

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

2013 NY Slip Op 31729(U)

July 29, 2013

Supreme Court, New York County

Docket Number: 105959/03

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

JAMES JOSEPH DUPLESSIS,

FILED
JUL 31 2013
COUNTY CLERK'S OFFICE
NEW YORK
Defendants.

INDEX NO. 105959/03

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

- v -

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

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

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

This motion is decided in accordance with the memorandum decision dated 7.29.13.

As per the annexed memorandum decision, Mr. Duplessis' individual action which bears Index No. 105959/03 is hereby severed from the multi-plaintiff action bearing Index No. 128019/02.

The County Clerk is directed to transfer any documents related to Mr. Duplessis' individual action that are currently located in the file bearing Index No. 128019/02 into the file bearing Index No. 105959/03, except that a copy of this order shall also be placed in the file bearing Index No. 128019/02.

Dated: 7.29.13

SHERRY KLEIN HEITLER J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

-----X
JAMES JOSEPH DUPLESSIS,

Index No. 105959/03
Motion Seq. 002

Plaintiff,

-against-

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

Defendant

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

DECISION & ORDER
FILED
JUL 31 2013
COUNTY CLERK'S OFFICE
NEW YORK

In this asbestos personal injury action, defendant Crane Co. ("Crane") moves pursuant to CPLR 3211(a)(4) and (8) to dismiss this action as duplicative of a prior multi-plaintiff action and for lack of personal jurisdiction. Defendant also moves pursuant to CPLR 3212 for summary judgment on the ground that plaintiff James Duplessis failed to establish that he was exposed to asbestos from any product manufactured, supplied or distributed by Crane. For the reasons set forth below, the motion is denied.

BACKGROUND

James Duplessis was diagnosed with pleural disease on May 30, 2002 and with asbestosis on December 9, 2003. On December 31, 2002 Mr. Duplessis joined with numerous other plaintiffs in a multi-plaintiff action in this court bearing Index No.128019/02 to recover for personal injuries caused by their alleged asbestos exposure. On March 31, 2003, in accordance with a court order which directed all New York City Asbestos Litigation ("NYCAL") plaintiffs to abandon multi-plaintiff actions in favor of individual actions, Mr. Duplessis abandoned the aforesaid multi-plaintiff action and individually filed the within action bearing Index No. 105959/03.

Mr. Duplessis was deposed on March 22, 2012.¹ During his deposition, he testified that he worked as an electrician from 1955 to 1995 at various commercial sites in upstate New York. Among other things, Mr. Duplessis testified that while working at the Nine Mile Powerhouse and Alcan Aluminum Plant in Oswego, New York he was exposed to asbestos-containing materials, including asbestos insulation and wiring, from the installation, maintenance, and repair of Crane valves, and from other trades insulating Cyclotherm boilers.²

Defendant argues that the court lacks personal jurisdiction over it due to plaintiff's failure to properly serve Crane in the within action. Defendant also argues that plaintiff failed to demonstrate that he was exposed to asbestos fibers originating from a product manufactured, supplied or distributed by Crane. Plaintiff asserts that Crane was properly served as a defendant herein, and that Mr. Duplessis' testimony regarding his asbestos exposure while working with and around Crane products raises a triable issue of fact sufficient to defeat summary judgment.

DISCUSSION

I. Motion to Dismiss

Defendant raised virtually identical issues under CPLR 3211(a)(4) and (8) in *Contento v A. C. & S., et al.*, Index No. 121539/01, decided by this court on March 13, 2012. In *Contento* I held that:

Crane Co.'s motion to dismiss because there is another action pending against it is without merit. In respect of this issue, Crane Co. submits that because there is a prior multi-plaintiff action pending against it . . . which arises from the same set of facts and asserts the same causes of action as the within action, dismissal of the within action is required under CPLR 3211(a)(4). To the contrary, if plaintiff's case against this defendant was severed from the prior multi-plaintiff action in favor of the within single plaintiff action, by reason of such severance the

¹ Mr. Duplessis's deposition transcript is submitted as defendant's exhibit E.

² Cyclotherm boilers are a Crane product.

plaintiff's prior action would no longer be viable, eliminating the possibility of the type of conflict addressed by CPLR 3211(a)(4).

