

Frieder v A.W. Chesterton Co., Inc.

2013 NY Slip Op 32943(U)

November 15, 2013

Supreme Court, New York County

Docket Number: 190212/12

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 : 190212/2012
FRIEDER, MORTON
vs.
A.W. CHESTERTON CO., INC.
SEQUENCE NUMBER : 013
SUMMARY JUDGMENT *(General Electric)*

INDEX NO. 190212/12
MOTION DATE _____
MOTION SEQ. NO. 013

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 11-15-13**

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

Dated: 11-15-13



HON. SHERRY KLEIN HEITLER *J.S.C.*

- 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
MORTON FRIEDER and ROSALIND FRIEDER,

Plaintiffs,

- against -

A.W. CHESTERTON CO, INC., *et. al.*,

Defendant(s).

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

Index No. 190212/12
Motion Seq. 013

DECISION & ORDER

In this asbestos personal injury action, defendant General Electric Company (“GE”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that there is no evidence to show that its products were a substantial contributing cause of plaintiff Morton Frieder’s injuries. For the reasons set forth below, the motion is granted.

From 1972 to 1979, Morton Frieder worked as a cashier at a small dining trailer known as the Dashing Dan Diner (the “Diner”) located within the Long Island Railroad’s (“LIRR”) Morris Park maintenance facility. The LIRR employees who patronized the Diner included electricians, carpenters, machinists, and metal workers. Plaintiffs contend that the sole source of Mr. Frieder’s asbestos exposure was the asbestos-laden clothing that the LIRR workers wore into the Diner. It is undisputed, however, that Mr. Frieder did not know what tasks the LIRR employees who patronized the Diner performed for the LIRR or the source of the dust on their clothing.

Former LIRR employee George Muckian was deposed on plaintiffs behalf.¹ Mr. Muckian worked as a LIRR boilermaker at the Morris Park facility, and among other things prepared boilers for repairs by breaking off chunks of brittle asbestos cement. After repairing the boilers Mr. Muckian typically ate breakfast at the Diner in his work clothes along with other LIRR employees. Mr. Muckian specifically recalled seeing Mr. Frieder at the Diner on a daily basis. While he spoke of other products, Mr. Muckian did not identify any GE product as a source of his own exposure.

Plaintiffs also rely on the 2010 deposition testimony of Norman McCollum who testified in his own asbestos personal injury action. Mr. McCollum worked as an electrician in the roundhouse directly across from the Diner assisting with periodic inspections of LIRR locomotives.² He recalled seeing GE locomotives at the Morris Park facility beginning in 1972 and testified that the LIRR started to use GE locomotives almost exclusively around 1975. Among other things, Mr. McCollum testified that he replaced burned out arc chutes as well as cables that ran between the traction motors and main generators with replacement parts manufactured by GE. Mr. McCollum's testimony is corroborated by LIRR equipment diagrams³ which indicate that GE was the overall manufacturer for several LIRR "Class M-1" passenger cars. There is no testimony, however, that Mr. McCollum ever patronized the Diner or that he even knew Mr. Frieder. GE thus argues that it would be speculative to assume that Mr. Frieder

¹ Mr. Muckian was deposed on September 11, 2012 (plaintiffs' exhibit D). His video deposition was taken on September 14, 2012 (plaintiffs' exhibit B).

² Mr. McCollum was deposed in his unrelated case over the course of several days in February and March of 2010. Relevant portions of his deposition transcripts are submitted as plaintiffs' exhibits G and H.

³ Plaintiffs' exhibit J.

was exposed to asbestos from GE products. In opposition plaintiffs submit that the testimony and documents are sufficient circumstantial evidence of Mr. Frieder's exposure to GE products to raise a material issue of fact.

The defendants have *prima facie* established their entitlement to summary judgment insofar as Mr. Frieder did not identify any GE product as a source of his exposure. To defeat GE's *prima facie* case, plaintiffs must demonstrate that Mr. Frieder was actually exposed to asbestos fibers released from a GE product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this regard, plaintiffs must 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), but cannot rely on conjecture or speculation. *Roimesher v Colgate Scaffolding*, 77 AD3d 425, 426 (1st Dept 2010).

While circumstantial evidence may be used to support liability where there is a link between the plaintiff and the alleged asbestos-containing product (*see Kreppein v Celotex Corp.*, 969 F2d 1424, 1426 [2d Cir 1992]; *Jamieson v A.C. & S., Inc., et al.*, 1998 WL 635549, No. 93-cv-7957, at *3 [SDNY Sept 16, 1998]), the connection alleged in this case is too attenuated to preclude summary judgment. Mr. Frieder never identified a GE product as a source of his exposure, nor did Diner patron George Muckian. There is also nothing to show that Mr. McCollum or any other tradesperson that allegedly worked with GE's products ever came into contact with Mr. Frieder. On this record, therefore, plaintiffs can only speculate that Mr. Frieder was exposed to asbestos fibers released from a GE product. *See Cawein, supra; Diel v Flintkote Co.*, 204 AD2d 53 (1st Dept 1994).

Accordingly, it is hereby

ORDERED that General Electric Company's motion for summary judgment is granted; and it is further

ORDERED that this action and any cross-claims against General Electric Company are severed and dismissed in their entirety; and it is further

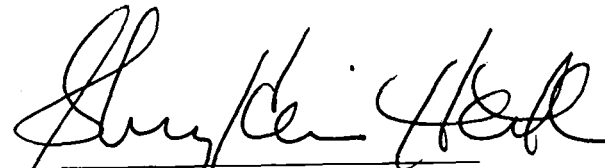
ORDERED that this action shall continue as against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 11.14.13



SHERRY KLEIN HEITLER
J.S.C.