

Sadowski v A.O. Smith Water Prods.

2013 NY Slip Op 33208(U)

January 24, 2013

Supreme Court, New York County

Docket Number: 190215/11

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 : 190215/2011
SADOWSKI, EDWARD
vs.
A.O. SMITH WATER PRODUCTS
SEQUENCE NUMBER : 011
REARGUMENT/RECONSIDERATION

INDEX NO. 190215/11
MOTION DATE _____
MOTION SEQ. NO. 011

(*GEORGIA*)
(*PACIFIC*)

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 1.24.13

FILED
JAN 28 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1.24.13

1.24.13, 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

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
EDWARD SADOWSKI and ALBERTA SADOWSKI,

Index No. 190215/11
Motion Seq. 011

Plaintiffs,

-against-

DECISION & ORDER

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

Defendants.

FILED

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

JAN 28 2013

NEW YORK
COUNTY CLERK'S OFFICE

Defendant Georgia-Pacific, LLC ("Georgia-Pacific") moved pursuant to CPLR 2221(d) for leave to reargue the prior decision of this court dated September 7, 2012 ("Order"), and upon reargument, for an order granting Georgia Pacific's motion for summary judgment.¹

CPLR 2221(d) provides that a motion for leave to reargue "...shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." While the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to afford an unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted. *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992).

Georgia-Pacific asserts that its motion for summary judgment should have been granted because there is no testimony in the record to show that Mr. Sadowski ever specifically saw others working with, or using, a Georgia-Pacific asbestos-containing joint compound product in a way that created dust, or that he was ever specifically in the zone of exposure of a Georgia-

¹My September 7, 2012 Order is incorporated herein by reference and made a part hereof.

Pacific asbestos-containing joint compound when it was being used in a way that created dust, or that he was exposed to Georgia-Pacific joint compound at all during the time period that Georgia-Pacific manufactured only asbestos-containing joint compound.

As set forth in my Order, among other things, Mr. Sadowski testified that he was exposed to asbestos-containing products, including joint compounds, when he worked on commercial projects in the New York metropolitan area for Golino Construction as a carpenter from 1955 to 1970, and as a construction superintendent for John Lowry, Inc., a general contractor, from 1970 to 1983. He testified that as such construction superintendent he would supervise the new construction and renovation of various commercial buildings in the New York Metropolitan area; that he traveled throughout the buildings he supervised; that during that time he would oversee the other trades that worked on those projects on a daily basis; and that he was exposed to asbestos, *inter alia*, from drywall products and joint compounds. He explicitly testified (Tr.² pp. 95, 101):

- Q. You also mentioned joint compound, who manufactured the joint compound?
A. US Gypsum, Georgia-Pacific.

* * * *

- Q. And with respect to the joint compound, how do you believe you were exposed as a result of that work?
A. Well, after the joint compound dried, usually sanded it down and the asbestos in the joint compound became airborne.

Also as set forth in my Order, Mr. Sadowski described the packaging and nature of the Georgia-Pacific joint compound that he encountered. He testified that Georgia-Pacific did not include information on its packaging whether its joint compound contained asbestos. In addition to testifying that he supervised new construction projects and commercial renovations for John

²The designation "Tr." refers to the transcript of Edward Sadowski's deposition, annexed to defendant's motion in chief as Exhibits B through D.

Lowry, Inc. he testified that he worked on many projects during that time supervising the various trades. Thus, while some 40-odd years later Mr. Sadowski found it difficult to identify the precise buildings or precise years as to which he testified, he did testify to the fact that he performed such duties starting in 1970, the same time frame during which Georgia-Pacific produced only asbestos containing joint compound.

While Mr. Sadowski could not identify a specific instance in which it was Georgia-Pacific joint compound rather than another brand that was used in his presence, he clearly identified Georgia-Pacific as one of the brands used in his presence as a construction supervisor in the early 1970's and later. In this regard, as in *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 462 (1st Dept 1995), Mr. Sadowski had identified specific brands of the subject asbestos products, including that of defendant, in use at his work sites during the relevant time, and showed that he was exposed to asbestos at such sites during that time. "The Plaintiff is not required to show the precise causes of his damages, but only to show facts and conditions from which defendant's liability may be reasonably inferred...." *Id.*

Accordingly, as defendant has failed to show that this court misapprehended or misapplied any matters of fact or law in determining defendant's prior motion, it is hereby ORDERED that this motion for leave to reargue is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 1.24.13

FILED
JAN 28 2013
NEW YORK
COUNTY CLERKS OFFICE
TERESA KLEIN HEITLER, J.S.C.