

Shea v A.C. & S., Inc.
2010 NY Slip Op 30658(U)
March 22, 2010
Supreme Court, New York County
Docket Number: 123777/00
Judge: Sherry Klein Heitler
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HON. SHERRY KLEIN HEITLER

NEW YORK — NEW YORK COUNTY

Index Number : 123777/2000

PART 30

AMES, FREDERICK

vs.

A.C. & S.

INDEX NO. 123777/00

SEQUENCE NUMBER : 004

MOTION DATE _____

SUMMARY JUDGMENT

MOTION SEQ. NO. 004

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

FILED
MAR 29 2010
NEW YORK COUNTY CLERK'S OFFICE
MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

Dated: 3.22.10

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

DEA SHEA, as Personal Representative
for the Estate of FREDERICK AMES,

Plaintiff,

-against-

A. C. and S., INC., et al.,
(GOODYEAR)

Defendants.

Index No. 123777/00
M.S. 004

DECISION AND ORDER

-----X

SHERRY KLEIN HEITLER, J.:

In this asbestos wrongful death case, The Goodyear Tire & Rubber Company and Goodyear Canada Inc. ("Goodyear") move to dismiss this action on the ground of forum non conveniens, pursuant to CPLR §327, and for summary judgment, pursuant to CPLR §3212, on the ground that plaintiff has not demonstrated that decedent, Frederick Ames ("Mr. Ames"), was exposed to asbestos from a Goodyear product. Plaintiff opposes this application.

Mr. Ames served in the United States Navy from 1960-1964. He held the rank of fireman and was assigned to the pipe shop aboard the USS Springfield in May of 1961. Following his service in the Navy, Mr. Ames worked as an assembly line worker for General Motors, Pontiac Division, in Michigan from 1964 to 1973. Thereafter, he worked in an Army Medical Center in Aurora, Colorado as a carpenter/pipefitter from 1973 to 1991. Mr. Ames was diagnosed with lung cancer on March 22, 2000 and passed away from the disease on March 23, 2001.

Defendants argue for dismissal of this action on the ground of forum non conveniens. Defendants allege that this action has no substantial connection to the state of New York, because neither party is a resident of New York, none of Mr. Ames' alleged asbestos exposures occurred in New York, and all relevant evidence and witnesses are located outside of New York. Additionally,

defendants assert that there are more adequate alternative forums in which to bring this action, such as Colorado, where the plaintiff was a resident at the time of his death, or France, Italy, Yugoslavia, Greece, Turkey, and Lebanon, where Mr. Ames allegedly was exposed to asbestos aboard the USS Springfield.

Plaintiff argues that this action has a substantial connection with the state of New York because Mr. Ames allegedly was exposed to asbestos aboard the USS Springfield while it was docked in the state of New York at the Brooklyn Navy Yard. Mr. Ames was stationed at the Brooklyn Navy Yard aboard the USS Springfield for approximately three months, from May 31 1963 until August 30, 1963, when he was transferred to the USS Rockbridge (see, Plaintiff's Exhibit 5, Deck Log Books of the USS Springfield; also, Plaintiff's Exhibit 6, National Personnel Records). Plaintiff alleges that since the ship was going through a major overhaul during this three month period, Mr. Ames was most certainly exposed to asbestos while stationed in New York. As a result, plaintiff argues that since the harm underlying this action occurred in New York, this case has a substantial connection with New York, and therefore dismissal on the ground of forum non conveniens is not warranted.

For the reasons stated below, the court denies defendants' motion for dismissal of this action on the grounds of forum non conveniens:

Under CPLR 327(a), the court may dismiss an action when in the "interest of substantial justice" such action should be heard in another forum. A court is not required to add to its burden by "entertaining litigation which does not have any connection with this State" (see, *Islamic Republic of Iran v. Pahlavi*, 62 NY2d 474 [1984]). In this case, New York is the appropriate forum. The deck logs of the USS Springfield show that Mr. Ames was stationed in New York for approximately three

months, from May 31, 1963 until August 30, 1963 (see, Plaintiff's Exhibit 5, Deck Log Books of the USS Springfield). When compared to the alternate forums proposed by defendant, New York has the most substantial connection to this case. Defendants have presented no evidence regarding the length of time the USS Springfield spent in the other proposed forums of France, Italy, Yugoslavia, Greece, Turkey, and Lebanon. The connection Mr. Ames had to these alternative forums is uncertain, whereas it is certain that he spent three months in New York. During this time, Mr. Ames was assigned to the pipe room when he was allegedly exposed to asbestos-containing Goodyear products. The alleged harm underlying this action occurred, at least in part, in New York.

