

Bickel v Air & Liquid Sys. Corp.

2012 NY Slip Op 31609(U)

June 14, 2012

Sup Ct, New York County

Docket Number: 190311/10

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

Index Number : 190311/2010
BICKEL, ALVIN
vs.
AIR & LIQUID SYSTEMS
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. 190311/10
MOTION DATE _____
MOTION SEQ. NO. 004

(Carroll)

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 decided in accordance with the memorandum decision dated

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

FILED

JUN 18 2012

NEW YORK COUNTY CLERK'S OFFICE

J.S.C.

Dated: 6.14.12

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
MARIAN BICKEL, as Executrix for the Estate of ALVIN
BICKEL, and MARIAN BICKEL, Individually,

Index No. 190311/10
Motion Seq. 004

Plaintiff,

DECISION & ORDER

- against -

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

FILED

Defendants.

JUN 18 2012

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

NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendant Gardner Denver Inc. (hereinafter, "Gardner") 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 granted.

BACKGROUND

In or about August of 2010, plaintiff's decedent Mr. Alvin Bickel and his wife Marian Bickel commenced this action to recover for personal injuries caused by Mr. Bickel's exposure to asbestos. Mr. Bickel was deposed on October 13, 2010.¹ He testified that he served in the United States Navy from 1960 to 1964 as a gunner's mate aboard the USS Lake Champlain and aboard the USS Constellation and 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, Mr. Bickel testified that he was exposed to asbestos from insulation that was installed on and used to

¹ A copy of his deposition transcript is submitted as defendant's exhibit D ("Deposition").

maintain such equipment, namely valves, pumps, and boilers.

Gardner filed this motion for summary judgment on the ground that Mr. Bickel did not specifically identify any product manufactured, distributed, sold, or installed by it as a source of his exposure. In opposition, plaintiff argues that there is sufficient evidence to show that Gardner pumps were present onboard the USS Lake Champlain and as such triable issues of fact exist with regard to Gardner's liability. Gardner replies that without more, the circumstantial evidence relied on by plaintiff does not create a sufficient nexus between the decedent and Gardner equipment so as to infer any liability herein.

DISCUSSION

A party moving for summary judgment must 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, if a defendant has made a *prima facie* showing of entitlement to summary judgment, the plaintiff must demonstrate that there was exposure to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this respect, the plaintiff must show facts and conditions from which a defendant's liability may be reasonably inferred, although not necessarily the precise cause of damages. *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995).

In this case Gardner has made a *prima facie* showing of its entitlement to summary judgment by demonstrating that Mr. Bickel did not identify any of its products as a source of his exposure. The plaintiff's attempt to rebut this charge cannot succeed because the evidence produced does nothing to demonstrate that Mr. Bickel was exposed to asbestos from, or was even in the presence of, Gardner pumps while aboard the USS Lake Champlain or the USS Constellation.

At his Deposition, Mr. Bickel testified that he was exposed to asbestos while observing the repair of pumps in the engine room of the USS Lake Champlain. (Deposition, pp. 45 - 48):

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

A. Well, when I traveled throughout the ship, there was always dust in the air.

Q. Can you be any more specific, other than that?

A. No, not really. I've been in the areas down in the engine room and such as that, and other parts of the ship where they've taken the asbestos, you know, taken the pipes apart and had it laying around, and it was definitely heavily in the air at that time.

Q. You said they had it laying around, they were taking it apart. Are you referring to the pipe covering that we were talking about?

A. Yes, there was pipe covering. There was one place I passed, they had the pumps all taken apart. That was a real mess.

* * * *

Q. These pumps that were all taken apart, are you able to tell me the brand name, trade name, or manufacturer name of those pumps?

A. No, that wasn't my expertise. I was just exploring.

Q. Can you tell me what kind of pumps they were?

A. The only thing I can tell you is there's electric motors hooked to them. I would imagine there's some kind of cooling pump or heating pump or steam lines. It wouldn't have been steam because it's hooked to an electric motor. I've seen a lot of, you know, those sitting around.

* * * *

Q. Are you able to give me physical description of the pumps? By 'physical description,' I mean, dimension, size, shape?

A. I can tell you it was hooked to big motors, some of them hooked to little motors. That's the only thing I could tell you.

Q. Electric motors, correct?

A. Yeah. Looking back, I had no expertise. You know what I'm saying?

Notably, Mr. Bickel's description of the pumps he saw does not comport with the documentary evidence that plaintiff has produced upon on this motion. To support its claims of exposure by reason of Gardner pumps, plaintiff has produced a single undated U.S. Navy record entitled "Data of Pumps, Blowers, and Compressors," which merely shows that two Gardner-brand diesel-driven fire pumps at some point were installed aboard the USS Lake Champlain. This document is significant in several respects. It shows that the Gardner-brand pumps aboard the USS Champlain were diesel-driven, not electric powered as to which Mr. Bickel consistently

testified. Further, it does not show the years in which these pumps were ordered nor where or when on the ship they were installed. Most critically, it is the only evidence submitted by the plaintiff that identifies the defendant Gardner by name.

To hold Gardner liable for personal injury due to asbestos exposure, the plaintiff must demonstrate that Gardner's product was a source of the decedent's asbestos exposure. *See Cawein, supra.* Upon consideration of the entire record herein, this has not been done. On this record no reasonable inference can be drawn that Mr. Bickel was exposed to Gardner diesel-driven pumps aboard the USS Lake Champlain. *Id.; see also Reid, supra.*

Accordingly, it is hereby

ORDERED that Gardner Denver Inc.'s motion for summary judgment is granted, and this action and any cross-claims as against this defendant are severed and dismissed in their entirety, and it is further

ORDERED that this case shall continue against the remaining defendants, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

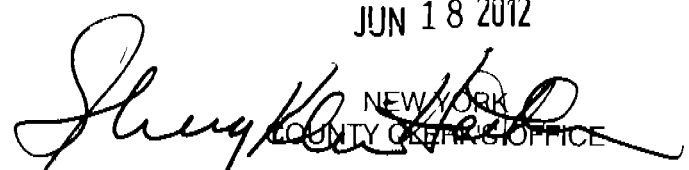
This constitutes the decision and order of the court.

FILED

ENTER

JUN 18 2012

DATED: 6.14.12


NEW YORK COUNTY CLERK'S OFFICE
SHERRY KLEIN HEITLER
J.S.C.