

Chilarski v A.W. Chesterton Co.

2012 NY Slip Op 32954(U)

December 12, 2012

Sup Ct, New York County

Docket Number: 190391/10

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 : 190391/2010

CHILARSKI, HELEN

vs.

A.W. CHESTERTON COMPANY

SEQUENCE NUMBER : 008

SUMMARY JUDGMENT

(GOODYEAR)

INDEX NO. 190391/10

MOTION DATE _____

MOTION SEQ. NO. 008

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 12-12-12

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

FILED

DEC 14 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12-12-12



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
HELEN CHILARSKI and MICHAEL CHILARSKI, as
Personal Representative of the Estate of
JOHN CHILARSKI, deceased,

Index No. 190391/10
Motion Seq. 008

Plaintiffs,

DECISION & ORDER

-against-

A.W. CHESTERTON COMPANY, et al.,

FILED

Defendants.

DEC 14 2012

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

NEW YORK
COUNTY CLERK'S OFFICE

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

Plaintiffs' decedent John Chilarski was diagnosed with mesothelioma on or about July 19, 2010. He passed away on March 11, 2011. Prior to his death, Mr. Chilarski was deposed in connection with this action over the course of eleven days in October and November of 2010. Copies of Mr. Chilarski's deposition transcripts are submitted as defendant's exhibit B ("Deposition").

Mr. Chilarski testified that he worked with a myriad of asbestos-containing products over the course of his long career. Relevant to this motion is the time he spent working as an aircraft mechanic for Lockheed Air Services (1947-1948), Scandinavian Airlines (1949-1950), and Pan American Airlines (1966-1991). In this regard, plaintiffs allege that Mr. Chilarski was exposed to asbestos from the braking systems associated with the various aircraft he was assigned to maintain, including the Douglas DC-4 ("DC-4"), Douglas DC-6 ("DC-6"), Douglas DC-8 ("DC-8"), Boeing 707, and Boeing

747. Goodyear Aerospace Corporation (“GAC”), formerly a wholly owned subsidiary of Goodyear, manufactured aircraft braking systems that were compatible with some of the aircraft at issue in this case.

Goodyear asserts that it is entitled to summary judgment because: (1) GAC did not manufacture or supply braking systems for the Boeing 747 and DC-8 aircrafts; (2) GAC multi-disc, tri-metallic braking systems manufactured for the Boeing 707 aircraft did not contain asbestos in the friction components; and (3) Mr. Chilarski did not identify Goodyear as a manufacturer of the braking system with respect to the DC-4 or DC-6 aircrafts.

In support, Goodyear relies primarily on the deposition testimony and affidavit of former GAC employee Harold Booher.¹ Mr. Booher was hired by GAC in 1965 as a developmental engineer. In 1974, he joined GAC’s sales and marketing group. In or about 1987, when GAC was sold to Loral, he became a program manager, and in 1989 he became director of anti-skid engineering. In 1999, Mr. Booher became the manager of brake control systems engineering, which position he held until he retired on January 1, 2005. Prior to his retirement, Mr. Booher served as a consultant for Loral’s parent company, Meggitt Aircraft Braking Systems.² Mr. Booher contends that he reviewed GAC’s engineering drawings,³ copies of which defendant purports were produced to plaintiffs’ counsel in January, 2012 pursuant to a signed protective order filed with this court. Based on his review of such documents, Mr. Booher concludes, among other things, that GAC manufactured braking systems

¹ Mr. Booher was deposed on February 8, 2012. His deposition transcript is submitted as exhibit C to the defendant’s reply affirmation, dated August 8, 2012. Mr. Booher’s affidavit was sworn to on May, 16, 2012. A copy is attached to defendant’s moving papers as exhibit C.

² Formerly known as Aircraft Braking Systems Corporation.

³ These drawings are submitted under seal as exhibit D to the defendant’s reply affirmation.

consistent in appearance with that described by Mr. Chilarski at his deposition which utilized all metal rotors and which contained no asbestos in the friction components.

Plaintiffs assert that there are numerous issues of fact regarding the GAC braking systems at issue that preclude summary judgment. Among other things, plaintiffs (1) object to the admissibility of Mr. Booher's affidavit insofar as his conclusions are not based upon his personal knowledge; (2) assert that there is no evidence that GAC braking systems were not integrated into the Boeing 747 and DC-8 aircrafts; (3) contend that GAC was the only manufacturer of braking systems for the DC-6 aircraft during the relevant time period; and (4) argue that Goodyear be sanctioned for spoliation.

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 moving defendant has made a *prima facie* showing of entitlement to judgment as a matter of law, the plaintiff must then demonstrate that there was actual exposure to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this regard, it is sufficient for the plaintiff 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).

I. Boeing 747 and Douglas DC-8 Aircraft

Mr. Chilarski identified Goodyear as the manufacturer of the braking systems on the Boeing 747 and Douglas DC-8 aircraft while he worked for Pan American Airlines at the Idlewild International Airport. (Deposition pp. 1106-1107):

Q. Okay. What planes do you believe you worked on that had Goodyear braking systems?

A. I saw nothing -- 747.

Q. Okay. Any others?

A. I think the 707. And I think the DC8. I'm not positive. But I -- I seem to -- in the back of my mind, it seemed like this is the way I remember it.

