

Moore v Asbeka Indus. of N.Y.
2010 NY Slip Op 33522(U)
December 21, 2010
Supreme Court, New York County
Docket Number: 190144/09
Judge: Sherry Klein Heitler
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

HON. SHERRY KLEIN HEITLER

PART 30

Index Number : 190144/2009

MOORE, JOHN F.

vs

ASBEKA INDUSTRIES OF N.Y.

Sequence Number : 003

(GEROSA)

SUMMARY JUDGMENT

INDEX NO. 190144/09

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided in accordance with the memorandum decision of 12/21/10

FILED

DEC 29 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12.21.10


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: PART 30

----- X
ANGELA MOORE, Individually and as Executrix
of the Estate of JOHN F. MOORE

Index No. 190144/09
Motion Seq. 003

Plaintiff(s),

DECISION AND ORDER

- against -

FILED

ASBEKA INDUSTRIES OF NEW YORK, et al.,

DEC 29 2010

Defendants.

----- X

SHERRY KLEIN HEITLER, J:

NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendant Gerosa Inc. ("Gerosa") moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all cross-claims against it.

For the reasons set forth below, the motion is granted.

BACKGROUND

This action was commenced by John Moore and his wife Angela Moore to recover for personal injuries allegedly caused by Gerosa employees who rigged and transported powerhouse equipment at various Consolidated Edison Company of New York ("Con Edison") facilities. Mr. Moore was deposed in this action on July 16, 2009, July 17, 2009, September 17, 2009, and January 25, 2010 and his deposition transcripts are submitted herein as plaintiffs exhibits D and E ("Deposition"). Mr. Moore testified that he began working for Con Edison as a general utility worker at its East River Powerhouse in Manhattan in or around 1966. After he completed welding school, Mr. Moore was assigned as a mechanic in Con Edison's maintenance department to the number 40 boiler at its Astoria Generating Station in Queens in 1973 or 1974. Mr. Moore worked at the Astoria facility for a period of approximately six months. He testified that he

worked at the East River, Hudson Avenue, Kips Bay, Waterside, West 59th Street, Kent Avenue, and Ravenswood powerhouses beginning in 1974 or 1975 until the late 1970's. He then returned to the Astoria facility and remained there until his retirement in 1997.

Mr. Moore testified that he witnessed Gerosa employees rig powerhouse equipment using cranes, dollies, and other equipment. He testified that Gerosa would then transport the powerhouse equipment to shops for repair or overhaul or to the manufacturer for retrofitting. Plaintiff argues that this work required Gerosa employees to handle products that were insulated or otherwise comprised of asbestos-containing materials, and that Mr. Moore was exposed to asbestos-containing dust that fell off of the equipment during this process.

Mr. Moore conceded that Gerosa's work did not involve the application or removal of asbestos from any of the powerhouse equipment. As such, and in accordance with the NYC Asbestos Litigation Case Management Order, on or about March 23, 2010, Gerosa served a request for a No Opposition Summary Judgment Motion and Order upon the plaintiff. The plaintiff declined to voluntarily dismiss the defendant from this case.

Defendant thus brought on this motion for summary judgment, on the ground, among other things, that it never manufactured, distributed, used, or installed any asbestos-containing products to which Mr. Moore was exposed. In opposition, plaintiff argues that Gerosa had a duty to warn even though it did not manufacture any asbestos-containing products, and the work performed by Gerosa employees produced asbestos-containing dust to which Mr. Moore was exposed, and as to which he sustained his injury.

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, 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. *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]. Mere boilerplate and conclusory allegations will not suffice. *Cawein, supra*, 203 AD2d at 105.

Plaintiff contends that summary judgment should be denied because Gerosa had a duty to warn concerning the dangers of asbestos-containing products, even though Gerosa did not manufacture, distribute, or install any products at any time. In *Cover v Cohen*, 61 NY2d 261, 275 [1984], the New York Court of Appeals held that "[a]lthough a product be reasonably safe when manufactured and sold and involve no then known risks of which warning need be given, risks thereafter revealed by user operation and brought to the attention of the manufacturer or

vendor may impose upon one or both a duty to warn.” This duty arises when a manufacturer learns of dangers in the use of a product after manufacture or sale by means of post-sale accidents or advancements in technology.

