

**Brown v Bell & Gossett Co.**

2013 NY Slip Op 32138(U)

September 3, 2013

Supreme Court, New York County

Docket Number: 190415/12

Judge: Sherry 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 : 190415/2012
BROWN, HARRY E.
vs
BELL & GOSSETT COMPANY
Sequence Number : 001
SUMMARY JUDGMENT (CRANE)

INDEX NO. 190415/12
MOTION DATE
MOTION SEQ. NO. 001

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 Sept 3, 2013

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

Dated: Sept 3, 2013

[Signature], 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  
HARRY E. BROWN and PHYLLIS BROWN,

Index No. 190415/12  
Motion Seq. 001

Plaintiffs,

**DECISION & ORDER**

- against -

BELL & GOSSETT COMPANY, et al.,

Defendants.

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

Defendant Crane Co. ("Crane") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all other claims asserted against it on the grounds that plaintiff Harry Brown's testimony regarding Crane is inadmissible at trial and because it is not liable for asbestos containing products that it did not manufacture, supply or specify for use with its pumps. Plaintiffs' position is that Mr. Brown's testimony should be heard by a jury and that Crane had a duty to warn against the use of asbestos-containing products because it knew or should have known that they would be integrated with its pumps for their intended use.

Plaintiffs commenced this action on September 7, 2012 to recover damages for personal injuries allegedly caused by Mr. Brown's exposure to asbestos-containing products. Mr. Brown was deposed over the course of four days between October 2012 and January 2013. He testified that he was exposed to a variety of asbestos-containing products and equipment during his career as a Union Asbestos Worker and Insulator from 1958 to 1974. Specifically, Mr. Brown testified that he was exposed to asbestos while applying and removing pipe covering, cement and insulation to various types of equipment, namely boilers, turbines, pumps and chillers. Mr. Brown also testified to bystander exposure from working in the vicinity of other tradesmen and contractors who worked with asbestos-

containing joint compound, wallboard, gaskets and fireproofing spray, among other products.

Mr. Brown did not specifically identify the defendant as a source of his exposure on direct examination. On cross-examination, however, plaintiffs' counsel produced Mr. Brown's supplemental/amended interrogatory responses, dated October 9, 2012 and verified by Mr. Brown on October 11, 2012, which contained a list of products to which Mr. Brown was allegedly exposed during his career. Mr. Brown then testified that he was exposed to asbestos by applying asbestos insulation to Crane pumps (defendant's exhibit D, pp. 380-381):

Q. Mr. Brown, I'm going to ask you a few questions. First of all, in your supplemental answers to interrogatories, among the brands of pumps that are listed are Crane pumps, but in the questioning here, you haven't mentioned Crane pumps. During your career, during your time as an insulator between 1958 and 1974, during which time you were exposed to asbestos, were you exposed to asbestos while working on Crane pumps?

A. Yes.

MS. MITTLEMAN: Objection

Q. Did you remove insulation from Crane pumps?

MS. MITTLEMAN: Objection

A. I removed it from Crane and others.

Q. I'm just asking about Crane for now. Did you apply insulation to Crane pumps?

MS. MITTLEMAN: Objection

A. Yes.

Q. Did you see Crane pumps frequently on jobs throughout that entire period between 1958 and 1974?

MS. MITTLEMAN: Objection

A. Yes.

Crane asserts that plaintiffs' counsel impermissibly failed to establish that Mr. Brown's memory was exhausted or required refreshing before referring to his interrogatory responses or that Mr. Brown possessed first hand knowledge of the manufacturers listed therein. Crane thus argues that Mr.

Brown's testimony, his interrogatory responses, and any testimony elicited from such interrogatory responses identifying Crane pumps are inadmissible against it at trial, and as such this action against it should be dismissed as a matter of law.

This issue is raised in the context of Crane's summary judgment motion. In reality, however, what Crane seeks is an evidentiary ruling in advance of trial, which is more appropriate to a motion in limine. *See State v Metz*, 241 AD2d 192, 198 (1st Dept 1998); *see also Speed Avis Rent-A-Car*, 172 AD2d 267 (1st Dept 1991) (Parties should "seek rulings at the time of trial regarding the admissibility of the documentary evidence at issue, when determinations of relevance may be made in context."). Thus, while the court has some concerns about the admissibility of Mr. Brown's testimony, this issue should be raised before the trial judge assigned to this action. *See Radosh v Shipstad*, 20 NY2d 504, 508 (1967) (The trial judge that has broad discretion as to the admissibility of evidence to be offered at trial).

In the summary judgment context, this court's role is to determine whether there exists evidence sufficient to require a trial of any issue of fact. *State v Metz, supra*, at 198. On its face, Mr. Brown's deposition testimony sufficiently identifies the defendant as a source of his asbestos exposure to give rise to a genuine issue of fact. *See Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996) ("The deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaint . . . . The assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact . . . .").

Crane also argues that it is not liable for plaintiffs' injuries because it did not manufacture the asbestos allegedly used in conjunction with its pumps. This court has addressed this issue and Crane's duty to warn in *Sawyer v A.C. & S., Inc., et al.*, Index No. 111152/99 (Sup. Ct. NY Co. June 24, 2011), in which I held that Crane had an affirmative duty to warn consumers against the hazards associated

with asbestos because the evidence demonstrated that Crane recommended the use of asbestos in conjunction with its products.

Crane's assertions that its pumps did not require asbestos to operate properly and that it did not specify the use of asbestos on said pumps do not comport with the record. As in *Sawyer*, the submissions on this motion show that Crane designed and supplied its products to be used with asbestos containing gaskets, packing, insulation, and cement. Accordingly, for the same reasons stated in *Sawyer, supra*, I find that Crane had a duty to warn the plaintiff of the hazards associated with asbestos. See *Liriano v Hobart Corp.*, 92 NY2d 232, 237 (1998); *Berkowitz v A.C. & S., Inc.*, 288 AD2d 148, 149 (1st Dept 2001).

Accordingly, it is hereby

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

This constitutes the decision and order of the court.

DATED: Sept. 3, 2013

  
SHERRY KLEIN HEITLER  
J.S.C.