Contento, supra, at *2. Similarly, in this case, although the prior action appears to still be active in respect of certain other plaintiffs, it bears no relation to the within action which was severed therefrom in 2003 and which has been maintained as a separate action by the plaintiff under Index No.105959/03 ever since. Also as set forth in *Contento*, since Crane did not dispute service upon it in the prior multi-plaintiff action, it has no ground upon which to challenge service upon it in this individual action, the pleadings for which were transferred to this action under a new index number by direction of this court. *Id.* Even assuming, *arguendo*, that there was a service deficiency, the motion to dismiss would still be denied, as the objection to personal jurisdiction based on improper service has been waived by Crane's willing participation in this matter over the course of many years. *See Lucadamo v A.O. Smith Water Products, Co., et al.*, Index No. 116293/04 (Sup. Ct. NY Co., June 26, 2013, Heitler, J.)

II. Motion for Summary Judgement

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 an asbestos personal injury action, should the moving defendant make a *prima facie* showing of entitlement to summary judgment as a matter of law, the plaintiff must then demonstrate that he was exposed to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). Moreover, plaintiff must show that it was more likely than not that such exposure was a substantial factor in his injury. *Diel v Flintkote Co.*, 204 AD2d 53, 54 (1st Dept 1994). In this regard, it is sufficient for plaintiffs 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).

During his deposition, Mr. Duplessis testified that he was exposed to asbestos at the Nine Mile Powerhouse while working in the presence of other trades that installed asbestos insulation on Crane products and from personally connecting asbestos-coated wiring to Crane valves (defendant's exhibit E, pp. 74-75, 77, 93-94):

Q. Was there anything about the work that you performed at Nine Mile Two that you believe exposed you to asbestos?

A. I worked in and around other crafts, insulators, that were installing asbestos materials.

Q. You mentioned insulators. What were the insulators doing in your presence?

A. Putting on pipe covering, putting on duct -- covering ducts.

Q. Anything else?

A. That would be -- you know, they would be insulating valves, and you know. . . .

Q. What about the insulators [sic] work do you believe exposed you to asbestos?

A. Just being in the presence of their work. It created dust. It was there, you know.

* * * *

Q. Do you know the brand name, trade name or manufacturer name of any of the valves that the insulators were covering with this material?

A. I think I might have seen a name, Weir. There was another one. I can't recall the name.

* * * *

Q. So, do you believe that the wiring that you were handling contained asbestos?

A. Some of it was asbestos coated wiring.

Q. And what exactly did you do with the wiring at Nine Mile 1?

A. You put it in the place it was supposed to go and hooked it up.

Q. What did you install it into? . . .

A. It could have gone into a valve. It could have went into a switch. It could have went into anything that required that type of wire. . . .

Q. Okay, So, you recall installing asbestos wiring into valves at Nine Mile 1?

A. Yes. . . .

Q. Do you know the brand name, trade name, or manufacturer name of the valves that you installed this wiring into at Nine Mile 1?

A. I think I mentioned it before, Crane. Can [sic] was perhaps one and Weir I think was the other one I mentioned.

Mr. Duplessis also testified that throughout the course of his employment as an electrician he inhaled asbestos dust while working in the vicinity of Cyclotherm boilers (defendant's exhibit E, pp. 87-88, 179, 181-182):

Q. So, is it fair to say that with respect to Alcan Aluminum Plant you can't tell me if you were exposed to asbestos at this site other than what you told me?

A. All I can tell you at this particular time throughout the course of my employment on construction as an electrician I saw several products that were -- that had asbestos to them. Boilers in specific there was American Standard. There was A.O Smith. There was Kohler, Foster Wheeler, Fitzgibbons, Cyclotherm, Aimes (phonetic). Peerless I think was another name. And other instruments there are other things that had asbestos on them. Turbines, for instance, General Electric turbines, Westinghouse.

* * * *

Q. Did you work on the boilers?

A. Not directly on them, but in the general vicinity of the boilers.

Q. Did other trades work on the boilers in your presence?

A. Yes.

Q. What would those trades be?

A. Insulators primarily and pipefitters.

Q. What, if anything, was on the outside of the boilers?

A. Some sort of asbestos covering of one description or another.

* * * *

Q. Okay. And when the insulators were insulating these boilers, what, if anything, would happen to the air around you?

A. You would have dust in the air. There was dust everywhere. . . .

Q. Did you breathe it in?

A. Probably did, but didn't ever pay any attention.

Crane argues that Mr. Duplessis's testimony amounts to bare speculation because on cross-examination he testified that he could not say with certainty that he was exposed to asbestos from either Crane valves or Cyclotherm boilers: (defendant's exhibit E, pp. 176-178, 201):

Q. Do you recall there being valves at Nine Mile 1 that were manufactured by Crane?

A. I don't recall it. I remember seeing the name, but I don't recall.

Q. So it's fair to say that you recall generally seeing the name while you were an electrician at some point in time, but you can't specify when and where?

