

Carroll v A.O. Smith Water Prods., Co.

2010 NY Slip Op 32632(U)

September 21, 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: SHERRY KLEIN HEITLER
Justice

PART 30

THOMAS C. CARROLL and
CHERYL CARROLL,

INDEX NO. 190259/09

Plaintiffs,

MOTION DATE _____

- v -

MOTION SEQ. NO. 009

A.O. SMITH WATER PRODUCTS, CO.
ELECTROLUX HOME PRODUCTS, INC.,
Individually and as Successor to Tappan, and
Copes-Vulcan, SPIRAX SARCO, INC., Individually
and as Successor to SARCO COMPANY, et. al.

MOTION CAL. NO. _____

Defendants.

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

It is hereby

ORDERED that this motion is decided in accordance with a Memorandum /

Decision dated SEPTEMBER 21, 2010.

FILED
SEP 23 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9.21.10

SKH
SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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,

Index No. 190259/09
Motion Seq. # 009

-against-

A.O. SMITH WATER PRODUCTS, CO.,
ELECTROLUX HOME PRODUCTS, INC.,
Individually and as Successor to Tappan, and
Copes-Vulcan, SPIRAX SARCO, INC., Individually
and as successor to SARCO COMPANY, et al.

Defendants.

FILED
SEP 23 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Defendants Electrolux Home Products, Inc., individually and as successor to Tappan and Copes-Vulcan (Copes-Vulcan), and Spirax Sarco, Inc., individually and as successor to Sarco Company (Spirax Sarco)(together, defendants), move, pursuant to CPLR 3212, for summary judgment on all claims and cross claims asserted against them, on the ground that there is no evidence that plaintiff Thomas C. Carroll (Mr. Carroll) was exposed to asbestos fiber released from a product sold and/or distributed by Copes-Vulcan and/or Spirax Sarco.

FACTS

Mr. Carroll worked as a comptroller with nonparty Frank D. Riggio Company, Inc. (Riggio) between 1986 and 1992. According to his deposition testimony, he was essentially responsible for accounting functions, human resources, legal matters and warehouse operations. Ex. E, at 55-56. Riggio was involved in the repair, sale and distribution of industrial products, including valves. Mr. Carroll maintains that he was exposed to asbestos while performing inventory of products in the warehouse, while visiting five different outside clients, and while present in the on-site repair shop.

Mr. Carroll was diagnosed with mesothelioma on April 22, 2009.

Vincent Riggio (Mr. Riggio), president of Riggio, contends that Mr. Carroll's employment did not bring him into contact with any hands-on work with respect to industrial valves, and he would not have been exposed to asbestos in any manner during his employment. Mr. Riggio asserts that Mr. Carroll played no role in overseeing maintenance or repairs performed at any of the off-site locations where repair and maintenance work was performed. Riggio Affid., ¶¶ 3, 4.

DISCUSSION

Defendants contend that plaintiff failed to produce any admissible evidence to establish that any work that he performed caused him to be exposed to asbestos from any valve. They further maintain that the record is devoid of evidence to support plaintiff's claim that his trips to clients' facilities resulted in asbestos exposure from either Copes-Vulcan or Spirax Sarco valves. Defendants argue that, although Mr. Carroll listed Copes-Vulcan and Spirax Sarco among the brands of valves that were at Riggio's repair shop and Consolidated Edison's Ravenswood powerhouse, he failed to name those manufacturers as the manufacturers of valves that were being worked on when he was present at the facilities.

In moving for summary judgment, a defendant is required to make a prima facie showing "that its product could not have contributed to the causation of plaintiff's injury." *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 462 (1st Dept 1995). Once that prima facie showing is made, the plaintiff must show that there is a genuine issue of triable fact from which the defendant's liability may be inferred. *Matter of New York City Asbestos Litig.*, 216 AD2d 79, 80 (1st Dept 1995). Here, defendants are attempting to make their prima facie case by pointing to weaknesses in plaintiff's case. However, on a motion for summary judgment, it is defendants who must show that their

products could not have caused Mr. Carroll to be exposed to asbestos. This they have failed to do.

Mr. Carroll testified that both Copes-Vulcan and Spirax Sarco valves were at Ravenswood, and that they were worked on in his presence. Carroll Dep., at 113, 293-294. He further testified that, at Ravenswood, he observed workers cutting out valves, and that when the valves were cut, fibers went into the air and were inhaled by whomever was in the vicinity of the work. *Id.*, at 111-113. While Mr. Carroll did not mention defendants' valves on one occasion during depositions, he did at another time. His failure to include defendants both times he was questioned does not permit the court to conclude that defendants' valves were not worked on in his presence. Rather, the jury must determine what, if any, import to place on Mr. Carroll's testimony, in which he included fewer manufacturers in response to one of the questions regarding which valves were worked on in his presence.

Mr. Carroll also testified that when he took inventory of the valves repaired at Riggio, he was exposed to valves and steam traps made by defendants that contained asbestos. Mr. Carroll testified that he was exposed to asbestos at that time. Copes-Vulcan and Spirax Sarco brands were among the valves that came into the shop and needed repair. Carroll Dep., at 65-66, 93-95. The valves of both companies contained asbestos. Further, Mr. Carroll testified that the valves were not intact, were in poor condition, and all of them were open at the ends. Defendants have not offered any evidence that the valves were intact when they were being inventoried, or that asbestos could not have come out of them in their poor condition. Defendants have, therefore, failed to exclude this as a possible time when Mr. Carroll might have been exposed to asbestos.

Mr. Carroll further testified that valves made by Spirax Sarco were repaired at Riggio, while Mr. Carroll was present. *Id.*, at 332. Defendants emphasize that Mr. Carroll never performed any

maintenance or repair work on valves; however, one does not have to be performing the work in order to be exposed to asbestos fibers that are released into the air. Thus, the fact that Mr. Carroll testified to being present while work was being done on the valves is sufficient to raise an issue of fact regarding whether defendants' valves exposed him to asbestos, resulting in his contracting mesothelioma.

While Mr. Riggio asserts that Mr. Carroll's activities would not have brought him into contact with asbestos, his affidavit is merely evidence that raises an issue of fact. The credibility of Mr. Riggio, or of Mr. Carroll, cannot be determined on a motion for summary judgment. *Dollas v Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996); *Missan v Schoenfeld*, 95 AD2d 198, 207 (1st Dept 1983). Therefore, summary judgment must be denied.

CONCLUSION

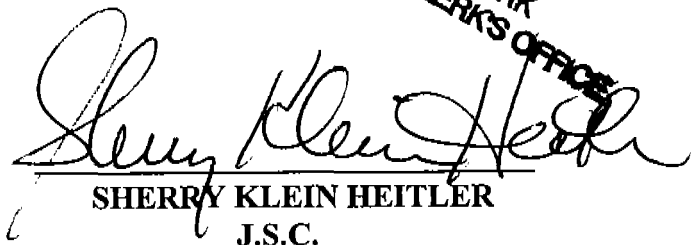
Accordingly, it is hereby

ORDERED that the motion of Electrolux Home Products, Inc., Individually and as Successor to Tappan and Copes-Vulcan, and Spirax Sarco, Inc., Individually and as Successor to Sarco Company, is denied.

This shall constitute the decision and order of the court.

DATED: SEPTEMBER 21, 2010

FILED
SEP 23 2010
NEW YORK
COUNTY CLERKS OFFICE


SHERRY KLEIN HEITLER
J.S.C.