

Guthrie v A.O. Smith Water Prods.

2012 NY Slip Op 32452(U)

September 18, 2012

Supreme Court, New York County

Docket Number: 190114/11

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 : 190114/2011
GUTHRIE, WALTER D.
vs.
A.O. SMITH WATER PRODUCTS
SEQUENCE NUMBER : 009
SUMMARY JUDGMENT

INDEX NO. 190114/11
MOTION DATE _____
MOTION SEQ. NO. 009

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). _____

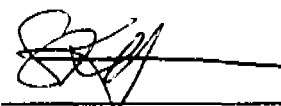
Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the
memorandum decision dated 9.18.12

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

FILED
SEP 24 2012
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9.18.12



_____, 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
WALTER GUTHRIE and LONA GUTHRIE,

Plaintiffs,

Index No. 190114/11
Motion Seq. 009

DECISION AND ORDER

- against -

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

Defendants.
----- X

SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant Elliot Company (“Elliot”) 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 Walter Guthrie worked as a welder and machinists’ assistant at the Brooklyn Navy Shipyard (“Shipyard”) from 1962 to 1968. He testified that he was exposed to asbestos aboard a number of ships there.¹ Relevant to this motion is Mr. Guthrie’s testimony that he worked aboard the USS Intrepid in 1962 and the USS Franklin D. Roosevelt (“FDR”) in 1963 when they were in the Shipyard for repairs.

Among other things, Mr. Guthrie testified that during this time he was responsible for removing the insulation, packing and gaskets from the pumps, valves, and generators in the engine and boiler rooms on both ships. He testified that he worked in all of the engine rooms and

¹ Mr. Guthrie was deposed on June 20, 21, and 22, 2011. Copies of his deposition transcripts are submitted as defendant’s exhibit D. Mr. Guthrie’s sat for a videotaped deposition on July 7, 2011, copies of which are submitted as defendant’s exhibit E. Mr. Guthrie is now deceased.

all of the boiler rooms on each ship. He also testified that he worked in proximity with a number of other machinists in those engine and boiler rooms who maintained various types of other equipment, including heaters, heat exchangers, condensers, and hot water circulating pumps, which created a lot of dust. Plaintiffs claim that these activities caused Mr. Guthrie to be exposed to asbestos.

Elliot moves for summary judgment on the ground that while plaintiffs listed Elliot as a defendant in their pleadings, plaintiffs did not list Elliot as a source of Mr. Guthrie's exposure in plaintiffs' interrogatory responses, nor did Mr. Guthrie testify at his depositions that any Elliot-brand product was a source of his asbestos exposure. In opposition plaintiffs submit ship records which indicate that several condensers, heaters, and heat exchangers manufactured by Elliot were utilized aboard the USS FDR and USS Intrepid, thus raising an issue of fact regarding Mr. Guthrie's exposure to asbestos from such products. Elliot replies that the ship records are not probative of Mr. Guthrie's exposure because they do not specifically show that its products were aboard those ships during the time Mr. Guthrie worked on them.

DISCUSSION

To obtain summary judgment, the proponent 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.

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 judgment as a matter of law, 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 the plaintiff is not required to show the precise causes of his damages, he is required to 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).

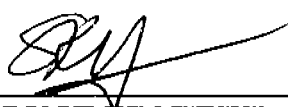
In this case, Elliot has made a *prima facie* showing of its entitlement to summary judgment. There is no dispute that Mr. Guthrie did not specifically identify an Elliot-branded product as a source of his exposure. However, the ship records produced by plaintiffs raise a genuine issue of fact sufficient to overcome Elliot's *prima facie* case. More to the point, plaintiffs submit a document entitled "Synopsis of Machinery and Hull Data" for the USS FDR which shows that an Elliot "Feed Water Heater" and an Elliot "Deaerating Tank Vent Condenser" were located in the Number 2 Engine Room aboard that ship. (Plaintiff's Exhibit C). The ship's "General Information Book" shows that a "Deaerating Feed Tank" was manufactured by the defendant and was affixed to the feed water heater. (Plaintiffs Exhibit D). A second "Synopsis of Machinery and Hull Data" specific to the USS Intrepid shows that the Intrepid contained two Elliot-branded "Feed Water Heaters" in each of the Number 1 and Number 2 Engine Rooms. (Plaintiffs' Exhibit F). Plaintiffs also submit a document that shows that Elliot manufactured "Deaerating Feed Water" tanks for the entire CV9 Essex Class of Aircraft Carriers, which includes the USS Intrepid. (Plaintiffs' Exhibit E).

The USS FDR ship records were revised in 1946 (Exhibit C) and 1960 (Exhibit D), respectively, and the documents for the USS Intrepid were revised in 1937 (Exhibit E) and 1952 (Exhibit F), respectively. Elliot argues that as these ship records pre-date Mr. Guthrie's time aboard the USS FDR and USS Intrepid, the connection between its products on board those ships and Mr. Guthrie's asbestos exposure is too attenuated. But Elliot has not submitted any proof to

refute that its products were on board when Mr. Guthrie worked on those ships or, as one example, expert testimony to show that the United States Navy customarily replaced aircraft carrier ship equipment on a regular interim basis. In any event, the period of time between 1960 and 1962-1963 is not so attenuated as to invalidate an inference that Elliot products were in place when Mr. Guthrie worked at the Shipyard. In light thereof, I find that a jury could reasonably infer that equipment manufactured by the defendant was present aboard the USS FDR and USS Intrepid during the relevant time period and that Mr. Guthrie was exposed to same. *See Reid, supra.*

Accordingly, it is hereby
 ORDERED that Elliot Company's motion for summary judgment is denied in its entirety.
 This constitutes the decision and order of the court.

DATED: 9.18.12



SHERRY KLEIN HEITLER
 J.S.C.

FILED

SEP 24 2012

COUNTY CLERK'S OFFICE
 NEW YORK