

Stewart v A.O. Smith Water Prod.

2010 NY Slip Op 32896(U)

October 6, 2010

Supreme Court, New York County

Docket Number: 190262/2009

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHERRY KLEIN HEITLER PART 30
Justice

JAMES STEWART and
PATRICIA STEWART,

Plaintiffs,

- v -

A. O. SMITH WATER PRODUCTS, et. al.
(PARKER HANNIFIN CORP.)

Defendants.

INDEX NO. 190262/09

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

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

Notice of Motlon/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

FILED
OCT 15 2010

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is hereby

ORDERED that this motion is decided in accordance with Memorandum /

Decision dated 10.6.10

Dated: 10.6.10

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
JAMES STEWART and
PATRICIA STEWART,

Plaintiffs,

Index No. 190262/2009
SEQ. # 003

- against -

A.O. SMITH WATER PRODUCTS, et. al.,
[PARKER HANNIFIN CORP.]

Defendants.
-----X

SHERRY KLEIN HEITLER, J.:

DECISION AND ORDER

FILED

OCT 15 2010

COUNTY CLERKS OFFICE
NEW YORK

In this asbestos personal injury action plaintiffs James Stewart (“Stewart”) and Patricia Stewart allege that James Stewart was exposed to defendant Parker Hannifin Corporation’s (“Parker Hannifin”) asbestos containing hydraulic valves, which caused him to develop mesothelioma. Parker Hannifin now moves, pursuant to CPLR 3212, for summary judgment, on the ground that plaintiffs have failed to identify its product.

Stewart alleges that he was exposed to defendant’s asbestos containing product while employed at the General Motors Ypsilanti, Michigan Plant (“GM Plant”), during the years 1975-2005, and that this exposure was a contributing factor to his diagnosis of mesothelioma. Parker Hannifin acknowledges that its valves were present in the GM Plant in machines on which Stewart worked; however, Parker Hannifin denies that its valves contained asbestos, arguing that the majority of its hydraulic valves at the GM Plant contained only o-rings, which were made of rubber material, not asbestos. Parker Hannifin argues further that any of its valves that did contain gaskets contained non-asbestos gaskets. Defendant argues that summary judgment is warranted because plaintiffs have failed to identify a Parker Hannifin manufactured asbestos containing product to which Stewart was exposed. Moreover, Parker Hannifin asserts that it could not have been expected

to warn against other manufacturers' potential replacement parts.

Plaintiffs assert that Stewart's deposition testimony, during which he named Parker Hannifin as one of the asbestos containing hydrolic valves on which he worked, is sufficient to identify defendant's asbestos containing product. In addition, plaintiffs argue that the Parker Hannifin Catalogs (*see, infra*) demonstrate that Parker Hannifin sold asbestos for its hydraulic valves. Plaintiffs assert that it was therefore foreseeable that asbestos components would be used in Parker Hannifin's hydraulic valves and Parker Hannifin therefore had a duty to warn. Accordingly, plaintiffs argue that summary judgment should be denied.

During Stewart's deposition, on December 17, 2009, he testified that his job required him to perform repairs to valves, some of which he knew to be Parker Hannifin valves because Parker Hannifin's name was embossed on the valve's main body. (Notice of Motion, Ex. C, p. 344.) Although Stewart testified that the valve itself was made of "brass I'm presuming or bronze" with no asbestos, he alleges that in the process of necessary repairs to the valve's components, he was exposed to asbestos packing and gaskets. (*Id.*, at 340-41, 343.) Stewart testified that he was required to replace gaskets in Parker Hannifin's valves three to five times a week during his time at the GM Plant. (*Id.*, at 341.) He testified that he used Palmetto manufactured packing and Victor and Garlock manufactured gasket material in Parker Hannifin valves, all of which had packaging with asbestos labels. (*Id.*)

Parker Hannifin provides evidence that the hydraulic valves with which Stewart worked did not require replacement materials that contained asbestos. It shows, through the deposition testimony of retired Parker Hannifin Manager/Engineer Paul R. Kuebler, Jr. Dated May 13, 2010 (Supplemental Affirmation in Opposition, Ex. A, p. 52-54) that its hydraulic valves did not require the replacement of packing. It further shows that Stewart himself described the work he performed

on Parker Hannifin's valves as, "some packing maybe. But usually on the packing we would just replace the valve if we had to if it's that bad." (Affirmation in Opposition, Ex. C, p. 53.) Parker Hannifin also points to Stewart's testimony that he did not use asbestos containing gasket material or packing material manufactured by Parker Hannifin on Parker Hannifin valves, but by other manufacturers of gasket and packing material. In this regard, while Parker Hannifin admits that its hydraulic valves contain o-rings and dust gaskets that would require replacement, Parker Hannifin has shown that such hydraulic valve components as manufactured or recommended by Parker Hannifin did not and do not contain asbestos. Further Parker Hannifin provides the affidavit of Dale Ashby, currently Vice President of Technology & Innovation for Parker Hannifin's Sealing and Shielding Group, sworn to May 28, 2010, that after reviewing the formulas for Parker Hannifin hydraulic valve o-rings dating back to their first date of sale, the o-rings have always been made of Nitrile or Buna-N rubber, and have not contained asbestos.

