

D'Alessandro v A.O. Smith Water Prods.

2010 NY Slip Op 32104(U)

August 6, 2010

Sup Ct, NY County

Docket Number: 190273/09

Judge: Sherry Klein Heitler

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SCANNED ON 8/10/2010
SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY
HON. SHERRY KLEIN HEITLER

PART 30

Index Number : 190273/2009

D'ALESSANDRO, FRANK R.

vs

A.O. SMITH WATER PRODUCTS

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. 190273/09

MOTION DATE _____

MOTION SEQ. NO. 004

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 in accordance with the memorandum decision dated

Aug 6, 2010.

FILED
AUG 10 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: Aug 6, 2010

[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
FRANK R. D'ALESSANDRO and
MARY D'ALESSANDRO,

Plaintiffs,

Index No.: 190273/09
Motion Seq. 004

- vs. -

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

Defendants

DECISION AND ORDER

-----X
SHERRY KLEIN HEITLER, J.:

Defendant Crane Co. moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims as against it.

Frank D'Alessandro suffers from lung cancer. He participated in depositions for four days in September, 2009. He claims he was exposed to asbestos during his work at various jobs from 1956 to 1990. He alleges he came across Crane Co. pumps while working as a cement mason at power and sewage plants in the New York area. Defendant contends that plaintiff has offered no evidence that he was ever in the presence of a Crane Co. pump or that he was exposed to asbestos from a Crane Co. pump. In addition, defendant argues that plaintiff was improperly questioned at his examination before trial by plaintiff's counsel regarding a list of products allegedly prepared by plaintiff in preparation for trial. Defendant contends that no proper foundation was put forth regarding the list.

For the reasons that follow, the Court holds that the introduction of the list was proper and there exist issues of fact sufficient such that a motion for summary judgment must be denied.

In the case at bar, plaintiff testified on more than one occasion that he had personally created a list in preparation for his testimony, which contained all the companies that he recalled as alleged

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sources of his asbestos exposure. (See, Plaintiff's Exhibit A, Deposition of Frank R. D'Alessandro, sworn to Sept. 23, 24, 29 2009 at 14-16, 251-254. When asked if he had mentioned all possible ways he was exposed to asbestos, plaintiff replied, "[t]here is a list that I have that when I was remembering these things I was jotting it down. I don't have that list. That could have probably helped me in a lot of these answers." (See, Plaintiff's Exhibit A, D'Alessandro Deposition at 251.) When shown the list by his attorney, plaintiff testified to additional companies as being sources of his exposure; Crane Co. was on the list. (See, Plaintiff's Exhibit A, D'Alessandro Deposition at 533.) All defendants objected to the use of the list, arguing that plaintiff was not using the list to refresh his memory, but instead to read names directly from the list.

Generally, a witness may use any writing to refresh his or her recollection, provided it actually serves that purpose. People v. Reger, 13 A.D.2d 63, 70 (1st Dept. 1961). However, a witness cannot refresh his recollection from records where "he had no knowledge or memory of any of the facts which could be refreshed." Munro Athletic Products Co., Inc. v. Universal Carloading Distrib. Co., Inc., 53 N.Y.S.2d 170, 170 (1st Dept. 1944).

Plaintiff stated that he had personally prepared the list prior to his deposition for the purpose of remembering all the potential sources of his asbestos exposure (See, Plaintiff's Exhibit A, D'Alessandro Deposition at 15.) He further stated that no one had helped him to prepare the list. Specifically, he states that:

Q Did anyone assist you in preparing that list?

A No.

Q Was anyone present when you prepared that list?

A No.

Q At some point, did you provide Mr. Roberts with a list?

A Yes.

Q Do you remember when that was?

A No.

Q Did you have to review any documents or do any research in order to assist you in preparing the list?

A No.

Q Did you have to review any documents or do any research in order to assist you in preparing the list?

A. No.

Q And did you have to speak with anyone who you used to work with in order to assist you with that list?

A No.

Q Other than the list, did you review any documents in preparation for your deposition, any other documents?

A No.

(See, Plaintiff's Exhibit A, D'Alessandro Deposition at 15-16.)