Q. Okay. And what is it -- you just have a vague recollection, or do you specifically recall?

A. It's a -- it's not specifically recall. It's pretty much vague.

Defendant asserts that the testimony is ambiguous and thus should not be considered in light of Mr. Booher's extensive research into the design and engineering of these aircraft. However, the documents upon which Mr. Booher relied in reaching his conclusions were submitted for the first time as exhibits to Goodyear's reply papers, and therefore may not be considered for the purpose of establishing Goodyear's *prima facie* case (see *Batista v Santiago*, 25 AD3d 326, 326 [1st Dept 2006]), especially where, as here, plaintiff had no opportunity to analyze or even consider such evidence in opposition to Goodyear's moving papers. See *Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 (1st Dept 1993). Accordingly, the court is essentially left with questions of credibility as between the decedent's testimony and defendant's witness' allegations which cannot be determined as a matter of law. The weight that should be accorded to Mr. Chilarski's testimony and Mr. Booher conclusions can only be decided by a jury. See *Ferrante v American Lung Ass'n*, 90 NY2d 623, 631 (1997); see also *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996) ("The assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact . . ."). On this ground alone, Goodyear's motion must be denied.

II. Douglas DC-4, DC-6, and Boeing 707 Aircraft

Goodyear does not dispute that GAC manufactured asbestos-containing braking systems for installation on DC-4, DC-6, and Boeing 707 aircrafts. It contends, however, that the description given by Mr. Chilarski at his deposition of the brakes he worked with matches that of GAC's metallic braking systems which did not contain asbestos in their friction components. In light of the complex

and technical nature of these braking systems, and Mr. Chilarski's exposure to all parts of such systems, a recitation of Mr. Chilarski's detailed testimony regarding his duties is appropriate (Deposition pp. 923-924, 1222-1223, 964-968, 990-991):

- Q. Okay. Now when you say "overhauling the brake system," what are you talking about?
- A. I'm talking about removing the wheels, checking to make sure there's no dirt in the bearings and repacking the bearings, if necessary, and boring out all the dust in between the various discs that are part of the landing gear system on the DC-4, and checking the discs from where -- watchamacallit -- from warping, excuse me.
- Q. Now when you say packing the bearings, you're talking about repacking them with grease; correct?
- A. Repacking them with grease, yes.
- Q. Okay. And that was some kind of petroleum product?
- A. Oh, yes, yes.
- Q. Okay. When you say blowing out the dust from the discs, you're talking about using an air hose?
- A. Air hose with a nozzle.
- Q. Did you do that, personally, or did you see others doing it?
- A. I've done it, also.

* * * *

- Q. Okay. Now you were talking about working on the brakes of DC4s. Do you remember that, talking about that?
- A. Yes.
- Q. Tell us about that process. What did you do.
- A. Very -- very dirty. Grimy process. Where you had to clean as much dirt off the assembly before you started. Then you proceeded to dismantle, remove the wheel, and that was a process where you had to remove the locking device and the large nut that held the bearing and the wheel assembly to the axle.

And when you removed everything, and you cleaned all the parts, inspect them for wear, for warpage. And when you were satisfied that you did all that was necessary, with the exception of perhaps replacing the part because the part -- you were inspecting wasn't serviceable anymore, then you would replace the part.

Then you would proceed -- proceed to reassemble the entire assembly, and you would also repack the wheel bearings as a precaution again, just entry of dirt.

* * * *

- Q. Can you tell me what it is that you did in connection with the brakes on the DC-6 aircraft?
- A. We usually tried to tie it with the changing of the tire, itself, and then we would work on the brake, so sort of kill two birds with one stone. . . .
- Q. Okay. And what was involved with checking the brakes?
- A. Of course, you had to -- you had to jack up the aircraft with three jacks on, and you proceeded to remove the safety on the nut that held the bearing and the wheel to the landing gear assembly. Once you removed that, then you proceeded to clean the assembly and then spray solvent on it to further clean whatever remained on it. Then you would remove the discs and check them for scoring -- oh, watchmacallit, or warping. . . .
- Q. And these were multi-disc brakes on the DC-6?
- A. Oh, yes.
- Q. And they were made of metal?
- A. Metal.
- Q. Okay. And as far as the cleaning of the assembly, after you take the wheel off, the cleaning of the assembly, was that using the air hose to spray it off?
- A. That's what we did. . . .
- Q: In that process, can you describe for me what tools you used and what you did to remove the discs?
- A. Well, we had the appropriate wrenches, you had to use a large wrench for the nut that held the wheel in place, and then we would disconnect -- take the wheels off and bearings and repack -- repack the bearings with fresh grease to make sure there was no contamination, and when he had everything to according to Hoyle, we re-assembled -- we reassembled the assembly. . . .
- Q. Okay. And what was involved in taking the disc off? Now that we have the wheel off, we've repacked the bearings and we're looking at the brake assembly. What is it that you did on the DC-6 to take the disc off?
- A. Well, you had to remove the hydraulic. You had one on the inside and one on the outside, and they pressed against one another. You had to take them so they wouldn't be in the way, and then you were able to take the discs off. . . .
- Q. Okay. Do you know what they were made of?
- A. They were aluminum and steel.
- Q. Okay. And they had hydraulic fittings on them?
- A. Yes.
- Q. Okay.
- A. It had a hydraulic hose.
- Q. And what's the hose made out of? Was it rubber and metal braided?

