

Moore v Asbeka Indus. of N.Y.
2011 NY Slip Op 31463(U)
May 27, 2011
Supreme Court, New York County
Docket Number: 190144/09
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHERRY KLEIN HEITLER
Justice

PART 30

ANGELA MOORE, Individually and as executrix of the estate of JOHN F. MOORE

190144/09

Plaintiff,

INDEX NO. 190244/09

- v -

MOTION DATE _____

ASBEKA INDUSTRIES OF NEW YORK, et al.,

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

Defendants.

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

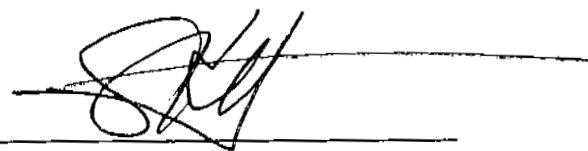
Upon the foregoing papers, it is ORDERED that this motion is decided in accordance with the memorandum decision dated May 27, 2011.

FILED

JUN 03 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5.27.11



SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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. 190314/09
Motion Seq. 004

Plaintiff,

**DECISION AND ORDER
FILED**

-against-

JUN 03 2011

ASBEKA INDUSTRIES OF NEW YORK, et al.,

Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

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

Plaintiff Angela Moore moves pursuant to CPLR § 2221(d) to reargue the prior decision of this court, dated December 21, 2010 and entered December 29, 2010, that among other things granted defendant Gerosa Inc.'s ("Gerosa") motion for summary judgment and dismissed the action and all cross-claims as against it. Plaintiff filed this motion to reargue on the ground that this court overlooked and misapprehended the facts of the case when it held that Gerosa had no duty to warn Mr. Moore of the hazards associated with asbestos. Plaintiff also contends, albeit for the first time on this motion, that Gerosa breached its duty of care when its employees dislodged asbestos from powerhouse equipment to which Mr. Moore was exposed. Gerosa opposes on the ground that this court properly applied the law in finding that plaintiff did not raise any triable issues of fact on the underlying motion. For the reasons set forth below, plaintiff's motion for leave to reargue is denied.

The underlying action was commenced by John Moore and his wife Angela Moore to recover for personal injuries caused by Mr. Moore's alleged exposure to asbestos-containing

products.¹ Mr. Moore testified that he witnessed Gerosa employees rig and transport powerhouse equipment which was insulated with or otherwise comprised of asbestos-containing materials. Mr. Moore alleges that he was exposed to asbestos-containing dust that fell off the powerhouse equipment during this process.

By motion dated April 5, 2010, Gerosa moved for summary judgment on the ground that it never manufactured, distributed, used, or installed any asbestos-containing products to which Mr. Moore was exposed. In opposition, plaintiff argued that Gerosa had a duty to warn of the hazards associated with asbestos even though it did not manufacture asbestos-containing products because Gerosa employees' rigging work caused errant asbestos-containing dust to be released into Mr. Moore's vicinity.

On December 21, 2010, this court granted Gerosa's motion for summary judgment, holding that Gerosa had no duty to warn Mr. Moore of the hazards associated with asbestos because it never manufactured any asbestos-containing products or equipment of any kind. *See Cover v Cohen*, 61 NY2d 261, 275 [1984]; *Berkowitz v AC&S Inc.*, 288 AD2d 148, 148 [1st Dept 2001]. The court reasoned that although Mr. Moore saw Gerosa workers at the various powerhouses in which he worked, he admitted that he never observed Gerosa workers remove asbestos from or apply asbestos to any equipment there. Notwithstanding, on the underlying motion plaintiff asserted that Gerosa employees' work involved the installation of asbestos on boiler equipment, in support of which she submitted the affidavit of Edward Leith (Plaintiffs exhibit D), a former member of the Boilermakers Union who indicated that he worked for Gerosa

¹ 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 exhibit G ("Deposition").

“a number of times” from the 1950's through the 1980's. Mr. Leith affirmed that he applied asbestos on equipment at various Con Edison powerhouses, but never indicated whether he worked at the same time as, or with Mr. Moore, or even in his vicinity.

CPLR § 2221(d) provides that a motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.” While the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to afford an unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted. *See William P. Pahl Equip. Corp.*, 182 AD2d 22, 27 [1st Dept 1992]. A motion to reargue cannot be based on new arguments raised for the first time or a new theory of law not previously advanced. *DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718 [1st Dept 2005].

Plaintiff argues for the first time on this motion to reargue that Gerosa breached its duty of care by causing asbestos fibers to be released into Mr. Moore's vicinity and for the first time cites to cases that plaintiff argues support such a proposition. While plaintiff's amended complaint states that “[e]ach of the defendants, whether acting individually or in concert with others, violated a duty of care owed to plaintiff or plaintiff's decedent or otherwise engaged in culpable activity against plaintiff or plaintiff's decedent,” this theory of liability was not raised, argued, expanded upon, or otherwise addressed in any way in the underlying motion. As set forth above, courts may not consider on reargument new theories of liability not previously raised in the underlying motion. As such, reargument on this issue is improper. *DeSoignies, supra*, 21

AD3d at 718.

Moreover, the court did not misapprehend any facts or misapply the law with regard to the claims made on the underlying motion for summary judgment. The record contains no evidence that Gerosa manufactured or supplied asbestos-containing products and Mr. Moore testified that he never observed Gerosa employees install or remove asbestos-containing insulation from powerhouse equipment in his presence.

Accordingly, it is hereby

ORDERED that plaintiff's motion for leave to reargue its motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: May 27, 2011


SHERRY KLEIN HEITLER
J.S.C.

FILED

JUN 03 2011

NEW YORK
COUNTY CLERK'S OFFICE