

<b>Wilson v 3M Company</b>
2013 NY Slip Op 33686(U)
December 2, 2013
Supreme Court, New York County
Docket Number: 190143/11
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

WILSON, ETHEL RUBY

INDEX NO.

190143/11

MOTION DATE

- v -

3M COMPANY, ETAL.

MOTION SEQ. NO.

20

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

**FILED**

DEC 04 2013

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12-2-13

HON. SHERRY KLEIN HEITLER J.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  
ETHEL WILSON, Individually and as Executrix of the  
Estate of CARMEN WILSON,

Index No. 190143/11  
Motion Seq. 20

Plaintiffs,

**DECISION & ORDER**

-against-

**FILED**

3M Company, et al.,

Defendants.

DEC 04 2013

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**SHERRY KLEIN HEITLER, J.:**

**NEW YORK  
COUNTY CLERK'S OFFICE**

Defendant Belden Wire and Cable Co., LLC ("Belden") moves pursuant to CPLR 2221(e)<sup>1</sup> for leave to renew the prior order of this court, dated July 8, 2013, and upon renewal, for an order granting its underlying motion for summary judgment. Belden's motion to renew is granted, and upon such renewal, the court adheres to its decision denying Belden summary judgment.

Plaintiff's decedent Carmen Wilson worked as an electrician for over 50 years installing fire alarms, switches, and other fire safety equipment in public buildings, schools, and homes in and around the New York metropolitan area. He was diagnosed with mesothelioma on or about February 14, 2011. The summons and complaint herein was filed on April 20, 2011. Mr Wilson passed away on July 23, 2011 without having been deposed. Carmen Wilson's son and former co-worker, Scott Wilson, testified on his father's behalf.<sup>2</sup>

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<sup>1</sup>A motion for leave to renew pursuant to CPLR 2221(e):  
"1. shall be identified specifically as such;  
2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and  
3. shall contain reasonable justification for the failure to present such facts on the prior motion."

<sup>2</sup> Scott Wilson was deposed on January 27, 2012, April 20, 2013, and April 23, 2012. Copies of his deposition transcripts are plaintiffs' exhibits 3 and 4 ("Deposition").

Scott Wilson first accompanied his father to work in or about 1964 or 1965 when he was approximately seven or eight years old. He assisted his father on an as-needed basis until the mid 1980's. Relevant to this motion is Scott Wilson's testimony that he observed his father work with Belden multi-conductor feeder cables (Deposition pp. 93-94, 199-201, 203, 430-31):

Q. Do you know the brand name, trade name or manufacturer name of any of that wire? . . .

A. We typically when we were doing rough construction or we were doing -- again, depending on the type of job, depending on the type of whether it's fire alarm or regular rough electric or whatever it might be, the wire might be a different manufacturer but we used spools of Carol, we used Belden, we used GE wire. . . .

\* \* \* \*

Q. So, am I correct you can't tell me a specific application or use that you recall your father using a Belden product for . . . ?

A. I know that it was used. I know he used it for, you know, feeder cables, for wiring strict regular electrical work. But do I know particular types of gauges and so on that he used, no?

Q. So, do I understand you observed him using a Belden product as a feeder cable?

A. Uh-huh . . . .

Q. Do you have any knowledge one way or the other whether the particular application would have called for an asbestos product or not?

A. I have no idea.

Q. Do you have any knowledge one way or the other whether the product that you observed him [] use would have contained asbestos or not?

A. It certainly could.

Q. Do you have any knowledge of whether it did one way or the other?

A. I had no literature that said one way or the other, no.

\* \* \* \*

Q. And you said you recalled your father using feeder cable that you understood to be Belden. What you just described, do you have any recollection of seeing him use that specific thing at a particular place and time?

A. I do recall using that particular thing at a location when he was putting up an aerial one time, so a feed going in from a pole, from an electrical pole to a meter pan.

\* \* \* \*

- Q. And in your previous testimony you mentioned Belden feed cable generally and you said that it was three or four conductors.
- A. That certainly could be yes. \* \* \* \*
- Q. . . . Do you have any personal knowledge as to whether the Belden cable that you observed your father work with in the manholes, any job site including the Mercy college, contained asbestos?
- A. I believe it to be so, yes.
- Q. What is the basis of your belief?
- A. Again, just general knowledge that my dad passed on to me.

On its underlying motion for summary judgment, Belden submitted an affidavit from its corporate representative, Mr. William Suddeth,<sup>3</sup> in which he stated that the Belden wires described by Scott Wilson were asbestos-free. In denying Belden's underlying motion, this court noted that "Belden provided no documentation to substantiate Mr. Suddeth's conclusions" and directed that Belden produce Mr. Suddeth for a deposition by plaintiff.<sup>4</sup>

Mr. Suddeth appeared for his deposition on August 28, 2013. He testified to having examined numerous corporate documents, including product catalogs and part number assignment books which specified the numerous custom made products manufactured by Belden not found in its catalogs.<sup>5</sup> On this premise, Mr. Suddeth concluded that the only asbestos-containing multi-conductor feeder cable that Belden manufactured was heater cordage for small appliances like toasters or irons, and that such cords would not have been approved for applications like the one described by Scott Wilson.

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<sup>3</sup> Mr. Suddeth's affidavit, sworn to November 28, 2012, was submitted as exhibit A to Belden's underlying motion.

<sup>4</sup> A copy of this court's prior order is submitted on this motion as defendant's exhibit A.

<sup>5</sup> For purposes of his deposition, Mr. Suddeth's review of the part number assignment books was limited to certain work locations and did not cover all of the custom made products manufactured by Belden.

There is no documentary evidence before the court in support of Mr. Suddeth's conclusion. Thus, the record herein consists primarily of Scott Wilson's deposition testimony that his father was exposed to asbestos from Belden feeder cables and Mr. Suddeth's deposition testimony that such feeder cables would not have contained asbestos. The weight to be given to their respective testimonies cannot be determined by this court as a matter of law, but must instead be determined by a jury at trial. *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013) (it is not the court's function on a motion for summary judgment to assess credibility); *Alvarez v NY City Hous. Auth.*, 295 AD2d 225, 226 (1st Dept 2002) ("Any inconsistencies in the several accounts of the incident go to the weight of the evidence, not its competence, and the value to be accorded to the evidence is a matter for resolution by the trier of fact."); *Josephson v Crane Club, Inc.*, 264 AD2d 359, 360 (1st Dept 1999) (deposition testimony submitted in opposition to a summary judgment motion constitutes evidence in admissible form by someone with personal knowledge of the facts); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996) ("The assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact. . .").

Accordingly, it is hereby

ORDERED that Belden Wire and Cable Co., LLC's motion to renew is granted, and upon renewal, Belden Wire and Cable Co., LLC's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 12.213

**FILED**  
 DEC 04 2013  
 NEW YORK  
 COUNTY CLERKS OFFICE  
 SHERRIE LEIN HEITLER  
 J.S.C.