

<b>Matter of New York City Asbestos Litigation</b>
2010 NY Slip Op 33285(U)
November 23, 2010
Sup Ct, NY County
Docket Number: 102707/07
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
SHERRY KLEIN HEITLER

SHERRY KLEIN HEITLER

PART 30

Index Number : 102707/2007

GREEN, THOMAS JOSEPH

vs.

A.O. & S.

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO.

102707/07

MOTION DATE

MOTION SEQ. NO.

001

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

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

*This motion was  
denied as per the memo  
decision of 11.23.10.*

**FILED**

NOV 30 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11.23.10

*[Signature]*  
SHERRY KLEIN HEITLER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

----- X  
In Re: New York City Asbestos Litigation  
----- X  
THOMAS JOSEPH GREEN

NYCAL

Index No. 102707/07  
Motion Seq. 001

Plaintiff,

- against -

A.O. SMITH WATER PRODUCTS CO., et al.,

Defendants.  
----- X

**FILED** DECISION AND ORDER

NOV 30 2010

NEW YORK  
COUNTY CLERK'S OFFICE

**SHERRY KLEIN HEITLER, J:**

In this asbestos personal injury action, defendants The Goodyear Tire & Rubber Company and Goodyear Canada Inc. (collectively, "Goodyear") move pursuant to CPLR § 3212 for an order granting them summary judgment dismissing the complaint and all cross-claims against them. For the reasons set forth below, the motion is denied.

**BACKGROUND**

On February 27, 2007, plaintiff commenced this action to recover damages for personal injuries allegedly caused by his exposure to asbestos-containing products manufactured by the defendants. The complaint alleges that plaintiff developed lung cancer as a result of exposure to defendants' asbestos-containing gaskets while working as a pipefitter at various residential sites from 1971 to 1973.

Plaintiff alleges exposure to numerous asbestos-containing products in connection with his employment with J. Hart & Son Plumbing in Albany, New York from 1971 to 1973 and from his work as a member of a pipefitters union from 1977 to 2005. Plaintiff was deposed fully on

February 5, 2010 and his deposition transcript is submitted as defendants' exhibit B, (hereinafter "Deposition"). As a pipefitter, plaintiff testified he was responsible for installing piping systems in new houses and removing piping and boilers from older homes. Specifically, plaintiff testified that while tearing out and replacing old piping systems and boilers, he was required to scrape off gaskets used in conjunction with these pipes and boilers and then cut new gaskets to be fitted onto flanges. Deposition, pp. 88-89, 94-95. While plaintiff testified that he came into contact with gaskets manufactured by the defendants, he was unsure whether those products were the source of his exposure. *Id.* Accordingly, Goodyear served a No Opposition Summary Judgment Motion and Order upon plaintiff on or about April 30, 2010, which was not executed by plaintiff's counsel.

Thereafter, defendants filed the instant motion for summary judgment alleging, among other things, that (1) plaintiff did not know whether the gasket material that he identified as having been manufactured by Goodyear contained asbestos; (2) plaintiff described products which fit the description of Goodyear's asbestos-free gasket material; and (3) Goodyear ceased manufacturing asbestos-containing gaskets two years before plaintiff worked with Goodyear products. In opposition, plaintiff alleges, among other things, that (1) plaintiff described gasket material which matched the description of asbestos-containing material manufactured by the defendants; and (2) Goodyear's answers to interrogatories provide sufficient proof that its gaskets contained asbestos.

#### DISCUSSION

In order to obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law,

[\* 4]

tendering sufficient evidence to demonstrate the absence of any material issues of fact. See *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR § 3212[b]. Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. See *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986].

In a personal injury action arising from a plaintiff's alleged exposure to asbestos or an asbestos-containing material, the plaintiff is required to demonstrate that he was actually exposed to asbestos fibers released from a particular defendant's product. See *Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994]. The plaintiff is required "to show facts and conditions from which defendants' liability may reasonably be inferred." *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995].

Summary judgment is a "drastic remedy" that must not be granted if there is "any doubt" about the existence of a triable issue of fact. *Id.* Where the facts are undisputed but are susceptible to more than one permissible inference, the choice between those inferences should not be made as a matter of law, but should be submitted to the trier of fact. *Ace Wire & Cable Co., v Aetna Casualty & Surety Co.*, 60 NY2d 390, 401 [1983]. If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978].

