Neff v A.W. Chesterton Co.
2010 NY Slip Op 32056(U)
July 28, 2010
Sup Ct, NY County
Docket Number: 190285/09
Judge: Sherry Klein Heitler
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[* 1]
SCANNED ON 8/4/2010

Index Number : 190285/2009

NEFF, ARTHUR V.

vs.

A.W.CHESTERTON COMPANY

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

NEW YORK — NEW YORK COUNTY

ustice

PART 30

INDEX NO. 190285/09

MOTION DATE

MOTION SEQ. NO. 002

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 decided As per the memo of 7.28.10.

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

FILED
AUG 04 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7.28.10

HON. SHERRY KLEIN HEITLER J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

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

---X

ARTHUR V. NEFF,

Plaintiff,

INDEX NO. No.: 190285/09
SEQ. NO. 002

vs.

DECISION & ORDER

A.W. CHESTERTON COMPANY, *et. al.*,
(CONRAIL)

Defendants.

FILED
AUG 04 2010
COUNTY CLERK'S OFFICE
NEW YORK

SHERRY KLEIN HEITLER, J.:

In this asbestos action, defendants, Consolidated Rail Corporation and American Premier Underwriters, Inc. (collectively "Conrail"), move, pursuant to CPLR 3212, for summary judgment, dismissing all claims and cross-claims asserted against them on the grounds that plaintiff, Arthur Neff, ("plaintiff", sometimes herein referred to as "Mr. Neff") has failed to show that Conrail breached its duty of care to the plaintiff and that this breach was a proximate cause of his injury. In opposition plaintiff claims that Conrail is responsible under the Federal Employers' Liability Act ("FELA") 45 USC 51 et seq.[1] for negligently creating an unsafe workplace by allowing him to be exposed to asbestos as a result of his employment at the railroad.

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[1] 45 U.S.C.A. § 51 et seq. provides in relevant part : "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. ****"

Mr. Neff worked for Conrail and its successors from 1947 to 1981 as a carman and car inspector. He is currently 83 years old and has been diagnosed with lung cancer. He smoked approximately one and a half packs of cigarettes a day until he quit approximately twenty years ago. Plaintiff testified that he was exposed to asbestos from working with brake shoes, steam lines, and car repairs for much of his employment on the railroad.

Plaintiffs who assert negligence under FELA must establish the traditional common law elements: (1) duty; (2) breach thereof; (3) foreseeability; and (4) causation of injury (see, Bruno v. Metropolitan Transportation Authority, 544 F. Supp. 2d 393, 396 [S.D.N.Y. 2008]). Under FELA, a plaintiff's burden in proving causation and negligence is lower than under common law because "the theory of FELA is that where the employer's conduct falls short of the high standard required of him by [FELA] and his fault...causes injury, liability ensues." Id. (quoting Kernan v. American Dredging Co., 355 U.S. 426, 438-39 [1958]). The statute imposes a "general duty to provide a safe workplace." (See, Zuckerberg v. Port Authority of New York and New Jersey, 24 Misc. 3d 559, 560-561[Sup. Ct. Queens County 2009] [quoting McGinn v. Burlington Northern R. Co., 102 F.3d 295, 300 [7th Cir.1996].) The burden is upon a plaintiff to "show that his injuries were due to failure of the defendant to do or to its omission to do what a reasonable and prudent man would have done or would have omitted to do in the exercise of ordinary care under all the circumstances." (See, Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67 [1943].) Under FELA, if the employer's negligent act or omission played any part, however slight, in bringing about injury, the employer is liable (see, Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 506 [1951]; Turner v. CSX Transp., 72 A.D.3d 1597, 1598 [4th Dep't 2010]).

In New York under CPLR 3212, in its motion for summary judgment, Conrail has the burden of showing that there is no issue of material fact that requires the determination of a factfinder (see,

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DiMenna & Sons, Inc. v. City of New York, 301 N.Y. 118 [1950]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact."(See, Mazurek v. Metropolitan Museum of Art, 27 A.D.3d 227, 228 [1st Dep't 2006].) 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 A.D.2d 129, 130 [1st Dep't 1991].) Plaintiff in this case has presented sufficient evidence under the standard of negligence as set forth by FELA to survive a motion for summary judgment.

