

**Dragone v Air & Liquid Sys. Corp.**

2011 NY Slip Op 30843(U)

April 5, 2011

Sup Ct, NY County

Docket Number: 190192/10

Judge: Sherry Klein Heitler

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

PRESENT: **SHERRY KLEIN HEITLER**

PART 30

Index Number : 190192/2010

DRAGONE, VINCENT

vs

AIR & LIQUID

(Georgia-Pacific)

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO.

190192/10

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 dated

4/5/11

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

**FILED**

APR 07 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/5/11

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.

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

----- X  
VINCENT DRAGONE,

Plaintiff,

-against-

AIR & LIQUID SYSTEMS CORP., et al.,

Defendants.  
----- X

**SHERRY KLEIN HEITLER, J.:**

Index No. 190192/10  
Motion Seq. 003

**DECISION AND ORDER**

**FILED**

**APR 07 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendant Georgia-Pacific, LLC ("Georgia-Pacific") 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 plaintiff Vincent Dragone to recover for personal injuries allegedly caused by his exposure to asbestos-containing joint compound manufactured by the defendant while employed as a laborer in the early 1960's during the construction of five 1964/1965 World's Fair pavilions. Plaintiff was deposed on June 29, July 6, and July 7, 2010. His deposition transcripts are submitted as defendant's exhibit B ("Deposition"). Specifically, plaintiff claims that he was exposed to asbestos from other trades that were sanding Georgia-Pacific joint compound, among other brands, while building the pavilions' walls in preparation for the fair's opening. Plaintiff also testified that he was exposed to asbestos-containing Georgia-Pacific joint compound at other unspecified locations throughout his career.

Georgia-Pacific commenced this motion for summary judgment on the grounds, among

other reasons: that it did not manufacture or sell any asbestos-containing joint compound during the relevant time period; and that Mr. Dragone's allegations regarding his exposure at other unspecified work locations are speculative. In opposition, plaintiff contends that the documentary evidence presents triable issues of fact regarding Georgia-Pacific's production of asbestos-containing joint compound during the relevant time period which preclude summary judgment.

### DISCUSSION

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]. To obtain summary judgment, a movant must establish its cause of action or defense sufficiently to warrant judgment in its favor as a matter of law, and must tender sufficient evidence to demonstrate the absence of any material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR § 3212[b]. Mere boilerplate and conclusory allegations will not suffice. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994].

In a personal injury action arising from a plaintiff's alleged exposure to asbestos or an asbestos-containing material, a plaintiff is required to demonstrate that he was actually exposed to asbestos fibers released from a defendant's product. *Cawein, supra*, 203 AD2d at 106. It is sufficient for plaintiff "to show facts and conditions from which defendant's liability may be reasonably inferred." *Reid, supra*, 212 AD2d 462, 463 [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

\* 4]  
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].

During the construction of the pavilions, Mr. Dragone testified that he was directly exposed to asbestos-containing joint compound manufactured by Georgia-Pacific (Deposition pp. 107-08):

Q: What were you sweeping or cleaning up off the floors at the World's Fair?

A: Well, it would be construction material. Even for the drywall when they sanded the joints went all over the place.

Q: What material was used on the joints that you're referring to?

A: Oh, geez. I believe that was Bondex or Georgia-Pacific.

Q: That particular material, how was it being used in the construction of the new pavilions?

A: It came in five-gallon buckets.

Q: My question was, how was it being used?

A: Well, they would smear it on the drywall, put the tape on and then put more on over the tape and trowel it down.

Q: Who was doing that work?

A: I believe it was the tapers.

Q: Do you believe you were exposed to asbestos from that work?

A: Yes, when they sanded.

Q: How did they go about sanding that material?

A: They had a block and they'd have sandpaper on it with a long pole and they would go up and down on the tape.

Q: Where were you in relation to them?

A: We were in the rooms with them when they were doing it.

The 1964/1965 New York World's Fair was opened to the public in April 1964.

Plaintiff testified that he worked on the pavilions for "over a year and a half, two years" before the fair opened (Deposition p. 271). Defendant argues that Mr. Dragone could not have worked

with Georgia-Pacific manufactured joint compound because it did not begin to manufacture or sell any joint compound until 1965, after the World's Fair opened. In support, defendant relies on the affidavit of Howard A. Schutte, Georgia-Pacific's former Vice President of Strategy and New Product Development, sworn to August 23, 2010 ("Schutte Affidavit"). The affidavit provides, in relevant part, that

Bestwall, which Georgia-Pacific acquired in 1965, manufactured and sold products that contained asbestos . . . beginning in 1956. Georgia-Pacific's Gypsum Division neither sold nor manufactured such products until the Company's acquisition of Bestwall in 1965. . . . After GP's acquisition of Bestwall, Ready Mix joint compound product continued to be branded as "Bestwall Ready Mix Joint Compound" and did not include any reference to Georgia-Pacific whatsoever until late 1965. (Schutte Affidavit ¶ 5-6).

However, defendant provides no documentary evidence to support such conclusory assertions. Defendant relies merely upon Mr. Schutte's offer that his conclusions are "based upon [his] personal knowledge of these matters." *Id.* ¶ 4. In addition, Georgia-Pacific's interrogatory responses (submitted in an unrelated asbestos action) provide that it began to sell its asbestos-containing joint compound during the relevant time period in 1963. (*See Chandler Affirmation in Opposition*, dated January 28, 2011, exhibit 4, p. 10).


To the extent there are discrepancies between Mr. Dragone's deposition testimony and Mr. Schutte's affidavit with regard to the presence of Georgia-Pacific joint compound at the World's Fair construction site, such issues go only to the weight and not the admissibility of Mr. Dragone's testimony, and are best left for resolution at trial. *See Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 [1st Dept 1996]. As such, there are genuine triable issues of fact regarding Mr. Dragone's exposure and Georgia Pacific's liability sufficient to defeat Georgia-Pacific's motion.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: April 5, 2011

  
SHERRY KLEIN HEITLER  
J.S.C.

**FILED**

APR 07 2011

NEW YORK  
COUNTY CLERK'S OFFICE