

Fernandez v A.C. and S., Inc.
2013 NY Slip Op 31669(U)
July 22, 2013
Supreme Court, New York County
Docket Number: 190399/11
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 : 190399/2011
FERNANDEZ, ALBERTO
vs.
3M COMPANY, ET AL.
SEQUENCE NUMBER : 010
SUMMARY JUDGMENT

INDEX NO. 190399/11
MOTION DATE _____
MOTION SEQ. NO. 010

(COURTER)

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). _____

FILED

JUL 25 2013

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the COUNTY CLERK'S OFFICE
memorandum decision dated 7.22.13
NEW YORK

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

Dated: 7.22.13

_____, 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
ALEIDA FERNANDEZ, Individually and as Administratrix
of the Estate of ALBERTO FERNANDEZ,

Index No. 190399/11
Motion Seq. 010

Plaintiffs,

DECISION AND ORDER
FILED

-against-

JUL 25 2013

A.C. and S., Inc., et al.,

COUNTY CLERK'S OFFICE
NEW YORK

Defendants.

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

In this asbestos personal injury action, defendant Courter & Company, Inc. ("Courter") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that there is no evidence to show that plaintiffs' decedent Alberto Fernandez was exposed to asbestos from work performed by Courter employees.

Mr. Fernandez was born in Cuba in 1939 and immigrated to the United States in 1962. From 1966 to 1969 he worked for Consolidated Edison ("Con Ed") as a general utility man and as a mechanic B. Mr. Fernandez and his wife Aleida Fernandez commenced this action on October 14, 2011 to recover for injuries caused by Mr. Fernandez' exposure to asbestos during this time period. Mr. Fernandez was deposed on December 2, 2011, December 5, 2011, and December 8, 2011 ("Deposition").¹

Mr. Fernandez testified that he personally performed maintenance work on switches, breakers, and other electrical equipment at Con Ed's Ravenswood Powerhouse and that such work exposed him to asbestos fibers. Mr. Fernandez further testified that other trades not employed by Con Ed

¹ Portions of Mr. Fernandez' deposition transcripts were submitted as part of the plaintiffs' opposition papers. At its request the court has since received a full transcript via email.

maintained the various “units” at Con Ed’s Ravenswood Powerhouse in his presence. These units consisted of boilers, turbines, pipes and other types of equipment.

Courter argues that plaintiffs’ claims against it are speculative because there is nothing to show that the other trades that worked in Mr. Fernandez’ vicinity were Courter employees or that such trades exposed Mr. Fernandez to asbestos. Plaintiffs oppose on the ground that Con Ed contracted with Courter to install the insulation and pipe work associated with Ravenswood’s main boiler during the time frame that Mr. Fernandez worked as a general utility man and mechanic B for Con Ed and that his testimony of the maintenance workers he encountered raises a material issue of fact whether he was exposed to asbestos as a bystander from such work.

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, should the moving defendant make 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). The identity of a manufacturer of a defective product may be established by circumstantial evidence but such evidence cannot be speculative or conjectural. *See Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596, 601 (1996).

Plaintiffs’ documentary submissions show that in 1965 Courter began to furnish and supervise the labor, materials, and equipment for the initial construction of Ravenswood’s main steam boiler and was contracted to install numerous piping systems associated with Ravenswood’s Unit # 3 (plaintiffs’

exhibits 4 & 5).² Mr. Fernandez, on the other hand, testified that he observed others performing maintenance and repair work at that location (Deposition pp. 228-229, 490, 493-94, objections omitted):

- Q. Now, you indicated that you worked at the powerhouse on three occasions in emergency scenarios?
- A. That is correct.
- Q. When you use the word “emergency,” what sort of scenario are you talking about?
- A. The unit’s down, “the unit” meaning the generator for that. You have, I believe, in Ravenswood you have three, three different units.
- Q. Okay.
- A. We call them one, two and Big Allie is the big one. So if the unit’s down, then everybody have to go in and work on that unit, once again, to put it back up.
- Q. Now, you would be there as a mechanic B?
- A. That’s correct.
- Q. On one of these emergency scenarios, how much time would you be there working? Would it be for a day or longer than a day?
- A. Oh, probably 20 days, 30 days. It depends how long it takes to put it back in.
- * * * *
- Q. At Ravenswood, did you see work being done on the boiler?
- A. I did.
- Q. And what year was that?
- A. It was 1967, ‘68. I can’t recall the year exactly.
- Q. But is it a reasonable estimate that it was around ‘67 or ‘68?
- A. Around there, yeah.
- Q. And what were you doing at Ravenswood during that period of time when you saw others work on the boiler?
- A. We were working on the system whenever you have to work on it.
- Q. Do you specifically recall what you were doing while other people, while you observed other people working on the boiler at Ravenswood?

² Plaintiffs submit a June 14, 1950 Con Ed specification for turbine casings and flange insulation (plaintiffs’ exhibit 6) which references the use of asbestos paper. However, the relationship to Courter is unclear and the document predates Mr. Fernandez’ employment by approximately 15 years.

- A. No, I don't recall. . . .
- Q. Back to Ravenswood. Do you recall what you observed the workers doing on the boiler when you were at Ravenswood?
- A. No, I do not.
- Q. So you don't know what work was being done on the boilers --
- A. No.
- Q. Let me finish my question.
- A. I'm sorry.
- Q. That's okay. You don't know what work was being done on the boilers when you were at Ravenswood?
- A. No. I don't even know if they replaced the pipes or what. In there, I really don't know.
- Q. Do you know if those workers who were working on the boilers used any asbestos-containing materials? . . .
- A. I don't know. When you say "asbestos-containing," meaning covered?
- Q. Anything. I mean --
- A. I don't, I don't recall.
- Q. How far away were you from the workers who were doing work on the boilers when you were doing your work? . . .
- A. I would say 30, 40 feet away from them.
- Q. And do you know who employed any of the workers who were doing work on those boilers at Ravenswood?
- A. No.
- * * * *
- Q. Do you believe you were exposed to asbestos from any work that was done on the boilers at Ravenswood? . . .
- A. I believe so. I don't know. To be honest with you, it was dusty. I don't know.
- Q. Do you know what the source of that dust was?
- A. No.
- Q. Do you know if you were in the vicinity if any dust was created from any work that was done on those boilers? . . .
- A. I don't know. I didn't see it.
- Q. Can you give me a physical description of any of the uniforms that the workers were wearing that worked on the boilers when you were at Ravenswood?

A. No.

Q. Do you know if they had on a hat?

A. They have to have a hat. But I don't recall what, you know, just what type of hat.

Q. And did, do you know if they had on, what type of uniform they had on --

A. No.

Q. -- if any? And how many times would you say that you observed workers working on boilers at Ravenswood?

A. Maybe once.

Significantly, Mr. Fernandez could not say who employed the workers at the Ravenswood facility that maintained the main boiler at that location, what work they were doing, where the dust came from, or whether such dust contained asbestos. Thus, even if this court were to assume, *arguendo*, that such work was performed by Courter employees, there is no evidence to show that it contributed to Mr. Fernandez' asbestos exposure. *See Cawein, supra.*

Accordingly, it is hereby

ORDERED that Courter & Company, Inc.'s motion for summary judgment is granted, and this action and any cross-claims against Courter 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.


ENTER:

FILED

JUL 25 2013

COUNTY CLERK'S OFFICE
NEW YORK

DATED: 7.22.13



SHERRY KLEIN HEITLER
J.S.C.