

Hammer v Algoma

2013 NY Slip Op 31801(U)

July 29, 2013

Sup Ct, New York County

Docket Number: 190363/12

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 : 190363/2012
HAMMER, ROLF
vs
ALGOMA HARDWOODS, INC.
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. 190363/12
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 7.29.13**

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

Dated: 7.29.13

_____, 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
MARGARET HAMMER and ROLF HAMMER

Index No. 190363/12
Motion Seq. 002

Plaintiffs,
-against-

DECISION & ORDER

ALGOMA, et al.,

Defendant(s).

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

In this asbestos personal injury action, defendant Bird Incorporated (“Bird”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint against it on the ground that there is no evidence to show that plaintiff Rolf Hammer was exposed to asbestos from a product manufactured, sold or supplied by Bird. For the reasons set forth below, the motion is denied.

BACKGROUND

Plaintiffs’ decedent Rolf Hammer¹ was diagnosed with malignant mesothelioma in or about June of 2012. On August 4, 2012, Mr. Hammer and his wife Margaret Hammer commenced this action to recover for injuries allegedly caused by his exposure to asbestos-containing products. Mr. Hammer was deposed on October 26 and November 7, 2012.² He was presented for a *de bene esse* deposition on November 28, 2012.³

¹ Plaintiff is directed to take appropriate actions so that the caption of this case can be amended.

² Mr. Hammer’s deposition transcripts are annexed as Exhibits B and C to defendant’s moving papers.

³ Mr. Hammer’s *de bene esse* deposition transcript is annexed as Exhibit D to defendant’s moving papers.

Mr. Hammer testified that during the summers of 1957 and 1959 he worked for a carpentry contractor delivering specialty products to worksites and did framing work at housing developments in Lincroft and Tinton Falls, New Jersey. Among other things, he unloaded Bird non-perforated roofing felt, three-tab shingles, and siding shingles from his delivery truck, carried them to the construction workers, and swept out the flatbed of his truck when he was finished. Mr. Hammer testified that asbestos dust got on his clothes when he handled such products and that he inhaled asbestos dust while cleaning out his truck. Mr. Hammer also testified that he was exposed to asbestos dust while working in the vicinity of other construction workers as they cut and installed these Bird products.

Bird argues that Mr. Hammer could not have been exposed to asbestos from Bird roofing felt or roofing shingles because those products did not contain asbestos. According to Bird, Mr. Hammer's testimony is speculative because he learned about the asbestos content of roofing materials at a later time when he worked for U.S. Plywood from 1960 to 1985. Bird further argues that Mr. Hammer failed to sufficiently identify any alleged exposure to Bird siding shingles.

DISCUSSION

Summary judgment is a drastic remedy that must not be granted if there is any doubt as to the existence of a triable issue of fact. *Tronlone v Lac d'Amiante du Quebec, Ltee*, 297 AD2d 528, 528-9 (1st Dept 2002). In a personal injury action arising from a plaintiff's alleged exposure to asbestos, the plaintiff is not required to show the precise causes of his damages, but 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). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to

the nonmoving party. *Angeles v Aronsky*, 105 AD3d 486, 488-89 (1st Dept 2013). Any doubt must be resolved against summary dismissal. *Reid, supra*, at 463.

I. Bird Roofing Felt and Shingles

Mr. Hammer testified that he was exposed to asbestos dust from Bird non-perforated roofing felt and three-tab shingles in a variety of ways while making his deliveries (defendant's exhibit C pp. 207-08, 209-10; defendant's exhibit D pp. 26-27):

Q. Did anyone else assist you in delivering products?

A. No.

Q. You were the only delivery man?

A. Right.

Q. And could you just elaborate a little bit on what delivering products entailed?

A. Sure. Okay. Because it was a subdivision that went just from foundation to foundation to foundation, these were mostly spec houses, okay, so certain products were delivered to me in bulk –

Q. Okay.

A. – in this one location, and then depending what the next foundation, next foundation needed, I would take that to them. You know, it would be roofing, siding, –

* * * *

Q. And you testified in your first day of deposition testimony that that was generally roofing shingles, felt, and siding?

A. Right.

Q. Okay. And when somebody would request that particular product, you would then deliver it to the foundation slab; is that correct?

A. Correct.

Q. Okay. And how would you move – how would you move the products from where they were being stored to the slab? Would you just carry them?

