

<b>Finazzo v A.O. Smith Water Prods. Co.</b>
2011 NY Slip Op 33504(U)
December 19, 2011
Supreme Court, New York County
Docket Number: 190129/2011
Judge: Sherry Klein Heitler
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER  
Justice

PART 30

Index Number : 190129/2011

FINAZZO, SALVATORE

vs.

A.O. SMITH WATER PRODUCTS

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

*(Georgia-Pacific)*

INDEX NO. 190129/11

MOTION DATE 11-22-11

MOTION SEQ. NO. 002

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for S.J.

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 in accordance with memorandum decision of even date, accepted.*

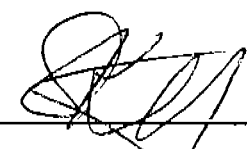
## FILED

JAN 04 2012

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 12-19-11

 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  
SALVATORE FINAZZO,

Index No. 190129/11  
Motion Seq. 002

Plaintiff,

**DECISION AND ORDER**

-against-

**FILED**

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

JAN 04 2012

Defendants.

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

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff Salvatore Finazzo commenced this action to recover for personal injuries alleged to have been caused by his occupational exposure to asbestos-containing products. Mr. Finazzo, who suffers from malignant mesothelioma, was deposed over a period of five days in June, 2011<sup>1</sup>. He testified that he spent the majority of his 40-year career (1953-1993) working as an electrician for various companies at various worksites. He alleges that he was exposed to asbestos from working with or around, roofing equipment, cement, brakes, gaskets, piping equipment, tiles and boilers, among other things. Relevant to this motion is his claim that he encountered spacklers who worked with asbestos-containing Georgia-Pacific joint compound or spackle in his presence during the period 1958 to 1983 when he worked for an electrical contractor called M. Eisenberg & Bros.. Georgia-Pacific moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff's action and all cross claims against it on the ground that plaintiff's claims of exposure to its product are, at best, speculative.

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<sup>1</sup>The transcripts of plaintiff's deposition testimony are annexed as Exhibits B through F to defendant's moving papers.

In an asbestos personal injury action, a plaintiff must demonstrate that he was exposed to asbestos fibers released from the defendant's product (*Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994]), and that it was more likely than not that such exposure was a substantial factor in his injury (*Diel v Flintkote Co.*, 204 AD2d 53, 54 [1st Dept 1994]).

In this case, plaintiff Salvatore Finazzo's evidence does not support a conclusion, or even an inference (*see, Reid v Georgia Pacific Corp.*, 212 AD2d 462, 462 [1st Dept 1995]) that he was exposed to asbestos from a Georgia-Pacific product. While Mr. Finazzo generally testified to the use of Georgia-Pacific joint compound or the like in his presence while he worked for Eisenberg, he was unable to establish where or when during that time that such encounters would have occurred. One example of plaintiff's equivocal testimony on the issue may be found in defendant's Exhibit B, pp. 281-293 (emphasis added):

Q. Sir, did you ever work at a Macy's store in Kings Plaza?

A. Yes.

\* \* \* \*

Q. Were you assigned to work on this new construction once or more than once?

A. Well, I was on that job for quite a while.

Q. And how long was that, sir?

A. Maybe a year and a couple of months.

Q. And you were sent there by M. Eisenberg?

A. Yes.

Q. Do you recall, if not the year, the decade that Macy's was constructed?

A. *Could have been in the 60's but I'm not sure of that.*

\* \* \* \*

4]

Q. You also testified that sheetrockers and spacklers worked on site. Do you associate a particular manufacturer's name with the sheetrock at the Macy's site?

A. I would say US Gypsum *and possibly Georgia-Pacific with the spackling at times.*

Q. It's not clear, sir. With which product do you associate the name US Gypsum.

A. Yes.

Q. Which product?

A. Mostly was US Gypsum that I saw.

\* \* \* \*

Q. Is there a name that you associate specifically with just the spackle or the joint compound at this particular site?

A. *Well, the reason why I mention the Georgia-Pacific, because I know I was on a job that had that spackling on the jobs but I can't say it was the Macy's job or this job or that job. But in most cases it was US Gypsum.*<sup>2</sup>

The information elicited therein is crucial given that Georgia Pacific's allegations, undisputed on this motion, are that it did not manufacture the subject asbestos-containing products until 1965, that it produced both asbestos and non-asbestos containing products from 1973-1977, and that it ceased to manufacture asbestos-containing products altogether in 1977. Because Mr. Finazzo could only speculate as to the times or places during which he may have been exposed to Georgia Pacific products, and because there is no corroborative evidence presented on this motion to assist in establishing such crucial information (for instance, evidence that might establish the date or dates of new construction at the Kings Plaza Macy's and/or other sites) there are no facts submitted herein from which a jury could infer, without speculation, that Mr. Finazzo encountered

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<sup>2</sup>Mr. Finazzo's testimony in this regard concerning his other job sites is similarly equivocal.

and was exposed to an asbestos-containing Georgia-Pacific product. (*See, Cawein v Flintkote Co., supra; Diel v Flintkote Co., supra; Reid v Georgia Pacific Corp., supra.*)

Plaintiff's reliance on this court's decision in *Galen v Air & Liquid Systems Corp., et al.*, Index No. 190335-2010 (S. Ct. NY Co., August 23, 2011, Heitler, J.) is misplaced. Unlike the case at bar, the plaintiff in *Galen*, who was a building inspector, unequivocally "testified that he saw 'lots of bags of Georgia-Pacific...all over'" at the diverse sites in Manhattan which he inspected, and he not only could identify the time frames during which his exposure occurred, which coincided with the time frames as to which Georgia Pacific concedes it provided asbestos containing products, but he also was able to unequivocally identify the buildings that he inspected during such time frames and to the common use of Georgia Pacific's product "in the new construction and renovations of the buildings into which it was his duty to inquire" as such building inspector (*see, Galen, supra, at 1, 2*).

Accordingly, it is hereby

ORDERED that Georgia-Pacific, LLC's motion for summary judgment is granted, and this action and any cross-claims against Georgia-Pacific are hereby severed and dismissed in their entirety; and it is further

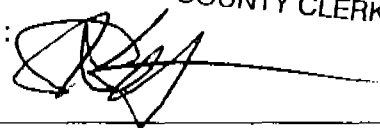
ORDERED that this action shall continue as against all the remaining defendants herein; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly

This constitutes the decision and order of the court.

DATED: 12-19-11

ENTER:



SHERRY KLEIN HEITLER, J.S.C.

**FILED**

JAN 04 2012

NEW YORK  
COUNTY CLERK'S OFFICE