

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

2013 NY Slip Op 32259(U)

September 19, 2013

Supreme Court, New York County

Docket Number: 190441/12

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: 190441/2012
MCCLOSKEY, PATRICK
vs.
A.O. SMITH WATER PRODUCTS CO.
SEQUENCE NUMBER: 001
SUMMARY JUDGMENT (GOODYEAR)

INDEX NO. 190441/12
MOTION DATE _____
MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

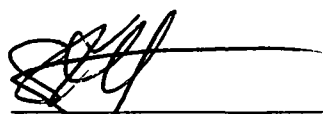
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____
Answering Affidavits — Exhibits _____ **No(s).** _____
Replying Affidavits _____ **No(s).** _____

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

**is decided in accordance with the
memorandum decision dated 9.19.13.**

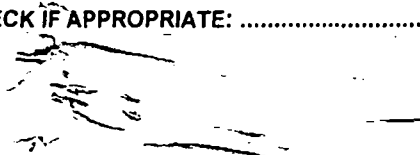
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9.19.13


_____, 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
PATRICK McCLOSKEY and MARY ANNE McCLOSKEY,

Index No. 190441/12
Motion Seq. 001

Plaintiffs,

DECISION & ORDER

-against-

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

Defendants.

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

In this asbestos-related personal injury action, defendants The Goodyear Tire & Rubber Company (“Goodyear”) and Goodyear Canada, Inc. move pursuant to CPLR 3212 for summary judgment dismissing the complaint and all other claims against them on the grounds that the plaintiff has no personal knowledge whether the Goodyear sheet gaskets he worked with contained asbestos and because most of the gaskets manufactured by Goodyear during the relevant time period were asbestos-free. Goodyear Canada, Inc.’s motion is granted as unopposed. Goodyear Tire & Rubber Company’s motion is denied as set forth herein.

Plaintiff Patrick McCloskey was diagnosed with mesothelioma in June of 2012. He and his wife Mary Anne McCloskey commenced this action on October 1, 2012. Mr. McCloskey was deposed over the course of six days in October of 2012 and March of 2013.¹ He testified that he was exposed to asbestos from various products and equipment while working as a career steamfitter from 1962 to 2003, including pumps, valves, boilers, floor tiles, packing, plaster, fireproofing, gaskets, and turbines. Relevant to this motion is Mr. McCloskey’s testimony that

¹ Mr. McCloskey’s deposition transcripts are submitted as exhibit B to the moving papers.

he worked with "Goodyear" brand sheet gaskets throughout this time period (Deposition pp. 359-60, 361, 362, 363, 365, 367, objections omitted):

Q. You also mentioned sheet material that you worked with, right?

A. Yes.

Q. Okay. And that's what you would use if preformed wasn't available, right?

A. Yes.

* * * *

Q. Sitting here today, can you recall any specific markings or logos?

A. Goodyear, Victor. I can't remember any others.

* * * *

Q. And you said you saw Goodyear markings on some gasket material; is that right? Is that what you said?

A. On the sheets.

Q. Okay. How was it written?

A. It was stamped. There was a stamp on it.

* * * *

Q. Just very briefly, when you were using the sheet material, just describe the process? How did you do it?

A. Well, if you needed a gasket, we'd go get the sheet, roll it out, cut a square big enough to place over the flange. And for a full face gasket you would start punching out, lay it on the gasket, start punching out the holes. You're creating dust all the time. You're cutting it, peening down the sides to get the round shape of the gasket. When you cut the piece off that you're going to use, you're creating dust. There's asbestos dust. It was asbestos gasket material.

* * * *

Q. . . . What's your basis for believing that the Goodyear gaskets you testified about contained asbestos?

A. I was told. . . .

Q. Can you recall the name or names of anyone who told you who is still living?

A. They're dead.

Q. Aside from being told that, do you have any personal knowledge that the Goodyear gaskets that you testified about contained asbestos? . . .

A. I was told by a lot of people and it was a standard thing back then that it was

gaskets, gasket material was asbestos, contained asbestos. It was general knowledge.

* * * *

- Q. And the general knowledge that you're talking about, that's a general belief that all gaskets during that time period contained asbestos?
- A. Not all gaskets.
- Q. Okay. The ones that you were using on the systems you were working on?
- A. Gaskets that we used on the steam hot water, chilled water were called asbestos gaskets.

Summary judgement 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 La 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). 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).

The defendant's argument that Mr. McCloskey has no personal knowledge whether the Goodyear gaskets he worked with contained asbestos is belied by the plaintiff's own testimony. Mr. McCloskey clearly stated that he believed the Goodyear gaskets with which he worked contained asbestos based on his understanding of the products that were used by steamfitters during the relevant time period. The assessment of the value of such testimony constitutes an issue for resolution by the trier of fact. It is not a matter for this court to decide on a summary

judgment motion. See *Ferrante v American Lung Ass'n*, 90 NY2d 623, 631 (1997); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996); *Missan v Schoenfeld*, 95 AD2d 198, 207 (1st Dept 1983).

The defendant's assertion that the vast majority of Goodyear gaskets manufactured during the relevant time period were asbestos-free is misplaced. In this regard, the defendant relies solely upon the July 2007 deposition testimony in an unrelated action of Goodyear corporate representative E.W. DeMarse. Mr. DeMarse, who worked for Goodyear in various capacities from 1952 to 1991, estimated that 75% of Goodyear's sheet gaskets were asbestos free. However, Mr. DeMarse admittedly did not "recall really ever seeing any figures on that" and conceded that his answer was "based more on observing in the factory the pounds and square feet that we made in both ways." (Defendant's exhibit C, p. 14²). That Mr. DeMarse "hazard[ed] a guess that [Goodyear] made two or three times more nonasbestos rubber gasketing material than [it] did the compressed asbestos sheet" (*id*) discredits his testimony.

In light of the foregoing, it is hereby

ORDERED that The Goodyear Tire & Rubber Company's motion for summary judgment is denied in its entirety; and it is further

ORDERED that Goodyear Canada, Inc.'s motion for summary judgment is granted; and it is further

ORDERED that this action and any cross-claims against Goodyear Canada, Inc. 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, including The Goodyear Tire & Rubber Company; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

ENTER:

DATED: 9.19.13



SHERRY KLEIN HEITLER
J.S.C.