

Bombace v A.O. Smith Water Prods. Co.
2010 NY Slip Op 30659(U)
March 19, 2010
Supreme Court, New York County
Docket Number: 190053/09
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. SHERRY KLEIN HEITLER

Index Number : 190053/2009

PART 30

BOMBACE, LAWRENCE

vs

A. O. SMITH WATER PRODUCTS

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. 190053/09

MOTION DATE _____

MOTION SEQ. NO. 003

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

MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.

FILED
MAR 29 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3-19-10

HON. SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X

CONCETTA BOMBACE, as Executrix for the
Estate of LAWRENCE BOMBACE,
and CONCETTA BOMBACE, Individually,

Index No. 190053/09
M.S. 003

Plaintiffs,

-against-

DECISION AND ORDER

A.O. SMITH WATER PRODUCTS CO., et. al.,
(GOODYEAR)

Defendants.

-----X

SHERRY KLEIN HEITLER, J.:

In this asbestos wrongful death case, The Goodyear Tire & Rubber Company and Goodyear Canada Inc. (collectively, "Goodyear") move for summary judgment on the ground that plaintiffs have not demonstrated that the decedent, Lawrence Bombace ("Mr. Bombace"), was exposed to asbestos from a Goodyear gasket. Plaintiffs oppose this application.

Mr. Bombace served in the Navy aboard the USS Forrestal as a fireman apprentice and boiler tender from 1959 to 1963. From 1963 to 1989, he worked as a sheet metal mechanic for JJ Flannery, Inc. ("JJ Flannery") at various locations throughout New York City. Mr. Bombace suffered from lung cancer and passed away from the disease on July 19, 2009. Goodyear claims that plaintiffs have failed to show that Mr. Bombace was ever exposed to asbestos from a Goodyear gasket. Goodyear points to Mr. Bombace's testimony that while working on the USS Forrestal he was exposed to asbestos from Goodyear gaskets that were preformed, and looked round with holes in them (Tevis Affirmation, Exhibit C, Deposition of Lawrence Bombace dated March 13, 2009, pp. 496-497). He further testified that while working for JJ Flannery he was exposed to asbestos as a bystander from steamfitters working with Goodyear gaskets at various telephone company buildings. Mr. Bombace could not remember if the Goodyear gaskets allegedly present at the telephone

company buildings were preformed or another type, but he testified that they looked round with holes in them, similar to the gaskets he observed on the USS Forrestal (Id., pp. 498-499). Goodyear asserts that this testimony is insufficient to raise a triable issue of fact because Goodyear's asbestos-containing gaskets were always shipped in sheets, not in preformed shapes ((Tevis Affirmation, Exhibit E, Affidavit of E.W. DeMarse sworn to March 23, 2004, p. 2), and therefore the preformed gaskets Mr. Bombace referred to could not be Goodyear gaskets. Additionally, Mr. Bombace testified that while working at the World Trade Center for JJ Flannery, he was exposed to asbestos from Goodyear preformed gaskets as well as sheet gasket material, but he could not identify the manufacturer of the sheet gasket material ((Tevis Affirmation, Exhibit C, Deposition of Lawrence Bombace dated March 13, 2009, p. 479). Goodyear argues that since Mr. Bombace could not identify the manufacturer of the sheet gasket material he was allegedly exposed to at the World Trade Center, plaintiff has failed to show that Mr. Bombace was exposed to asbestos specifically from a Goodyear gasket.

Plaintiffs argue that summary judgment should be denied because Mr. Bombace testified that he was exposed to asbestos from Goodyear gaskets. Although Mr. Bombace testified that while working on the USS Forrestal he was exposed to preformed gaskets, he also stated he was exposed to sheet gaskets, and he identified Goodyear as one of the manufacturers of such gaskets (Tevis Affirmation, Exhibit B, Deposition of Lawrence Bombace dated March 12, 2009, p. 43). Mr. Bombace also testified generally to working around Goodyear gaskets throughout his employment with JJ Flannery. (Tevis Affirmation, Exhibit B, Deposition of Lawrence Bombace dated March 12, 2009, pp. 109 and Tevis Affirmation, Exhibit C, Deposition of Lawrence Bombace dated March 13, 2009, pp. 479-80). Furthermore, Goodyear gaskets appear on the handwritten list Mr. Bombace created to indicate all of the asbestos-containing products and manufacturers he recalled working

with or around throughout his career (Brandis Affirmation, Exhibit 2). Plaintiffs assert that Mr. Bombace's testimony creates a reasonable inference that he was exposed to asbestos from a Goodyear product, and therefore defendants' motion for summary judgment should be denied.

For the reasons stated below, the court denies defendants' motion for summary judgment:

Summary judgment is a drastic remedy, which must not be granted if there is "any doubt as to the existence of a triable issue" (*Henderson v. City of New York*, 178 A.D.2d 129 [1st Dept., 1991]). A plaintiff is "not required to show the precise causes of his damages, but only to show facts and conditions from which defendant's liability may be reasonably inferred" (*Reid v. Georgia Pacific Corp.*, 212 A.D.2d 462 [1st Dept., 1995]). Here, plaintiffs have presented evidence sufficient to raise a triable issue of fact concerning Mr. Bombace's alleged asbestos exposure from a Goodyear product. Mr. Bombace testified that while working aboard the USS Forrestal, "some of the gaskets were preformed and some of them we used to make out of just flat gasket material." He then went on to specifically identify Goodyear as a manufacturer of these gasket materials he worked with aboard the ship (Tevis Affirmation, Exhibit B, Deposition of Lawrence Bombace dated March 12, 2009, p. 43). Although Goodyear argues that they did not manufacture preformed gaskets, this testimony establishes that in addition to preformed gaskets, Mr. Bombace may have been exposed to asbestos from "flat gasket material" manufactured by Goodyear.

Mr. Bombace also testified that during his employment with JJ Flannery, he was exposed to asbestos-containing Goodyear gaskets at various telephone company buildings throughout New York City (*Id.* at p.109), and that while he worked with preformed Goodyear gaskets, the gaskets also came in sheet form (Tevis Affirmation, Exhibit C, Deposition of Lawrence Bombace dated March 13, 2009, p. 497). Although Mr. Bombace could not recall how many times he installed a Goodyear gasket, he testified that he did it "many, many times" whenever there was a leak (*Id.* at

p.497). This testimony raises issues of fact as to whether Mr. Bombace was exposed to asbestos from a Goodyear gasket.

Additionally, although Goodyear asserts that they did not manufacture preformed asbestos-containing gasketing material, Goodyear did manufacture "anywhere from six to ten different styles of asbestos sheet gasketing material" from which Mr. Bombace could have been exposed (Brandis Affirmation, Exhibit 3, Testimony of Ernest William DeMarse dated January 14, 1998, p. 27).

Under the circumstances of this case, plaintiff has set forth sufficient evidence to create a reasonable inference that Mr. Bombace was exposed to asbestos from a Goodyear gasket.

Therefore, it is hereby

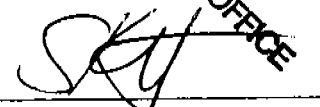
ORDERED that Goodyear's motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: MARCH 19, 2010

ENTER:

FILED
MAR 29 2010
NEW YORK
COUNTY CLERK'S OFFICE



SHERRY KLEIN HEITLER
J.S.C.