

Malaney v A.C.&S., Inc.
2011 NY Slip Op 33467(U)
December 9, 2011
Sup Ct, NY County
Docket Number: 107492/00
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

Justice

Index Number : 107492/2000
MALANEY, ANGELA
VS.
A.C. AND S., INC
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 107492/00
MOTION DATE _____
MOTION SEQ. NO. 001

(Goodyear)

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

decided
as per the decision
of 12-9-11

FILED

DEC 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 12-9-11

SKH 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
ANGELA MALANEY, as Executrix for the Estate of
JERRY MALANEY,

Index No. 107492/00
Motion Seq. 001

Plaintiff,

DECISION AND ORDER

-against-

A.C. & S., INC., et al.,

FILED

Defendants.

DEC 19 2011

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

NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendants Goodyear Tire & Rubber Company and Goodyear Canada, Inc. (collectively, "Goodyear") move pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all other claims asserted against it. For the reasons set forth below, Goodyear's motion is granted.

BACKGROUND

This action was commenced by Jerry E. Malaney, now deceased, to recover for personal injuries allegedly caused by his occupational exposure to a myriad of asbestos-containing products during the 1960's and 1970's. Plaintiff produced for deposition Mr. Robert Shively, who testified on June 16, 2010 with respect to the time he worked with Mr. Malaney at the Hooker Chemical plant in Niagara Falls, New York.¹ Mr. Shively alleged that he and the decedent were exposed to a number of different asbestos-containing products and equipment, including gaskets, pumps, valves, and insulation materials. Relevant to this motion is Mr. Shively's claim that the decedent was exposed to asbestos from preformed gaskets manufactured by defendant Goodyear.

¹ Mr. Shively's deposition transcript is submitted as defendant's exhibit B ("Deposition").

On this motion, Goodyear argues that it is entitled to summary judgment because Mr. Shively alleged that plaintiff's decedent was exposed to asbestos from asbestos-containing preformed gaskets, a product it never manufactured or sold. As such, defendant submits that plaintiff's decedent could not have been exposed to asbestos fibers released from a Goodyear product. In opposition, plaintiff argues that Mr. Shively's testimony raises issues of fact as to the decedent's exposure to Goodyear gaskets sufficient to preclude summary judgment.

DISCUSSION

In order 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 issues of fact. *See Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR § 3212(b). Once the movant has made a *prima facie* showing, a plaintiff is then required to demonstrate that he was actually exposed to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994]. The plaintiff is 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]. Mere boilerplate and conclusory allegations will not suffice. *Cawein, supra*, 203 AD2d at 105.

Goodyear submits, and plaintiff does not dispute, that the company never manufactured or sold asbestos-containing preformed gaskets. *Cf. Fiore v A.O. Smith*, Index No. 116446/04 (Sup. Ct. NY Cty. May 17, 2005, n.o.r.) (plaintiff's deposition testimony that he was exposed to asbestos-containing preformed gaskets manufactured by Goodyear is incredible as a matter of law). The only question, therefore, is whether Mr. Shively's testimony raises a material issue of fact as to whether the decedent was exposed to asbestos-containing Goodyear sheet gaskets, which Goodyear concedes that it produced

during the relevant time period.

While Mr. Shively's testimony regarding Goodyear is limited, it is nonetheless plain and unequivocal that the Goodyear gaskets as to which he testified were preformed (Deposition pp. 118-21, 138-39):

Q: All right. So now you mentioned the gasket material. What was the -- what did the gasket material look like?

A: It was in a sheet. And it come in different thicknesses, from, like, an eighth inch up to five-sixteenths. And Chesterton was written on it.

And then there was another one from Goodyear. Goodyear mostly was the formed gaskets.

Q: Preformed?

A: Yes.

Q: And what was the Chesterton material?

A: It was a sheet.

* * * *

Q: And where were the Garlock asbestos-containing gaskets used?

A: Well, if you're on midnight shift and you are replacing the gasket, you get whatever gasket you can get to go into the pipeline. So it could have been Garlock, Goodyear, whatever. There was no definite: You use Garlock in this pipeline and Goodyear on that pipeline. They were --

Q: Interchangeable?

A: Interchangeable, yes.

* * * *

Q: So out of the 10 to 20 times that Mr. Malaney preformed work in contact with gaskets, what percentage involved using a preformed gasket and what percentage involved cutting a new piece?

A: I would say 90 percent of the time we had the performed gaskets.

Q: And you identified that there were different manufacturers of gaskets that Mr. Malaney would have been in contact with. Of those were there different - strike that. Let me rephrase that. Were there different manufacturers of the preformed gaskets?

A: Yes.

Q: And who were the different manufacturers of preformed gaskets?

- A: Conselco, Goodyear, and I had forgotten about Garlock gaskets. They were all preformed.
- Q: And were there different manufacturers of the gaskets that you had to cut?
- A: Chesterton was the one that I remember.
- Q: So the other three that you mentioned, is it Conselco?
- A: Yes.
- Q: Goodyear and Garlock, those were strictly the preformed gaskets?
- A: Correct.

Plaintiff's contention that Mr. Shively's testimony is somehow contradictory is without merit. Taken in context, nowhere in his deposition does Mr. Shively testify that he worked with or was otherwise exposed to sheet gaskets manufactured by Goodyear, nor can such be reasonably inferred from the record. In fact, as set forth above, Mr. Shively's testimony that the gaskets he associated with Goodyear were preformed is unequivocal. As such, plaintiff has failed to raise an issue of fact sufficient to defeat Goodyear's motion.

Accordingly, it is hereby

ORDERED that the motions by the Goodyear Tire & Rubber Company and Goodyear Canada, Inc. are granted, and this action and any cross-claims against these defendants are dismissed in their entirety; and it is further

ORDERED that 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.

DATED: December 9, 2011


 SHERRY KLEIN HEITLER
 J.S.C.

FILED

DEC 19 2011

NEW YORK
 COUNTY CLERK'S OFFICE