

Carroll v A.O. Smith Water Prods.

2010 NY Slip Op 32135(U)

August 9, 2010

Supreme Court, New York County

Docket Number: 190259/09

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 : 190259/2009
CARROLL, THOMAS C
 VS.
A.W.CHESTERTON COMPANY
 SEQUENCE NUMBER : 007
 SUMMARY JUDGMENT

INDEX NO. 190259/09
 MOTION DATE _____
 MOTION SEQ. NO. 007
 MOTION CAL. NO. _____

his 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 denied

*As per the memo decision
of Aug 9, 2010.*

FILED

AUG 12 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: Aug 9, 2010.

Aug 9, 2010.

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**

-----X
THOMAS C. CARROLL
and CHERYL CARROLL,

Plaintiffs,

- against -

A. O. SMITH WATER PRODUCTS, et al.,
(NELES-JAMESBURY)

Defendants.
-----X

SHERRY KLEIN HEITLER, J.:

Index No. 190259/09
Motion Seq. 007

DECISION AND ORDER

FILED

AUG 12 2010

**NEW YORK
COUNTY CLERK'S OFFICE**

In this asbestos products liability action, the defendant, Neles-Jamesbury, Inc. ("Neles-Jamesbury") moves for summary judgment on the ground that plaintiffs have not demonstrated that Mr. Carroll was exposed to an asbestos-containing product manufactured by defendant. The plaintiffs oppose this application.

The plaintiffs are Thomas Carroll and Cheryl Carroll. Thomas Carroll was diagnosed with mesothelioma on April 22, 2009. At the time of diagnosis Mr. Carroll was 53 years old. Prior to the diagnosis he enjoyed good health and exercised regularly. Mr. Carroll was deposed on August 26th, 27th, 28th, 2009. In his testimony, Mr. Carroll stated that he was exposed to asbestos while working as a comptroller from 1986 to 1992 at Frank D. Riggio Company, Inc. ("Riggio"), a distributor and repairer of industrial valves. Part of Riggio's repair operation involved tearing apart the valves, repairing them and providing new seals and gaskets. Mr. Carroll was often present in the warehouse because he was in charge of warehouse operations.

Defendant asserts that plaintiffs failed to adequately demonstrate that Mr. Carroll was exposed to any asbestos-containing product manufactured or distributed by Neles-Jamesbury. Defendant argues that although Mr. Carroll listed Neles-Jamesbury valves among those that were

at Riggio's repair shop and Con Ed's Ravenswood powerhouse, he failed to name Neles-Jamesbury when asked at his deposition to identify the manufacturers of valves that were being worked on when he was present at these facilities. Specifically, Mr. Carroll failed to identify Neles-Jamesbury valves when he was present at the Exxon Bayway, Astoria and Arthur Kill powerhouses. The defendant also argues that although plaintiffs present the testimony of Thomas Wittek, which confirms the presence of Neles-Jamesbury valves at the Exxon Bayway powerhouse, this testimony fails to demonstrate that Mr. Carroll was exposed to asbestos from a Neles-Jamesbury valve. Finally, defendant contends that Mr. Carroll could not have been exposed to asbestos from a Neles-Jamesbury valve when he was inspecting the inventory at the Riggio warehouse. To support this contention, defendant submits the affidavit of Joseph B. Wright, Neles-Jamesbury's corporate witness, who states that because asbestos-containing materials in Neles-Jamesbury valves were encapsulated in rubber and enclosed inside the valves, handling intact valves manufactured by Neles-Jamesbury could not expose one to the asbestos inside the valves.

In opposition, plaintiffs claim that Mr. Carroll was exposed to asbestos-containing Neles-Jamesbury products in three ways: (1) when he was present in the Riggio repair shop where valves were being repaired, (2) while he inspected inventory of the valves in the Riggio warehouse where many valves were old and opened at both ends, and (3) during his numerous visits to the powerhouses.

The powerhouses where Mr. Carroll observed valves being worked on are: Ravenswood, Exxon Bayway, Astoria, and Arthur Kill. According to Mr. Carroll, Riggio purchased Neles-Jamesbury valves and some of his exposure occurred when he inspected the inventory in the warehouse. Mr. Carroll also identified Neles-Jamesbury among the valves present at Riggio repair shop and at Ravenswood powerhouse, where he observed workers cutting valves that contained

asbestos packing. He contends that his exposure occurred from breathing in asbestos dust fibers released into the air as a result of the cutting. Mr. Carroll did not identify Neles-Jamesbury valves at Exxon Bayway, Astoria and Arthur Kill powerhouses. However, plaintiffs contend that Neles-Jamesbury valves were used at the Exxon Bayway facility during the period of Mr. Carroll's exposure. In support of this claim, plaintiffs submit the deposition testimony of Mr. Thomas Wittek, a plaintiff in an unrelated litigation who worked at the Exxon Bayway facility intermittently from 1975 to 1991. Mr. Wittek testified that he was exposed to asbestos from Neles-Jamesbury valves when he worked at the facility. He also installed Neles-Jamesbury valves at Exxon Bayway within a period of six months prior to his employment (which began in 1985) at Anheuser-Busch. Further, plaintiffs ask the court to strike the affidavit of defendant's corporate witness, Joseph B. Wright, on the ground that Mr. Wright is not qualified as an expert in asbestos diseases.

