

McDonald v CBS Corp.
2013 NY Slip Op 32297(U)
September 19, 2013
Supreme Court, New York County
Docket Number: 190079/12
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER

PART 30

Justice _____

Index Number : 190079/2012
MCDONALD, ELSIE
vs.
CBS CORPORATION
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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):

FILED

SEP 27 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9.19.13

[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

ELSIE MCDONALD, as Proposed Executrix for
the Estate of LESLIE MCDONALD, and ELSIE MCDONALD
Individually,

Plaintiffs,

Index No. 190079/12
Motion Seq. 001

DECISION & ORDER

-against-

CBS CORPORATION, f/k/a VIACOM INC., et al.,

Defendants.

FILED

SEP 27 2013

----- X

SHERRY KLEIN HEITLER, J.:

COUNTY CLERK'S OFFICE
NEW YORK

In this asbestos-related personal injury action, defendant Hoffman-New Yorker, Inc. (“Hoffman”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims against it on the ground that there is no evidence to show that plaintiffs’ decedent Leslie McDonald was exposed to an asbestos-containing product manufactured, sold, supplied, distributed or installed by Hoffman.

Mr. McDonald was diagnosed with mesothelioma on July 1, 2010 and passed away from his illness on March 23, 2012. Prior to his death he and his wife Elsie McDonald commenced this action to recover damages for personal injuries allegedly caused by Mr. McDonald’s exposure to asbestos-containing dust while working as a steam presser in Brooklyn and Queens, New York. Mr. McDonald was deposed over the course of three days in February and March of 2012.¹ He

¹ Mr. McDonald’s deposition transcripts are submitted as defendant’s exhibits C, D and E.

testified that he worked for a number of dry-cleaners between 1941 and 1986² and that Hoffman was among the manufacturers of garment presses with which he worked at these businesses. Mr. McDonald believed that changing the press pads and covers on these presses caused him to be exposed to asbestos (defendant's exhibit E, pp. 142, 144-45, 145-46, objections omitted):

Q. Do you know who manufactured any of those press machines you worked with throughout your career? . . .

A. Hoffman and Cissell.

Q. Okay. And you testified that these press machines had press pads, correct? . . .

A. Yeah.

Q. Do you know who manufactured any of the press pads on these machines?

A. Qualitex and [Resillo].

* * * *

Q. What were the press pads made out of? . . .

A. The press pad was made of asbestos.

Q. Do you believe that you were exposed to asbestos when you were working on the press machines? . . .

A. Yes.

Q. How so?

A. I had to stand at the machine and work with the steam and the steam would come through the asbestos covering . . . which covered the machine. In order for the steam to come [through], it had to come up through the machine and through the asbestos covering, then, it covers the top of the pad. . . .

* * * *

Q. Did you change the press pads on the press machines? . . .

A. Yes.

Q. Okay. And I know you said it already, but tell me again how you would do that?

A. The pad was always laid out on the machine. We would use the pad maybe a

² From 1942 to 1945 Mr. McDonald worked as a cook in the United States Navy.

month and when the pad got old it would burn out, and it had clamps underneath holding. We had to take the clamps off and pull off the rotten pad which created dust. . . .

Q. Did you breathe that dust? . . .

A. Yes.

Q. Do you believe that caused you to be exposed to asbestos? . . .

A. Yes, I was.

Q. When you operate the presses and you said the steam would come through the asbestos covering, do you believe that caused you to be exposed to asbestos? . . .

A. Yes.

Defendant asserts that there is no evidence to establish that Mr. McDonald ever encountered an asbestos-containing Hoffman press pad and that it had no duty to warn Mr. McDonald of the dangers associated with products manufactured, sold, supplied, distributed or installed by third-party manufacturers Qualitex and Resillo. Plaintiffs argue that there is an issue of fact whether Mr. McDonald was exposed to asbestos from Hoffman press pads that were shipped with new Hoffman press machines and that Hoffman had a duty to warn with respect to asbestos-containing replacement press pads because it advertised and sold such press pads to be used with its press machines.

A plaintiff “may recover in strict products liability or negligence when a manufacturer fails to provide adequate warnings regarding the use of its product.” *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 297 (1992); *see also Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 106 (1983). A manufacturer “has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known.” *Liriano v Hobart Corp.*, 92 NY2d 232, 237 (1998); *see also Rogers v Sears, Roebuck & Co.*, 268 AD2d 245 (1st Dept 2000); *Baum v Eco-Tec, Inc.*, 5 AD3d 842 (3d Dept 2004). Although a product may “be reasonably safe when manufactured and sold and involve no then known risks of which warning need be given, risks thereafter revealed by user

operation and brought to the attention of the manufacturer or vendor may impose upon one or both a duty to warn.” *Cover v Cohen*, 61 NY2d 261, 275 (1984). The law however cautions against holding a manufacturer liable for another’s defective product where the manufacturer’s sound product is merely compatible with the defective one. *Rastelli, supra*, at 297-98.

The defendant’s reliance on this court’s decision in *Peraica v A.O. Smith Water Products Co.*, Index No. 190339/11 (Sup. Ct. NY Co. Aug. 27, 2012, Heitler, J.) is misplaced. In *Peraica*, I granted the defendant pump manufacturer summary judgment because there was uncontradicted testimony that the defendant did not specify the use of asbestos-containing insulation with its pumps. In fact, product literature showed that the defendant directed its customers not to insulate their pump brackets or motors. Here, the defendant relies solely on the January 7, 2013 affidavit of Hoffman/New Yorker’s former director of engineering, Mr. George Thompson, who stated, based upon his “personal knowledge and information available” to him, that replacement press pads compatible with Hoffman press machines did not have to contain asbestos. (Plaintiffs’ exhibit I, ¶¶ 1,5). However, insofar as the defendant submitted no documentary evidence in support thereof, Mr. Thompson’s assertions are conclusory. Such unsupported, uncross-examined evidence is insufficient to form the basis of a motion for summary judgment. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Republic Nat. Bank of New York v Luis Winston, Inc.*, 107 AD2d 581, 582 (1st Dept 1985).

It is noteworthy that plaintiffs’ opposition contains a New York Pressing Machinery Corporation “New Yorker” instruction manual and parts list printed in or about 1950 for “dry cleaner-clothing manufacturers.” This manual advertises the manufacture and supply of New Yorker rubber press pads containing an “asbestos side” which would provide a “softer base” and “eliminate

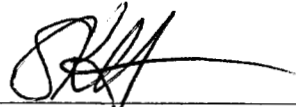
shine to a great extent on gabardines and other materials.”³ In this same vein, plaintiffs’ exhibit H is an undated New Yorker catalog page which promotes an “Asbestall Rubber Pad” constructed with an “asbestos cloth base”.⁴ While the defendant argues that these catalogs are irrelevant because the plaintiff only identified “Hoffman” brand presses as a source of his exposure, it has not defined the relationship between Hoffman and New York. *See Tronlone v Lac d’Amiante du Quebec, Ltee*, 297 AD2d 528, 528-529 (1st Dept 2002) (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).

Accordingly, and in light of the foregoing, it is hereby

ORDERED that Hoffman-New Yorker, Inc.’s motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: 9.19.13



SHERRY KLEIN HEITLER
J.S.C.

FILED

SEP 27 2013

COUNTY CLERK'S OFFICE
NEW YORK

³ Plaintiffs’ exhibit D at 2.

⁴ Plaintiffs’ exhibit H at 38.