

Ackley v A.C. and S., Inc.

2010 NY Slip Op 31657(U)

June 25, 2010

Supreme Court, New York County

Docket Number: 110943/01

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

Justice

Index Number : 110943/2001

ACKLEY, JUDITH E.

vs.

A.C. & S., INC.

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. 110943/01

MOTION DATE 3-16-10

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for S.J.

	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 granted*
in accordance with memorandum
decision dated June 25, 2010, accepted.

FILED
JUL 01 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6.25-10

SKH

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**

JUDITH E. ACKLEY, as Executrix for the
Estate of ROLAND DI ANTONIO,

Index No. 110943/01
M.S. 001

Plaintiffs,

-against-

DECISION AND ORDER

A. C. and S., INC., et al.,
(ARMSTRONG CONTRACTING AND SUPPLY)

Defendants.

SHERRY KLEIN HEITLER, J.:

FILED
JUL 01 2010
NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos wrongful death case, The Goodyear Tire & Rubber Company and Goodyear Canada Inc. ("Goodyear") move for dismissal of this action on the ground of forum non conveniens. Copies of this motion and of plaintiff's opposition thereto have been duly served upon all other party defendants in this action. Except for plaintiff's opposition, no other party has responded to this motion.

Plaintiff's decedent, Roland DiAntonio ("Mr. DiAntonio"), served in the United States Navy from November of 1942 until February of 1946. During that period, Mr. DiAntonio served aboard the USS Bunch and the USS Thunder and was assigned to naval stations in Philadelphia, Pennsylvania, Newport, Rhode Island, Lido Beach, New York, and Brooklyn, New York. Mr. DiAntonio also worked as a mechanic at Rayburner, an oil and gas burner installation company, from June of 1960 until February of 1962. James Ackley ("Mr. Ackley"), a co-worker of Mr. DiAntonio at Rayburner, testified that during his employment at Rayburner Mr. DiAntonio cut sheet gaskets, the cutting of which created what Mr. Ackley believed to be a visible asbestos-containing dust. (Exhibit B of Affirmation in Opposition, Ackley Deposition, p.203-208.) Mr. Ackley further testified that he and Mr. DiAntonio worked for Rayburner at several commercial locations in New

Jersey, Pennsylvania, and Delaware (Ackley Deposition, p. 111).

Defendants argue that this action lacks a substantial connection to the state of New York, and therefore should be dismissed on the ground of forum non conveniens. Mr. DiAntonio was not a resident or domiciliary of New York; the executrix of Mr. DiAntonio's estate is a resident of New Jersey, and Goodyear has no principal place of business in New York. Additionally, defendants argue that there is no evidence that Mr. DiAntonio sustained his asbestos exposure in New York. They assert that Mr. Ackley testified that he never worked with Mr. DiAntonio in New York and did not know of any asbestos exposure Mr. DiAntonio may have sustained in New York (see, Ackley Deposition, pp. 71-72). Therefore, defendants maintain that plaintiff has presented no evidence that Mr. DiAntonio was ever exposed to asbestos in the state of New York.

Plaintiff contends that Mr. DiAntonio suffered asbestos exposure in New York while aboard the USS Bunch, and therefore defendants' motion to dismiss on the ground of forum non conveniens should be denied. The USS Bunch was a destroyer escort that made six voyages from New York to London and subsequently was converted to a high-speed transport boat in New York in 1944 (Plaintiff's Exhibit E). In support of plaintiff's opposition, she submits an affidavit from a shipmate of Mr. DiAntonio aboard the USS Bunch, John F. Miller ("Mr. Miller"), who stated that he recalled Mr. DiAntonio being aboard the USS Bunch during its deployment and subsequent conversion in New York. Mr. Miller also recalled that Mr. DiAntonio was exposed to asbestos while serving aboard the ship (Affidavit of John F. Miller sworn to January 19, 2010, p. 1). Plaintiff argues that Mr. DiAntonio's presence in New York aboard the USS Bunch coupled with Mr. Miller's testimony that Mr. DiAntonio was exposed to asbestos aboard the ship is enough to establish a substantial connection with the state of New York and defeat defendants' motion to dismiss.

