

Vadi v A.O. Smith Water Prods. Co.

2013 NY Slip Op 33472(U)

November 22, 2013

Supreme Court, New York County

Docket Number: 117772/06

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 : 117772/2006

BOU, LORRAINE

VS.

GENERAL ELECTRIC COMPANY

SEQUENCE NUMBER : 006

SUMMARY JUDGMENT

(Georgia Pacific)

INDEX NO. 117772/06

MOTION DATE _____

MOTION SEQ. NO. 006

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 11.22.13

FILED

NOV 27 2013

NEW YORK

CLERK'S OFFICE

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

Dated: 11.22.13

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

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

-----X

DESIREE VADI and DONNA MOODY, as Co-Administrators
of the Estate of LORRAINE BOU,

Index No. 117772/06
Motion Seq. 006

Plaintiffs,

DECISION & ORDER

-against-

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

FILED

Defendants.

-----X

NOV 27 2013

SHERRY KLEIN HEITLER, J.:

NEW YORK

In this asbestos personal injury action, defendant Georgia-Pacific LLC (“GP”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all other claims against it on the ground that plaintiffs have not raised a genuine issue of fact whether plaintiffs’ decedent Lorraine Bou (“Mrs. Bou”) was exposed to asbestos fibers released from GP’s joint compound.¹ As more fully set forth below, the motion is denied.

Mrs. Bou was diagnosed with mesothelioma on April 7, 2005. She died on September 19, 2005. On November 29, 2006 Mrs. Bou’s daughters commenced this action against GP, among others, to recover for her wrongful death. Mrs. Bou’s husband, Ismael Bou, was deposed on November 28, 2012 and November 29, 2012.² He testified that for a three year period during the late 1960’s he and Mrs. Bou lived in an apartment building on Pleasant Avenue in Manhattan. During that time Mr. Bou occasionally performed renovations for the owner of the building, Mr.

¹ It is undisputed on this motion that from 1965 until 1973 all of GP’s joint compound were manufactured with asbestos, and that from 1973 until approximately 1977 GP manufactured both asbestos-containing and asbestos-free joint compound products.

² Copies of Mr. Bou’s deposition transcripts are submitted as defendant’s exhibit B (“Deposition”).

Benjamin Gold. He recalled working with joint compound in at least four apartments, including his own. He testified that the joint compound he used on behalf of Mr. Gold was manufactured by GP (Deposition pp. 58, 60):

- Q. How many apartments did you renovate in the building for Mr. Gold?
- A. About four, four apartments.
- Q. Did Lorraine assist you on that work?
- A. Some of them. . . .
- Q. Was all of the work generally the same that you did in these four apartments?
- A. Just about plaster work.
- Q. Okay. It was exclusively plaster work?
- A. Plaster work, yeah. I also did plumbing in there, but most of it was plaster work.

* * * *

- Q. Now, what types of materials did Mr. Gold provide you with to do this plaster work?
- A. He provided me with a piece of flat board, compound, cement, the joint compound and nails. . . .
- Q. Do you know the manufacturer of the joint compound that he provided you with during that time?
- A. I think that compound came out of a company called -- give me a minute to see if I remember. I think it was Georgia-Pacific, if I remember.

The defendant contends that upon further examination Mr. Bou actually described a Johns-Manville³ pre-mixed joint compound (Deposition pp. 109-11, 112-13):

- Q. You mentioned you used a cement product too. How did that cement product come packaged?
- A. It was not a package. It was in a bucket.
- Q. Did you have to mix that product?
- A. No. Just put it on in the seam where the pipe meets. If the pipe meets like there, you put some around it. . . .
- Q. Do you know who manufactured that cement product?
- A. I think it was John Bidget. I mean, hold on. I'm sorry. I said John Bidget. It was

³ Throughout his deposition Mr. Bou referred to Johns-Manville as "John Bidget."

not John Bidget. It was some company in the south called Georgia -- I think it was Georgia -- I forgot the name.

Q. Do you recall the packaging that that cement product came in?

A. Georgia Pacific, it was.

Q. Do you recall the packaging that that cement came in?

A. It was not in a package.

Q. What did it come in?

A. Bucket.

Q. How big was the bucket?

A. It was a five-gallon bucket.

Q. Do you recall the color of that five-gallon bucket?

A. It was light grey.

Q. Do you recall any distinctive markings on that bucket?

A. That's the only thing I know about the bucket.

Q. Did you read anything about the bucket?

A. Yeah. It says "MJ" -- "JM," I mean.

Q. Other than the bucket saying "JM," did you read anything else on the bucket?

A. No. I didn't bother. I just went to work. I went to work.

On further examination, however, Mr. Bou was shown a photograph of a GP pre-mixed joint compound container. He definitely testified that he worked with such product (Deposition pp. 381-83, objections omitted):

Q. Today and yesterday when you were testifying in this case you testified that you used three different types of joint compound and maybe some others. You testified specifically about what you said was JM, Georgia Pacific and Gold Bond. Do you remember that testimony?

