

Vellucci v Borg Warner Corp.

2013 NY Slip Op 31304(U)

June 12, 2013

Sup Ct, NY County

Docket Number: 190201/12

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 : 190201/2012
VELLUCCI, JOHN
vs.
BORG-WARNER CORPORATION,
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT (TRANE/AMER. STD)

INDEX NO. 190201/12
MOTION DATE _____
MOTION SEQ. NO. 002

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 6.12.13,**

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

Dated: 6.12.13



HON. SHERRY KLEIN HEITLER, J.S.C.

- 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
JOHN VELLUCCI and LINDA VELLUCCI,

Plaintiffs,

Index No. 190201/12
Motion Seq. 002

DECISION & ORDER

-against-

BORG WARNER CORPORATION, et al.,

Defendants.

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

Defendant Trane US, Inc., f/k/a American Standard, Inc. (“Trane”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint in this action and all cross-claims against it on the ground that plaintiffs have failed to establish that plaintiff Joseph Vellucci was exposed to an asbestos containing product manufactured, sold, supplied, and/or distributed by Trane or any predecessor of Trane. As more fully set forth below, the motion is denied.

Plaintiff John Vellucci was diagnosed with mesothelioma on or about March 5, 2012 at the age of 81. On April 17, 2012, Mr. Vellucci and his wife Linda Vellucci (“Plaintiffs”) commenced this action to recover for personal injuries allegedly caused by Mr. Vellucci’s exposure to asbestos.

Mr. Vellucci was deposed fully over the course of two days on June 7 and 8, 2012.¹ He testified that he was exposed to asbestos during the course of his career as a pressman/press operator for various printing outfits in New York City. He further testified that he was exposed during the course of renovation projects and repairs he performed at his personal residences,

¹ Mr.Vellucci’s deposition transcripts are submitted as defendant’s exhibits A and B.

including routine maintenance that he performed on an Ideal-brand boiler at his Brooklyn, New York home where he resided from 1946 to 1949. In this regard, Mr. Vellucci testified as follows (defendant's exhibit A, pp. 80-81, 163, 167-168, 172-73):

Q. Other than home renovations and your work as a pressman, do you believe you were exposed to asbestos in any other way during your lifetime?

A. Yes.

Q. How so?

A. We used to clean out the burners, and they were all loaded with asbestos.

Q. Where were these burners located?

A. In the houses that we owned.

Q. Can you tell me specifically which houses you performed this work?

A. Carol Street and Third Place.

Q. Do you know the brand name, trade name or manufacturer name of the burner in Carol Street?

A. Carol Street was Weil McNeil (phonetic), Weil McLane, and on Third Place it was Ideal.

Q. You identified the burner at that residence as Ideal. How is it that you identify Ideal as the manufacturer on the burner? . . .

A. It was written on the outside, on the door.

Q. You testified earlier that you would open the door, blow the oil out of the lines and then close the door?

A. Yeah. You had to shut the burner off, and the lines in where the oil flowed through to the burners, and we would have to take it apart, because the oil was always dirty. You had to clean the pipe, put it back together again, open it up and slide it again.

Q. When you say clean the pipe, what are you talking about?

A. Dirt used to get stuck in the pipe so the oil wouldn't flow, and the oil -- the burner would be shut down.

Q. Where did the pipe lead to and from that you're referring to?

A. From the burner, from the oil tank down on the floor, and it went inside. We

had to open the door and go inside on the floor and disconnect where the valve was. Disconnected and blow it out with something to clean it out. Put it back together again, open it up and start it. . . .

Q. Okay. Do you believe you were exposed to asbestos from that process?

A. Partially.

Q. How so?

A. Well, it was asbestos.

Q. Asbestos where?

A. On the door or around it.

* * * *

Q. . . . And with regard to the insulation that was on the outside on the boiler, what is the basis for your belief that that product contained asbestos?

A. Well, my brother-in-law said it was all asbestos

Q. Other than your brother-in-law telling you that, you have no personal knowledge? . . .

A. My father.

Q. You remember both your father and brother-in-law telling you?

A. Yeah. They knew it was asbestos

A . . . I would say what's this. He would say, this is all asbestos so that it will keep the burner cool on the outside.

It is undisputed that defendant Trane is responsible for the Ideal product line. Trane's corporate history can be traced back to the American Radiator Company which was formed in 1892. American Radiator acquired the Ideal Boiler Company in 1897. It is also undisputed that Ideal marketed asbestos cement to be used as insulation on its boilers. According to interrogatory answers provided by the defendant in unrelated cases in Harris County, Texas and in Wharton County, Texas, Ideal marketed asbestos cement under the trade name "Ideal" for use in conjunction with Ideal boilers until at least 1930. (See defendant's exhibit B, p. 3 [Harris Co.], defendant's exhibit B, p. 4 [Wharton Co.]).

Notwithstanding, Trane argues it is entitled to summary judgment pursuant to CPLR 3212 because Mr. Vellucci's testimony that the Ideal boiler in his home contained asbestos is inadmissible hearsay insofar as he learned such information from what his father and brother-in-law told him. Trane further argues that even were the court to consider Mr. Vellucci's testimony, it is still entitled to summary judgment because Mr. Vellucci has no knowledge of the service history of the boiler and thus does not know how many times the external insulation may have been changed prior to his family moving into the home.

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 overcome summary judgment in asbestos cases, the plaintiff need only 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).

Trane's motion for summary judgment is denied. To the extent Mr. Vellucci's testimony may be based on hearsay, it nevertheless may be considered in opposition to Trane's motion because it is not the sole basis for the court's determination. *Oken v. A.C. & S.*, 7 AD3d 285, 285 (1st Dept 2004). As set forth above, Trane's interrogatory responses show that Ideal provided asbestos cement to be used with Ideal boilers at least until 1930.

Mr. Verducci's inability to provide testimony with respect to the service history of the boiler on which he worked goes only to the weight to be accorded to his testimony by the trier of

fact. On a summary judgment motion it is not for the court to make such an assessment. *See Asabor v Archdiocese of NY*, 102 AD3d 524, 527 (1st Dept 2013); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996).

In light of the foregoing, it is hereby

ORDERED that Trane US, Inc., f/k/a American Standard, Inc.'s motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED:

6-12-13



SHERRY KLEIN HENTLER
J.S.C.