

Meyer v A.O. Smith Water Products, Co.

2013 NY Slip Op 30899(U)

April 24, 2013

Sup Ct, New York County

Docket Number: 190094/2012

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

MEYER, TIMOTHY, ET AL.

INDEX NO. 190094/12

- v -

A.O. SMITH WATER PRODUCTS, Co.,
ET AL.

MOTION DATE _____

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the
memorandum decision dated 4.24.13.

FILED
APR 29 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4.24.13

[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
TIMOTHY MEYER and KAREN MEYER,

Index No.: 190094/2012
Motion Seq. 002

Plaintiffs,

DECISION & ORDER

-against-

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

FILED

Defendants

APR 29 2013

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

**NEW YORK
COUNTY CLERKS OFFICE**

In this asbestos related personal injury action, defendant Columbia Boiler Company of Pottstown ("Columbia") 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 Timothy Meyer ("Meyer") was diagnosed with lung cancer on or about July 15, 2009. On February 23, 2012, Meyer and his wife ("plaintiffs") commenced this action to recover damages for personal injuries allegedly caused by Meyer's exposure to asbestos containing products.

Meyer was deposed on March 22, 23, and 30, 2012.¹ He testified that from approximately 1980 to 1990 he was employed as a plumber's helper and plumber by Independent Services of Holbrook. In this capacity, Meyer's work included but was not limited to the removal and installation of boilers located throughout the five boroughs of New York City, Long Island, Connecticut, and New Jersey. Meyer testified that he worked with Columbia boilers at

¹ A transcript of Meyer's deposition is attached as defendant's exhibit C.

several commercial premises and industrial sites, although he could not recall any building names or addresses specifically. Significantly, Meyer stated that he worked with two types of Columbia boilers, namely vertical tubeless boilers and Scotch Marine boilers, but that only his work with the Scotch Marine variety caused him to be exposed to asbestos.

Columbia claims entitlement to summary judgment because the company did not sell or repackage Scotch Marine type boilers during the period of Meyer's alleged exposure. In support, Columbia submits the October 23, 2012 affidavit of General Manager Edward Passifione, Jr. in which he avers that Columbia did not supply Scotch Marine type boilers prior to January of 2003.² In opposition, plaintiffs assert that Mr. Passifione lacks personal knowledge to testify to the make of boilers Columbia manufactured prior to his employment with Columbia and that defendant provides no evidence to support his conclusions. Plaintiffs further allege that Meyer's testimony regarding Columbia boilers merely speaks to the weight of his testimony and should thus be resolved at trial.

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 1995). 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 asbestos-related litigation, should the movant establish its *prima facie* entitlement to summary

² Passifione's affidavit is attached as plaintiffs' exhibit C.

judgment, the plaintiff must then demonstrate that there was actual exposure to asbestos fibers released from a particular defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this regard, the plaintiff need only show facts and conditions from which defendant's liability may reasonably be inferred. *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995).

Here, Meyer plainly testified that he encountered Columbia's Scotch Marine boilers on the job "frequently" and that he was exposed to asbestos while installing, servicing, and removing same (defendant's exhibit C, pp. 364-5; 367-9):

Q . . . You believe that you were exposed to asbestos in installing the Columbia Scotch Marine boilers?

A I do.

Q In what way?

A By the rope gasket in the front and back doors.

Q Is that the only way you believe you were exposed to asbestos from installing those Scotch Marine Columbia boilers?

A Well, there would be a gasket by the burner as well.

* * * *

Q When you were installing them, did the installation include putting in that rope gasket, or was that already in place when you got the boiler?

A It would be in place, but you would have to remove the gasket or the doors themselves just to make sure that everything was okay and then you would put it back together, or you would have to install it a lot of times on the front gasket, the back one would be in place already.

* * * *

Q Do you believe you were ever exposed to asbestos from servicing those boilers?

A I do.

Q In what manner?

A When you opened the door, those boilers ran at a very high temperature, so when you would open those doors, they would be very dusty in that area.

Q In what area?

A Where the doors were sealed. When you would open the door, dust would fly.
 Q The dust that would fly at that point, do you know the source of that dust?
 A I believe it would be from the gasket as well as soot that was inside the boiler.

* * * *

Q Let's talk about removing the Columbia Scotch Marine boilers. Can you estimate how many times you did that?
 A No.
 Q Was it more than 10?
 A I would think.
 Q You believe you were exposed to asbestos from that work?
 A I do.
 Q In what way?
 A Then we would remove all the utilities, you would disconnect the burner and that gasket would be disturbed and dust would fly. You would have to disconnect the duct work and the breeching and then any time that the boiler was moved or disturbed, it create at [sic] quite a bit of dust from in and around the boiler.

Columbia asserts that it could not have contributed to Meyer's injury because it did not manufacture the type of boiler from which Meyer claims exposure until at least twelve years after Meyer stopped working for Independent Services of Holbrook. In this regard Mr. Passifione avers that he familiarized himself with all of Columbia's product lines by reviewing available product specifications and concluded that Scotch Marine type boilers did not appear in Columbia's price books until approximately 2002 or 2003.

However, Columbia provided no documentary evidence to support its affiant's conclusions. Thus, the record consists primarily of Meyer's deposition testimony that asbestos from a Columbia Scotch Marine boiler was a source of his asbestos exposure and Mr. Passifione's affidavit that Columbia did not manufacture asbestos containing Scotch Marine boilers as described by Meyer. Without more, the weight to be accorded to their conflicting assertions can not be decided on motion for summary judgement as a matter of law, but rather

[*6]
presents a question of fact to be resolved by the jury. *See Asabor v Archdiocese of NY*, 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) (“The assessment of the value of a witnesses’ testimony constitutes an issue for resolution by the trier of fact . . .”).

Accordingly, it is hereby

ORDERED that defendant’s motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: 4. 24. 13



SHERRY KLEIN HEITLER
J.S.C.

FILED
APR 29 2013
NEW YORK
COUNTY CLERK'S OFFICE