A. Yes, I remember.

Q. Is it true that you can't read English very well?

A. It's true.

Q. Can you recognize pictures and symbols better than you can read English?

A. Yes. That's how I communicate.

Q. You also were saying on your testimony earlier that if somebody showed you a picture of something you might be able to say whether you had used something or

not?

A. Yes. . . .

Q. Mr. Bou, showing you what's been marked as Plaintiff's Exhibit No. 1, can you tell me what that picture shows?

A. The compound, the metal can of compound.

Q. And what that picture is showing in Plaintiff's Exhibit No. 10 [sic], is that a type of compound that you would have used throughout your -

A. We used this. We used this.

In or about 1970 the Bou family moved to an apartment on East 117th street where they resided for approximately five years. During this time period Mr. Bou renovated their apartment using joint compound, among other products. (Deposition pp. 118-19). Mrs. Bou's daughter, Desiree Vadi, was deposed in this matter on December 7, 2012. She testified that some of that joint compound was manufactured by GP (Vadi Deposition pp. 58, 59, 61, 62-63)⁴:

Q. As a superintendent in the building, did your father have any responsibilities with respect to renovating other apartments?

A. Yes. . . .

Q. Did you ever observe any product types that your father used in connection with any of that renovation work?

A. Compound.

* * * *

Q. Where did he keep the compound that he used?

A. In the kitchen. . . .

Q. Do you recall the manufacturer of any of that compound that he kept in the kitchen during that time frame?

A. There were different ones at different times.

Q. I am asking specifically from 1970 to '75 when you lived at 501 East 117th Street. Do you know the manufacturer of any of the compound that your father kept in that kitchen?

A. I remember the Georgia-Pacific. I remember the Kaiser Gypsum, and I also

⁴ A copy of Ms. Vadi's deposition transcript is submitted as part of defendant's exhibit B ("Vadi Deposition").

remember – I want to say it was plaster of Paris.

* * * *

Q. Do you recall any writing on the can?

A. Yes.

Q. What was the writing?

A. “Joint compound,” “GP.”

* * * *

Q. Did you ever see the inside of any Georgia-Pacific joint compound that you saw in the kitchen?

A. When it was full.

Q. Did you ever see it open?

A. Yes.

Q. The Georgia Pacific joint compound you saw in the kitchen?

A. All of them, whichever ones he had there at the time.

Q. Where did you see them opened.

A. He would open them to make sure that nothing was dry on the inside. . . .

Q. Other than to see him do that work in the kitchen, did you actually ever see him use any of that compound you saw in the kitchen during that time frame?

A. When I went to bring food to him with my mother, yes. . . .

Q. Do you recall what you were observing him doing with any joint compound during that time frame that you brought him food with your mother?

A. Passing it on the walls.

Q. What do you mean “passing it on the walls”?

A. Putting the compound on the spatula and passing it, smoothing it over the walls.

Mr. Bou testified that his wife was present and occasionally assisted him while he performed renovations. He further testified that Mrs. Bou washed his dirty work clothes (Deposition pp. 53, 93-94, 130-31, 134):

Q. . . . Where was that performed, what part of the apartment?

A. I did the walls in the bathroom, plaster, and put some board on it, what they call flex board and plaster.

Q. Did your wife assist you on this job at all?

A. Yes.

* * * *

Q. What would your clothes look like at the end of the day when you did this work . . .

A. A lot of times I had dust on me, and I would just shake it out, went home after I finished work. * * * *

Q. What would you do with your clothes after you did that wiping in the hallway and you walked into the house?

A. I walked into the house, changed my clothes, took off my shirt, took off my pants and my socks, whatever, and my wife took care of them. She washed them. She washed them, and the next day when they were dry I used them again to work.

* * * *

Q. By the way, with respect to the plaster work that you did in apartment 1, did your wife assist you on that work?

A. Yeah.

Q. What did she do?

A. She cleaned.

Q. How?

A. She did the cleaning, picked up all the plaster, whatever was -- whatever that we was not using. Whatever we took out of the wall, she had to pick up, pick up the leftovers.

* * * *

Q. Other than the plaster work that you did . . . was there any other repair or renovation work done to apartment 1 at 501 East 117th Street, besides that?

A. No.

Q. When you did the work in apartment 1, what type of clothes were you wearing?

A. Most of the time I wore jeans, because jeans were hard to break. That's what I wore and a regular cotton shirt. . . .

Q. Who did the laundry on those clothes?

A. My wife in the bathtub.

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). To preclude summary judgment, 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 plaintiffs' favor. *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dept 1990).

Here, as in *Reid*, the testimony sufficiently identifies GP's joint compound as a source of Mrs. Bou's asbestos exposure and adduces facts from which GP's liability may be reasonably inferred.

Accordingly, it is hereby

ORDERED the Georgia-Pacific LLC's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the Court.

DATED: 11.22.13



SHERRY KLEIN HEITLER
J.S.C.

FILED
NOV 27 2013
NEW YORK
COUNTY CLERK'S OFFICE