

Nolan v A.O. Smith Water Prod. Co.

2013 NY Slip Op 32396(U)

October 3, 2013

Sup Ct, New York County

Docket Number: 108180/06

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

Index Number : 108180/2006
NOLAN, JOAN M.

INDEX NO. 108180/06

vs
A.O. SMITH WATER PRODUCTS
Sequence Number : 001
SUMMARY JUDGMENT

MOTION DATE _____
MOTION SEQ. NO. 001

(GOOD YEAR)

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 *Oct 3, 2013***

FILED

OCT 08 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: *Oct. 3, 2013*


_____, 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
JOAN M. NOLAN, Individually and as Administratrix for the
Estate of THOMAS ROBERT NOLAN, Sr.,

Index No. 108180/06
Motion Seq. 001

DECISION & ORDER

Plaintiffs,

-against-

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

Defendants.

FILED

OCT 08 2013

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

NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendants The Goodyear Tire & Rubber Company ("Goodyear Tire") and Goodyear Canada, Inc. ("Goodyear Canada") (collectively, "Defendants" or "Goodyear") move pursuant to CPLR 3212 for summary judgment dismissing the complaint and all other claims against them on the ground that the non-party co-worker's testimony identifying Goodyear's sheet gasket material as the product which actually exposed the plaintiffs' decedent to asbestos is insufficient and speculative. For the reasons set forth below, the motion is granted.

Plaintiffs' decedent Thomas Nolan was diagnosed with lung cancer on July 22, 2003. On June 13, 2006, Mr. Nolan and his wife Joan Nolan commenced this action to recover for personal injuries allegedly caused by Mr. Nolan's exposure to asbestos. Mr. Nolan passed away on November 19, 2006 and did not testify in this action. Mr. Nolan's co-worker, Mr. John Rozonewski, was deposed on his behalf on October 18, 2012.¹

Mr. Rozonewski testified that he worked as a sheet metal worker out of Local 83 from 1965 to 1994 and that he knew Mr. Nolan, who worked as a sheet metal worker out of the same

¹ A copy of Mr. Rozonewski's deposition transcript is submitted as defendant's exhibit C ("Deposition").

shop prior to the time Mr. Rozonewski started his apprenticeship. He testified that they worked together at times over the years and that he first worked with Mr. Nolan when both he and Mr. Nolan were journeymen. He testified that when they worked together they worked along side each other, performing the same work. He testified that the sheet gasket materials he regularly encountered throughout his career were manufactured by Goodyear and one other unnamed manufacturer, and that they contained asbestos. However, Mr. Rozonewski could not recall the time when he first worked with Mr. Nolan, how many times they worked together, at what locations they worked together or for how long they worked together (Deposition, pp. 41-42, 53-54, 57-60, 75-76, 84-85 [objections omitted]):

Q. Okay. On any instance where you were working with Mr. Nolan, were you both working for the same employer?

A. Yes.

Q. Understood. Do you recall how often you worked for the same employer as Mr. Nolan?

A. No....

Q. Are you able to tell me how long the two of you worked together for the same employer, so for example, do you believe that you worked together for a week, a month, a year, or something else?

A. I couldn't tell you that.

* * * *

Q. So what I'm asking is I understand that you had a long career, during periods of it you worked with Mr. Nolan. For today's purpose I'm only interested in those instances that you recall that you specifically worked alongside Mr. Nolan. And so if you give me a list of, for example, if you give me a list of you're saying you worked on boilers, exhausts and pumps, whatever else, and earlier we talked about hospitals and schools and plants, I'm trying to distinguish between what you recall throughout your career and those instances that you recall specifically with Mr. Nolan. And so if you're able to give me manufacturers, for example you gave me the manufacturer or the gasket material earlier, are you certain that that was the gasket material that you worked with while you were alongside Mr. Nolan or was that just your recollection of gasketing material throughout your career? . . .

A. I would -- that was the gasket used on mostly all our boilers.

Q. Okay.

A. So I would say, yes, it would be used through my career.

Q. Okay. Do you recall when's the last time that you worked with Mr. Nolan?

A. No, I don't. I don't remember that.

* * * *

Q. In preparation for this lawsuit...the defendants were provided some information for this case, and for the record I'm referring to the Answers to Interrogatories. In that document we have some work sites that Mr. Nolan worked at....I'd like to know if you recall working with him at any of those work sites. All right?

A. Yes.

Q. Do you recall working with him, Mr. Nolan, at the South Mall in Albany?

A.I couldn't right now remember.

Q.Do you recall an instance you worked at New York Telephone with Mr. Nolan?

A. That's, again, I - I couldn't say.

Q.Do you recall any instance where you worked at West Milton Submarine Base with Mr. Nolan?