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

There are several factors to be considered when deciding a motion to dismiss on the ground of forum non conveniens, including: (i) the residency of the parties; (ii) the jurisdiction in which the underlying transaction occurred; (iii) the location of relevant documents and witnesses; (iv) the availability of a suitable forum; and (v) the interest of the alternative forum in deciding the issues (*See Islamic Republic of Iran v. Pahlavi*, 62 NY2d 474 [1984]). No one factor is controlling. Indeed "the great advantage of the rule of forum non conveniens is its flexibility based upon the facts and circumstances of each case." (*Islamic Republic of Iran v. Pahlavi*, *supra*, 62 NY2d at 479). In this case, neither the residency of the parties nor the location of relevant documents and witnesses bear a connection to the state of New York. Mr. DiAntonio lived his entire life in New Jersey, and the executrix of his estate lives in New Jersey (*see*, Defendant's Exhibit D, ¶ 5A). Goodyear is incorporated in Ohio with its principal place of business in Akron, Ohio and Goodyear Canada Inc. is incorporated in Canada with its principal place of business in Toronto, Canada (*see*, Defendant's Exhibit C, ¶ 4A). In addition, Mr. DiAntonio's doctor is located in New Jersey, as are his relevant medical records. Although Mr. Ackley testified that Mr. DiAntonio was exposed to asbestos from cutting Durabla asbestos-containing sheet gaskets, he specifically testified that he never worked with Mr. DiAntonio in New York, and that he has no knowledge of any asbestos exposure Mr. DiAntonio may have sustained in New York (Ackley Deposition, pp. 71-72).

Additionally, even though Mr. DiAntonio served aboard the USS Bunch while it was stationed in New York, there is no evidence that Mr. DiAntonio was exposed to asbestos during that time. The testimony of Mr. Miller fails to identify what asbestos-containing product to which Mr.

DiAntonio was allegedly exposed, how the alleged exposure occurred, or when the alleged exposure occurred (see, Affidavit of John F. Miller sworn to January 19, 2010, p. 1). Therefore, plaintiff has provided no evidence to suggest that the alleged underlying exposure occurred while the USS Bunch was in New York.

A prerequisite to bringing this asbestos case in New York City is the existence of evidence that plaintiff sustained his injury due to asbestos exposure in New York. As plaintiff has failed to provide any such evidence, defendants' forum non conveniens dismissal motion is granted.

Accordingly, it is hereby,

ORDERED that the motion of defendants to dismiss this action on the ground that New York is an inconvenient forum is granted, without costs, on the condition that all of the defendants served herein stipulate to accept service of process in the event that this action is commenced in an alternative forum, and further stipulate to waive the defense of the statute of limitations in the event that this action is commenced in an alternative forum (see, CPLR 327[a]); and it is further

ORDERED that, within 30 days from date of service of a copy of this order with notice of entry, plaintiff shall file proof of compliance with the above conditions with the Clerk of Part 30 and with the County Clerk (60 Centre Street, Room 141B, New York, New York, 10007), together with a copy of this order with notice of entry and proof of service of the foregoing on defendants' counsel; and it is further

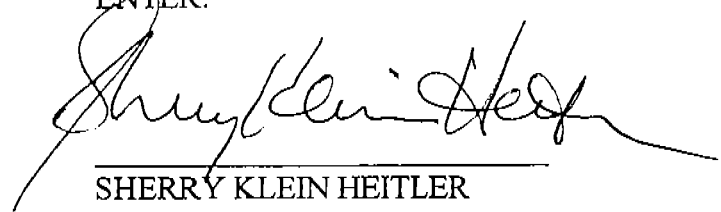
ORDERED that, upon the timely filing of the foregoing, the County Clerk shall enter judgment dismissing the action; and it is further

ORDERED that in the event of non-compliance, counsel on the motion are directed to appear for a status conference in Part 30, 60 Centre Street, Room 543, New York, New York, 10007. Counsel are directed to contact the Clerk of Part 30 at (646) 386-3291 within 45 days from the date hereof to ascertain the date and time of such conference.

This constitutes the decision and order of the court.

DATED: JUNE 21, 2010

ENTER:


SHERRY KLEIN HEITLER
J.S.C.

FILED
JUL 01 2010
NEW YORK
COUNTY CLERK'S OFFICE