

Deon v A.C. & S, Inc.
2012 NY Slip Op 32158(U)
August 10, 2012
Supreme Court, New York County
Docket Number: 111994/02
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 : 111994/2002
DEON, RONALD J.
vs
A,C, & S.
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. 111994/02
MOTION DATE _____
MOTION SEQ. NO. 001

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

denied

*as per the memo
devised 8-10-12.*

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

FILED

AUG 16 2012

NEW YORK
COUNTY CLERK'S OFFICE
_____, J.S.C.

Dated: 8-10-12

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
RONALD J. DEON and LINDA M. DEON,

Index No. 111994/02
Motion Seq. 001

Plaintiffs,

DECISION AND ORDER

-against-

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

FILED

Defendants.

AUG 16 2012

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

NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos-related personal injury action, defendant The Goodyear Tire & Rubber Company ("Goodyear") 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 denied.

Summary judgment is a drastic remedy that must not be granted if there is any doubt or if it is even arguable there exists a triable issue of fact. *Tronlone v Lac d'Aminate du Quebec, Ltee*, 297 AD2d 528, 528-29 (1st Dept 2002). 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. *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 its entitlement to summary judgment, the plaintiff must then 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 context, the plaintiff need only show "facts and conditions from which the defendant's liability may be reasonably inferred." *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995).

Plaintiff Ronald Deon was diagnosed with lung cancer in or about August of 2006, four years¹ after the plaintiffs commenced this action to recover for personal injuries alleged to be caused by Mr. Deon's exposure to asbestos-containing products. Mr. Deon was deposed on August 2, 2011 and September 13, 2011. Copies of his deposition transcripts are submitted as defendant's exhibit B ("Deposition"). In relevant part Mr. Deon testified that he served in the United States Army from 1960 to 1963 as an auto mechanic. Mr. Deon was stationed at Fort Sill in Oklahoma for approximately thirteen weeks and then at Fort Hood in Texas for twelve to eighteen months. Mr. Deon testified that he installed and removed both pre-formed and sheet gasket materials while performing maintenance on jeeps and large trucks. The record also shows that he replaced gaskets in connection with his work on small generators.

The defendant does not dispute that Mr. Deon may have seen Goodyear-brand sheet gasket materials at those locations. Instead, defendant argues that there is no evidence that such materials contained asbestos or that Mr. Deon ever worked specifically with sheet gasket material to begin with. With respect to his service at Fort Sill, Mr. Deon briefly testified that he fashioned water pump gaskets and fuel pump gaskets from sheet gasket material for use on motors and that they were manufactured by "either Goodyear and sometimes Garlock." Deposition p. 277. He later testified in detail regarding his exposure at Fort Hood (Deposition pp. 412-13, 401-03):

- Q: You had testified on the first day about working at Fort Hood, in Texas, and you mentioned working on Jeeps, two and a half ton trucks and some small generators, you recall that testimony?
- A: Yes.
- Q: And you mentioned during that work you also did gasket work. Do you know who manufactured the gasket material you used at Fort Hood?
- A: If it was a sheet gasket it was a Goodyear.

¹ Mr. Deon was diagnosed with asbestosis in 2000.

Q: Do you recall whether or not you used Goodyear sheet gaskets at Fort Hood? . . .

THE WITNESS: To the best of my knowledge, yes.

Q: Do you know what you used those sheet gaskets for at Fort Hood? . . .

A: Water pumps, fuel pumps.

Q: Would the process of using those sheet gaskets be any different at Fort Hood than the process you described for us today?

A: No.

* * * *

Q: Do you believe that process at Fort Hood caused you to be exposed to asbestos from the Goodyear sheet gaskets?

A: I do believe.

Q: From the cutting?

A: Yes.

* * * *

Q: Is there any way for you to estimate for us how many times you had to cut out sheet gaskets when you were in the Army? . . .

A: At least 15 to 18 times.

* * * *

Q: What tool would you use to cut out the gaskets you needed in the Army from these sheets?

A: Usually a sharp knife or razor, a razor blade. Sometimes just a bolt over a bolt hole to punch the holes through so they were even.

* * * *

Q: And when you used the razor or the bolt holes to form the gasket in the army, did it create dust in the same way you just described for me a moment ago? . . .

A: Yes.

Q: Where would that dust come from? . . .

A: It would come from penetrating the gasket itself. It would be just fibers from the gasket itself.

Q: These fibers were coming out of the actual sheet?

A: Yes.

Q: Do you believe those fibers that were released from the sheet contained asbestos?

. . .

A: I do.

Q: What makes you think so? . . .

THE WITNESS: Because all gasket -- pretty near every gasket back in that era was made with asbestos.

Q: And when you had to cut out these gaskets, what would be the distance between your face and the material that you were cutting? . . .

A: Sometimes three, four inches.²

In reliance upon the July 2007 deposition testimony of Goodyear corporate representative Mr. E.W. DeMarse in an unrelated action, the defendant argues that there is no evidence the Goodyear gaskets Mr. Deon alleges to have worked with contained asbestos. Mr. DeMarse, who worked for Goodyear in various capacities from 1952 to 1991, testified that 75% of Goodyear's sheet gasket material did not contain asbestos during the early 1960s. However, the accuracy of Mr. DeMarse's calculation is open to question because he admitted that he did not recall ever "seeing any figures on that." Defendant's exhibit C, p. 28. Instead, Mr. DeMarse "hazard[ed] a guess . . . based more on observing in the factory the pounds and square feet that we made in both ways." *Id.* In light of Mr. DeMarse's estimations as compared to Mr. Deon's testimony, there is a triable issue of material fact which can only be decided at trial.

Defendant's assertion that there is no specific evidence linking Mr. Deon to Goodyear gaskets as opposed to other brands is without merit. Here, as in *Reid, supra*, Mr. Deon sufficiently identified specific brands of asbestos-containing gaskets, including Goodyear, in use at the relevant worksites at the relevant times. His testimony further indicates that he used such gaskets interchangeably. *Id.*

² Defendant cites to portions of Mr. Deon's deposition testimony wherein he testified he had no personal knowledge as to the asbestos-content of the sheet gasket materials he worked with while in the Army. (Deposition pp. 286-293). While such testimony arguably conflicts with the testimony quoted above, it merely raises a credibility issue, and is not determinative of this motion. See *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996) ("The function of a court entertaining a motion for summary judgment is one of issue finding, not issue determination . . .").

The defendant also argues that Mr. Deon's alleged exposure to asbestos from Goodyear products was so *de minimis* that it could not have caused his lung cancer given his alternative occupational exposures and substantial smoking history. In support defendant relies on *Thompson v A.C&S, et al.*, Index No. 111186/99 (Sup. Ct. NY. Co., Nov. 4, 1999), to which defendant cites for the proposition that *de minimis* levels of exposure in asbestos-related lung cancer cases cannot survive summary judgment. However, the *Thompson* decision is inconsistent with prevailing appellate authority, (*see Reid, supra; Cawein, supra*), and provides no factual backdrop to show that it is consistent with this case. Whether Mr. Deon's work with Goodyear-brand gaskets actually caused his injuries will necessarily require a jury to weigh competing evidence and reflect on the credibility of expert witnesses, notwithstanding Mr. Deon's alternative occupational exposures and smoking history. *See Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996).

Accordingly, it is hereby

ORDERED that The Goodyear Tire & Rubber Company's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

FILED

AUG 16 2012

DATED: 8-10-12


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