

**Fleming v Advance Auto Parts, LLC**

2010 NY Slip Op 30322(U)

February 9, 2010

Supreme Court, New York County

Docket Number: 190001/08

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 : 190001/2008

EDWARDS, MARC

vs

ADVANCE AUTO PARTS

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. 190001/08

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

MOTION SEQ. NO. 003

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

\_\_\_\_\_ 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 ordered that this motion

*is decided  
as per the memo  
decision of 2.9.10.*

NEW YORK  
COUNTY CLERK'S OFFICE

FEB 17 2010

**FILED**

Dated: 2.9.10

SKH  
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

ADRIENE FLEMING,  
as Personal Representative for the  
Estate of MARC EDWARDS,

Plaintiff,

Index No. 190001/08  
M.S. 003

-against-

**DECISION AND ORDER**

ADVANCE AUTO PARTS, LLC, et. al.,  
(DANA COMPANIES, LLC)

Defendants.

-----X

**SHERRY KLEIN HEITLER, J.:**

In this asbestos-related wrongful death action, the defendant, Dana Companies, LLC (hereinafter "Dana") moves for summary judgment, pursuant to CPLR §3212 for an order, dismissing all claims and cross-claims asserted against it. Dana argues that the plaintiff has failed to provide sufficient evidence that Victor gaskets (manufactured, sold or supplied by Dana) were the cause of Marc Edwards' injury. The plaintiff opposes this application.

Mr. Edwards died from malignant mesothelioma at age 51. He testified, on November 12<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> of 2008. According to his testimony, he was exposed to asbestos while working as a mechanic's helper and mechanic from 1964 to 1979. With respect to Mr. Edwards' contact with various brands of carburetor gaskets, he testified that he did some automotive work at a friend's house between 1977 and 1979. He stated that this work required him to scrape and remove asbestos-containing gaskets, some of which he believed were Victor gaskets. Specifically, Mr. Edwards testified as follows:

Q Do you know the brand name or manufacturer of the gaskets you were removing?

A Some were - - let's see. Some were dealer. The majority of them were. Some were made by Holley. Some were made by S&K. Some were made by Mr. Gasket. Some were made by I believe - - one was maybe Victor. Some of them I just didn't know. The majority of them came from dealers. It depends where you got the carburetors from.

(See, Exhibit 3, Kromberg Affirmation, p.105, 8-17.)

Mr. Edwards also stated that he never removed or installed a carburetor gasket that was made with asbestos. Specifically, he stated:

Q The gasket that was used underneath the carburetor, did you ever remove or install one that was made with asbestos?

A No.

(See, Exhibit 4, Kromberg Affirmation, p.524, 4-7.)

Mr. Edwards explained that the carburetor came with the gaskets and they were included in the purchase of a carburetor. Specifically, he stated:

Q When you're scraping off or removing a gasket, how can you tell what the brand name or the manufacturer of that gasket is?

A Actually, sometimes you buy the carburetor. You're going to buy the carburetor separate from the manifold. The carburetor comes with a gasket. So some would - - some would - - if you went to S&K and bought the carburetor, it would come with an S&K gasket. If you went to Holley and bought the carburetor, it would come with a Holley gasket. And so on with the dealers. That was all part of the package.

(See, Exhibit 3, Kromberg Affirmation, p.105-106, 18-5.)

In support of the motion for summary judgment, Dana provides an affidavit from Marcy Duncan, who worked for Dana from 1968 through 2006. She states that at all times from 1967 to May 1988 Victor manufactured both asbestos-containing and asbestos-free vehicular gaskets (see, Exhibit 6, Kromberg Affidavit dated September 9, 2009, p.2, 4). She also states that Victor

did not manufacture or sell carburetors or operate dealerships or automotive parts stores. (Id. at p.2, 4.)

Dana argues that plaintiff has failed to present sufficient evidence to show that he was exposed to asbestos from a Victor carburetor gasket, rather plaintiff has proffered speculation, hope and unsubstantiated assumptions as to the possibility that he both worked with a Victor carburetor gasket and that it contained asbestos.

In opposition, plaintiff claims, in essence, that Mr. Edwards was talking about a manifold carburetor when he stated he worked on carburetors. Specifically, Mr. Edwards referred to the manifold as the carburetor manifold since the carburetor sat on top of the exhaust manifold. Plaintiff argues that Mr. Edwards testified to removing and installing manifold gaskets and that the manifold gaskets did contain asbestos. As Dana manufactured both asbestos-containing carburetors and manifold gaskets, plaintiff argues that summary judgment must be denied.

Under the facts of this case, the court grants Dana's motion for summary judgment. Only a genuine and material issue raised by evidentiary facts will defeat a prima facie showing of entitlement to summary judgment (see, NYCAL v. A.O. Smith, 52 A.D.3d 300 [1<sup>st</sup> Dept., 2008]). Plaintiff's contention that the manifold gaskets contained asbestos does not relate to Mr. Edwards' identification of Victor gaskets. It is undisputed that the identification testimony states that Mr. Edwards "maybe" used Victor gaskets. The identity of a manufacturer of a defective product may be established by circumstantial evidence but such evidence cannot be speculative or conjectural (see, Methyl Tertiary Butyl Ether ["MTBE"] Products Liability Litigation, 2008 WL 5188193 [S.D., N.Y.], citing Healey v. Firestone Tire & Rubber Co., 87 N.Y.2d 596 [1996]).

The plaintiff has failed to present sufficient evidence that it is “reasonably probable, not merely possible or evenly balanced, that the defendant was the source of the offending product” (see, Healey v. Firestone Tire & Rubber Co., 87 N.Y.2d 596 [1996]).

Accordingly, the court finds that the testimony is insufficient to defeat summary judgment and the court grants summary judgment dismissing the complaint and all cross-claims against Dana; and it is hereby

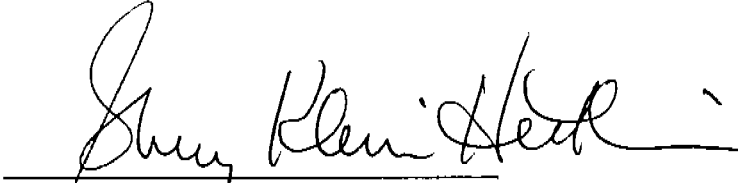
ORDERED that Dana’s motion for summary judgment is granted and this action against Dana and any counter-claims are severed and dismissed; and it is further

ORDERED that the remainder of the action shall continue as against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This shall constitute the decision and order of the court.

DATED: FEBRUARY 9, 2010

  
SHERRY KLEIN HEITLER

J.S.C.

**FILED**  
FEB 17 2010  
NEW YORK  
COUNTY CLERK'S OFFICE