

Bickel v Air & Liquid Sys.Corp.
2011 NY Slip Op 33187(U)
December 7, 2011
Sup Ct, NY County
Docket Number: 190311/10
Judge: Sherry Klein Heitler
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IN RE: ESTATE OF HEITLER
 Index Number : 190311/2010
BICKEL, ALVIN
 vs.
AIR & LIQUID SYSTEMS
 SEQUENCE NUMBER : 003
 SUMMARY JUDGMENT

**STATE OF NEW YORK
 COUNTY**

Justice

PART 30

INDEX NO. 190311/10

MOTION DATE _____

MOTION SEQ. NO. 003

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

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

*As per the memo decision
 of 12-7-11*

FILED
 DEC 12 2011
 COUNTY CLERK'S OFFICE
 NEW YORK

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

Dated: 12-7-11

[Signature] J.S.C.

HON. SHERRY KLEIN HEITLER

1. CHECK ONE: ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

----- X
ALVIN BICKEL and MARIAN BICKEL,

Plaintiffs,

- against -

AIR & LIQUID SYSTEMS CORP. AS SUCCESSOR
BY MERGER TO BUFFALO PUMPS, INC., et al.

Defendants.
----- X

SHERY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant Aurora Pump Company (hereinafter, "Aurora") 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

Plaintiff Alvin Bickel served in the U.S. Navy from 1960 to 1964 as a gunner's mate aboard the USS Lake Champlain and USS Constellation and testified on October 13, 2010 ("Deposition") that he was exposed to asbestos in different locations aboard both ships. Mr. Bickel's primary responsibilities included chipping paint, moving equipment, and maintaining bomb elevators. Though he did not work directly on any mechanical equipment, plaintiffs claim that Mr. Bickel was exposed to asbestos from insulation that was installed on and used to maintain such equipment, namely valves, pumps, and boilers.

Aurora filed this motion for summary judgment on the ground that Mr. Bickel did not identify any product manufactured by it as a source of his exposure. Aurora argues that any circumstantial evidence showing that its pumps were manufactured for use aboard the USS

Constellation is insufficient to establish a time and place connection between Mr. Bickel and Aurora equipment so as to raise questions as to its liability herein. In opposition, plaintiff argues that there is sufficient documentary evidence to show that Aurora pumps were present onboard the USS Constellation and as such triable issues of fact exist with regard to Aurora's liability.

DISCUSSION

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, and must tender sufficient evidence to demonstrate the absence of any material issue of fact. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980) CPLR § 3212(b). In asbestos-related litigation, once the movant has made a *prima facie* showing of entitlement to summary judgment, the plaintiff must then demonstrate actual exposure to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). 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 Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995).

In this case, Aurora has made a *prima facie* showing of its entitlement to summary judgment by demonstrating that Mr. Bickel failed to identify any of its products as a source of his exposure. Nevertheless, plaintiffs have met their burden by, among other things, producing "plant load reports" which indicate that a large number of Aurora pumps were installed aboard the USS Constellation, including (but not limited to) "fuel aviation," "fuel aviation seawater," and "heavy end aviation fuel" pumps. This, in conjunction with Mr. Bickel's testimony that he was exposed to asbestos from pumps being dismantled in the engine rooms in his presence is

sufficient to raise a question of fact regarding his exposure from Aurora pumps aboard the USS Constellation. See *Henderson v City of New York*, 178 AD2d 129 (1st Dept 1991).

In this regard, Mr. Bickel testified as follows (Deposition, pp. 62-66, 157-58, objections omitted):

Q. During the time that you were on board the USS Constellation, do you believe that you were exposed to asbestos?

A. Yes.

Q. Did you personally, handle any products on board the Constellation?

A. No.

Q. How do you believe you were exposed?

A. Again, just being in the air.

* * * *

Q. ...[D]o you believe that you were exposed to asbestos as a result of any other asbestos-containing products on board the Constellation?

A. I traveled on occasion down in the engine room compartments, again, both interfaced with electricians. I would describe work to them, and just traveling through the area, exploring it.

* * * *

Q. Can you tell me specifically what products were believe you were exposed to in the engine room?

A. Again, it was the insulation asbestos that was insulating the motors, the pumps and boys doing maintenance on all that stuff.

* * * *

Q. When you went down to those [engine] areas, did you see the men working down there?

A. Yes.

Q. What were they doing?

A. They were mainly working on motors. I mean, pumps and the boilers and all different things, types of things, valves. You know, at different times there were different things they were working on.

In light of the testimony, this court finds Judge Freedman's holding in *McKeon v A.W.*

Chesterton, et al., Index No. 113240/05 (Sup. Ct. NY Cty. Dec. 15, 2006, n.o.r.) to be highly persuasive. In that case, plaintiff Joseph McKeon served as a rigger who worked in the vicinity of steamfitters. Like Mr. Bickel, Mr. McKeon failed to identify Aurora pumps as a source of his exposure. However, the court denied summary judgment, finding that as there were “at least 38 Aurora pumps” aboard the USS Constellation there was sufficient circumstantial evidence to raise triable issues of fact. Here, as in *McKeon*, there is a reasonable inference that Mr. Bickel was exposed to Aurora pumps that were present in the USS Constellation engine rooms. See *McKeon, supra*; see also *Reid v Georgia Pacific Corp.*, 212 AD2d at 463.

At the same time, Aurora’s reliance on *D’Amico v Manufacturers Hanover Trust Co.*, 173 AD2d 263, 266 (1st Dept 1991) is misplaced. In that case, the court granted the defendant summary judgment because it could not determine the manufacturer of a ladder as between two different companies. The court held that there was simply no “documentary proof whatsoever that might permit a reasoned inference that [the defendant] was the manufacturer of the ladder.” *Id.* Here, for one, the court is not being asked to choose between two competing products as the source of Mr. Bickel’s exposure. Indeed, the record contains no evidence that a manufacturer other than Aurora had its pumps installed aboard the USS Constellation. Moreover, it is undisputed that many Aurora pumps were present aboard that ship, thus giving rise to a reasonable inference that the defendant manufactured at least some of the pumps Mr. Bickel saw being worked on in his presence and which caused him to be exposed to asbestos.

This court’s decision in *Diglio v A.W. Chesterton Co.*, Index No. 190166/10 (Sup. Ct. N.Y. Cty. Aug. 9, 2011, n.o.r.) is also inapposite. In that case, the court held that even though the record may have been sufficient to place defendant’s asbestos-containing products at the

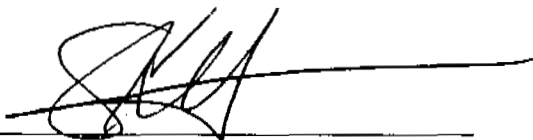
plaintiff's job site, this was not sufficient to show that the plaintiff was exposed to asbestos therefrom. Mr. Bickel, on the other hand, testified that he traversed the engine rooms where he interfaced with other maintenance workers, including electricians, and specifically identified the insulation on the engine room pumps as a source of his asbestos exposure.

Inasmuch as plaintiffs have met their burden of proof, summary judgment is inappropriate. *See Cawein, supra; Henderson, supra.* Accordingly, it is hereby

ORDERED that Aurora Pump Company's motion for summary judgment is denied

This constitutes the decision and order of the court.

DATED: December 7, 2011


SHERRY KLEIN HEITLER
J.S.C.

FILED
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