

Meyer v A.O. Smith Water Prods. Co.

2013 NY Slip Op 30956(U)

April 30, 2013

Supreme Court, New York County

Docket Number: 190094/12

Judge: Sherry Klein Heitler

Republished from New York State Unified Court System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HEITLER

PART 30

HON. SHERRY KLEIN HEITLER^{Justice}

MEYER, TIMOTHY, ET AL.

INDEX NO. 190094/12

MOTION DATE _____

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

- v -

A.O. SMITH WATER PRODUCTS, CO.

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 4.30.13

FILED
MAY 03 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4.30.13

[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. 190094/12
Motion Seq. No. 003

Plaintiffs,

DECISION & ORDER

-against-

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

Defendants.

----- X

FILED

SHERRY KLEIN HEITLER, J.:

MAY 03 2013

NEW YORK COUNTY CLERK'S OFFICE

In this asbestos-related personal injury action, defendant UCC Fibre Corporation ("UCC") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint against it.

For the reasons set forth below, the motion is denied.

BACKGROUND

Plaintiff Timothy Meyer was diagnosed with lung cancer on or about July 15, 2009. Mr. Meyer and his wife Karen Meyer commenced this action on February 23, 2012 to recover for personal injuries allegedly caused by Mr. Meyer's exposure to asbestos-containing products. The original complaint did not name UCC as a defendant. Mr. Meyer was deposed on March 22, 23 and 30, 2012.¹ Thereafter the complaint was amended to add UCC as a defendant, as to which UCC was served on or about May 3, 2012.

Mr. Meyer testified that he was exposed to asbestos between approximately 1978 and 1979 while installing, removing and cleaning up vinyl asbestos floor tiles as an employee of Stanley

¹ Mr. Meyer's deposition transcripts are submitted as exhibits 1, 2, and 3 to UCC's reply papers.

Amster, a company located in Stony Brook, New York. In this capacity, Mr. Meyer removed tiles in need of replacement and installed new tiles in their place, cutting them to fit when necessary. Mr. Meyer testified that he inhaled asbestos-laden dust both while cutting new tiles and while sweeping up. Although Mr. Meyer could not name the manufacturers of the tiles that he removed, he did identify the brand names of the tiles he installed, including Azrock, Amtico, Armstrong, Goodrich, Kentile, and Congoleum.

Between 1963 and 1985 UCC sold raw short-fiber chrysotile asbestos under the trade name Calidria. It is undisputed that UCC supplied Azrock with asbestos and that UCC's asbestos was integrated into Azrock's vinyl asbestos tiles ("VAT tiles"). UCC claims that Azrock only manufactured VAT tiles until 1977 whereas Mr. Meyer did not install Azrock tiles until 1978. UCC further asserts that as a bulk supplier of asbestos it had no duty to warn Mr. Meyer of the dangers associated with Calidria because it provided adequate warnings to Azrock. UCC maintains that because it had no opportunity to cross-examine Mr. Meyer at his deposition there is no admissible evidence identifying Union Carbide as a source of his exposure.

Plaintiffs counter that UCC was the exclusive supplier of asbestos to Azrock from February 1974 until October 1982. As a result, plaintiffs submit that any Azrock VAT tiles with which Mr. Meyer worked must have contained UCC's asbestos. Plaintiffs also assert that in respect of UCC's duty to warn of the hazards associated with its asbestos, the adequacy of any warnings provided by UCC to Azrock is a question of material fact that must be decided by a jury.

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). 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). All reasonable inferences should be resolved in the plaintiff's favor. *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dept 1990).

In support of its argument that plaintiffs' claims against it are speculative because Azrock stopped manufacturing VAT tiles in 1977, at least one year prior to Mr. Meyer's alleged exposure, UCC offers three sets of interrogatory responses made in unrelated cases by Azrock's successor-in-interest, Domco Products Texas L.P. ("Domco"), which provide that Azrock VAT tiles were manufactured no later than 1977.² Plaintiffs however submit different interrogatory responses sworn to by Jeff Chalifoux, Domco's then Controller for U.S. Operations, which show that Azrock VAT tiles were manufactured until 1978.³ As a preliminary matter, therefore, it is apparent there exists a material question of fact as to when Azrock ceased to manufacture VAT tiles.

