

Cotrona v CBS Corp.
2011 NY Slip Op 32113(U)
July 27, 2011
Sup Ct, NY County
Docket Number: 190403/10
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 : 190403/2010

COTRONA, COSIMO

INDEX NO. 190403/10

vs

A.O. SMITH WATER PRODUCTS

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. 002

SUMMARY JUDGMENT

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

FILED

Cross-Motion: Yes No

AUG 02 2011

Upon the foregoing papers, It is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

is decided in accordance with the
memorandum decision dated 7-27-11

Dated: 7-27-11

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

COSIMO COTRONA,

Index No. 190403/10
Motion Seq. 002

Plaintiff,

DECISION AND ORDER

-against-

CBS CORPORATION, f/k/a VIACOM INC.,
successor by merger to CBS CORPORATION, f/k/a
WESTINGHOUSE ELECTRIC CO., et al.,

FILED

AUG 02 2011

Defendants.

----- X

SHERRY KLEIN HEITLER, J.:

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 cross-claims asserted against it. For the reasons set forth below, the motion is denied.

BACKGROUND

This action was commenced by plaintiff Cosimo Cotrona to recover for personal injuries allegedly caused by his exposure to, among other things, asbestos-containing joint compound manufactured by defendant Georgia-Pacific.¹ Mr. Cotrona testified that he was employed as a carpenter for several different construction contractors from 1969, shortly after he first immigrated to the United States from Italy, until his retirement in 1996. As a carpenter, plaintiff was required to install sheetrock and apply and sand down joint compound. Mr. Cotrona testified that he was exposed to asbestos when he breathed the dust that resulted from such activities.

¹ Mr. Cotrona was diagnosed with mesothelioma in August 2010. He passed away from the disease in March of 2011. Mr. Cotrona was deposed in this action over the course of three days on November 1, 2010, November 2, 2010 and January 4, 2011. His deposition transcripts are submitted as plaintiff’s exhibit 1 (“Deposition”).

Georgia-Pacific asserts that Mr. Cotrona could not have worked with asbestos-containing Georgia-Pacific joint compound in light of his testimony that he worked with Georgia-Pacific joint compound in the 1980's and 1990's, three years after Georgia-Pacific ceased the manufacture and sale of all asbestos-containing joint compound in 1977. In opposition, plaintiff argues that Mr. Cotrona's testimony presents triable issues of fact as to whether he worked with asbestos-containing Georgia-Pacific joint compound well prior to 1977, sufficient to defeat 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); *Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528 (1st Dept 2002). 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. *See 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, such plaintiff is required to demonstrate that he was actually exposed to asbestos fibers released from a particular defendant's product. *Cawein, supra*, 203 AD2d at 105. The plaintiff is required "to show facts and conditions from which defendants' liability may reasonably be inferred." *Reid, supra*, 212 AD2d at 462.

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).

Here, Georgia-Pacific relies on Mr. Cotrona's deposition testimony and Social Security records in order to establish that he did not work with asbestos-containing Georgia-Pacific joint compound. Mr. Cotrona's deposition testimony identifies four different contractors for whom he worked throughout his career; "Ale," "Frank Horse," SPG Contracting Ltd. and Giurdanella Brothers Inc. According to Georgia-Pacific, Mr. Cotrona testified to using Georgia Pacific joint compound only while employed by SPG and Giurdanella. His Social Security records show that he worked for SPG from 1982 to 1988 and for Giurdanella from 1988 to 1991. It is undisputed that Georgia-Pacific ceased the manufacture and sale of asbestos-containing joint compound in 1977. This, according to defendant, establishes that Mr. Cotrona was mistaken as to the contents of the joint compound to which he was exposed and could have only worked with an asbestos-free product during his time with SPG and Giurdanella.

While concededly Georgia-Pacific stopped manufacturing and selling asbestos-containing joint compound in 1977, the plaintiff asserts that Mr. Cotrona worked with Georgia-Pacific asbestos-containing joint compound as early as 1969 and well into the 1970s. Upon plaintiff's counsel's examination of Mr. Cotrona his testimony was: (Deposition pp. 374-76 [objections omitted]):

Q: Mr. Cotrona, I just have a few questions for you, okay? And some of them you may have already answered but just bear with me, okay? What year did you start working as a carpenter?

A: '79 -- '69, '70.

Q: When you started in 1969, what were your job duties?

A: Carpenter, carpenter.

Q: What did you do?

A: I used to install doors, do partitions, sheetrock and compound.

Q: And did you work with floor tiles?

A: No, at that time, no.

Q: When you started in 1969, do you remember the joint compounds that you worked with in general?

Q: In general.

THE INTERPRETER: In '69 you said, right?

MS. BRANDIS: In general.

THE INTERPRETER: Now I lost the question. The compound?

MS BRANDIS: Manufacturers that he worked with at the beginning of his career.

A: Georgia Pacific, UGL.

Q: Any others?

A: Georgia Pacific....

Q: So, when you first began as a carpenter you worked with Georgia-Pacific, Johns-Manville, UGL and Paco, are there any others?

A: Yes.

Q: Are there any others that you recall?

A: No, I don't recall.

Q: Do you recall using these joint compounds throughout the 1970's?

A: Yeah, I would use that, I use that.

While Mr. Cotrona did not specifically testify that he worked with Georgia Pacific joint compound while employed at "Ale" or "Frank Horse," his Social Security records show that he worked for at least nine contracting companies other than SPG and Giurdanella before 1977. Mr. Cotrona testified that he worked for companies whose names he did not recall, and that he was exposed to asbestos while performing the same type of work as when he was employed by SPG and Giurdanella. (Deposition, p. 378). When given the opportunity during cross-examination, the defendant did not seek to have Mr. Cotrona clarify that testimony. Therefore, there are issues of fact concerning whether Mr. Cotrona was exposed to asbestos-containing Georgia Pacific joint compound before 1977.

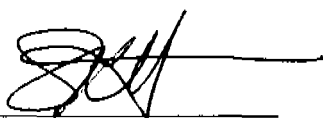
In light of the inconsistency alleged in his testimony on this material issue, the court must deny Georgia-Pacific's motion. *See Schachat v Bell Atlantic*, 282 AD2d 329, 330 (1st Dept 2001) (summary judgment denied when there is inconsistent deposition testimony); *Gonzales v Anglebrook Ltd. Partnership*, 280 AD2d 452, 452 (2d Dept 2001) (where there is contradictory deposition testimony there is an issue of fact to be determined by the jury); *Aslam v Weiss*, 308 AD2d 426, 427 (2d Dept 2003) (inconsistent deposition testimony precludes summary judgment).

Accordingly, it is hereby

ORDERED that Georgia-Pacific LLC's motion for summary judgment is denied.

This constitutes the decision and order of the Court.

DATED: July 27, 2011


 SHERRY KLEIN HEITLER
 J.S.C.

FILED

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