

Bergrin v Abex Corp.
2011 NY Slip Op 30209(U)
January 27, 2011
Sup Ct, New York County
Docket Number: 190294/09
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 : 190294/2009

BERGRIN, DORIS

VS.

ABEX CORP.

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. 190294/09

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

Decided w/ attached decision

FILED

JAN 31 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: Jan 27, 2011



HON. SHERRY KLEIN HEITLER *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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
DORIS BERGRIN,

Plaintiff,

-against-

ABEX CORPORATION., et al.,

Defendants.
----- X

SHERRY KLEIN HEITLER, J.:

Index No. 190294/09
Motion Seq. 002

DECISION AND ORDER

FILED

JAN 31 2011

NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendant Belden Wire and Cable Company (“Belden”) 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 Doris Bergrin to recover for personal injuries allegedly caused by secondary exposure from laundering her husband’s clothes after he had worked with asbestos containing products, including electrical wires manufactured by defendant Belden. Plaintiff’s late husband, Gerald Bergrin, was an electrician who operated his own business selling and installing kitchen cabinets and bathroom vanities. Plaintiff was deposed on September 22, 2009 and testified that she was exposed to asbestos from washing her husband’s dirty clothes after he came home from work. However, she was unable to identify any product manufactured by Belden as the source of her exposure. Plaintiff’s son, non-party witness Ronald Bergrin, was deposed on November 19, 2009, November 20, 2009, December 10, 2009, and January 28, 2010, and his deposition transcript is submitted as defense exhibit C (“Deposition”). Ronald Bergrin

testified that his father performed electrical work while renovating kitchens and installing kitchen appliances. He testified that he worked with his father from the time he was a teenager and that he observed his father work with electrical wires manufactured by Belden. Mr. Bergrin was unable to identify any job sites where his father performed such work. He was also unable to state whether any of the electrical wires contained asbestos.

Thereafter, Belden commenced the instant motion for summary judgment, arguing that the products described by Ronald Bergrin during his deposition did not contain asbestos. In opposition, plaintiff contends that Belden produced asbestos containing products during the relevant time period to which Gerald Bergrin was exposed.

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. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994]. The plaintiff is required "to show facts and conditions from which defendant's liability may be reasonably 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.

Here, Ronald Bergrin testified that his father performed significant rewiring and electrical work in residential kitchens. Specifically, Mr. Bergrin ran wire, installed and moved appliances, and cut out holes for fixtures. Ronald Bergrin identified Belden as the manufacturer of some of the electrical wires used by his father throughout his career and testified that he observed his father use them many times (Deposition, pp. 458-460):

Q: Do you have a specific recollection of observing your father work with Belden?

A: Yes.

* * * *

Q: And do you recall the last time that you saw your father, you personally observed your father use a Belden wire?

A: Many, many times.

Q: Do you recall the last time you saw a Belden wire?

A: I can't say specifically but probably in the late 70's.

Q: Do you know what the specific use of a Belden wire was for?

A: He would use it for wiring in general.

* * * *

Q: Do you recall the color?

A: No. I mean, there were numerous, numerous colors, my understanding was that there were numerous colors.

* * * *

Q: Do you know if it was a single conductor or a multi conductor?

A: No.

Q: Do you know the gauge size?

A: No.

Q: How about the packaging?

A: No. But I did see the name Belden.

Q: Do you have a specific rccollection of ever being with your father while he purchased a Belden wire?

A: Yes.

Defendant argues that the Belden products described by Ronald Bergrin in his deposition could not have contained asbestos, and therefore were not the cause of plaintiff's injuries. In support, defendant relies on the affidavit of Travis Wake, sworn to March 31, 2010 ("Wake Affidavit"). Belden employed Mr. Wake from 1969 through 2008. He served as an engineer and held various titles, including Senior Product Development Engineer and Intellectual Property Manager. His affidavit states that Belden manufactured both asbestos and non-asbestos containing wire and cable products but concludes that "none of the products identified by either Doris Bergrin or Ronald Bergrin, as having been manufactured, or otherwise placed in the stream of commerce, by Belden contained asbestos." (Wake Affidavit, ¶ 4).

