

Krauss v 3M Co.

2013 NY Slip Op 30681(U)

March 29, 2013

Sup Ct, New York County

Docket Number: 190020/2012

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

William E. Krauss, Et Al.

INDEX NO.

190020/12

MOTION DATE

MOTION SEQ. NO.

6

MOTION CAL. NO.

- v -

3M Company, Et Al.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it's ordered that this motion

is decided in accordance with the memorandum decision dated 3-29-13

FILED

APR 08 2013

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3-29-13

[Signature]
HON. SHERRY KLEIN HEITLER ^{J.S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

-----X
WILLIAM E. KRAUSS and JEANNE KRAUSS,

Index No.: 190020/2012
Motion Seq. 006

Plaintiffs,

DECISION & ORDER

-against-

3M COMPANY, *et al.*,

Defendants

FILED

APR 08 2013

**NEW YORK
COUNTY CLERKS OFFICE**

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

In this asbestos related personal injury action, defendant York International Corporation (“York”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims against it. For the reasons set forth below, the motion is denied.

BACKGROUND

Plaintiff William Krauss (“Krauss”) was diagnosed with asbestosis in 1991. In 2011, a biopsy revealed that he had lung cancer. On or about January 17, 2012, Krauss and his wife (“plaintiffs”) commenced this action to recover damages for personal injuries allegedly caused by Krauss’s exposure to asbestos-containing products. Among other things, plaintiffs allege that Krauss developed lung cancer as a result of his occupational exposure to Borg Warner gaskets for which the defendant is liable.

Krauss was deposed over eight non-consecutive days between February 28, 2012 and March 16, 2012. Krauss’s video deposition was taken on April 10, 2012.¹ Krauss testified that he was employed as a union sheet-metal worker throughout his career. In this capacity, Krauss replaced air conditioning equipment and installed flooring, among other tasks. Pertinent to this motion is Krauss’s first

¹ Transcripts of Krauss’s deposition and video deposition are attached as plaintiffs’ exhibits D and E, respectively.

employer, Howard Martin, for whom he worked from approximately 1952 through 1959. During this period, Krauss worked at several job sites, including but not limited to a New York City office building, Ebbetts Field, the Empire State Building, Grand Central Terminal, the Chrysler Building, an Associated Press warehouse, Anaconda Copper, a Consolidated Edison Powerhouse, the General Motors Building, and a Union Carbide building. Krauss testified that he worked on and was exposed to asbestos from a number of products and types of equipment at these sites.

York claims entitlement to summary judgment because Krauss did not specifically identify any York product as a source of his asbestos exposure. In opposition, plaintiffs assert that Krauss testified to being exposed to asbestos containing gaskets manufactured by York's predecessor, Borg Warner, thus rendering York responsible for his injuries. York replies that Krauss's identification of Borg Warner products as a source of his asbestos exposure is based on conjecture and is therefore insufficient to raise a material issue of fact.

DISCUSSION

Summary judgment is a drastic remedy that must not be granted if there is any doubt about the existence of a triable issue of fact. *Tronlone v Lac D'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-529 (1st Dept 2002). To obtain summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law, tendering 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 an asbestos-related personal injury action, should the movant establish its *prima facie* entitlement to summary judgment, the plaintiff is then required to demonstrate that there was actual exposure to asbestos fibers released from the defendant's product. *See Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this regard, the plaintiff need only "show facts and conditions from which defendants' liability may reasonably be inferred." *Reid v*

Georgia-Pacific Corp., 212 AD2d 462, 463 (1st Dept 1995). Where the facts are disputed but are susceptible to more than one permissible inference, the choice between those inferences should not be made as a matter of law, but should be submitted to the trier of fact. *Ace Wire & Cable Co. v Aetna Casualty & Surety Co.*, 60 NY2d 223, 231 (1978).

York asserts that it did not manufacture gaskets for the types of air conditioning equipment identified by Krauss or sell gaskets under the trade name "Borg Warner", especially during the period at issue, to wit, 1952 to 1959.² However, it appears that through a series of corporate transactions, Borg Warner and York had a symbiotic relationship which at one point resulted in a single entity, raising a material question whether indeed York is liable for injuries caused to the plaintiff by Borg Warner products.³ As such, the defendant's argument that York itself did not procure, manufacture or sell Borg Warner gaskets, or that York itself did not manufacture or sell gaskets for use in the air conditioning equipment with which Krauss worked is misplaced.

