

Kersten v A.O. Smith Water Prods. Co.

2011 NY Slip Op 30636(U)

March 14, 2011

Sup Ct, NY County

Docket Number: 190129/10

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 : 190129/2010

KERSTEN, GEORGE W.

vs

A.O. SMITH WATER PRODUCTS

Sequence Number : 002

SUMMARY JUDGMENT

(Peerless)

INDEX NO. 190129/10

MOTION DATE _____

MOTION SEQ. NO. 002

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 be granted with the memorandum decision dated

3-14-11

FILED

MAR 17 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3-14-11

[Signature]

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

GEORGE KERSTEN, SR. and
ENRIQUETA KERSTEN

Index No. 190129/10
Motion Seq. 002

Plaintiffs,

DECISION AND ORDER

-against-

A.O. SMITH WATER PRODUCTS CO., et al., (Peerless)

FILED

MAR 17 2011

Defendants.

----- X

SHERRY KLEIN HEITLER, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendant Peerless Industries, Inc. ("Peerless") 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 plaintiffs George Kersten, Sr. (now deceased) and Enriqueta Kersten to recover for personal injuries allegedly caused by Mr. Kersten's exposure to asbestos-containing products. Mr. Kersten was deposed on April 26-29, 2010 and his deposition transcripts are submitted as defendant's exhibit B. He testified that he was exposed to a variety of asbestos-containing products while working as a steamfitter at various commercial sites throughout New York City and Long Island. Mr. Kersten did not testify that he installed, maintained, or repaired Peerless boilers. But he did testify that he was exposed to asbestos from flange gaskets which he used to connect new Peerless boilers to pipes and other equipment.

Peerless filed the instant motion for summary judgment on the grounds that Mr. Kersten

was never exposed to an asbestos-containing product manufactured, specified, sold, or distributed by Peerless and that he failed to testify as to any encounter he may have had with a Peerless boiler. In opposition, plaintiffs contend that Peerless had a duty to warn of the hazards associated with asbestos contained within the flange gaskets Mr. Kersten used as a steamfitter.

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].

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. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *see also 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].

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 the defendant's product. *Cawein v Flinikote Co.*, 203 AD2d 105, 106 [1st Dept 1994]. In this regard, it is sufficient for plaintiff "to show facts and conditions from which defendant's liability may be reasonably inferred." *Reid, supra*, 212 AD2d at 463. However, mere boilerplate and conclusory allegations will not suffice. *Cawein, supra*, 203 AD2d at 105.

Here, Mr. Kersten testified that he was exposed to asbestos with respect to Peerless boilers from flange gaskets which he used to connect boilers to pipes and other equipment (Deposition pp. 280-281, 485-486, 669-670):

Q: Do you believe you were exposed to asbestos in any manner from the installation of those boilers?

A: Yes. When I went in there to put on valves and pumps, et cetera, with the gasket material.

* * * *

Q: Okay. With respect to this work that you just told me about with respect to making connections either on top or on the back of a [sic] any boiler, what specifically were you making connections to?

A: To the outlets on the boiler. They usually come with a flange connections that you had to valve them off before the pipe --

* * * *

Q: With respect to any of this work that you just talked about, how do you believe that work would have caused you to be exposed to asbestos?

A: Many times you had to make a gasket out of gasket material.

* * * *

Q: You also told another attorney that you believe your only exposure to asbestos in connection with boilers came from your work with gaskets, making and handling gaskets for installation on boilers. Is the same true for your dealings with Peerless boilers?

A: Yes.

* * * *

Q: And do you have any reason to believe that Peerless ever supplied gaskets for use on its boilers?

A: No reason to believe that.

Plaintiffs contend that Peerless had a duty to warn about the dangers of asbestos-containing products used in connection with the installation of its boilers. The duty to warn of the dangers associated with third-party products was discussed recently in *Curry v American Standard, et al.*, Slip Op., Case No. 7:08-CV-10228 [SDNY Dec. 6, 2010, Gwin J.]. While the

court in *Curry* cautioned against imposing liability where a defendant's product "merely could have been used with asbestos-containing components," (*Id* at 3 citing *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 297 [1992] [tire manufacturer not liable for injuries resulting from a defective rim produced and installed by another manufacturer]), it found nevertheless that in New York where a defendant "meant its products to be used with asbestos-containing components or knew that its products would be used with such components, the company remains potentially liable for injuries resulting from those third-party manufactured and installed components." *Curry, supra*, p. 3 citing *Berkowitz v A.C. & S., Inc.*, 288 AD2d 148, 148 [1st Dept 2001] [pump manufacturer could be held liable for asbestos-containing insulation manufactured and installed by third party where the pump manufacturer knew that asbestos-containing insulation ought to be or would be used with said pumps].

Peerless' catalog instructions (plaintiffs' exhibits C & F) provide for the use of asbestos-containing gaskets on its own burners and specify in detail how to install the piping which connects the equipment. While those instructions do not specifically call for the use of flange gaskets, Mr. Kersten testified that the outlets on the top and back of the boilers came with flange connections which necessarily required the use of flange gaskets. This is sufficient to raise issues of fact as to whether Peerless knew or should have known that asbestos-containing gaskets would be used to connect their boilers to associated piping. *See Berkowitz, supra*.

Nor has movant met its burden on its claim that Mr. Kersten failed to identify Peerless as one of the boilers he encountered during his work as a steamfitter. To the contrary, his testimony straightforwardly identifies Peerless as among those boilers on which he performed steamfitting work (Deposition p. 280):

Q: Do you believe you were exposed to asbestos in any manner from the installation of those boilers?

A: Yes. When I went in there to put on valves and pumps, et cetera, with the gasket material.

* * * *

Q: Do you know the brand name, trade name or manufacturer of those boilers?

A: No. Other than the ones I mentioned before, which are American Standard, A.O. Smith, Burnham, Cleaver-Brooks, Peerless.

Mr. Kersten's testimony sufficiently identifies Peerless as the manufacturer of boilers on which he worked and describes his exposure to asbestos dust from the piping work he performed on such equipment as part of his job. Plaintiffs are not required to show the precise cause of Mr. Kersten's damages, but only to show the facts and conditions from which defendant's liability may be reasonably inferred. *Reid, supra*, 212 AD2d at 463. Mr. Kersten's testimony raises questions of fact as to whether he was exposed to asbestos contained in the gaskets he used to install defendant's boiler units.

Accordingly, it is hereby

ORDERED that Peerless' motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: March 14, 2011


SHERRY KLEIN HEITLER
J.S.C.

FILED

MAR 17 2011

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