In opposition, plaintiff contends that Ronald Bergrin's deposition testimony, combined with documentary evidence provided by Belden during discovery, raise issues of fact as to

whether the Belden products used by Gerald Bergrin contained asbestos. Specifically, plaintiff argues that Belden sold a number of asbestos-containing wire and cable products for electrical use in kitchens and small appliances. Indeed, Belden's interrogatory responses, dated August 16, 2007 and submitted as plaintiff's exhibit 1, provide that Belden produced five asbestos-containing products: single conductor "AA" wire, portable cords and cordage, "TAGT" wire, coated magnet wire, and flexible fixture single conductor wire.

Ronald Bergrin stated generally that his father worked with appliances, and specifically identified electrical ovens. In this respect, Belden's interrogatory responses provide that it manufactured "CSA type TAGT wire" which was used for "ovens and curling/drying equipment." (Plaintiff exhibit 1, pp. 5, 13). However, there is a great deal of confusion regarding the TAGT product line. The interrogatories provide that TAGT wire was manufactured and sold as early as 1980. Mr. Wake, in a deposition ("Wake Deposition") taken in a separate action ("Rosenberg Matter") and attached to plaintiff's Sur-Affirmation in Opposition as exhibit 1, testified that TAGT was produced from 1980 through 1985. While one of Belden's product catalogs lists TAGT wire as a "new item" in 1982, Mr. Wake's testimony suggests that these "new" TAGT products may not have been new items at all, but new versions of an already existing product. These inconsistencies are critical given that Ronald Bergrin testified that he saw his father use Belden wire's through the late 1970's.

Plaintiff also contends that Belden produced more asbestos-containing wires than those five described in its interrogatory responses. In support, plaintiff submits several reports from Underwriters Laboratories ("UL"), an independent product safety organization, from the 1960's and 1970's. See plaintiff's exhibits 14-19. In an affidavit submitted by Belden in the Rosenberg

Matter and attached to Belden's reply brief as exhibit A, Mr. Wake stated that "the asbestos products noted in the UL are either products that Belden has always admitted that it manufactured and sold, or were products that were never manufactured or sold by Belden." (Supplemental Affidavit of Travis Wake, sworn to August 31, 2007). Mr. Wake noted that "[s]imply because a manufacturer has approval for a particular construction does not mean that the approved product was ever manufactured or sold." *Id.* at ¶ 9. According to Mr. Wake, for example, Belden has no record that it ever manufactured or sold types "A" and "AI" wire, which are listed throughout the UL reports under the heading "Belden." However, defendant has failed to produce any documentation to support Mr. Wake's conclusions. The only corporate document submitted by Belden, its 1982 product catalog, was first provided to the court as an attachment to Belden's supplemental reply brief.

The Wake Deposition further suggests that the record is incomplete and that Mr. Wake's affidavit may be based on incomplete and/or inaccurate information (*Id.* at 98, 154):

Q: And again, where do you keep those product specifications?

A: All the asbestos-containing constructions that Belden ever had have been long obsoleted. And when they were obsoleted, those files eventually got put on an old microfilm system. And there's -- I don't know -- 50, 60 reels, like an old eight millimeter movie film.

Q: And you haven't reviewed them?

A: We have been able to locate some of the specifications. When they obsolete them, it's kind of like a clerk pulled out, here's ten files we want to put on microfilm and then the next day another so many files from a number of series or whatever. And we can't determine any numerical order or anything. They're just on there.

* * * *

Q: How about the TAGT wire?

A: A couple of them we were able to find.

* * * *

Q: So, Mr. Wake, based on your research and all your personal experience, was there wire and cable that was made by Belden that was not in their catalog?

A: Yes.

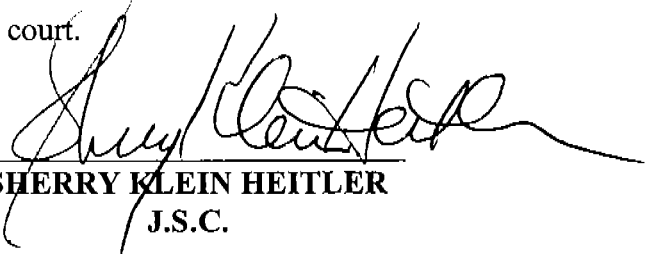
Without more information, the court simply cannot conclude as a matter of law that Belden's products were not the proximate cause of plaintiff's injuries.

Accordingly, it is hereby

ORDERED that Belden's motion for summary judgment is denied without prejudice.

This constitutes the Decision and Order of the court.

DATED: January 27, 2011


SHERRY KLEIN HEITLER
J.S.C.

FILED

JAN 31 2011

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