As set forth below, this court denies defendant's motion for summary judgment. In moving for summary judgment, the defendant is required to "make a prima facie showing that its products could not have contributed to the causation of plaintiff's injury" Reid v. Georgia-Pacific Corp., 212 A.D.2d 462, 463 (1st Dept. 1994). In opposing the motion, plaintiff must show the existence of facts and conditions from which defendant's liability may reasonably be inferred. Comeau v. W.R. Grace, 216 A.D. 2d 79, 80 (1st Dept. 1995). Here the defendant fails to establish that there is no triable issue of fact. Mr. Carroll's testimony raises an issue of fact with regard to his exposure to asbestos by Neles-Jamesbury valves at Ravenswood powerhouse. Mr. Carroll testified that Neles-Jamesbury valves were at Ravenswood:

Q: Do you know the brand, trade or manufacturer of those valves inside the Ravenswood powerhouse?

A: Well, they would be the ones that I've listed already and others. Shall I list those again?

Q: You can if you like.

A: Sure. Bell & Gossett, Dresser, Crane, Copes-Vulcan, Crosby, Edwards, Grinnell, Spirax-Sarco, Neles-Jamesbury, Robertshaw, Rockwell, Worthington, Yarway, Velan, Vogt.

(Defendant's Exhibit B, Deposition of Thomas Carroll, p. 113.)

When asked to identify the valves that were worked on in his presence at Ravenswood, Mr. Carroll testified that they were the valves he identified earlier in the deposition, which included Neles-Jamesbury:

Q: But can you tell me as you sit here today what manufacturer of the valves were (sic) being worked on while you were there?

A: While I was there – it was those that I mentioned. It was those valves that I mentioned yesterday.

Q: So as you sit here today, you have a recollection of being at Ravenswood and all those manufacturers of valves were being worked on while you were present; is that what you telling me, sir?

A: I'm going to say the bulk of those valves that I mentioned yesterday were being worked on.

(Defendant's Exhibit B, Deposition of Thomas Carroll, pp 293-294.)

However, later on in his deposition, Mr. Carroll did not name Neles-Jamesbury among those valves he recalled "on particular instances" that were worked on when he visited Ravenswood:

Q: Do you know specifically which valve manufacturers were being worked on while you were there at Ravenswood?

A: On particular instances, I can remember seeing names of particular valves, so should I mention those valves?

Q: Do you know who the manufacturers of the valves were that were worked on the occasions that you were at Ravenswood?

A: Crane valves, Vogt valves, Edwards. Those are three I remember for sure. Velan. Those are some that I remember for sure.

(Defendant's Exhibit B, Deposition of Thomas Carroll, pp 293-294.)

Contrary to defendant's assertion, the plaintiff's apparently inconsistent testimony is not dispositive proof that summary judgment should be granted in defendant's favor. "The assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact, and any apparent discrepancy between the testimony and the evidence of record goes only the weight and not the admissibility of the testimony." Dollas v. W.R. Grace, 225 A.D. 2d, 319, 321 (1st Dept. 1996). Therefore, Mr. Carroll's account as to whether Neles-Jamesbury valves were worked on in his presence at Ravenswood constitutes an issue of fact for resolution at trial.

Mr. Carroll's testimony also raises an issue of fact regarding his exposure to asbestos contained in Neles-Jamesbury valves when he inspected the inventory at the warehouse. Mr. Carroll testified that Riggio purchased Neles-Jamesbury valves and that he was exposed to asbestos in Neles-Jamesbury valves when he handled them in the warehouse. Plaintiffs ask the court to disregard the affidavit of Joseph B. Wright, which states that because asbestos in Neles-Jamesbury valves were encapsulated in rubber, mere handling of intact valves would not have exposed Mr. Carroll to asbestos. This request is denied. As defendant's corporate witness, Mr. Wright possesses intimate knowledge of Neles-Jamesbury products. His testimony falls within his area of expertise, since it concerns the possibility of exposure to asbestos through direct contact with Neles-Jamesbury. However, Mr. Wright's affidavit does not negate plaintiff's claim that Mr. Carroll was exposed to asbestos in defendant's products because Mr. Wright's testimony specifically pertains to intact Neles-Jamesbury valves, whereas Mr. Carroll testified that the valves he handled were in poor condition and not completely intact:

A: All the valves were open at the ends. So you know, as far as I know, packing fibers could come out through the ends of the valves. In addition, a lot of the valves were old, as I said, and what kind of conditions they were in, I don't know, but a lot of them were in poor condition and not, you know, completely not tight. I mean, some of the parts were loose, so I believe that packing fibers certainly have come out of the valve.

(Defendant's Exhibit B, Deposition of Thomas Carroll, p. 326.)

Plaintiffs have proffered evidence which raises the question whether Mr. Carroll was exposed to asbestos from a Neles-Jamesbury product at the Ravenswood powerhouse and the Riggio warehouse.

Because summary judgment is a drastic remedy, it should only be granted where no genuine triable issue of fact exists. Gibson v. Am. Exp. Isbrandtsen Lines, Inc., 125 A.D.2d 65, 74 (1st Dept. 1987). In the circumstances of this case, plaintiffs have set forth sufficient evidence to raise an issue whether Mr. Carroll was exposed to asbestos from a Neles-Jamesbury valve. Hence summary judgment must be denied.

Accordingly, it is hereby

ORDERED that Neles-Jamesbury Inc.'s motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: AUGUST 9, 2010



SHERRY KLEIN HEITLER
J.S.C.