York argues that Krauss's testimony regarding his exposure to Borg Warner gaskets is too speculative to withstand summary judgment because he never knew exactly which brand of gaskets he was working with because he received the materials on site already out of their boxes. However,

² In support York submits a reply statement by former York employee Fred Ziffer (defendant's exhibit H) who was employed in various engineering and managerial capacities from 1964 until he retired in 2002. Among other things, he says that York never procured gaskets from Borg Warner and that York never manufactured or sold gaskets with the name "Borg Warner" on the gasket. *Id.* ¶¶ 6-7.

³ Plaintiffs submit the decision in *York Int'l Corp. v Liberty Mut. Ins. Co.*, 1:10-CV-0692, 2011 US Dist. LEXIS 57202 (M.D. Pa. May 26, 2011, Rambo, J.), in which the court addressed the relationship between the defendant, York International Corporation, and Borg-Warner. Among other things, the Pennsylvania court noted that through a series of corporate transactions York acquired all of Borg-Warner's assets and liabilities.

Krauss plainly testified that he routinely worked with Borg Warner asbestos-containing gaskets from 1952 to 1959. Indeed, when asked generally about the manufacturers of the gasketing material with which he worked during this seven year period at his videotaped deposition, Krauss affirmatively responded "Borg Warner, Boise Cascade, and John Crane." (plaintiffs' exhibit E, p. 19).

When identifying the manufacturers of the asbestos-containing products he used as an apprentice working at the Empire State Building between 1952 and 1953, Krauss explicitly named Borg Warner together with Boise Cascade and Crane (plaintiffs exhibit D, p. 133). Krauss explained that while he did not necessarily know which particular brand he was using at any given time because the gaskets were delivered from his employer's shop in unmarked containers, all three brands were typically available at this centralized storage facility and he used them all during the course of his employment. *See id*; *see also Reid, supra*, at 463 (1st Dept 1995) ("plaintiff's papers identified specific brands of the subject asbestos products, including those of defendant, in use at the relevant work site during the relevant time, showed that various asbestos products were interchangeable in the work site at the time, and showed that he was heavily exposed to asbestos dust at that site during that time.")

Similarly, with regards to his work at Grand Central, Krauss testified that Borg Warner gasketing material was among the brands he used at that site, (plaintiffs' exhibit D, p. 143):

- Q. Specifically with regards to the Grand Central track work job, do you know the brand name, trade name, or manufacturer of any of the gasketing material?
- A. It was – it didn't – we'd get the rolls out just in the plain box where it came in; but the few times I had to go into the shop, I saw boxes, it was like Warner, Borg Warner, Boise Cascade, and John Crane. . . .

York asserts that Krauss's testimony fails to definitively establish that the materials in the labeled boxes in his employer's shop that he saw were the same as the unlabeled ones to which he was

exposed at his work sites. However, Krauss clearly identified three different types of gaskets by name - Borg Warner, John Crane and Boise Cascade - and stated that he worked, on and off, with all of them, interchangeably. *See Reid, supra*, at 463; *Lowe v AERCO Intl, Inc.*, Index No. 110194/04, 2013 NY Misc LEXIS 761, at *6-7 (Sup. Ct. NY Co. Feb. 20, 2013). The extent to which Krauss could not distinguish one brand of gaskets from another once such gaskets left his employer's shop does not render his identification of Borg Warner products speculative. Rather, it raises the issue of the weight to be given to Krauss's testimony, which should be determined by the trier of fact. *See Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013); *Alvarez v NY City Hous. Auth.*, 295 AD2d 225, 226 (1st Dept 2002); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996).

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is denied in its entirety. Plaintiffs may proceed with their discovery requests.

This constitutes the decision and order of the Court.

DATED: 3 29.13



SHERRY KLEINHEITLER
J.S.C.

FILED

APR 08 2013

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