

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

2011 NY Slip Op 32743(U)

October 4, 2011

Supreme Court, New York County

Docket Number: 190411/2010

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 : 190411/2010

FOLEY, PATRICIA A.

VS.

A.O. SMITH WATER PRODUCTS

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. 190411/10

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

FILED PAPERS NUMBERED _____

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

Answering Affidavits — Exhibits _____

OCT 12 2011

Replying Affidavits _____

Cross-Motion: Yes No

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion *is denied*

*As per the memo discussion
of 10-4-11.*

Dated: 10-4-11



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
PATRICIA A. FOLEY and THOMAS FOLEY,

Plaintiffs,

Index No.: 190411/10
Motion Seq. 001

-against-

DECISION AND ORDER

A.O. SMITH WATER PRODUCTS CO., et al.,

FILED

Defendants.

OCT 12 2011

----- X

SHERRY KLEIN HEITLER, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendant OAKFABCO, INC. ("Oakfabco") 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 granted.

BACKGROUND

This action was commenced by plaintiffs Patricia A. Foley and her husband, Thomas Foley, to recover for personal injuries allegedly caused by Mrs. Foley's exposure to asbestos while laundering her husband's clothing during his career as a laborer and boilermaker. Mr. Foley was deposed on January 4, 2011 and his deposition transcript is submitted as defendant's exhibit B ("Deposition"). Mr. Foley testified that from 1967 to 1974 he worked as a laborer and boilermaker for A. Wagner & Sons in numerous locations including Pilgrim State Hospital in Long Island; Ledley Labs in Pearl River, New York; Indian Point Nuclear Power Plant in New York; Hudson Avenue Power Plant in Brooklyn, New York; West Point; and various public schools in the Bronx and Manhattan.

With regard to this defendant, Mr. Foley testified that he was exposed to asbestos in

connection with his work on industrial boilers, including Kewanee boilers. It is undisputed that Oakfabco acquired Kewanee's boiler division by virtue of a 1970 asset purchase agreement. *See American Std., Inc v Oakfabco, Inc.*, 58 AD3d 485 (1st Dept 2010). Mr. Foley testified that such work caused asbestos dust to settle on his clothes, which his wife laundered. According to Mr. Foley, such activities led her to be exposed to asbestos as well.

On this motion for summary judgment, defendant Oakfabco argues that while Mr. Foley heard the name "Kewanee" while working at A. Wagner & Sons, he can not recall whether he ever saw or worked with a Kewanee Boiler, whether any other employee worked on a Kewanee boiler in his presence, or if asbestos was installed or maintained on a Kewanee boiler in his presence. In opposition, plaintiffs contends that defendant has not made a *prima facie* showing of entitlement to summary judgment, and, in any event, Mr. Foley's deposition testimony raises issues of fact as to Oakfabco's liability which preclude summary judgment.

DISCUSSION

CPLR § 3212(b) provides, in relevant part, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." *See also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980) ("[o]ne opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.") (citation omitted).

In asbestos-related litigation, once the movant has made a *prima facie* showing of entitlement to summary judgment, the plaintiff must then demonstrate that he was exposed to asbestos fibers released from a particular defendant's product. *See Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994); *see also Diel v Flintkote Co.*, 204 AD2d 53, 54 (1st Dept 1994) (“[I]n order to succeed on their claim, the plaintiffs had to establish that the decedent was exposed to the defendant's product and that it was more likely than not that this exposure was a substantial factor in his injury.”).

Here, Oakfabco has made a *prima facie* case of plaintiffs' failure to sufficiently identify any of its products as a source of Mr. Foley's exposure. Construing the evidence in the light most favorable to plaintiffs, they have failed to produce a triable issue of fact. *See Henderson v City of New York*, 178 AD2d 129 (1st Dept 1991). While Mr. Foley did recall hearing the name Kewanee during his employment as a boilermaker, he could not recall whether he saw or worked with a Kewanee boiler, or if any of his co-workers installed or maintained a Kewanee boiler in his presence. (Deposition pp. 72, 127- 29) (objections omitted):

Q: I want to know if you know the brand name, trade name or manufacturer name of any of the boilers that you worked with or around while you were employed by Wagner & Sons?

A: It would be Bryant, American Standard, Cleaver Brooks, Kewanee, Reilly Stoker, AO Smith, Crown, Keeler, Peerless, Federal, Utica, Burnham, Weil-McLain. I think that's it.

Q: Is the name Kewanee a name you heard at Wagner & Sons?

A: Yes, it is.

Q: Do you specifically recall seeing a Kewanee boiler?

A: I don't specifically recall.

Q: So if I were to ask you for a description of the boiler you could not give me one, correct?

A: No.

Q: Could you tell me what type of boiler it would be?

A: No.

Q: You wouldn't know the type of job site where you heard the name Kewanee, would you?

A: No.

Q: Do you know if anyone worked on a Kewanee boiler in your presence?

A: I have no idea.

Q: Do you specifically recall working on a Kewanee boiler?

A: No.

Q: As you sit here today, you don't know one way or the other whether asbestos was utilized on a Kewanee boiler; is that correct?

A: No.

While plaintiffs are not required to show the precise causes of their damages, they are required to show facts and conditions from which defendant's liability may be reasonably inferred. *Reid v Georgia-Pac., Corp.*, 212 AD2d 462, 463 (1st Dept 1995). In addition to the speculative nature of the testimony, plaintiffs have also failed to present any documentary evidence in support of their position. As such, there is no evidence that Mr. Foley was exposed to asbestos in any way from a Kewanee boiler. Accordingly, plaintiffs have failed to meet their burden of proof and summary judgment is appropriate. *See Cawein, supra*, 203 AD2d at 106; *see also Diel, supra*, 204 AD2d at 54.

Accordingly, it is hereby

ORDERED that OAKFABCO, INC.'s motion for summary judgment is granted, and that this action against OAKFABCO, INC., and any cross-claims related to this defendant are severed

and dismissed; and it is further

ORDERED that the remainder of this action shall continue as against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

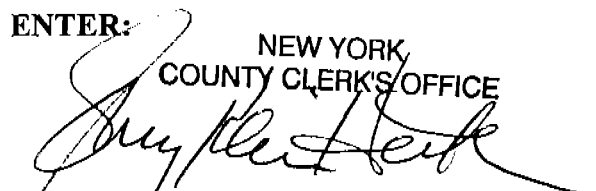
This constitutes the decision and order of the court.

FILED

OCT 12 2011

ENTER:

NEW YORK
COUNTY CLERK'S OFFICE



SHERRY KLEIN HEITLER
J.S.C.

DATED:

October 4, 2011