Here, defendants argue that summary judgment should be granted because plaintiff worked for J. Hart & Son Plumbing from 1971-1973, at least two years after defendants allegedly

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ceased manufacturing asbestos-containing products. Accordingly, defendants contend plaintiff could not have worked with an asbestos-containing product manufactured by Goodyear. To support this proposition, Goodyear relies on the affidavit of non-party E.W. DeMarse, sworn to March 23, 2004 (“DeMarse Affidavit”). Mr. DeMarse worked in the Goodyear Industrial Products Department from 1952 to 1983. His affidavit states that defendant Goodyear Tire & Rubber Company produced compressed asbestos sheet gasket materials for approximately fifty years, with production terminating in 1969. However, Mr. DeMarse also states that defendant Goodyear Canada continued to produce compressed asbestos sheet gasket materials until 1973. As such, Goodyear produced asbestos-containing products during the relevant time period. In any event, even if both Goodyear Tire & Rubber Company and Goodyear Canada stopped manufacturing asbestos products before 1971, it would still be possible that Goodyear’s asbestos containing gaskets were still sold and used in the marketplace during the relevant time period, and that plaintiff worked with these asbestos-containing gaskets in the course of his employment. *See Taylor v AC&S, Inc., et al.*, 304 AD2d 403, 404-05 (1st Dept 2003); *see also Kofler v A.W. Chesteron, et. al.*, Index No. 190014/08, 2009 NY Misc LEXIS 6064, at \*4 [Sup. Ct. September 2, 2009].

Defendants also contend that plaintiff failed to identify Goodyear as the source of his exposure. Notably, plaintiff identified Goodyear as the manufacturer of some of the new sheet gasket materials that he used during his employment with J. Hart & Son Plumbing from 1971 to 1973, but was unable to state whether they were the source of his exposure. This shortcoming does not require the court to grant summary judgment in defendants’ favor so long as plaintiff

provides other evidence from which defendants' liability may reasonably be inferred. *See Reid, supra*, 212 AD2d at 463. Here, plaintiff relies on his description of the gaskets he worked with as evidence of his exposure. (Deposition p. 95):

- Q: And the gaskets that you would cut into sheets, what color were the sheets?
- A: Most of the time [they] would be like a silverish gray. They ranged from different -- it depends on the type of steam you're using, pressure steam. It would range; different colors I guess.
- Q: Do you know who manufactured any of the gaskets that you cut the sheets from?
- A: Goodyear was one. I know they used a lot of them. I can't recollect -- there's others. I just don't remember.

Plaintiff contends that this description matches the description of asbestos-containing gaskets manufactured and distributed by defendants during the relevant time period. Plaintiff relies on Goodyear's interrogatory answers which state that Goodyear's asbestos containing gaskets were "shiny gray," "black," or "white cardboard." However, later on in his deposition, plaintiff testified (Deposition, p. 98):

- Q: What color were the sheets that were manufactured by Goodyear?
- A: I already told you that, didn't I?
- MS. BRANDIS: Yes, objection.
- Q: I think I asked more generally about all of the different sheets?
- A: They got gray and little streaks of red in them, I remember.

Defendants contend this description matches the description of asbestos-free products manufactured by the defendants. Defendants rely on the DeMarse affidavit, which provides that the non-asbestos containing gaskets were "various different colors, ranging from rusty or brownish red to various shades of gray, to black." DeMarse Affidavit, § 4.

Ordinarily, internal contradictions presented in a party's materials offered in opposition to a summary judgment motion would not eliminate a genuine issue of material fact if some of that evidence sufficiently rebutted the evidence presented in support of summary judgment. See *Carroll v A.O. Smith Water Prods.*, Index No. 129996/93, 2010 NY Misc LEXIS 3787, at \*7 [Sup. Ct. August 9, 2010]. The internal conflicts or inconsistencies in the evidence available would go to the weight of that evidence as considered by the trier of fact, rather than neutralizing it for summary judgment purposes. See *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 [1st Dept 1996]. In *Dollas*, for example, the lower court erred in rejecting, as being unworthy of belief, the testimony of the plaintiff offered in opposition to the defendants summary judgment motion. Here, on the other hand, there is no internal inconsistency. Plaintiff first described in general the various gaskets he worked with. Later on, plaintiff was asked to and did in fact describe in detail the gaskets on which he worked which were manufactured by Goodyear. Plaintiff's second statement clarifies but does not contradict his initial statement.

However, Plaintiff's description of the gaskets was not explored in sufficient detail by Goodyear to eliminate all issues of fact. Plaintiff's description of the products as "gray with little streaks of red in them" does not sufficiently comport with the description of Goodyear's non-asbestos gaskets as described by E.W. Demarse in his affidavit to warrant summary judgment. As such, Plaintiff's deposition testimony raises issues of fact from which a reasonable jury may infer that the gaskets on which he worked contained asbestos, thereby causing plaintiff's injuries.

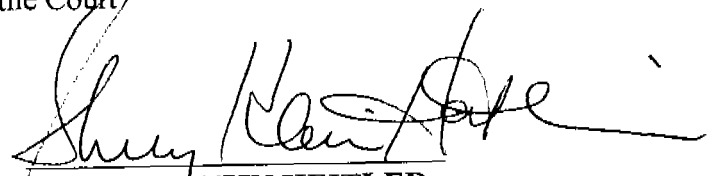
Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is denied and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court

DATED: November 23, 2010

  
SHERRY KLEIN HEITLER  
J.S.C.

**FILED**

NOV 30 2010

NEW YORK  
COUNTY CLERK'S OFFICE