

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

2014 NY Slip Op 30596(U)

March 5, 2014

Supreme Court, New York County

Docket Number: 116852/06

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER

PART 30

Index Number : 116852/2006

BOVA, ANTHONY M.

vs

A.O. SMITH WATER PRODUCTS

Sequence Number : 001

SUMMARY JUDGMENT

(GOODYEAR)

INDEX NO. 116852/06

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 3.5.14.

FILED

MAR 13 2014

**NEW YORK
COUNTY CLERKS OFFICE**

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

Dated: 3.5.14

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
ANTHONY M. BOVA, as Executor for the Estate of
DOROTHY T. BOVA, and ANTHONY M. BOVA, individually,

Index No. 116852/06
Motion Seq. 001

Plaintiffs,

DECISION & ORDER

- against -

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

Defendants.

FILED

MAR 13 2014

SHERRY KLEIN HEITLER, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendants The Goodyear Tire & Rubber Company and Goodyear Canada, Inc. (collectively, "Goodyear") move pursuant to CPLR 3212 for summary judgment dismissing plaintiffs' action and all cross-claims asserted against them on the grounds that there is no evidence to show that plaintiffs' decedent Dorothy Bova was exposed to asbestos released from a Goodyear product. For the reasons set forth below, the motion is denied.

Anthony Bova, the decedent's husband, worked for Bethlehem Steel in Lackawanna, New York as a machinist's helper and machine operator from 1951-53 and from 1955-1982. On or about June 19, 2002, Mrs. Bova was diagnosed with lung cancer. She died in 2005. Mr. Bova was deposed on his wife's behalf on July 10 and 11, 2012 and on August 21, 2012.¹ He generally testified that while working at Bethlehem Steel he was exposed to asbestos dust from a number of products including pumps, valves, and gaskets. Mr. Bova testified that the

¹ Mr. Bova's deposition transcripts are submitted by Goodyear as exhibit B ("Deposition"). It appears that Goodyear has omitted the first portion of Mr. Bova's August 21, 2012 testimony which commenced at 10:15AM but has submitted the second August 21, 2012 portion of his testimony that started at 10:56AM.

gaskets to which he was exposed were manufactured by Goodyear and one other company's brand called Cranite (Deposition, pp. 133-34, 263):

Q. And earlier you talked about as a machinist's helper in the main machine shop, you would do - you would clean gaskets off the pumps and valves, correct?

A. Pumps and valves, yes.

Q. And you said you would also apply new gaskets; is that correct?

A. Correct.

Q. . . . Can you identify any of the gaskets you were removing from the pumps by brand, trade, or manufacturer's name?

A. I remember two of them. One was Cranite, and the other one was Goodyear. I don't know if we had any other brands.

* * * *

Q. How do you know that those were Goodyear gaskets?

A. How do I know? I'm not sure if there was an emblem on it, but just from word of mouth.

Q. Well, who do you recall telling you that they were Goodyear gaskets? . . .

A. Whoever was on the job.

Q. Do you recall any specific people?

A. No.

Mr. Bova further testified that both the work he did at Bethlehem Steel and the work performed in his vicinity by his co-workers, which included cutting gasket material, created asbestos-containing dust that collected on his uniform (Deposition, pp. 397, 399-401):

Q. . . . Were you doing the same exact thing, removing insulation and removing gaskets and replacing gaskets on these pumps and valves?

A. Yes.

* * * *

THE WITNESS: . . . Can I add something?

Q. Absolutely.

A. Even when I was a machine operator I worked in the vicinity where all of this was done.

Q. Okay. So as you were a machine operator, if you're not working on the pumps or valves, is it your testimony that there are other individuals working on the pumps and valves in your vicinity?

A. Yes. .

Q. Did you see them making gasket material for those pumps and valves?

A. Right.

Q. Did they use the same manufacturers of gasket material that you used previously?

A. Yes.

Q. Okay. And did all of the work that was going on around you while you were a machinist, even though you weren't working on that equipment, did all of that work create dust?

A. Yes.

Q. Do you believe asbestos was in that dust?

A. Yes.

Mr. Bova testified that his wife laundered his asbestos-laden work clothes three times a week (See second portion of Mr. Bova's August 21, 2012 Deposition, pp. 23-24):

Q. Mr. Bova, do you believe that your wife was exposed to asbestos?

A. Yes.

Q. Okay. How do you believe she was exposed to asbestos?

A. My clothing and whatever I did around the house. She used to wash my clothing.

Q. Okay. And with your clothes that she washed, were these work clothes that you're talking about?

A. Yes. . . .

Q. Okay. How did she wash the clothes?

A. First thing, she would empty out the pockets over the stationary tub and shake off any debris that was on it and then maybe wash them a couple of times if they were real bad. . . .

Q. How often did she wash your clothes per week?

A. Most of the time I brought them home at least three times a week.

The defendants assert that there is no admissible evidence in this case that Mrs. Bova was exposed to asbestos dust which emanated from a Goodyear product. They contend that Mr.

Bova's testimony which purports to identify Goodyear as the manufacturer of the gaskets to which he was exposed is speculative and hearsay because it was based on discussions he had with an unidentified co-worker. They also argue that even if the gaskets with which he worked were in fact manufactured by Goodyear, Mr. Bova's testimony that they contained asbestos is speculative because Goodyear manufactured both asbestos-containing and asbestos-free gaskets during the period in question.

"It is axiomatic that summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue of fact. . . or where such issue is even arguable . . ." *Tronlone v La d'Amiante du Quebec, Ltee*, 297, AD2d 528, 528-29 (1st Dept 2002). In an asbestos personal injury action, should the defendant make a *prima facie* showing of its entitlement to summary judgment, the plaintiff must demonstrate that there was exposure to asbestos fibers released from the defendant's product as well as show a causal nexus between that exposure and plaintiff's injuries. *Cawein v Flinkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). However, the plaintiff need only 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]), and all reasonable inferences must be resolved in the plaintiff's favor (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990]).

Mr. Bova's testimony that he worked with Goodyear asbestos-containing gaskets and that his wife consistently came into contact with his asbestos-laden work clothes is sufficient to raise a triable issue of fact whether Goodyear gaskets in fact contributed to her injuries. *See Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996). The defendants' contention that such testimony is not admissible is a matter for determination by the trial judge *in limine*. *See*

Ferrante v American Lung Ass'n, 90 NY2d 623, 631 (1997). Defendants' argument against Mr. Bova's testimony goes to the weight to be given to such testimony by the trier of fact, and may not be determined by this court on a summary judgment motion. *Id.*

In addition, Goodyear's contention that the majority of its gaskets produced during the relevant time period were asbestos-free is not supported by the record. Defendants' reliance upon the July 2007 testimony in an unrelated action of former Goodyear employee E.W. DeMarse² who testified that during the same time period approximately 75% of the gaskets manufactured by Goodyear were asbestos-free is misplaced. Mr. DeMarse was shown to have "hazard[ed] a guess" in that estimation and in actuality did not "recall really ever seeing any figure" which indicated the number or percentage of asbestos-containing gaskets versus the number of asbestos-free gaskets manufactured by Goodyear.³

Accordingly, it is hereby

ORDERED that the motion for summary judgment by the Goodyear Tire & Rubber Company and Goodyear Canada, Inc. is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 3.5.14


SHERRY KLEIN HEITLER
J.S.C.

FILED

MAR 13 2014

² Defendants' exhibit C.

³ *Id.* p. 28.

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