOV 18 2009
NEW YORK
COUNTY CLERK'S OFFICE