While the court recognizes that Goodyear has known about the time Mr. Ames spent outside New York since November 2000 (see, Interrogatory Responses, Exhibit 3), the court is also aware that plaintiff produced the product identification witness' testimony in August of 2009. Even though this application is timely, in light of the timing of the product identification witness, this matter has, nonetheless, been pending for ten (10) years in New York. Accordingly, defendants' application is denied.

The court must now consider Goodyear's motion for summary judgment.

Dennis Redmond served aboard the USS Springfield with Mr. Ames. Mr. Redmond testified that Mr. Ames was exposed to asbestos aboard the ship, but that he had no specific recollection of Mr. Ames working with a Goodyear gasket (see, Deposition of Dennis Redmond dated August 13, 2009, p. 56-57). Defendants argue that Mr. Redmond's testimony fails to raise a triable issue of fact, because he could not remember if Mr. Ames worked with asbestos-containing Goodyear products.

Plaintiff contends that although Mr. Redmond could not point to a specific date or time at which Mr. Ames was exposed to asbestos, he did testify that Mr. Ames worked with asbestos-

containing Goodyear gaskets in the ship's pipe room. Mr. Redmond stated that Mr. Ames worked with asbestos-containing gaskets that came in rolls and had the Goodyear logo stamped periodically throughout (see, Deposition of Dennis Redmond dated August 13, 2009, p. 52-53). Plaintiff argues that this testimony creates a material issue of fact concerning Mr. Ames' alleged asbestos exposure from a Goodyear product.

Defendants' summary judgment motion is also denied. Summary judgment is a drastic remedy, which must not be granted if there is "any doubt as to the existence of a triable issue" (see, *Henderson v. City of New York*, 178 AD2d 129 [1st Dept., 1991]). For the court to deny a summary judgment motion, a plaintiff must allege facts and conditions from which the defendant's liability may reasonably be inferred, that is, that the plaintiff worked in the vicinity where the defendant's products were used and that the plaintiff was exposed to defendant's product (see, *Comeau v. W.R. Grace & Co. Conn.*, 216 A.D.2d 79 [1st Dept., 1995]). Here, plaintiff has shown that a triable issue of fact exists concerning Mr. Ames' alleged exposure to an asbestos-containing Goodyear product. Mr. Redmond testified that Mr. Ames worked with asbestos-containing Goodyear gaskets in the pipe room on the USS Springfield. He recalled that the gaskets in question came in rolls which had the Goodyear logo stamped throughout (see, Deposition of Dennis Redmond dated August 13, 2009, p. 52-53). While Mr. Redmond also testified that he had "no specific recollection" of observing Mr. Ames working with a Goodyear gasket (see, Deposition of Dennis Redmond dated August 13, 2009, p. 56-57), that testimony conflicts with his earlier testimony and creates a material issue of fact (see, *Dollas v. W. R. Grace and Co.*, 225 A.D.2d 319 [1st Dept., 1996]), requiring denial of this motion. Additionally, plaintiff is "not required to show the precise causes of his damages, but only to show facts and conditions from which defendants' liability may be reasonably inferred." (see, *Reid v.*

Georgia-Pacific Corp., 212 A.D.2d 462 [1st Dept., 1995]). Mr. Redmond's statements make it impossible to conclude that Mr. Ames was not exposed to asbestos from a Goodyear product, and therefore defendant's motion for summary judgment must be denied.

Therefore, it is hereby

ORDERED that Goodyear's motion to dismiss on ground of forum non conveniens is denied; and it is further

ORDERED that Goodyear's motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: MARCH 22, 2010

ENTER:



SHERRY KLEIN HEITLER
J.S.C.

FILED
MAR 29 2010
NEW YORK
COUNTY CLERK'S OFFICE