

Engle v 3M Co.

2014 NY Slip Op 30160(U)

January 15, 2014

Supreme Court, New York County

Docket Number: 190284/12

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

ENGLE, BETSY ANN

INDEX NO. 190284/12

- v -

3 M COMPANY,
(SUPERIOR) ET AL.

MOTION DATE _____

MOTION SEQ. NO. 05

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance
with the amended decision
dated 1.15.14

Dated: 1-15-14


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
BETSY ANN ENGLE, as Executrix of the Estate of
ROLLAND M. ENGLE, deceased,

Index No. 190284/12
Motion Seq. 005

Plaintiff,

DECISION & ORDER

-against-

3M Company, et al.

Defendants.
-----X

SHERRY KLEIN HEITLER, J:

In this asbestos personal injury action, defendant Superior Lidgerwood Mundy Corp., a/k/a Lidgerwood Manufacturing Co., Individually and as Successor to M.T. Davidson Co. ("SLM"), moves pursuant to CPLR 3212 for summary judgment. SLM argues, among other things, that there is no evidence to show that plaintiff's decedent Rolland Engle was exposed to asbestos from a product manufactured, supplied, or sold by M.T. Davidson ("Davidson").¹ SLM further argues that it is not responsible for replacement and component parts used to maintain its valves that were manufactured by third parties. As set forth below, SLM's motion is denied.

Summary judgment 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 Lac D'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-529 (1st Dept 2002). Should SLM establish its *prima facie* entitlement to summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), the plaintiff must demonstrate that there was actual exposure to asbestos fibers released from an SLM product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this regard, the plaintiff need only show facts and conditions from which SLM's liability may reasonably be inferred. *Reid v Georgia-Pacific Corp.*,

¹ There is no dispute on this motion that SLM is responsible for Davidson's line of products.

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).

Relevant to this motion is the approximately five year period during the mid 1960's that Rolland Engle served in the United States Navy as a machinist's mate, the overwhelming majority of which he spent maintaining pumps and other equipment inside the USS Chukawan's engine room. Mr. Engle clearly testified² to his belief that his regular work with the packing and gaskets associated with all of the pumps in the USS Chukawan's engine room was a source of his asbestos exposure (Deposition, pp. 79-80):

Q. Since we started talking about them, I'm going to finish out the engine room pumps first. The work you did on these engine room pumps, do you believe any of that work would have caused you to be exposed to asbestos?

A. Yes, I do.

Q. What about that work do you believe would have caused you to be exposed?

A. When the pump would quit we had to tear it apart and find out what was wrong. Sometimes it was the sleeves in the pump. We had to pull the packing, the packing was usually dry and brittle. We used a packing puller and it probably had six rings in it and it was all different size packing on different pumps. It may take you an hour to pull some of that packing out because it just comes bits and pieces. If we had to split the pump in half, you had asbestos there we had to scrape, and then we would use an electric wire brush and make sure we got it all off so it would seal again. And it was dusty and we used a wire brush, a hand wire brush to get the packing gland clean pulling out the excess particles from the fire glass insulation packing and then we'd . . . blow it out with air, fix the pump and turn around and put it back together, repack it, put it back-in-service.

Mr. Engle identified Davidson as one of several manufacturers of pumps that he maintained in this fashion (Deposition p. 83):

Q. And now to the pumps themselves, sir. With respect to the pumps that you worked on in the engine room only, I want to focus on these first, do you know who manufactured those pumps?

A. Some of them, I do.

² Mr. Engle was deposed in July and August of 2012. Copies of his deposition transcripts are submitted as defendant's exhibit B ("Deposition").

Q. Tell me the ones you recall?

A. Warren was one of them, Worthington was one of them, Davidson was one of them, De Laval was our circulating pumps.

To corroborate Mr. Engle's testimony that the pumps he maintained while aboard the USS Chukawan were manufactured by Davidson, plaintiff submits Naval records which establish that the USS Chukawan underwent an overhaul at the Norfolk Shipbuilding & Drydock Corporation in 1963 and 1964. Among other things, the records confirm that Davidson manufactured the USS Chukawan's brine and condensate pumps and indicate that workers were required to overhaul such pumps by replacing the packing and gaskets.³

SLM argues that its motion should be granted because there is no proof that Mr. Engle worked on packing or gaskets that were original to Davidson pumps or that he was exposed to replacement packing or gaskets supplied by Davidson for such pumps. Yet Mr. Engle testified that the Navy purchased replacement gaskets for a pump directly from that pump's manufacturer (Deposition p. 82, emphasis added):

Q. You also mentioned that there was some sort of material that you believe that was asbestos inside the split casing area?

A. *Inside the pump on the gasket, there was a gasket there and we bought them from the manufacturer of the pump. Buy [sic] they were all hard to make. We would just order them from the, order them and have them come in.*

Q. And you said that they were hard to make so that's why you ordered them. Did you ever have occasion to make gaskets?

A. Yeah, yes, we had a time when we had to make gaskets. But they were flange gaskets and everything. The one in the pump had to be a certain size and everything so it was pretty hard to duplicate.

In light of this testimony, I find that there is triable issue whether Mr. Engle worked with and was exposed to Davidson's own asbestos-containing materials.

3

Plaintiff's exhibit B.

Relying on *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 297 (1992), SLM disclaims any liability to the extent Mr. Engle used replacement gaskets aboard the USS Chukawan that were not manufactured or supplied by Davidson. However, SLM's contentions are not supported by any admissible proofs. CPLR 3212; *Zuckerman, supra*, at 562-63. By such failure SLM has not made out a *prima facie* case in this regard. In any event, it is well settled that a manufacturer "has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known." *Liriano v Hobart Corp.*, 92 NY2d 232, 237 (1998); *see also Berkowitz v A.C. & S., Inc.*, 288 AD2d 148, 149 (1st Dept 2001). Here, plaintiffs submit a slue of documents in the form of interrogatory responses, correspondence, testimony, and Naval records which conclusively demonstrate that the Davidson pumps supplied to the Navy specified and required the use of asbestos components.⁴ New York law is clear that under these circumstances Davidson had a duty to warn of the hazards associated therewith. *Berkowitz, supra*.

Accordingly, it is hereby

ORDERED that Superior Lidgerwood Mundy Corp.'s motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 1-15-14



 SHERRY KLEIN HEITLER
 J.S.C.

⁴ See plaintiff's exhibits C-K.