

Lieberman v A.O. Smith Water Prods. Co.
2013 NY Slip Op 30955(U)
May 1, 2013
Supreme Court, New York County
Docket Number: 190057/12
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHERRY KLEIN HEITLER
Justice

PART 30

LEONID LIBERMAN and DINA LIBERMAN,

INDEX NO. 190057/12

Plaintiffs,

MOTION DATE _____

- v -

MOTION SEQ. NO. 002

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

MOTION CAL. NO. _____

Defendants.

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

This motion is decided in accordance with the memorandum decision dated 5-1-13.

FILED
MAY 03 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5-1-13

[Signature]
SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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
LEONID LIBERMAN and DINA LIBERMAN,

Plaintiffs,

Index No. 190057/12
Motion Seq. 002

DECISION & ORDER

-against-

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

Defendants.

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

FILED
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Plaintiff Leonid Liberman, now deceased, was diagnosed with mesothelioma on or about December 28, 2011. On February 2, 2011 Mr. Liberman and his wife Dina Liberman ("Plaintiffs") commenced this action to recover for personal injuries allegedly caused by Mr. Liberman's exposure to asbestos-containing products. Mr. Liberman was deposed on February 14, 15 and 16, 2012.¹

Mr. Liberman emigrated to the United States from the Ukraine in May of 1992. Between 1992 and 1996 he worked as an electrician at residential and commercial buildings throughout New York City. Mr. Liberman testified that during the course of his employment he was exposed to asbestos-containing phenolic moldings incorporated into electrical equipment such as panel boxes and circuit breakers. These panel boxes and circuit breakers were supplied by Square D, among others. Because they were usually very old, Mr. Liberman often used hacksaws, drills, hammers, and other tools to work with them. In so doing, Mr. Liberman testified that he was

¹ Mr. Liberman's deposition transcripts are submitted as defendant's exhibits 1, 2 and 3.

exposed to asbestos dust which got on his clothes, and into his nose and mouth (defendant's exhibit 2, pp. 132-135):

Q Explain to me how you encountered the material that you believe was asbestos containing.

A All this breaker, make it from asbestos. All these breakers are asbestos; plus when open back box, you see it's like black plastic, but it's not plastic. This is, this is asbestos. So you have to chop it, because they got some screw. This is -- when you start to chop it, dust coming into your face -- to my face, correct.

Q Anything else in addition to that?

A And panel.

Q In the panel, or is that it?

A Breaker and panel and back box.

* * * *

Q Do you know the brand name, trade name or manufacturer's name of any of the old panels that you removed. . . ?

A Yes.

Q What were those names?

A General - - . . . like Cutler-Hammer, GE, Murray, ITE, Siemens, Square D and Westinghouse. . . .

* * * *

Q Okay. Do you know who manufactured the old circuit breakers that were contained in those panels?

A Same company . . .

* * * *

Q Okay. Do you know who manufactured the black plastic that was in the back box?

A Black plastic. You mean asbestos?

Q You said there was black plastic in the back box that you referred to as asbestos.

A Yes.

Q Do you know who manufactured that?

A I think it's the same, same name . . . I just mentioned.

Defendant Union Carbide Corporation ("UCC") manufactured and sold asbestos-containing phenolic molding compound under the trade name "Bakelite" until 1975. Bakelite, which has the appearance of hard plastic, was commonly used in electrical panels, insulators and switches due to its electrically nonconductive and heat-resistant properties. While most Bakelite did not contain asbestos, some varieties did, including one form designated BMRS-5314.

Plaintiffs' exhibit 7 is an internal UCC memorandum dated August 17, 1972 in which a UCC representative discussing BMRS-5314 shipments to Square D's Lexington, Kentucky plant observes that "the adherence to these seven Special Customer Requirements will go a long way towards Union Carbide's maintaining 100% of this customers [*sic*] valuable phenolic molding material business." Emphasizing the "100%" language, Plaintiffs submit that UCC was the exclusive supplier of asbestos-containing phenolic molding material to Square D, and, *a fortiori*, that Mr. Liberman was necessarily exposed to UCC's asbestos while working with Square D phenolic molding.

UCC moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims against it on the ground that it was not the exclusive supplier of phenolic molding compound to Square D, which had dozens of North American facilities in addition to the Lexington, Kentucky plant. UCC also argues there is no evidence to show that Square D's Lexington, Kentucky plant manufactured circuit breakers and panel boxes, which are the types of materials Mr. Liberman testified to working on, and assuming it did, that such products were

supplied to the New York market.²

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 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).

UCC's motion for summary judgment is granted. The memorandum in question refers only to Square D's Lexington, Kentucky facility, whereas Square D had at least four dozen plants throughout North America besides the Kentucky plant, (Defendant's exhibit 5), and Plaintiffs have not shown that the asbestos-containing products manufactured in Kentucky supplied the New York region. In fact, Square D's March 9, 2006 interrogatory responses filed in Madison County, Illinois³ provide that the company purchased its phenolic molding compounds from at least seven different suppliers. Notably, UCC was not among the suppliers listed therein. (Defendant's exhibit 4, p. 18). Thus, Plaintiffs' assertions that the Square D products with which Mr. Liberman

² UCC's contention that as a later added defendant it was not present at plaintiff's deposition is unavailing. UCC's remedy in this regard was to serve a deposition notice on the plaintiff.

³ Submitted as exhibit 4 to UCC's reply brief.

worked in New York City were manufactured at Square D's Lexington, Kentucky facility and that Mr. Liberman was exposed to UCC's asbestos are unsupported by the record.

Plaintiffs have similarly failed to establish that Square D's Lexington, Kentucky plant even produced circuit breakers and panel boxes. Defendant's exhibit 5 is a promotional catalog celebrating Square's D 100 years in the electrical industry. One section, entitled "History of Operations", details the operations of each Square D plant. It shows that in 1955 the company's plastic molding operations were transferred from Peru, Indiana to a plant in Cedar Rapids, Iowa that produced circuit breakers. By comparison, it appears that Square D's Lexington, Kentucky facility mainly produced "load centers, general and heavy-duty safety switches and components shipped to other Square D facilities." (Defendant's exhibit 5).

In light of the foregoing, it is hereby

ORDERED that UCC'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 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

MAY 03 2013

ENTER:

NEW YORK

COUNTY CLERK'S OFFICE

DATED: *May 1, 2013*

SHERRY KLEIN HEITLER
J.S.C.