Given this testimony, plaintiff demonstrated that he possessed sufficient knowledge of the facts contained in the document such that its use to refresh his memory was proper. Further, once plaintiff named the defendant as a potential source of his asbestos exposure, he was able to recall specific instances (not contained within the list) of seeing the Crane Co. name on pumps that he worked near in sewage plants as well as the LILCO and Con Ed power plants. (See, Plaintiff's Exhibit A, D'Alessandro Deposition at 535-36.)

In addition to objecting to the use of the list by plaintiff at his examination before trial, defendant also moves for summary judgment on the premise that plaintiff has offered no evidence that he was ever in the presence of a Crane Co. pump or that he was exposed to asbestos from a

Crane Co. pump. Defendant argues that plaintiff has not shown that Crane Co. pumps were located at any specific job site where plaintiff worked nor has he shown that he was exposed to asbestos-containing material from any pumps that he did come into contact with. Plaintiff testified at his deposition that he had seen Crane Co. pumps at sewage and power plants where he had worked as a cement mason (See, Plaintiff's Exhibit A, D'Alessandro Deposition at 535-36.) He further stated that although he did not work on the pumps themselves, he had swept up the area around them and inhaled dust from gasket material on or near the pumps.

Q: And were you exposed to asbestos from pumps?

A: Well, Yes.

Q: How?

A: Because those pumps would be on, especially the sewer plant and they'd be hanging around and the gaskets would be hanging around. And if you cleaned up, you had to sweep or something, you were exposed.

Q: What would the atmosphere look like when you were exposed?

(All defendants object)

A: Well, not too good, dusty.

Q: Did you breathe that dust in from the gaskets and the pumps?

(All defendants object)

A: Yes.

(See, Plaintiff's Exhibit A, D'Alessandro Deposition at 530-531.)

Plaintiff also produced evidence to show Crane Co. made pumps that contained asbestos gasket and packing materials during the period of his exposure (See Plaintiff's Exhibit B).

Defendant claims that plaintiff's evidence is insufficient because plaintiff has no recollection of a specific job site where he encountered Crane Co. pumps; further, defendant alleges that plaintiff

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did not work with pumps as a cement mason and offered no detailed knowledge about the pumps' description, function, location, and purpose.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Santiago v. Filstein, 35 A.D.3d 184, 185-186 (1st Dept 2006). Defendant fails to show, however, that its products were not responsible for plaintiff's asbestos related injury.

CPLR 3212 (b) provides in relevant part: "Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." The deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude summary judgment. Dollas v. W.R. Grace Co., 224 A.D.2d 319, 321 (1st Dept 1996). Here, plaintiff has presented direct testimony of having seen and swept gasket material that came from Crane Co. pumps (See, Plaintiff's Exhibit A, D'Alessandro Deposition at 535-536, 543-544, 551.) Plaintiff's testimony that identifies Crane Co. as a potential source of asbestos exposure and describes how he was exposed is sufficient to defeat summary judgment.

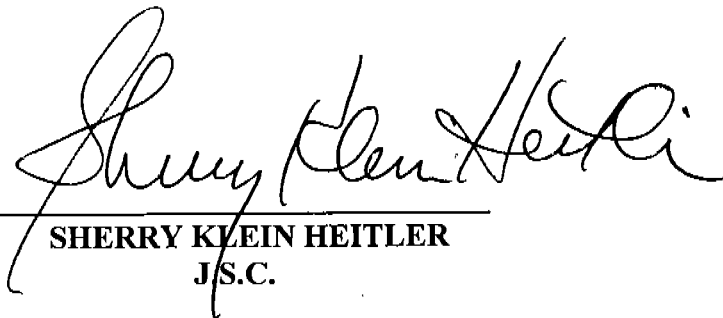
"The plaintiff is not required to show the precise causes of his damages, but only to show facts and conditions from which defendants' liability may reasonably be inferred (internal citations omitted)." Reid v. Georgia-Pacific Corp., 212 A.D.2d 462, 463 (1st Dept 1995). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223, 231 (1978). In this case, plaintiff has presented sufficient evidence to create a reasonable inference that he was exposed to asbestos-containing materials from Crane Co. pumps. As such, there exist tissues of fact that must be determined at trial.

Accordingly, it is hereby

ORDERED, that defendant Crane Co.'s motion for summary judgment to dismiss the complaint as against it and to dismiss all cross-claims against it denied.

This shall constitute the decision and order of the court.

DATED: AUGUST 6, 2010



SHERRY KLEIN HEITLER
J.S.C.

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