For the non-moving party to defeat a motion for summary judgment, it is insufficient to merely show that the defendant's products were in existence at plaintiff's workplace. *Cawein v. Flintkote Co.*, 203 A.D.2d 105, 106 (1st Dept. 1994). Rather, a plaintiff must show that he actually inhaled fibers from the defendant's asbestos containing product. *Id.* In asbestos litigation, the deposition testimony of a litigant is sufficient to raise an issue of fact if the litigant provides information to establish a reasonable inference that *the defendant's products* caused his or her injury (emphasis added). *Dollas v. W.R. Grace & Co.*, 225 A.D.2d 319, 321 (1st Dept. 1996); *see also Cawein v. Flintkote Co.*, *supra*, 203 A.D.2d at 106. Stewart's deposition testimony alone does not create a reasonable inference that he came into contact with dust from a product which the defendant manufactured because he testified that he never used Parker Hannifin manufactured asbestos containing materials (see Notice of Motion, Exh. C, pp. 340-41).

Plaintiffs have submitted two Parker Hannifin Packing, Compression, and Gasket Catalogs (“Catalogs”) from the 1970’s. (See Supplemental Affirmation in Opposition, Exh. A, plaintiff’s deposition Exhibits 11 and 12.) The Catalogs, from the Parker Hannifin Seal Division, list for sale multiple asbestos packing and gasket materials, many of which are specified for use in valves and valve stems. (*Id.*) Plaintiffs assert that the mere existence of these Parker Hannifin products demonstrate that the use of asbestos products in Parker Hannifin’s hydraulic valves was foreseeable, and defendant, thus, had a duty to warn.

In *Renow v A.W. Chesterton*, Sup. Ct., N.Y. County, Jan 16, 2003, Freedman, J., Index No. 106444/03, Seq No. 006, quoting *Baughman v. Gen. Motors Co.*, 780 F.2d 1131 (4th Cir. 1986) this court granted summary judgment for the defendant on the ground that a manufacturer could not be held liable for failure to warn of a “myriad of replacement parts supplied by any number of manufacturers” where the plaintiff testified that his asbestos exposure occurred from replacement parts not manufactured by the defendant. In *Porper v. A.W. Chesterton Co.*, Sup. Ct., N.Y. County, Dec. 22, 2003, Freedman, J., Index No. 0109441/2003, this court held that “exposure to another product even when certain attributes are specified, does not create liability by an owner for replacement parts manufactured by another.”

In this case plaintiffs have not demonstrated that the Catalogs contain products intended for use with Parker Hannifin hydraulic valves. The connections plaintiffs thus attempt to make are too attenuated and speculative to hold Parker Hannifin liable to warn for the use of other manufacturers’ potential replacement products. The words “hydraulic valve” do not appear in the Catalogs and Parker Hannifin sells a wide variety of valves. (Affirmation in Opposition, Ex. J.) In addition, Parker Hannifin provides the Affidavit of Paul Kuebler, the former Integration Manager for Parker Hannifin’s Hydraulic Division, sworn to May 27, 2010, who attests that the Catalogs did not offer

any products intended for use with hydraulic valves, the only type of Parker Hannifin products with which Stewart worked. Plaintiffs do not dispute this claim.

The party moving for summary judgment has the burden of establishing a *prima facie* case for judgment as a matter of law by demonstrating that there are no material issues of fact, *Comeau v. W.R. Grace & Co.*, 216 A.D.2d 79, 80 (1st Dept. 1995). If the moving party meets this burden, then the non-moving party must demonstrate, by admissible evidence, the existence of an issue of fact requiring trial. *Id.* In this case, Parker Hannifin has met its initial burden and plaintiffs have failed to sufficiently provide evidence of the existence of a material issue of fact requiring a trial.

Accordingly, defendant Parker Hannifin's motion is granted and it is hereby

ORDERED, THAT Parker Hannifin's motion for summary judgment dismissing the complaint and all cross claims against it is granted, and this action against Parker Hannifin and any cross claims are severed and dismissed; and it is further

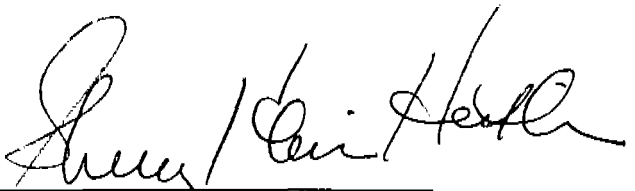
ORDERED that the remainder of the action shall continue as against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This shall constitute the decision and order of the court.

DATED: OCTOBER 15, 2010

FILED
OCT 15 2010
COUNTY CLERK'S OFFICE
NEW YORK



SHERRY KLEIN HEITLER
J.S.C.