A. Yes. . . .

Q. And it's fair to say that you don't specifically recall performing any work on a Crane valve, correct?

A. That's correct.

Q. And it would also be fair to say that you really couldn't tell me if you were ever exposed to asbestos from a Crane valve, correct?

A. No. I can't say that.

Q. Okay. So, it's fair to say, correct?

A. Yes.

* * * *

Q. Is it fair to say that while you may recall Cycletherm [sic] boilers throughout your career as an electrician, you can't tell me if you ever saw any insulators working on those particular boilers?

A. I don't recall.

Q. So it's fair to say that you can't tell me what work may have ever been performed on one of those boilers, correct?

A. That's a fair assumption.

Q. And so, would it also be fair to say that you can't tell me if you were really ever exposed to asbestos from a Cylcotherm boiler? . . .

A. I can't tell you that no.

Mr. Duplessis' testimony that he worked directly with and in the vicinity of Crane products is sufficient evidence from which a jury may reasonably infer Crane's liability even though he may have offered conflicting testimony on cross-examination. *See Reid, supra*. The court's function on a motion for summary judgment is to determine whether there exist factual issues that require resolution at trial, not to assess credibility. *See Ferrante v American Lung Ass'n*, 90 NY2d 623, 631 (1997). Consequently, the trier of fact must decide the weight to be given to Mr. Duplessis' testimony. *See Alvarez v NY City Hous. Auth.*, 295 AD2d 225, 226 (1st Dept 2002) ("Any inconsistencies in the several accounts of the incident goes to the weight of the evidence, not its competence, and the value to be accorded to the evidence is a matter of resolution by the trier of fact."); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996) ("The assessment of the value of a witnesses' testimony constitutes and issue for resolution by the trier of fact . . .").

Crane also alleges for the first time in reply that it is not liable for external insulation, packing and gaskets, manufactured, designed, supplied or installed by others and used in conjunction with Crane valves and Cyclotherm boilers. However, the First Department has consistently held that the purpose of reply papers is to address only arguments made in opposition to the position taken by the movant and not to permit the introduction of new grounds for the motion. *See Dannasch v Bifulco*, 184 AD2d 415, 417 (1st Dept 1992); *see also Batista v Santiago*, 25 AD3d 326, 341 (1st Dept 2006); *Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 (1st Dept 1993). Therefore, the court will not address this argument. Moreover, this

court has already addressed this issue in its decision in *Sawyer v. A.C.&S., Inc.*, Index No. 111152/99 (Sup. Ct. NY Co., June 24, 2011, Heitler, J), wherein I held that Crane has a duty to warn consumers against the hazards associated with asbestos. *Sawyer, supra*, at *8.

Accordingly, it is hereby

ORDERED that Crane Co.'s motion to dismiss is denied in its entirety; and it is further

ORDERED that Crane Co.'s motion for summary judgment is denied in its entirety; and it is further

ORDERED that to the extent not already completed, the Clerk is directed to sever Mr. Duplessis' action from the multi-plaintiff action bearing Index No. 128019/02; and it is further

ORDERED that the Clerk is directed to correct his records to reflect that Mr. Duplessis' action bearing Index No. 105959/03 is the action pending for such plaintiff in this court; and it is further

ORDERED that the Clerk is directed to transfer any documents related to Mr. Duplessis that are currently located in the file bearing Index No. 128019/02 into the file bearing Index No. 105959/03, except a copy of this decision shall be placed the file bearing 128019/02; and it is further

ORDERED that the multi-plaintiff action shall continue as to all remaining plaintiffs therein.

This constitutes the decision and order of the court.

DATED: 7.29.13

FILED
JUL 31 2013
COUNTY CLERK'S OFFICE
NEW YORK

SHERRY KLEIN HEITLER
J.S.C.