Defendants assert that plaintiff has failed to demonstrate the elements of breach and proximate cause to sustain a negligence case under FELA. Conrail argues that plaintiff's deposition testimony in which he states that he lacks training in the identification of asbestos-containing products demonstrates that he is unable to quantify the amount of asbestos he was allegedly exposed to on the railroad. Defendants thus contend that this testimony is insufficient to show that defendants breached any duty owed to plaintiff. Defendants also argue that plaintiff's expert, Dr. Castleman's deposition testimony is insufficient because he does not claim to be an industrial hygienist and his research was based on asbestos as a public health problem and not specifically related to the railroad industry. Without such an expert, defendants contend the level of proof offered by plaintiff fails to establish a causal relationship between plaintiff's injuries and his employment with Conrail.

The court disagrees with both of defendant's contentions. Under New York's standard for summary judgment, plaintiff's testimony "constitutes evidence in admissible form by someone with personal knowledge of the facts." (See, Joshephson v. Crane Club, Inc., 264 A.D.2d 359, 360 [1st Dep't 1999].) Therefore, it "is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaint." (See, Dollas v. W.R. Grace and Co., 225 A.D.2d 319,

321 [1st Dept., 1996].) Plaintiff's testimony that he was exposed to asbestos while working for Conrail from 1948 to 1951 meets the criteria (see, Reid v. Georgia Pacific Corp., 212 A.D.2d 462 [1st Dept., 1995]).

> Q: You told me that you believe you worked with asbestos-containing brake shoes at Bronx Terminal during the 1948 to 1951 time period; is that right?
>
> A: Yes.

(See, Defendant's Exhibit A, p. 82).

Plaintiff's state of the art expert's testimony further supports the court's decision to deny summary judgment, as it too creates a question of fact concerning Conrail's negligence. Dr. Castleman testified as to his credentials, as follows:

> I've served as a consultant to government regulatory agencies such as the United States Environmental Protection Agency, the Occupational Safety and Health Administration, the Consumer Product Safety Commission, and the Federal Trade Commission, all on the subject of asbestos; and I have been a consultant to Congress' Office of Technology Assessment and the United States Department of Justice as well...(where he was) involved in litigation over asbestos disease and the state of knowledge of the government versus the company that was suing the government" and testified as an expert witness in the government's presentation of its case.

(See, Defendant's Exhibit 4, p. 66-67).

Dr. Castleman further testified that the railroad industry used asbestos: "(T)he main use of asbestos in the railroad industry at that time (the '30s and '40s) was as thermal insulation for steam locomotives (see, Defendant's Exhibit 4, p. 59). His book, *Asbestos Medical and Legal Aspects* contains five or six pages concerning the railroad industry's knowledge of asbestos and precautions it could have taken to alleviate employee exposure to dangerous dust particles (see, Defendant's Exhibit 4, p. 56). Dr. Castleman proffers evidence of this knowledge through documentation from proceedings of the annual meetings of the American Railway Association, the Medical and Surgical

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Selection for the year 1932-1935. Dr. Castleman testified that these documents first make reference to the hazard of dust disease as it was known at that time in 1935 (see, Plaintiff's Exhibit 4, p.53, 55). He testified that in the proceeding, asbestosis was identified as a disease of concern to railroad medical personnel: "It says among other things asbestosis causes extensive pulmonary fibrosis and takes on a more rapid course than does silicosis, meaning it can kill you sooner." (see, Plaintiff's Exhibit 4, p. 56). Hence, there arises a question of fact as to whether or not defendant was put on notice of the dangers of asbestos during the time of plaintiff's employment and can thus be held liable under FELA.

Under the circumstances of this case, plaintiff has set forth sufficient evidence to create a reasonable inference that Mr. Neff was exposed to asbestos while working in his scope of employment for Conrail.

Accordingly, it is hereby

ORDERED that Conrail's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: JULY 28, 2010

SHERRY KLEIN HEITLER
J.S.C.

FILED
AUG 04 2010
NEW YORK
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