Moreover, even if Azrock stopped manufacturing VAT tiles in 1977, it is possible that such tiles were still in the marketplace in 1978 and beyond. *See Taylor v A.C. & S., Inc., et. al*, 304 AD2d 403, 404-05 (defendant failed to proffer any evidence that its asbestos products were not being residually used in the market place); *see also Orszulak v A.O. Smith Water Prods.*, Index No.

² Domco's Responses to Interrogatories filed in the Superior Court of California, County of San Francisco (Feb. 27, 2008); Superior Court of California, County of Los Angeles (December 14, 2007); and Circuit Court Third Judicial Circuit, Madison County, Illinois (undated) are submitted as defendant's reply exhibits 4, 5 and 6, respectively.

³ Domco's Responses to Interrogatories filed in the Superior Court of California, County of San Francisco (Feb. 29, 2000) are submitted as plaintiff's exhibit C.

190141/00, 2010 NY Misc. LEXIS 5900 (Sup. Ct. NY Co. 2010). In this regard, Mr. Meyer plainly testified to working with and being exposed to asbestos while installing Azrock VAT in 1978 and 1979 (defendant's exhibit 1, pp. 51-52; defendant's exhibit 2, pp. 315-317):

Q During the time that you worked for Stanley Amster, do you believe you were exposed to asbestos?

A I do.

Q Did you personally handle any products that you believe contained asbestos in the course of your employment?

A I did.

Q What types of products?

A VAT, vinyl asbestos tiles.

Q What did you have to do with the tile?

A Any tiles that were broken I would scrape out, and any tiles that needed to be replaced, I would, and if they had to be cut, I would cut them to fit.

Q The tiles that you removed, do you believe they contained asbestos?

A I wouldn't know.

Q Do you know the brand name, the trade name or manufacturer name of any of the tiles that you removed?

A I do not.

Q Am I correct that you would then install new tiles?

A That is correct.

Q Do you know the brand name, trade name or manufacturer name of any of the new tiles that you would install?

A I do. Azrock, Amtico, Armstrong, Kentile, Congoleum. . . . At the moment, that's what I remember.

* * * *

Q . . . Am I correct that you would identify floor tiles being manufactured by Azrock based on removing it from an Azrock box located in Mr. Amster's garage?

A That's correct.

Q Can you describe the box, the Azrock box for me in terms of size? . . .

A It was a cardboard box. It would be a little more than 12 inches wide and maybe

eight inches high.

* * * *

Q Where did the name appear on the box?

A Towards the top.

Q On the front of the box towards the top?

A On the side of the box towards the top.

* * * *

Q Do you recall any other writing on the box?

A It would have vinyl asbestos tile written on it. . .

The defendant also argues that Azrock was in a better position to warn ultimate users such as Mr. Meyer because it controlled the characteristics, packaging, and use of the final product. This court addressed near-identical issues in *Vega v Georgia Pacific, LLC, et. al.*, Index No. 190409/11 (Sup. Ct. NY Co. January 10, 2013), and in *Macek v CBS Corp., et. al.*, Index No. 190085/11 (Sup. Ct. NY Co. March 22, 2013). In those cases I held that UCC had an affirmative duty to warn its customers of the dangers associated with Calidria asbestos and that the adequacies of any such warnings were questions of fact to be determined by the jury. I held that UCC could not free itself of its duty to warn in light of evidence which indicated that UCC may have withheld highly relevant information from its customers regarding Calidria's health effects. As in *Vega* and *Macek*, the submissions on this motion show that UCC may not have provided Azrock with relevant information regarding health concerns associated with its asbestos product, and as such UCC's motion on this ground is denied.

UCC further asserts that because it did not have an opportunity to cross-examine Mr. Meyer his deposition testimony is inadmissible against it at trial and, consequently, plaintiffs' claims against it should be dismissed. However, there is no evidence to show that UCC has sought to depose Mr. Meyer since being named as a defendant in this case. In any event, UCC will have the

opportunity to question him at trial.

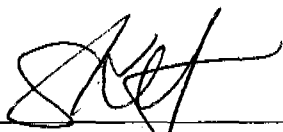
The court has considered the defendant's remaining contentions and finds them to be without merit.

Accordingly, it is hereby

ORDERED that Union Carbide Corporation's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 4.30.13



SHERRY KLEIN HEITLER
J.S.C.

FILED
MAY 03 2013
NEW YORK
COUNTY CLERK'S OFFICE