A. That's kind of sticky....

Q. Was there a portion of this base that you recall working on with Mr. Nolan?

A. I believe he was working on the same site I was....

Q. Can you describe it it [sic] in any way?

A. It was a big, brick building to put people in if there's ever an attack.

Q. Do you recall what the two of you were doing on that particular site?

A. No, I don't.

Q. Do you recall working with Mr. Nolan at IBM Fishkill?

A. Not offhand I don't.

Q. Do you recall working with Mr. Nolan at Norton Sand Paper in Albany, New York?

A. No, I don't remember that one at all.

* * * *

Q. All right. Now, when it comes to the actual specific work you did, the counsel that spoke before went through a lot of different jobs sites...you don't have a specific recollection of using a Goodyear gasket, do you?...

A. No, I don't recall.

* * * *

Q. So we know you started in 1965, you had a four year apprenticeship, 1969 theoretically, based on testimony, would have been the first opportunity you could have worked with Mr. Nolan, would you agree with me, correct?

A. Could be, yes.

Q. Now, do you have any recollection of when you started working with Mr. Nolan?

A. I couldn't tell you....

Q. Can you put it in on any historical event, so say when Nixon was impeached, Reagan came to office?

A. No. It's -- impossible to even give you any time....

Q. All right. So is it fair to say, as you sit here today, you can't tell me with any specificity the time period that you worked with Mr. Nolan?

A. All I know is I worked with him.

Q. Right. But you can't give me any specificity on the period you may have worked with him, correct?

A. Correct.

Goodyear Tire manufactured asbestos-containing sheet gasket material in the United States from the 1920's until 1969 when it transferred all of such manufacturing capability to

Goodyear Canada. From 1969 to 1973, Goodyear Canada produced Durabla gaskets for the Durabla Manufacturing Corporation in Pennsylvania. While Goodyear Canada also produced gaskets under the brand names “Goodyearite” and “Cranite,” there is nothing to show that these products were distributed in the United States. In 1973 Goodyear Canada stopped its production of asbestos-containing sheet gasket material and sold all of its gasket manufacturing equipment to Durabla Canada. Thus, the time period within which Mr. Rozonewski and Mr. Nolan could have encountered Goodyear asbestos-containing gaskets is somewhat limited in relation to the whole time period relevant to this motion. It is also undisputed on this motion that during the relevant time period Goodyear also manufactured asbestos-free gaskets.

The movant on a summary judgment motion must establish its defense sufficiently to warrant a court’s directing judgment in its favor as a matter of law by demonstrating the absence of any material issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In asbestos-related litigation, once the moving defendant has *prima facie* established its entitlement to summary judgment, the plaintiff must then demonstrate that there was actual exposure to asbestos fibers released from the defendant’s product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). While the plaintiff 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]), the plaintiff cannot rely on conjecture or speculation. *Roimesher v Colgate Scaffolding*, 77 AD3d 425, 426 (1st Dept 2010).

Dispositive of this motion is that Mr. Rozonewski could not say when, or where, or how often he worked with Mr. Nolan. He could not say whether the first time they worked together was in 1969 or later. He could not identify any job site at which he could testify they were together and as to which they used Goodyear gasket material. For the one job site at which he

could recall they were together, he could not recall what work they were there for. In light of the fact that Goodyear manufactured asbestos-free gaskets as well as asbestos-containing gaskets during the relevant time period, and manufactured asbestos-containing gaskets only until 1973 after which they only produced asbestos-free gaskets, it is mere speculation to infer that the Goodyear gaskets Mr. Nolan allegedly worked with contained asbestos to which he was exposed. *See Cawein, supra; Diel v Flintkote Co.*, 204 AD2d 53, 53-54 (1st Dept 1994) (The mere presence of the product at the plaintiff's worksite is not a sufficient nexus to create a reasonable inference of exposure to the defendant's product).

Accordingly, it is hereby

ORDERED that the motions by the Goodyear Tire & Rubber Company and Goodyear Canada, Inc. are granted; and it is further

ORDERED that this action and any cross-claims as against Goodyear Tire & Rubber Company and Goodyear Canada, Inc. are hereby severed and dismissed in their entirety; and it is further

ORDERED that this action shall continue as against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

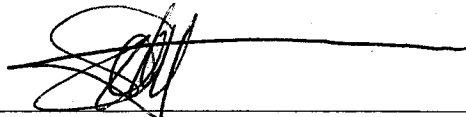
DATED: *Oct 3, 2013*

FILED

OCT 08 2013

NEW YORK
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ENTER:



SHERRY KLEIN HEITLER, J.S.C.