

Bradley v A.O. Smith Water Prods.

2010 NY Slip Op 30343(U)

February 18, 2010

Supreme Court, New York County

Docket Number: 117569/04

Judge: Sherry Klein Heitler

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CLERK OF SUPREME COURT
HON. SHERRY KLEIN HEITLER

YORK — NEW YORK COUNTY

Index Number : 117569/2004

BRADLEY, CHARLES E.

vs.

A.O. SMITH WATER PRODUCTS

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

PART 30

INDEX NO. 117569/04

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 ordered that this motion *is denied*

as per the memo discussed

of 2.18.10

FILED

FEB 23 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2.18.10 _____

[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
CHARLES E. BRADLEY and
WANDA MAY BRADLEY

Index No. 117569/04
M.S. 001

Plaintiffs,

DECISION & ORDER

-against-

A. O. SMITH WATER PRODUCTS, et. al.
(GOODYEAR TIRE & RUBBER COMPANY and
GOODYEAR CANADA INC.),

Defendants.
-----X

SHERRY KLEIN HEITLER, J.:

In this asbestos wrongful death action, Goodyear Tire & Rubber Company and Goodyear Canada Inc., (collectively, "Goodyear") move for summary judgment dismissing all claims and cross-claims asserted against them. Plaintiffs oppose this application.

Plaintiff Charles Bradley worked at the General Electric ("GE") Plant in Schenectady, New York as a plumber/steamfitter from 1941 until 1985. He was diagnosed with asbestosis in March 2000, and lung cancer and plural disease in March 2003. His lung cancer had been attributed to asbestos exposure including exposure to asbestos containing gaskets. Mr. Bradley died in June 2004 before giving his deposition testimony. William Lucier, a co-worker of Mr. Bradley, testified on his behalf in June 2009.

Goodyear alleges that plaintiffs have not proffered sufficient evidence of an exposure to asbestos from a product manufactured, sold or supplied by Goodyear. Specifically, Goodyear claims that plaintiffs failed to show that Mr. Bradley removed or installed a Goodyear gasket. Defendants also argue that Mr. Lucier did not begin to work with Mr. Bradley until 1975, more

than six years after Goodyear ceased manufacturing asbestos containing gaskets in the United States in 1969.

Plaintiffs in response assert that the deposition testimony of Mr. Lucier shows that Mr. Bradley handled asbestos-containing gaskets manufactured by Goodyear. Plaintiffs further argue that even if defendant ceased its manufacture of asbestos containing products prior to 1975, defendant has not proffered any evidence to demonstrate that its gaskets were not still being used in the 1970s and 1980s.

In moving for summary judgment, Goodyear 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). This drastic remedy should not be granted where there is any doubt as to the existence of such issues. Id.

Here, plaintiffs have presented 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). Mr. Lucier testified that he observed the plaintiff personally handle products that contained asbestos. Specifically he stated:

Q During the time that you worked with Mr. Bradley at GE do you believe that he was exposed to asbestos in your presence?

A Yes.

Q Did you ever observe him personally handle any products that contained asbestos?

A Yes.

Q What products did you observe him personally handle?

A Gasket material to repair valves or pumps, pipe covering.

Q Are you finished with your answer?

A Yes.

Q Do you know the brand name, trade name or manufacturer's name of the gaskets you observed him handling?

A Yes, there was Goodyear, Garlock, Chesterton. I believe that's it.

(See, Plaintiff's Exhibit D [W. Lucier], at p. 13-14, l. 15-6.)

Furthermore, Mr. Lucier testified that he observed Plaintiff remove the gaskets which created a lot of dust in the process. Mr. Lucier testified:

Q And what did you see Mr. Bradley do with gasket material?

A He'd make them, cut them out. Replace them. Scrape them off. Had to grind some off. Sometimes they would be on really good.

(See, Plaintiff's Exhibit D [W. Lucier], at p. 21, l. 12-16.)

Q And you described that he used a gasket scraper. How did he go about removing the gasket material with a gasket scraper?

A The scraper was made so you could scrape it. It was sharp so you could get the material off, but [a] lot of times, that wouldn't do it. You would have to use like a wire wheel on a grinder and that would get the rest of it off. That would create a lot of dust.