A. Rubber braided metal.

Q. And then the disc, itself, that was made of some metal?

A. Yes.

* * * *

Q. Any other work that you saw being performed by others in the immediate vicinity while you were working on a 707 while employed by Pan Am?

A. There was a lot of brake work. . . .

Q. What did you observe the landing gear crew doing when they worked on the brakes of the 707?

A. Inspect, clean. First clean, then inspect

Defendant asserts that the only part of its tri-metallic braking systems which contained asbestos was the "piston insulator" and that it is entitled to summary judgment because Mr. Chilarski never testified that he worked with such component. However, Mr. Chilarski was never specifically asked whether he encountered a "piston insulator" in connection with his work on either the DC-4, DC-6, or Boeing 707. On the evidence herein, this court has reason to believe that the piston insulator is a critical component of a braking wheel assembly. Given Mr. Chilarski's vivid testimony which recounts how he regularly disassembled, cleaned, and reassembled brake systems piece by piece, it raises the question whether Mr. Chilarski would have encountered a number of asbestos-containing piston insulators throughout his career.

Moreover, plaintiffs have provided unrefuted documentary evidence which demonstrates that GAC's DC-6 compatible brake assemblies contained asbestos-containing parts. (See Plaintiffs' exhibits 3, 5). In this regard, plaintiffs submit a chart which shows that at least ten parts of GAC's DC-6 brake assembly utilized material which itself appears to have been an asbestos-containing product. (Plaintiffs' exhibit 4, pp. 38-39).

Goodyear alleges that plaintiffs' claims with respect to the DC-6 are speculative because Mr. Chilarski did not identify the manufacturer of the brake assemblies associated with this aircraft and

because there were several other companies that supplied brake assemblies for it. In support Goodyear relies on the deposition testimony of plaintiffs' expert Mark Thompson (Defendant's exhibit D, pp. 157-158, 200-201):

Q. Okay. What manufacturers are identified in Exhibit W for braking systems for the DC-6?

A. This document here only talks about the Goodyear brake.

Q. And that is not the only braking system for the DC-6 aircraft type, is it?

A. No.

* * * *

Q. First, a few follow-up questions. Regarding Exhibit W, in response to a question by Mr. Gordon, you said that Goodyear was not the only manufacturer of the brakes for the DC-6. Do you remember saying that?

A. Yes.

Q. What other manufacturer produced brakes for the DC-6?

A. I believe Goodrich did also.

Q. Any other manufacturer?

A. I can't think of others at this time.

Plaintiffs submit Department of Transportation aircraft specifications which show that Goodyear manufactured the DC-6 braking system (plaintiffs' exhibit 1), and further submit in this respect that the only brake manufactured by Goodrich was for the DC-6b, which was made after 1951, subsequent to the time period that Mr. Chilarski worked on DC-6 brake systems. (Deposition p. 956; McRillis Deposition, plaintiffs' exhibit 2, pp. 11-12).

The testimony and documentary evidence herein raise triable issues of fact whether Mr. Chilarski was exposed to asbestos from braking systems associated with the DC-4, DC-6, and Boeing 707 aircraft, and whether GAC was the primary braking system manufacturer for the DC-6 aircraft during the relevant time period. Accordingly, on these issues Goodyear's motion is similarly denied.

III. Spoliation

Plaintiffs' request for spoliation sanctions is summarily denied. While GAC has been unable to locate two sixty-five year old project drawings, plaintiffs have shown no convincing reason for the court to believe that such documents were either purposely or negligently destroyed prior to or during the course of this litigation. See *Utica Mut. Ins. Co. v Berkoski Oil Co.*, 58 AD3d 717, 718 (2d Dept 2009) ("The party requesting sanctions for spoliation [sic] has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and 'fatally compromised its ability to defend [the] action'") (quoting *Lawson v Aspen Ford, Inc.*, 15 AD3d 628, 629 [2005]).

CONCLUSION

The court has considered the defendant's remaining contentions and finds them to be without merit.

Accordingly, it is hereby

ORDERED that the Goodyear Tire & Rubber Company's motion for summary judgment is denied in its entirety; and it is further

ORDERED that plaintiffs' request for sanctions is denied in its entirety.

This constitutes the decision and order of the court.

FILED

DEC 14 2012

NEW YORK
COUNTY CLERK'S OFFICE

DATED: 12-12-12


SHERRY KLEIN HEITLER
J.S.C.