

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

2013 NY Slip Op 32862(U)

November 4, 2013

Sup Ct, New York County

Docket Number: 190441/12

Judge: Sherry Klein Heitler

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PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

PATRICK McCLOKEY, ET AL.

INDEX NO. 190441/12

A.O. Smith WATER PRODUCTS Co., ET AL. (CON EDISON)

MOTION DATE _____

MOTION SEQ. NO. 4

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the memorandum decision dated 11-4-13.

Dated: 11-4-13

[Signature]
HON. SHERRY KLEIN HEITLER ^{S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

-----X
PATRICK MCCLOSKEY and MARY MCCLOSKEY,

Plaintiffs,

-against-

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

Defendants.

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

Index No. 190441/12
Motion Seq. 004

DECISION & ORDER

Defendant Consolidated Edison Company of New York, Inc. ("Con Edison") moves pursuant to CPLR 3212 for summary judgment dismissing plaintiffs' Labor Law § 200 claim and all other claims against it on the ground that there is no evidence to show that Con Edison supervised any of the work that is alleged to have caused plaintiff Patrick McCloskey's injuries. Plaintiffs do not oppose Con Edison's motion on Labor Law § 200 grounds¹, but instead argue that Con Edison is liable under the common law because its employees directly contributed to Mr. McCloskey's injuries.

Mr. McCloskey worked as a steamfitter from 1962 until 2004. He was diagnosed with mesothelioma in June of 2012. On October 1, 2012 Mr. McCloskey and his wife Anne McCloskey commenced this action to recover for personal injuries allegedly caused by Mr. McCloskey's occupational exposure to asbestos. Mr. McCloskey was deposed over a period of

¹ As plaintiffs have not opposed the motion on Labor Law § 200 grounds, Con Edison's motion in that respect only is granted.

six days, commencing on October 9, 2012.² He testified that he worked at a number of commercial locations in the New York metropolitan area on various types of equipment, including boilers, pumps, valves, and gaskets. As to those locations, Mr. McCloskey testified that he worked at seven Con Edison powerhouses, and alleges that he was exposed to asbestos at four of them: Arthur Kill, Astoria, Indian Point, and 74th Street. Mr. McCloskey testified that his asbestos exposure at these powerhouses resulted from his own work and the work of other trades in his presence.

Con Edison argues that it is entitled to summary judgment because it did not supervise or control the work that caused Mr. McCloskey's asbestos exposure. Plaintiffs contend that Con Edison workers directly contributed to Mr. McCloskey's exposure by causing asbestos dust to be released into his immediate vicinity. Con Edison disputes Mr. McCloskey's testimony as not credible and too speculative and conclusory to oppose this motion.

To succeed on a motion for summary judgment, the movant must establish its defense sufficiently to show the absence of any triable issue of fact and that judgment should be granted as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In asbestos-related litigation, should the movant establish *prima facie* its entitlement to judgment as a matter of law, the non-moving party must demonstrate facts and conditions from which the movant's liability may reasonably be 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).

² Copies of Mr. McCloskey's deposition transcripts are submitted as defendant's exhibit C ("Deposition").

Here, Mr. McCloskey testified that Con Edison employees contributed to his exposure while he was working at the Astoria and Arthur Kill Powerhouses (Deposition, pp. 112-13, 413-16, objection omitted):

Q: Do you believe you were exposed to asbestos as a result of any work done by the Con Edison workers on this job site?

A: Yes.

Q: How so?

A: They were removing old piping, they were working on the turbine and generator in Unit 1 ½.

Q: Specifically what products were these Con Edison workers using that you believe contained asbestos?

A: Con Edison workers, pipe covering.

Q: Is that that same half –

A: I know they used asbestos blankets also when they were doing repair work in Unit 1 and repairing any pumps the Con Ed workers were doing. They would repair the pumps, change gaskets.

* * * *

Q: . . . What were the Con Edison workers specifically doing regarding the new construction?

A: Working on different pumps that were already installed and working on different piping that had come in from Unit 1. They would continue doing it, then they would come up to a certain point and then we would pick it up from there. They were doing mostly maintenance work.

Q: If this was new construction, how was it maintenance work? . . .

A: On certain areas that were already completed they would come in and I guess getting familiarized with it and doing work on it, you know? I knew they were Con Edison workers because they had Con Ed uniforms, shirts. . . .

Q: So is it your testimony that it was in the old unit where you were occasionally in the vicinity of Con Edison workers?

A: Yes.

Q: What do you specifically recall those Con Edison workers doing with respect to the older units at Arthur Kill?

A: They were working on the piping in certain areas there where we were working, they were taking old valves out, they were doing that, working on pumps. I guess

that's about it.

- Q. Do you specifically recall observing any of the Con Edison workers at this site using asbestos products?
- A. There was asbestos all over the place. If you've ever been in a powerhouse on the grating itself, on all the floors there was dust and just walking there it would rise up. If they were changing any valves, they would be doing the same thing we were doing, removing the old gaskets and cleaning the flanges, creating dust and then installing new gaskets.
- Q. Did you specifically observe any of this work occurring?
- A. I seen them do it, yes.
- Q. Okay. How far away were you from any of this work? . . .
- A. The same floor, the same area. I couldn't give you the footage.
- Q. Would it be -
- A. It was close. This would be like something in this room. . . .
- A. I'd say 20 feet.

Mr. McCloskey also testified that Con Edison personnel produced asbestos dust that he inhaled (Deposition, pp. 694-95):

- Q. You testified about your work at Con Edison powerhouses. Do you remember that testimony?
- A. Yes.
- Q. And you testified about Con Ed employees being at those sites. Do you remember that testimony?
- A. Yes.
- Q. What were those employees doing, if anything? . . .
- A. Maintenance work.
- Q. Did that work create asbestos dust? . . .
- Q. Did you see that dust?
- A. Yes.
- Q. Did you breathe that dust?
- A. Yes.

I find that such testimony is not speculative or conclusory as defendant contends but sufficient to oppose this summary judgment motion. *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.”) Under well-settled New York law, the weight to be given to same should be determined by a jury at trial. *See Asabor v Archdiocese of New York*, 102 AD3d 524, 527 (1st Dept 2013) (quoting *Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]) (“it is not the court’s function on a motion for summary judgment to assess credibility”); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1996) (“The assessment of the value of a witness’s testimony constitutes an issue for resolution by the trier of fact, and any apparent discrepancy between the testimony and the evidence of record goes only to the weight and not the admissibility of the testimony.”)

Accordingly, it is hereby

ORDERED that Consolidated Edison Company of New York Inc.’s motion for summary judgment is granted in part and denied in part; and it is further

ORDERED that plaintiffs’ Labor Law § 200 claims are hereby dismissed as against Con Edison; and it is further

ORDERED that Con Edison’s motion is otherwise denied in its entirety.

This constitutes the decision and order of the court.

ENTER:

DATED: 11-4-13



SHERRY KLEIN HEITLER, J.S.C.