

Baruch v Baxter Healthcare Corp.

2013 NY Slip Op 32795(U)

October 25, 2013

Sup Ct, New York County

Docket Number: 190372/12

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

Index Number : 190372/2012
BARUCH, ESTER
vs
BAXTER HEALTHCARE CORPORATION
Sequence Number : 001
SUMMARY JUDGEMENT (FISHER)

INDEX NO. 190372/12

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 10.25.13

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

Dated: 10.25.13

[Signature] J.S.G.

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
ESTER BARUCH and NERYE BARUCH,

Index No. 190372/12
Motion Seq. 001

Plaintiffs,

DECISION & ORDER

-against-

BAXTER HEALTHCARE CORP., et al.,

Defendants.

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

In this asbestos personal injury action, defendant Fisher Scientific Company, LLC (“Fisher”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims against it on the ground that plaintiff Ester Baruch did not identify a Fisher product as a source of her asbestos exposure. As more fully set forth below, the motion is denied.

Ms. Baruch was diagnosed with mesothelioma in or about January 24, 2012 and thereafter commenced this action to recover for personal injuries allegedly caused by her exposure to asbestos. Relevant to this motion is plaintiffs’ allegation that Ms. Baruch was exposed to asbestos from lab equipment while working as a lab technician and from insulation, tiles, and pipe covering at her home in Queens, New York.

Ms. Baruch was deposed on December 11, 2012.¹ She testified that as a lab technician at Shiel Medical Laboratory from 1994 through 1999 she interchangeably used two old pairs of

¹ Portions of Ms. Baruch’s deposition transcript are submitted as defendant’s exhibit C and plaintiffs’ exhibit B (“Deposition”).

asbestos gloves while performing tests for the serology department. Ms. Baruch testified that one such pair of gloves was manufactured by Fisher and that she was exposed to asbestos therefrom (Deposition pp. 144-45, 157-58, 254-55, objection omitted):

- Q. Do you have any information regarding who would have purchased them?
- A. I don't know. Maybe ten or 15 years came before me, so I don't know when they came.
- Q. When you say ten to 15 years, what are you basing that on?
- A. They were old. They looked old. They were dusty and old, old.
- Q. Was there anything written on the gloves indicating when they were manufactured?
- A. Yeah. There was a label on one pair was Fisher Scientific asbestos gloves and another was American Scientific asbestos gloves.

* * * *

- Q. What is it about just using the gloves to transfer your specimen from the incubator to the reader caused you to believe you were exposed to asbestos?
- A. Because it was dusty. I feel like dust. I saw the dust and I feel it on my arms like a dust. I didn't realize at that time. I didn't know anything about it. . . .
- Q. How many times a day would you use the gloves?
- A. About five, six times. Every time I have to take out my specimens.

* * * *

- Q. And why do you believe that this pair of Fisher Scientific gloves, why do you believe that they contained asbestos?
- A. Because they called them asbestos gloves.
- Q. Okay. Because it was written on the tag?
- A. Yes.
- Q. Any other reason for believing that they actually contained asbestos? . . .
- A. Because everybody call it asbestos gloves and it was written asbestos gloves on them.

The defendant argues that Ms. Baruch's testimony is speculative and erroneous. In support, the defendant submits the affidavit of Mr. Robert J. Forte, sworn to January 23, 2013. (Defendant's exhibit D). Mr. Forte is Fisher's Senior Vice President of Business Development.

He has worked for Fisher since 1968 and attests he is familiar with its product lines, corporate structure, and history. With respect to plaintiffs' claims, Mr. Forte stated in relevant part as follows (defendant's exhibit D, ¶ 4):

... Fisher Scientific's catalogues from 1959 to 1970 included woodcuts associated with asbestos gloves on which the word "FISHER" was superimposed at the base of the palm of the gloves. There is no indication that the actual asbestos gloves offered for sale by Fisher Scientific were marked or otherwise labeled in that manner, or had any interior tag that said Fisher Scientific Asbestos Gloves. In no Fisher Scientific catalogue at any time has there been a woodcut associated with asbestos gloves on which the word "FISHER" or "Fisher Scientific Asbestos Gloves" was superimposed on an interior tag on the gloves, as alleged by Plaintiff Ester Baruch. Fisher Scientific last offered for sale asbestos gloves in its 1979 catalogue. Fisher Scientific did not manufacture asbestos gloves, and did not have any involvement in the characteristics of the asbestos gloves it offered for sale in its catalogues. (emphasis in original).

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." *Tronlone v Lac D'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-529 (1st Dept 2002). To obtain summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Here, the defendant failed to submit any of the sources which Mr. Forte consulted in reaching his conclusions. Thus, the record on this motion consists primarily of Ms. Baruch's deposition testimony that she was exposed to asbestos from gloves with a "Fisher Scientific" label and Mr. Forte's affidavit that the asbestos-containing gloves sold by Fisher never contained such a label. Mr. Forte's affidavit plainly conflicts with the plaintiff's testimony, leaving the court with questions of the weight to be accorded thereto. Such an issue cannot be determined as a matter of law which necessarily precludes summary judgment. *See Josephson v Crane Club*,

Inc., 264 AD2d 359, 360 (1st Dept 1999) (deposition testimony submitted in opposition to a summary judgment motion constitutes evidence in admissible form by someone with personal knowledge of the facts); *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013) (it is not the court's function on a motion for summary judgment to access credibility); *Alvarez v NY City Hous. Auth.*, 295 AD2d 225, 226 (1st Dept 2002); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996).

Accordingly, it is ORDERED that Fisher Scientific Company, LLC's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED:

10.25.13



SHERRY ~~KLEIN~~ HEITLER, J.S.C.