

**Swalling v American Standard, Inc.**

2011 NY Slip Op 30067(U)

January 7, 2011

Supreme Court, New York County

Docket Number: 190229/09

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

Index Number : 190229/2009

SWALLING, LINDA A.

INDEX NO. 190229/09

vs

AMERICAN STANDARD

MOTION DATE \_\_\_\_\_

Sequence Number : 009

MOTION SEQ. NO. 009

SUMMARY JUDGMENT

MOTION CAL. NO. \_\_\_\_\_

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

Upon the foregoing papers, It is ordered that this motion

*is denied as per the memo decision of 1-7-11.*

**FILED**

JAN 12 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: \_\_\_\_\_

*1-7-11*

*[Signature]*

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  
LINDA A. SWALLING, Individually and as  
Executrix of the Estate of MATHEW PETER  
SWALLING, Deceased,

Index No. 190229/09  
Motion Seq. 009

Plaintiff,

**FILED**

DECISION AND ORDER

-against-

JAN 12 2011

AMERICAN STANDARD, INC., et al.,

Defendants.

NEW YORK  
COUNTY CLERK'S OFFICE

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

In this asbestos personal injury and wrongful death action, defendant Henegan Construction Co., Inc. ("Henegan"), moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all other claims against it. For the reasons set forth below, the motion is denied.

**BACKGROUND**

This action was commenced by Mathew Swalling, now deceased, to recover for personal injuries allegedly caused by his exposure to asbestos while working as an automobile service person and telephone installer. Mr. Swalling spent the bulk of his career working at one building located at 60 Broad Street in Manhattan ("60 Broad") from 1968 through 1980. The defendant, Henegan, provides construction management and general contracting services throughout the New York City area. Mr. Swalling was deposed in this action on August 14, 2009, September 9, 2009, and September 17, 2009, and the relevant portions of his deposition transcript are submitted as defense exhibits C, D, and E ("Swalling Deposition"). Mr. Swalling testified that

he worked in the presence of drywall contractors who used asbestos-containing joint compound at 60 Broad and that he was exposed to this asbestos while laborers sanded the joint compound throughout the building. Mr. Swalling did not identify Henegan as the source of his alleged exposure.

On April 15, 2010, defense counsel requested that plaintiff sign a No-Opposition Summary Judgment Motion and Order on the ground that there were no references made to Henegan during the course of discovery. In or about June 2010, plaintiff's counsel advised defense counsel that Mr. Swalling's co-workers could identify Henegan as an installer of drywall at 60 Broad beginning in 1972.

Thereafter, Henegan filed the instant motion on the ground that Mr. Swalling never identified Henegan as the source of his exposure. In opposition, plaintiff submits the affidavit of co-worker Richard Sciolto, sworn to September 13, 2010, which states that Henegan was present at 60 Broad and caused Mr. Swalling to be exposed to asbestos-containing materials.<sup>1</sup> During oral argument on November 29, 2010, the court directed that Mr. Sciolto's deposition be taken and that the parties submit supplemental papers regarding same. Mr. Sciolto was deposed on December 2, 2010. In its supplemental papers, defendant argues that the submission of Mr. Sciolto's deposition testimony is untimely and is otherwise unreliable and conclusory. Plaintiff contends that his testimony unequivocally demonstrates the existence of issues of fact regarding Henegan's liability in this action.

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<sup>1</sup> An affidavit was submitted in lieu of deposition testimony because the parties adjourned the deposition several times.

## 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, e.g., 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].

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. *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 462 [1st Dept 1995]. Where the facts are undisputed but 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].

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 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, supra*, 212 AD2d at 462. Mere

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

Here, Mr. Swalling testified that as a telephone installer he worked in very close proximity to tapers and sanders (Swalling Deposition, pp. 107-08):

We had a very solid regimen set up with the trades. . . . Then as soon as the sheetrock goes up, we had pulled our telephone cables. . . . The tapers are now there while we're physically in the space running the telephone wires and actually terminating them in the room where every room has a terminal box set up for that room and all the telephones to go to it. And it could be several dozen or so, 100 phones, and we would sit there throughout the day while they were taping and while they were sanding terminating our telephone boxes, that was just part of the regimen.

Mr. Swalling testified that he saw the tapers use joint compound in his presence, which was then sanded while he worked on the telephone terminals (*Id.* at 115):

We would sit there and they were sanding the walls, the ceilings. While the guys were sweeping all day long, we were sitting in that same room breathing in that -- I mean, we were coming out white every day after the sanders were done. And that was on just about every major construction floor.

Mr. Swalling further testified that the joint compound was manufactured by Georgia Pacific and that it came in five gallon pails.

Plaintiff argues that Georgia Pacific's joint compound contained asbestos and submits several documents in support. One is Georgia Pacific's responses to interrogatories, dated May 13, 1986, in a separate action venued in Dallas County, Texas. They provide, and defendant does not dispute, that Georgia Pacific's joint compound did in fact contain asbestos in the late 1960's and early 1970's. (Plaintiff exhibit B, pp. 3-4). Also submitted is an internal memorandum from a Georgia Pacific employee which suggests that all joint compound products contained asbestos prior to 1974, even those products manufactured by other companies. (Plaintiff exhibit C). Finally, plaintiff submits a set of formula cards which identify asbestos as a component of

Georgia Pacific's joint compound in 1974 and provide that it was sold in five gallon pails.  
(Plaintiff exhibit D).

