

Mazzoli v Advanced Auto Parts, Inc.

2014 NY Slip Op 30810(U)

March 26, 2014

Sup Ct, New York County

Docket Number: 190008/13

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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CAROLYN T. MAZZOLI, as Administratrix for the
Estate of VINCENT G. GRAFF,

Index No. 190008/13
Motion Seq. No. 001

Plaintiff,

DECISION & ORDER

- against -

ADVANCED AUTO PARTS, INC., et al.,

Defendants.

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

In this asbestos personal injury action, defendant Standard Motor Products, Inc. (“Standard”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that plaintiff’s decedent Vincent G. Graff misidentified EIS brake products as a source of his asbestos exposure.¹ For the reasons set forth below, the motion is denied.

Mr. Graff was diagnosed with lung cancer on January 26, 2012.² He commenced this action on January 10, 2013 to recover for personal injuries allegedly sustained in connection with his occupational exposure to asbestos. Mr. Graff was deposed for five days in March and April of 2013.³ In general he testified that he was exposed to asbestos while working as a mechanic from 1967 through 1995, first for Oaks Pontiac and then for Con Edison.⁴ With respect to the defendant, Mr. Graff specifically and repeatedly identified EIS as one of several manufacturers of brake products with which he worked throughout his career that contributed to his asbestos exposure.

¹ It is undisputed that Standard is responsible for the EIS line of brake products.
² Mr. Graff died on September 4, 2013.
³ Complete copies of his deposition transcripts are submitted as plaintiff’s exhibit 1 (“Deposition”).
⁴ Plaintiff does not contend that Mr. Graff was exposed to asbestos after the middle of 1979.

The core of the defendant's motion is that Mr. Graff misidentified EIS brake products as a source of his exposure. In this regard, the defendant refers to the fact that Mr. Graff distinguished one brake shoe manufacturer from another based on the name stamped on the brake shoe itself (Deposition pp. 152, 243-245, 423-24):

Q. And do you know who manufactured any of those aftermarket brake products?

A. EIS, Bendix -- EIS, Bendix -- I'm thinking out loud.

* * * *

Q. On any of the shoes that you were removing, were you able to tell who the manufacturers were of the old shoes you removed?

A. Yes.

Q. How could you tell that?

A. It was stamped on the shoe lining -- the shoe itself.

Q. And do you recall who the manufacturers were on any of the old shoes you removed from trucks at Con Ed?

A. Bendix, EIS.

Q. E-I-S.

A. Raybestos.

Q. Raybestos? . . .

A. Yeah. And EIS -- I said EIS, and Apex. Apex. . . .

Q. In terms of the new products that you received, do you know who the manufacturers were of any of the new brakes?

A. I've seen Raybestos, EIS.

Q. Was that Raybestos?

A. Raybestos, EIS. Same manufacturers I'd see coming off going on.

* * * *

Q. Okay. When you were doing a brake job at Oaks Pontiac, was there ever a time when you were able to identify the manufacturer of the brake product that you were removing from a vehicle?

A. Yeah. They're marked.

Q. I'm sorry?

A. Yes. They are marked.

Q. Okay. And how are they marked?

A. They're stamped on the shoe.

Q. Okay. And is that true, to you knowledge, of all manufacturers?

A. As far as I know.

Q. Okay. And where would it be stamped on the shoe?

A. On the frame, there's a -- there's a curved part of the shoe and then a flat part. The flat part is the frame that faces you. That's where the stamp would be, the manufacturer's stamp.

Q. All right. And what were the names of the manufacturers you can recall of brake products that you removed from vehicles while you were working at Oaks Pontiac?

A. Bendix, EIS -- Bendix, EIS. Just give me a second. Bendix, EIS, Apex and Raybestos.

The defendant also points out that Mr. Graff claims to have removed aftermarket EIS brake shoes from old vehicles from 1967 to 1972 while he was employed by Oaks Pontiac and that he would occasionally have to grind the brake shoes before installing new ones (Deposition pp. 459, 462-63, 246-47):

Q. Okay. You had testified earlier that you believe some of the aftermarket brake products that you came across during your time at Oaks were EIS products?

