

Rollock v 3M Company
2013 NY Slip Op 30758(U)
April 11, 2013
Sup Ct, New York County
Docket Number: 105851/07
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 : 105851/2007
ROLLOCK, MURIEL
VS.
3M COMPANY, ET AL.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 105851/07
MOTION DATE _____
MOTION SEQ. NO. 001

(GRANTED)

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 4.11.13.**

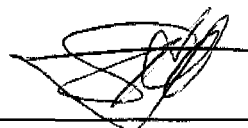
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

APR 15 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4.11.13


_____, 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
MURIEL ROLLOCK, as Administratrix of the
Estate of DONALD ROLLOCK,

Index No. 105851/07
Motion Seq. 001

Plaintiff,

-against-

3M COMPANY, et al.,

Defendants.
-----X

DECISION & ORDER

FILED

APR 15 2013

NEW YORK
COUNTY CLERK'S OFFICE

SHERRY KLEIN HEITLER, J:

In this asbestos-related personal injury action, defendant Griffin Wheel Company (“Griffin”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint against it on the ground that plaintiff has produced no evidence to show that it contributed to plaintiff’s decedent’s asbestos-related injuries. For the reasons set forth below, the motion is granted.

BACKGROUND

Donald Rollock worked for the New York City Transit Authority (“NYCTA”) from 1947 to approximately 1978 when he retired from his position as a car inspector. Many years later he was diagnosed with malignant mesothelioma and died in or about May of 2005. On April 30, 2007, Murial Rollock (“Plaintiff”) commenced this personal injury action on behalf of her deceased father to recover for injuries resulting from his exposure to asbestos-containing products. Mr. Rollock could not be deposed in this action, but his former co-worker at the NYCTA, Kenneth Yeager, testified that Mr. Rollock was exposed to asbestos while working as a car inspector at a facility in Kew Gardens, New York known as the Jamaica barn.¹

¹ Mr. Yeager’s deposition transcripts are submitted as plaintiff’s exhibits A, B and C (“Deposition”).

Mr. Yeager testified that from 1967 to 1978 Mr. Rollock served as the senior car inspector at the NYCTA's Jamaica barn. In this role, Mr. Rollock routinely worked underneath train cars on, or in the vicinity of others working on, generators, controllers, power motors, and, of relevance to this motion, composition air brakes. Plaintiff alleges that composition air brakes manufactured by Griffin were one of many sources of Mr. Rollock's asbestos exposure.

Under Mr. Rollock's supervision a team of workers would cut out and replace worn brake shoes on a daily basis, a procedure which created a substantial amount of dust. Mr. Yeager testified that Mr. Rollock personally would be positioned underneath the train cars when brake shoes were being changed. When steel brake shoes were being replaced, the dust created was metallic in nature, but when composition brake shoes were being replaced, the dust created therefrom was laden with asbestos fibers. Additionally, at the end of each workday a night crew would use an air hose to clean the undersides of the cars leaving behind a cloud of dust in the barn which was still there when the workers arrived the next morning.

Defendant Griffin manufactured and sold brake shoes for freight and railway cars under the brand name Anchor Brake Shoes. Defendant contends that it is entitled to summary judgement because Mr. Yeager did not identify either Griffin Wheel or Anchor Brake Shoes as a possible source of Mr. Rollock's exposure. Defendant further states that it has no records to show that it ever sold asbestos-containing brake shoes to the NYCTA while Mr. Rollock was employed there. As such, defendant alleges that its product was never in Mr. Rollock's zone of exposure.

In contravention, plaintiff relies on the testimony in an unrelated matter by John Caputo, a former NYCTA employee who worked at the Jamaica barn from 1981 to 1985 and had testified that

Anchor Brakes were used at the Jamaica Barn in the mid-1980s. Plaintiff asserts that these proofs raise an issue of material fact sufficient to defeat summary judgment.²

DISCUSSION

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 issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). 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). Speculative or conjectural evidence of the manufacturer's identity is not sufficient to raise an issue of fact. *Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596, 602 (1st Dept 1996).

As set forth above, Mr. Yeager testified that Mr. Rollock would necessarily have been exposed to asbestos throughout his many years overseeing the removal of composite brake shoes at the NYCTA terminal. However, at no point during his deposition does Mr. Yeager identify this defendant's brake shoes as a source of such exposure. To the contrary, he only recalled the use of one type of brake shoe, the Cobra brand brake shoe, for which the defendant is not responsible (plaintiff's exhibit A, pp. 126-127):

Q You also testified earlier that some of the brakes that you observed were manufactured by a company called Cobra; do you recall that?

² Mr. Caputo's deposition transcripts are submitted as plaintiff's exhibits D and E.

A Yes.

Q How specifically do you know they were manufactured by Cobra?