Plaintiff also asserts that Henegan was a drywall contractor that performed work in Mr. Swalling's presence at 60 Broad despite the fact that he was unable to precisely identify Henegan during his deposition. In support, plaintiff submits the deposition testimony of Richard Sciolto, taken December 2, 2010.<sup>2</sup> Mr. Sciolto worked at 60 Broad between 1971 and 1978 as an electrician for Arc Electric. He testified that he first met Mr. Swalling at 60 Broad, that they saw each other on a daily basis, and that they were friends. Mr. Sciolto testified regarding Henegan's responsibilities and Mr. Swalling's alleged exposure (Sciolto Deposition, pp. 35-36, 42, 44):

Q: Did you work for Henegan?

A: No, I was a subcontractor for Henegan.

\* \* \* \*

Q: Okay. And you said Henegan would run the meetings?

A: They were the general contractor. They were responsible for the job being started and completed.

\* \* \* \*

Q: How do you know -- well, how many Henegan employees did you ever see at any given time?

A: The job super, the laborers, that was three, and I think maybe a carpenter or two -- no, not a carpenter. They didn't have finish carpenters. Just maybe three or four, that's all.

\* \* \* \*

Q: Did you see them do any cutting of drywall?

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<sup>2</sup> Mr. Sciolto's deposition transcript was submitted as an attachment to a letter to the court, dated December 6, 2010 ("Sciolto Deposition").

A: Yes.

Q: And on those occasions that you observed that, did you see Mr. Swalling anywhere near that?

A: He was near. He was always around. He was always on the site.

\* \* \* \*

Q: . . . I'm just asking on how many occasions did you see Mr. Swalling in the same space where drywall cutting was being done by Henegan employees?

A: I would say many times.

Q: What does many mean?

A: Twenty, forty, fifty, many times.

Defendant contends that the court should disregard the testimony of Mr. Sciolto because he was a previously undisclosed witness. *See Muniz v New York City Hous. Auth.*, 38 AD3d 628, 628 [2nd Dept 2007] (declining to consider the affidavit of the plaintiff's wife because the plaintiff failed to properly disclose his wife as a notice witness in his discovery responses); *see also Garcia v Good Home Realty, Inc.*, 67 AD3d 424, 425 [1st Dept 2010]. Defendant notes that Henegan brought this motion 119 days after the filing of the Note of Issue, by which time it contends plaintiff should have disclosed any witnesses or documentary evidence linking Henegan to this case.

To the contrary, the New York City Amended Asbestos Litigation Case Management Order ("CMO") explicitly provides that discovery may continue after the filing of the Note of Issue. *See CMO Amendment*, dated November 17, 2004. In essence, the CMO recognizes that the filing of the Note of Issue is a mere formality in the unique circumstances of the volume of asbestos-related personal injury and wrongful death cases and does not signify the formal completion of discovery. This comports with § 202.21 of the Unified Rules for the New York

State Trial Courts. Accordingly, while plaintiff might have noticed Mr. Sciolto's deposition earlier in time, its conduct and the court's direction that the deposition be conducted were in full accord with governing law and the CMO.

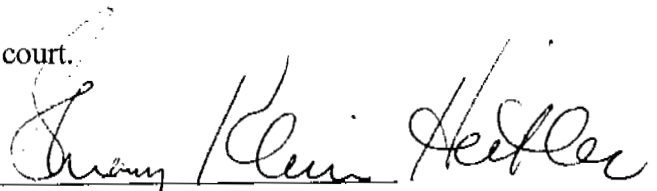
Notwithstanding Mr. Sciolto's testimony, defendant argues there is no evidence to suggest that Henegan was present at 60 Broad during the relevant time period. In support, defendant submits, among other things, the affidavits of Henegan executives Catherine Ziegler and Mary E. Raftery, both of which were sworn to June 2, 2010. Ms. Ziegler, Henegan's general counsel, affirms that Henegan has no records which indicate that it was ever involved in any project at 60 Broad between 1968 and 1980. Ms. Raftery, Henegan's vice president and general manager, affirms that she too is unaware of any Henegan involvement at 60 Broad. However, Henegan appears to have no records for *any* of its projects for the period 1968 through 1980. More important, Ms. Ziegler and Ms. Raftery, both of whom did not begin working for Henegan until the mid 1970's, effectively concede that they have no knowledge of the activities of the corporation during the late 1960's and early 1970's. Their affidavits fail to account for Henegan's presence at 60 Broad between 1969 and 1974, which is the time period at issue. As such, the affidavits do not eliminate any issues of fact relevant to this case.

Mr. Sciolto's testimony clearly identifies Henegan as a general contractor at 60 Broad during the relevant time period. His testimony also suggests that Mr. Swalling was exposed to asbestos as a direct result of the actions of Henegan employees. The combined testimony of Mr. Swalling and Mr. Sciolto is sufficient to raise triable issues of fact regarding Mr. Swalling's exposure and Henegan's liability.

Accordingly, defendant's motion for summary judgment is denied.

This constitutes the Decision and Order of the court.

DATED: January 7, 2011

  
SHERRY KLEIN HEITLER  
J.S.C.

**FILED**

JAN 12 2011

NEW YORK  
COUNTY CLERK'S OFFICE