A. Yes.

Q. And that was both products that you removed --

A. Yes.

Q. -- as well as products that you installed?

A. Yes.

* * * *

Q. For a car to come in and have aftermarket brakes on it that you would be removing --

A. Okay.

Q. -- how old would that car need to be?

A. Using 15- or 18,000 miles, 20,000 miles as a wear, in 1966, the car would have to be '64. . . .

Q. So if you were doing brake jobs in between '68 and '72 those cars would need to be about four years old for you to be putting -- taking aftermarket brakes off of them?

A. Yeah. There were some that a brake failed of over -- excessive use or somebody uses a brake more than other people, but for the average, yeah.

* * * *

Q. And when you got the new shoes, did you then apply them?

A. Yes.

Q. Did you then reassemble the wheel?

A. Well, after you got the shoes on and you got the mechanical portion of them working, you would check for the -- the radius or the run-out of the shoe.

Q. What do you mean by that, sir?

A. The arcing of the shoe. When you go into them there, you've got a perfect circle, so you had to make sure that the drum maintained an arc and your shoe itself was arced; a little less on the top, a little more on the bottom, you know.

Q. What did you have to do to check that arc or radius?

A. Grind it.

Q. And were you using a separate machine for that?

A. Yes, an Arc Liner. To be fair, it wasn't often that they were out of whack, but...

Q. On occasion you had to use that machine?

A. Yeah.

Standard's corporate counsel, Mr. Sanford Kay⁵, avers herein that EIS never stamped its name on its brake shoes⁶, did not sell aftermarket friction brake products until 1967 when EIS acquired the friction brake product line of The Pick Automotive Corporation⁷, and that there would be no need to grind an EIS brake shoe because they came pre-formed to fit specific car models. However, not a single catalog, specification or relevant document accompanies the defendant's moving papers even though Mr. Kay's conclusions are stated to be based in part on his review of "thousands of pages of documents regarding every aspect of EIS's business" ⁸ As this court has held many times before,

⁵ A copy of Mr. Kay's affidavit, sworn to September 11, 2013, is submitted as defendant's exhibit E ("Kay Affidavit").

⁶ Specifically, Mr. Kay states that "[t]he only manner the product manufacturer was identified was by a Friction Materials Standard Institute . . . edge code stamped onto the edge of the brake lining. The edge code is a series of numbers. 'EIS' did not appear on the brake shoe and brake lining; nor was there any name or logo on the brake lining and the brake shoe." Kay Affidavit ¶ 9.

⁷ According to Mr. Kay EIS brakes could not have been original to any of the equipment Mr. Graff encountered because EIS did not sell its products directly to equipment manufacturers.

⁸ Kay Affidavit ¶ 6.

an unsubstantiated affidavit is insufficient to form the basis of a summary judgment motion. See *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Republic Nat. Bank of New York v Luis Winston, Inc.*, 107 AD2d 581, 582 (1st Dept 1985). This is especially true where, as here, the testimony clearly identifies the defendant's product as a source of the decedent's injuries. *Josephson v Crane Club, Inc.*, 264 AD2d 359, 360 (1st Dept 1999) (quoting *Butler v Helmsley Spear Inc.*, 198 AD2d 131, 132) (The deposition testimony of a plaintiff submitted in opposition to a summary judgment motion "constitutes evidence in admissible form by someone with personal knowledge of the facts. . . .")

It is the defendant's burden on a summary judgment motion to show there is no issue of material fact requiring the fact finder's determination. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). The most the Kay Affidavit does is create a conflict between his conclusions and Mr. Graff's testimony which raises an issue of credibility that must be determined by the trier of fact and which necessarily precludes summary judgment. *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013); *Alvarez v NY City Hous. Auth.*, 295 AD2d 225, 226 (1st Dept 2002); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996).

The court has considered the defendant's remaining arguments and finds them to be without merit. Accordingly, it is hereby

ORDERED that Standard Motor Products, Inc.'s motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 3.26.14



 SHERRY KLEIN HEITLER, J.S.C.