A. Put them – took them from where they were stacked up, into the back of the truck by hand, yeah.

- Q. Okay. So you'd put them on the back of a truck, drive them to the slab –
- A. I knew how many – I was told by the installer how many bundles I needed to take to them.
- Q. Okay. Great. And during this time, you were never working – you were not installing these products, correct?
- A. I wouldn't install them, but I was around them and I might hand the guy a bundle of something.
- Q. Okay.
- A. But I would – I would – but I did the unloading –
- Q. Yup.
- A. – to wherever he wanted them.

* * * *

- Q. And this felt material, do you recall the names of the companies that supplied the felt that you were delivering?
- A. Bird and CertainTeed.
- Q. And did you handle this material?
- A. Yes.
- Q. And what would happen when you handled the felt?
- A. Well, I – you know, I unloaded it from the truck. I also would occasionally be asked by the installer, you know, I need a roll of felt, bring it up the ladder. So I would have it on my shoulder, so it would, you know – my shoulder would get black, but whatever was on there got on me.
- Q. Okay. And do you believe that the handling of the felt caused you to be exposed to asbestos?
- A. Yes.

Bird argues that Mr. Hammer could not have been exposed to asbestos from its non-perforated roofing felt or three-tab shingles because those products were asbestos-free. In support, Bird offers the affidavit, sworn to March 13, 2013, of Richard C. Maloof.⁴ Mr. Maloof, a former president of Bird who was employed by the company from 1971 until 2003, states that the “three-tab asphalt roofing shingles and residential non-perforated asphalt roofing felts made

⁴ Mr. Maloof's affidavit is annexed as exhibit E to defendant's moving papers.

and distributed by Bird as were described by Mr. Hammer were asbestos free.” (Defendant’s exhibit E ¶ 7). However, no documentary evidence is provided to support his conclusion that such products did not contain asbestos. What remains, then, is a simple conflict between Mr. Hammer’s testimony and Mr. Maloof’s affidavit. The weight to be accorded to each is a question of fact to be decided by a jury at trial. *See Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996) (“The assessment of the value of a witnesses’ testimony constitutes an issue for resolution by the trier of fact...”). Thus, Mr. Maloof’s “[u]nsupported, uncross-examined testimony is insufficient to form the basis of [this] motion for summary judgment.” *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Bird’s argument that Mr. Hammer’s testimony is speculative is without merit. The fact that Mr. Hammer learned that Bird roofing felt and shingles contained asbestos while employed at U.S. Plywood goes to his credibility as a witness. *See Dollas, supra* at 321. Moreover, Bird gave no credence to Mr. Hammer’s testimony that he “grew up a half mile from an asbestos factory that made asbestos shingles” so he “knew what they looked like.” (Defendant’s exhibit C p. 257.)

II. Bird Siding Shingles

Bird argues that Mr. Hammer failed to sufficiently identify and allege exposure to Bird siding. In this regard, Bird relies on Mr. Hammer’s Nov. 7, 2012 testimony that he could not recall the manufacturer of the siding shingles he delivered. However, Mr. Hammer’s testimony from his *de bene esse* deposition dilutes that argument (defendant’s exhibit D, p. 22):

Q. Okay. And I wanted to ask you some follow-up questions about what you just described. You mentioned a product that you called asbestos shingles?

A. Yes.

- Q. And where on the house would that product go?
- A. In this case, it was siding.
- Q. Okay. And do you recall the manufacturers of the shingle product?
- A. Yeah. Bird and CertainTeed.
- Q. And you mentioned that you would be responsible, in part, for delivering this product?
- A. Yes.
- Q. And do you believe that the delivering of the product caused you to be exposed to asbestos?
- A. Yes.

Thus, while Mr. Hammer's earlier deposition does not explicitly identify Bird siding shingles as a source of his exposure, he subsequently clearly identified his exposure to such product at his *de benne esse* deposition. This is sufficient to raise a triable issue of fact in this regard. *See Ferrante v American Lung Ass'n*, 90 NY2d 623, 631 (1997) ("It is well settled that the court's function on a motion for summary judgment is to determine whether there exist factual issues that require resolution at trial, not assess credibility."); *see also Alvarez v NY City Hous. Auth.*, 295 AD2d 225, 226 (1st Dept 2002) ("Any inconsistencies in the several accounts of the incident go to the weight of the evidence, not its competence, and the value to be accorded to the evidence is a matter for resolution by the trier of fact."). The court has considered Bird's remaining arguments and finds them to be without merit.

CONCLUSION

In this case, I find that plaintiffs' submissions raise material questions of fact as to Mr. Hammer's alleged exposure to asbestos from Bird products sufficient to preclude summary judgment.

Accordingly, it is hereby

ORDERED that Bird Incorporated's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 7.29.13



SHERRY KLEIN HENTLER
J.S.C