A . . . they came in a box with a big cobra on it, it said Cobra.

* * * *

Q And what about other occasions?

A Other occasions they'd change shoes and if they didn't have Cobra shoes, they'd put other shoes on them.

Plaintiff stresses that while Mr. Yeager failed to identify any other brake shoe by name, he did state that the NYCTA used other types of brakes when Cobra shoes were unavailable, leaving open the possibility that Anchor Brake Shoes were used intermittently at the Jamaica barn during the relevant time period. However, it appears that these alternative brake shoes would have been made of steel, not an asbestos-containing composite material (plaintiff's exhibit A, pp. 127-128, 135):

A Other occasions they'd change shoes and if they didn't have Cobra shoes, they'd put other shoes on them.

Q And I don't want to cut you off, I want you to finish. Is that the end of your answer, sir?

A It all depends if they had a home run and it didn't have no Cobra shoes, right? They would put steel shoes on it because the train has to go out.

* * * *

Q So, how were you able to determine who manufactured them?

A Steel shoes, you could tell right away. A Cobra shoe was a light shoe made out of asbestos and you could -- it was gray and you could tell right away. Steel shoes were rusted steel.

Q Now, you're describing two different types of shoes from what I understand, there's a steel shoe --

A Right.

Q -- and a smaller style shoe, okay?

A A lighter style.

Q A lighter style. Were there other manufacturers than Cobra that made the lighter style shoe?

A There were other manufacturers that they used but in our barn they had Cobra.

Q Do you know why in your barn they used Cobra and other barns they used other manufacturers? . . .

A . . . Well, they were testing those there.

Plaintiff also introduces the 2003 deposition testimony of John Caputo, a consultant who testified in a group of New York City Asbestos Litigation cases collectively captioned the "John Dearie Transit Cases." Mr. Caputo testified that Anchor Brake Shoes were used at the Jamaica site from 1981 and 1985 while he was employed there. Plaintiff thus contends that if the NYCTA was using Anchor Brakes by the mid-1980s, that type of brake could have been among the unnamed other brands Mr. Yeager alluded to seeing on Jamaica barn trains between 1967 and 1979 (plaintiff's exhibit D, pp. 1492-1494):

Q Could you estimate how frequently you have had to use the Cobra brake shoe rather than the Tiger or the Anchor brake shoe?

A In the New York Transit Authority, it works this way basically: It's what's available at the time. We used so many Cobra brake shoes during that period that I worked there from '81 to '85 . . . But there was times when the supply that was on hand at Jamaica was depleted, meaning there was no Cobra brake shoes available and whatever was in stock was used. It was -- sometimes it was the Tiger shoe. That came later on, but -- and there was periods of time where the Anchor brake shoe was used.

Q . . . [C]ould you give us a percentage of how frequently . . . you would use Cobra and what percentage of time you would use Tiger, what percentage of time would you use Anchor?

* * * *

A Primarily Cobra was used daily. Griffin -- the Anchor brake shoe was used quite a bit of the time, and then it no longer was used, to the best of my knowledge, in the mid-80s any more. . .

Insofar as Mr. Caputo started working at the Jamaica barn in 1981, two years after Mr. Rollock retired, his testimony does not provide, nor can it be reasonably inferred therefrom, that Mr. Rollock was exposed to Anchor Brake Shoes at any point during his tenure at NYCTA.

Notwithstanding the testimony, plaintiff submits historical documents to show that the defendant supplied composition brake shoes to the NYCTA during the relevant time period. In this regard, plaintiff's exhibit M is an undated product advertisement which indicates that Anchor Brake

Shoes were specified to be used on all American Steel Foundry ("ASF") self-contained brakes, which in turn were integrated by the NYCTA into some of its train cars while Mr. Rollock was an employee. (See plaintiff's exhibits L, & N). The documents also show that between October 1961 and August 1962 the defendant sold composition brake shoes to Pullman-Standard to be used for its NYCTA account. (Plaintiffs exhibit K).

While these documents may demonstrate that Anchor Brake Shoes were utilized by the NYCTA in one or more of its barns, in light of the Mr. Yeagar's testimony, it would be speculative at best to infer that Anchor Brake Shoes were used in Mr. Rollock's presence at the Jamaica barn. *See Comeau v. W. R. Grace & Co.- Conn.*, 216 AD2d 79, 80 (1st Dept 1995); *Cawein, supra*.

Accordingly, it is hereby

ORDERED that Griffin Wheel Company's motion for summary judgment is granted, and this action and any cross-claims against this defendant are severed and dismissed in their entirety; and it is further

ORDERED that the remainder of the action shall continue as against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

FILED

APR 15 2013

ENTER:

NEW YORK
COUNTY CLERK'S OFFICE

DATED: 4.11.13



SHERRY KLEIN HEITLER
J.S.C.