

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

2014 NY Slip Op 30326(U)

January 31, 2014

Sup Ct, NY County

Docket Number: 190101/13

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 : 190101/2013
BRUMLEY, DANIEL R.
vs
A.O. SMITH WATER PRODUCTS CO.,
Sequence Number : 001
SUMMARY JUDGEMENT

(CRANE CO.)

INDEX NO. 190101/13

MOTION DATE _____

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 1.31.14**

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

Dated: 1.31.14

_____, 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
CAROL BRUMLEY, as Administratrix for the Estate of
DANIEL R. BRUMLEY, and CAROL BRUMLEY, Individually,

Index No. 190101/13
Motion Seq. 001

Plaintiffs,

DECISION & ORDER

- against -

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

Defendants.

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

Defendant Crane Co. ("Crane") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all other claims asserted against it on the ground that plaintiffs have not shown that plaintiffs' decedent Daniel R. Brumley was exposed to asbestos from working on or around any products manufactured by Crane or the Pacific boilers¹ of which plaintiffs complain. Crane also argues that it is not liable for asbestos-containing products that Pacific did not manufacture, supply or specify for use with its products. Plaintiffs' position is that the testimony raises a material issue of fact whether the decedent was exposed to asbestos from Pacific boilers and that Pacific knew or should have known that asbestos-containing insulation would be integrated with its boilers for their intended use.

Summary judgment is a drastic remedy that must not be granted if there is any doubt as to 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 Crane make a *prima facie* showing of its entitlement to

¹ The defendant admits that "Pacific is a product line belonging to Crane Co." (See defendant's moving papers, p. 4, n. 3.)

judgment as a matter of law, plaintiffs must then demonstrate that there was actual exposure to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994); *see also Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995) (It is sufficient for plaintiffs to show facts and conditions from which the defendant's liability may be reasonably inferred). All reasonable inferences should be resolved in plaintiffs' favor. *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dept 1990).

Daniel Brumley's ("Daniel") deposition was taken in 2007 in connection with several prior asbestos personal injury actions which he filed to recover for asbestosis, a non-malignant lung condition. It is undisputed that Daniel did not identify any Crane or Pacific product as a source of his exposure at that deposition.² Unfortunately Daniel was diagnosed with asbestos-related lung cancer in December of 2012. He commenced this action on March 21, 2013 but died before he was able to be re-deposed.

The decedent's brother, Robert Brumley ("Robert"), was produced for a deposition on June 4, 2013.³ Robert testified that from approximately 1968 to 1984 he and his brother worked on and off together as plumbers. With respect to the defendant, Robert testified that Daniel was exposed to asbestos from a single Pacific Boiler that he helped remove from a commercial location in Brooklyn during the mid-1970's (Deposition pp. 50-52, 53, 135, 136, 139, 140-41):

- Q. Can you take me through the process of what your brother would do to remove a boiler on a job site when you were working with him?
- A. Well, you would disassemble whatever piping you have on it, you would take, I guess, whatever covering you have on it off, and then you would cut what they

² Crane was not a party to Daniel's prior actions.

³ A copy of Robert Brumley's deposition transcript is submitted as defendant's exhibit F ("Deposition").

call the bolts, and each section comes with push nipples, and you spread them apart, and you remove the boiler. . . .

Q. Can you tell me specifically what product or products you believe your brother was exposed to asbestos as a result of in [sic] the removal process of boilers?

A. Probably removing some of the covering, probably removing some of the stuff inside the boiler, which is -- and probably, with the new stuff that he had to put on --

Q. Do you recall the brand name, trade name, or manufacturer name of any of the boilers you observed your brother remove?

A. Sure. You got American Standard, Weil-McLean, Burnham . . . Utica, Crown . . . Let me see what else? Pacific was another one. . . .

* * * *

Q. Where was the covering material located?

A. All around the boiler.

Q. On the external portion?

A. Yes.

* * * *

Q. . . . You testified earlier that you recalled seeing your brother remove Pacific boilers; is that correct?

A. Yes.

Q. Am I correct that you cannot give me an exact location where you recall him removing a Pacific boiler; is that correct?

A. I would say probably in Brooklyn, that's all I know.

* * * *

Q. Is this the only instance that you recall your brother removing a Pacific boiler?

A. Yes.

Q. Why do you believe it was a Pacific boiler?

A. It was Pacific.

Q. How do you know it was Pacific?

A. Because it was on the order list, whatever they had, that says Pacific on it, it has numbers on it.

* * * *

Q. Do you know if the Pacific boiler was externally insulated?

A. I don't remember.

Q. Did it have any type of a covering over the metal jacket?

A. Yes.

Q. Okay. What covering did it have over the metal jacket?

A. I don't know, it looked like probably things like -- insulation, some sort of an insulation. . . .

Q. Did you assist your brother in removing this Pacific boiler?

A. I took -- I took the parts to the car. You know what I mean. I took them out, and put them in the truck.

* * * *

Q. Is there anything different about the way you disassembled and removed the Pacific boilers than the other boilers that you have already described today?

A. Yes, this was much bigger.

Q. Bigger, okay. So then can you describe for me the process of disassembling?

A. Well, I guess he did most of the removing. I was doing most of the carrying. So, you know, whatever he did, I don't know if he cut it out, or, you know, whatever.

Q. Okay. So there would be times when you were carrying parts out that you didn't see what he was doing?

A. Exactly, right.

The defendant argues that plaintiffs' claims are speculative because Mr. Brumley had no actual knowledge whether his brother was exposed to asbestos from the specific Pacific boiler at issue. I disagree and find that the testimony is sufficient to raise a triable question in this regard. *See Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996); *Missan v Schoenfeld*, 95 AD2d 198, 207 (1st Dept 1983).

The defendant also argues that it is not liable for plaintiffs' injuries because Pacific neither manufactured the asbestos allegedly used in conjunction with its boilers nor advised consumers to use asbestos to insulate its boilers. Yet all of the defendant's submissions pertain to Crane, not Pacific, rendering the defendant's assertions about Pacific's business practices conclusory. It is

noteworthy, however, that plaintiffs' submissions indicate that during the late 1920's and early 1930's Pacific specifically called for the insulation of its boilers with asbestos (see plaintiffs' exhibits 4-6).

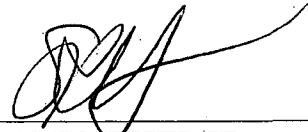
In light of the foregoing, it is hereby

ORDERED that Crane Co.'s motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED:

1. 31.14



SHERRY KLEIN HEITLER
J.S.C.