Applying the duty to warn to asbestos-related personal injury actions, the First Department held that a manufacturer could be liable for a failure to warn even though it did not produce any asbestos-containing products. *See Berkowitz v AC&S Inc.*, 288 AD2d 148 [1st Dept 2001]. In *Berkowitz*, the court affirmed the denial of the defendant pump manufacturer’s motion for summary judgment and held there were genuine issues of material fact because the defendant may have had a duty to warn concerning the dangers of asbestos, which it had neither manufactured nor installed on its pumps. The court found it questionable whether the pumps, which transported steam and hot liquids on board United States Navy ships, could be operated safely without insulation, which the defendant knew would be made out of asbestos. Unlike in *Cover* or *Berkowitz*, in this case Gerosa never manufactured any products or equipment of any kind. Gerosa simply provided rigging and transportation services for the removal of Con Edison equipment for repair, which places its activities outside of the distribution chain typically associated with the duty to warn. As such, Gerosa had no duty to warn Mr. Moore of the hazards associated with asbestos.

In addition, although Mr. Moore recalled seeing Gerosa workers present at the Astoria and Ravenswood powerhouses, he admitted that he never observed Gerosa workers remove asbestos from or apply asbestos to any equipment at either powerhouse. Mr. Moore also testified that the work performed by Gerosa workers did not involve the use of asbestos. (Deposition, Exhibit D, pp. 220-221):

Q: You testified that Gerosa workers were responsible for rigging. Is that correct?

A: Yes ma'am.

Q: What exactly was involved in that rigging?

A: To transport equipment that was being disassembled in the plant and bring it Van Nest Shops for overhaul or back to the manufacturer for retrofits. Gerosa would use cranes, and dollies and equipment to extract this equipment to put it on flatbed trucks or barges in the river to transport these pieces of machinery.

* * * *

Q: Did you observe Gerosa workers performing any other work?

A: Not to my knowledge.

* * * *

Q: The rigging work that Gerosa performed would not require the use of asbestos, correct?

A: Correct.

Despite this testimony, plaintiff asserts herein that Gerosa employees' work involved the installation of asbestos on boiler equipment at Con Edison powerhouses. In support, plaintiff produces the affidavit of Edward Leith, sworn to June 25, 1998. Mr. Leith states that he was a member of the Boilermakers Union from 1963 until 1985 and indicated that he worked for Gerosa "a number of times" from the 1950's through the 1980's. Although Mr. Leith states that he applied new asbestos on equipment he installed or repaired at Con Edison powerhouses, Mr. Leith's affidavit does not identify a specific powerhouse in which he worked, nor does it state that he ever worked with Mr. Moore or in his vicinity at any time during the relevant time period. As such, Mr. Leith's affidavit does not raise triable issues of fact as to Mr. Moore's alleged exposure.

It is evident that Gerosa never manufactured or distributed any products or equipment and

was merely responsible for rigging, transportation, and storage. Although some equipment within the powerhouses may have been insulated with asbestos, Mr. Moore's testimony is that Gerosa was not responsible for the installation or removal of same. In light of the above, Gerosa cannot be held liable for Mr. Moore's injuries.

Accordingly, it is hereby

ORDERED that Gerosa's motion for summary judgment is granted, and that this action against Gerosa, and any cross-claims related to this defendant are severed and dismissed; and it is further

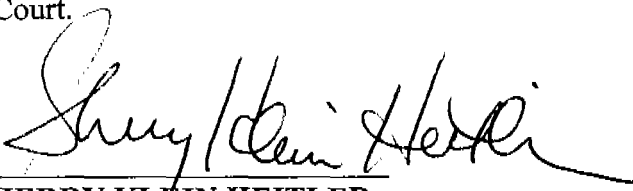
ORDERED that the remainder of the action shall continue as against the remaining defendants; and it is further

ORDERED that the old caption, "John F. Moore and Angela Moore v Asbeka Industries of New York, et al.," is amended to read "Angela Moore, Individually and as Executrix of the Estate of John F. Moore v Asbeka Industries, et al.," in accordance with the letters testamentary for the estate of John F. Moore issued to Angela Moore on September 9, 2010, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

DATED: December 21, 2010


SHERRY KLEIN HEITLER
J.S.C.

FILED

DEC 29 2010

EM YCI
CLERK