(See, Plaintiff's Exhibit D [W. Lucier], at p. 22, l. 12-20.)

Although Goodyear cites to Cawein v. Flinkote Co., 203 A.D.2d 105 (1st Dept., 1994), for the proposition that plaintiffs must show that Mr. Bradley was exposed to asbestos fibers released from defendant's products, the facts in that case are distinguishable from the evidence presented here. In Cawein, plaintiff presented only a co-worker's affidavit that unopened bags of defendant's product were seen in the workplace, with no suggestion that those unopened bags

were used by or near the plaintiff. Here, Mr. Lucier did not simply testify that Goodyear gaskets were present at the site. See. Def. Rep. Aff. In Supp. At ¶ 2. Rather, Mr. Lucier testified that he *personally observed* plaintiff handling the gaskets, including those manufactured by Goodyear. (See, Plaintiff's Exhibit D [W. Lucier], at p. 14, l. 3-5.) (Emphasis added).

Defendants contend that since Goodyear ceased the manufacture of asbestos containing gaskets six years before the date Mr. Lucier began working with the plaintiff, there is no basis on which to claim the gaskets contained asbestos. In support of this contention, Goodyear cites to Bona v. Amchem Products, Sup. Ct., New York County, December 14, 2007, Freedman, J., Index No. 104800/07. In Bona, supra, summary judgment was granted to Goodyear, finding that plaintiff's exposure to Goodyear gaskets occurred after the year Goodyear ceased manufacturing asbestos-containing gaskets. In granting summary judgment, Justice Freedman considered that the plaintiff's exposure was secondary bystander exposure as the plaintiff did not work with the products. In this case, plaintiffs have presented evidence that Mr. Bradley worked personally with the product. In addition, Justice Freedman noted in the Bona case, Goodyear Canada gaskets contained asbestos until 1973, which is only two years prior to Mr. Lucier's working with Mr. Bradley. (See, also, Defendant's Response to Plaintiffs' First Set of Interrogatories at A28.) Goodyear Canada is also a defendant in this action and is seeking summary judgment together with Goodyear Tire & Rubber Company. Pursuant to Taylor v. A.C. &S, 304 A.D.2d 403 (1st Dept. 2003), there must be some evidence that shows that the products were not being used residually in the market. Id. at 404. Even if Goodyear ceased making the gaskets, defendant has failed to proffer any evidence that would lead a trier of fact to conclude that its asbestos products were not being used residually in the marketplace by various companies during the relevant time period.

Finally, although the witness testified that he did not have a specific recollection of seeing Mr. Bradley cut a gasket out of sheet material manufactured by Goodyear (see, Defendant's Exhibit C [W. Lucier], at p.28, l.15-18.), he also testified that Mr. Bradley was exposed to asbestos from Goodyear asbestos-containing sheet gaskets. The assessment of the value of Mr. Lucier's conflicting 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. See Dollas v. W.R. Grace and Company, 225 A.D.2d 319, 321 (1st Dept. 1996). The function of this court is one of issue finding, not issue determination and any conflict between plaintiff's allegations and the documentary evidence merely presents an issue of credibility for resolution at trial. Id. A discrepancy between the parties' versions creates a genuine issue of material fact for the trier of fact to determine.

Accordingly, defendant's summary judgment motion is hereby denied.

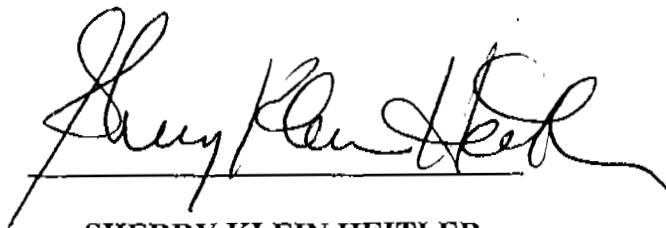
This shall constitute the decision and order of the court.

DATED: FEBRUARY 18, 2010

FILED

FEB 23 2010

NEW YORK
COUNTY CLERK'S OFFICE



SHERRY KLEIN HEITLER

J.S.C.