

Bova v A.O. Smith Water Products Co.

2013 NY Slip Op 33139(U)

November 8, 2013

Sup Ct, New York County

Docket Number: 102148/03

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 : 102148/2003
BOVA, ANTHONY M.

INDEX NO. 102148/03

vs
A.O. SMITH WATER PRODUCTS

MOTION DATE _____

Sequence Number : 001
SUMMARY JUDGMENT (GOODYEAR)

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 11-8-13

FILED
NOV 13 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11-8-13



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
ANTHONY M. BOVA and DOROTHY BOVA,

Index No. 102148/03
Motion Seq. 001

Plaintiffs,

DECISION & ORDER

-against-

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

Defendants.

FILED

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

NOV 13 2013

NEW YORK COUNTY CLERKS OFFICE

In this asbestos personal injury action, defendants The ~~New York~~ Fire & Rubber Company and Goodyear Canada, Inc. (collectively, "Goodyear") move pursuant to CPLR 3212 for summary judgment dismissing the complaint and all other claims against them on the ground that there is no competent evidence to show that plaintiff Anthony Bova was exposed to asbestos from a Goodyear product. As more fully set forth below, the motion is denied.

Anthony Bova worked for Bethlehem Steel in Lackawanna, New York as a machinist's helper and machine operator from 1951-1953 and from 1955-1982.¹ On or about June 19, 2002, Mr. Bova was diagnosed with lung cancer which plaintiffs' expert has attributed to his exposure to asbestos during the course of his employment at Bethlehem Steel.

Mr. Bova was deposed in July and August of 2012.² He testified that he was exposed to asbestos at Bethlehem Steel from a myriad of products and equipment, including pumps, valves,

¹ From 1953 to 1955 Mr. Bova served in the United States Army.

² Copies of Mr. Bova's deposition transcripts are submitted as plaintiffs' exhibit 3 ("Deposition").

turbines, pipe-covering, welding blankets, firebrick, and gaskets. At the beginning of his career, Mr. Bova worked exclusively as a machinist's helper. Among other duties, Mr. Bova scraped and removed old gaskets from pumps and valves and installed new gaskets in their place. Mr. Bova testified that he consistently worked with gaskets manufactured by two companies, one of which was Goodyear (Deposition pp. 133-34, 263).

Q. And earlier you talked about as a machinist's helper in the main machine shop, you would do -- you would clean gaskets off the pumps and valves, correct?

A. Pumps and valves, yes.

Q. And you said you would also apply new gaskets; is that correct?

A. Correct.

Q. . . . Can you identify any of the gaskets you were removing from the pumps by brand, trade, or manufacturer's name?

A. I remember two of them. One was Cranite, and the other one was Goodyear. I don't know if we had any other brands.

* * * *

Q. How do you know that those were Goodyear gaskets?

A. How do I know? I'm not sure if there was an emblem on it, but just from the word of mouth.

Q. Well, who do you recall telling you that they were Goodyear gaskets? . . .

A. Whoever was on the job.

Q. Do you recall any specific people?

A. No.

Mr. Bova became a machine operator in 1956 but continued to occasionally take on machinist's helper work. Mr. Bova testified that during these time periods other Bethlehem Steel employees would cut gasket materials in his presence (Deposition pp. 396-401, objection omitted):

Q. . . . When you were a machine operator and you had to do helper's work, that's what you testified to on the first two days, correct?

Q. Okay. And did all of the work that was going on around you while you were a machinist, even though you weren't working on that equipment, did all of that work create dust?

A. Yes.

Q. Do you believe asbestos was in that dust?

A. Yes.

Q. Do you believe you breathed that dust?

A. Yes.

The defendants contend that Mr. Bova's testimony regarding the Goodyear gaskets he allegedly encountered is inadmissible because such testimony derived from discussions Mr. Bova had with an unidentified coworker. The defendants also argue that even if Mr. Bova did work with Goodyear gaskets it is speculative to suggest that they contained asbestos since Goodyear manufactured both asbestos-containing and asbestos-free gaskets during the relevant time period.

Summary judgement 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 La d'Amiante du Quebec, Ltee*, 297 AD2d 528, 528-529 (1st Dept 2002). In an asbestos personal injury action, should the moving defendant make a *prima facie* showing of entitlement to summary judgment as a matter of law, the plaintiff must then demonstrate that he was exposed to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). It is sufficient for plaintiffs to 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). All reasonable inferences should be resolved in the plaintiff's favor. *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dept 1990).

Mr. Bova's testimony that the gaskets he worked with were manufactured by Goodyear based on his understanding of the products that he and others used at Bethlehem Steel over the

- A. Yes.
- Q. Sometimes the work as a machine operator would be slow and you would be asked to do work that a helper would do, correct?
- A. Correct.
- Q. What type of work were you doing when you were doing helper's work?
- A. All kinds of work. All different jobs.
- Q. Would it be the same type of work that you did previously when you were a helper?
- A. Yes. . . .
- Q. And you would be removing -- well, let me ask you: Were you doing the same exact thing, removing insulation and removing gaskets and replacing gaskets on these pumps and valves?
- A. Yes.
- Q. Would the brands of the manufacturers change while you were a machine operator doing helper's work?
- A. Usually we had the same brands.
- Q. Okay. Did the process in which you did the work differ in any way when you were a machine operator versus the time when you were a helper?
- A. No. . . .
- Q. Okay. And that goes for removing the gaskets as well, correct?
- A. Yes.
- Q. The process did not change when you were a machine operator versus the time that you were a helper, did it? . . .
- A. No. Can I add something?
- Q. Absolutely.
- A. Even when I was a machine operator I worked in that vicinity of where all this was done.
- Q. Okay. So as you were a machine operator, if you're not working on the pumps or valves, is it your testimony that there are other individuals working on the pumps and valves in your vicinity?
- A. Yes. . . .
- Q. Did you see them making gasket material for those pumps and valves?
- A. Right.
- Q. Did they use the same manufacturers of gasket material that you used previously?
- A. Yes.

course of decades is sufficient to preclude summary judgment. The trier of fact must determine the weight to be given thereto. Whether or not such testimony is admissible should be determined by the trial judge *in limine*. See *Ferrante v American Lung Ass'n*, 90 NY2d 623, 631 (1997); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996); *Missan v Schoenfeld*, 95 AD2d 198, 207 (1st Dept 1983).

Further, Goodyear's claim that the majority of its gaskets were asbestos-free is not supported by the record. Goodyear relies solely upon the July 2007 deposition testimony in an unrelated action of its corporate representative, Mr. E.W. DeMarse. Mr. DeMarse, who worked for Goodyear in various capacities from 1952 to 1991, estimated that 75% of Goodyear's sheet gaskets were asbestos free. However, Mr. DeMarse did not "recall really ever seeing any figures on that" and conceded that his answer was "based more on observing in the factory the pounds and square feet that we made in both ways." (Defendant's exhibit C, p. 28). Mr. DeMarse admittedly "hazard[ed] a guess that [Goodyear] made two or three times more nonasbestos rubber gasketing material than [it] did the compressed asbestos sheet." (*id.*)

Accordingly, it is hereby

ORDERED the motion for summary judgment by The Goodyear Tire & Rubber Company and Goodyear Canada, Inc. is denied in its entirety.

This constitutes the decision and order of the Court.

DATED: 11-8-13

FILED
 NOV 13 2013
 NEW YORK
 COUNTY CLERK'S OFFICE
 J.S.C.

FILED

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
JULY 10 1968