

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

2014 NY Slip Op 30845(U)

April 3, 2014

Supreme Court, New York County

Docket Number: 103009/08

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

Justice

Index Number : 103009/2008
SKELTON, EILEEN C.

INDEX NO. 103009/08

vs.
A. O. SMITH WATER PRODUCTS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

MOTION DATE _____

MOTION SEQ. NO. 001

(CRANE)

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). _____

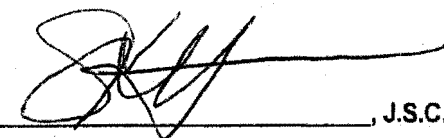
Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the
memorandum decision dated 4.3.13

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

FILED
APR 04 2014
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4-3-13


_____, 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

EILEEN C. SKELTON, Individually and as Executrix
for the Estate of DONALD T. SKELTON,

Index No. 103009/08
Motion Seq. 001

Plaintiffs,

DECISION & ORDER

-against-

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

FILED

Defendants.

-----X

APR 04 2014

SHERRY KLEIN HEITLER, J:

NEW YORK
COUNTY CLERKS OFFICE

In this asbestos personal injury action, defendant Crane Co. ("Crane") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that there is no evidence to show that plaintiffs' decedent Donald T. Skelton was exposed to asbestos from a Crane product. The motion is denied for the reasons set forth below.

David Skelton worked as a heavy equipment operator and rigger for Consolidated Edison Company of New York, Inc. ("Con Edison") from 1962 to 1995 at Con Edison powerhouses and substations throughout New York State, including the 14th Street Powerhouse, the Arthur Kill Powerhouse, the Ravenswood Powerhouse, the Hellgate Powerhouse, and the Waterside Powerhouse. Mr. Skelton was diagnosed with pleural disease on August 8, 1995. Approximately eleven years later on September 7, 2006 he was diagnosed with lung cancer. Mr. Skelton died on October 6, 2006.

Plaintiffs commenced this action on February 27, 2008.¹ The complaint alleges that Mr. Skelton was injured as a result of his occupational exposure to asbestos-containing materials

¹ Plaintiffs' case is included in this court's May 2013 FIFO trial group.

throughout his career. Mr. Skelton's co-worker Kenneth Schulhoff was deposed on January 23, 2013.² Mr. Schulhoff testified that he worked with Mr. Skelton from the early 1970s through the mid-1980s and that Mr. Skelton sustained direct and bystander asbestos exposure from gaskets and insulation associated with pumps, valves, motors, generators, transformers, and boilers. While Mr. Schulhoff did not explicitly identify Crane as the manufacturer of any such equipment, plaintiffs contend that there is sufficient circumstantial evidence from which it may be reasonably inferred that these valves were manufactured by Crane. *See Kreppein v Celotex Corp.*, 969 F2d 1424, 1426 (2d Cir 1992) (circumstantial evidence may be used to support liability where there is a link between the plaintiff and the alleged asbestos-containing product).

In this regard plaintiffs rely on Mr. Schulhoff's testimony that Mr. Skelton was exposed to asbestos-containing insulation associated with valves. Crane's assertion that Mr. Skelton's exposure to valves was limited to certain powerhouses is belied by Mr. Schulhoff's testimony that he and Mr. Skelton encountered the same types of equipment at all of the Con Edison powerhouses in which they worked (Deposition pp. 92, 94-95, 106, 109-110):

Q. What type of equipment did you and Mr. Skelton rig at Hell Gate?

A. Pumps, valves, motors.

Q. Anything else?

A. That's what I can recall now. Whatever we moved in the other powerhouses.

Q. Okay. I'm talking specifically about this powerhouse?

A. I mean, whatever we moved in the other ones we moved there too.

* * * *

Q. Now. You just said that Mr. Skelton rigged valves as well. Where were the valves located at Hell Gate?

A. Inside going on, either they're going onto motors or the valves had the big wheels on them. So they would go into, they may ever go into the turbines. I don't remember. . . .

² A copy of his deposition transcript is submitted as defendant's exhibit C ("Deposition").

Q. How do you believe he was exposed to asbestos from rigging the valves?

A. Again, what was left of whatever asbestos insulation was left on them.

Q. On the valves?

A. And what was on the floor. When you would break the valve apart, the gasket again would either completely come off or come off in pieces and there would be, you know, asbestos gaskets laying, if there was asbestos laying the floor or still part of it on the ground itself. . . .

Q. Do you know the brand name, trade name or manufacturer's name of the valves themselves at Hell Gate?

A. I can't recall, no.

* * * *

Q. What types of equipment did you and Mr. Skelton rig at Waterside?

A. Pumps, motors, valves.

* * * *

Q. Moving on to the valves, where were the valves located, the valves that you and Mr. Skelton rigged at water house [sic]?

A. Waterside.

Q. Waterside?

A. I don't remember being above the ground floor.

Q. Okay. Do you believe the process of rigging valves caused Mr. Skelton to be exposed to asbestos?

A. Yes.

Q. How so?

A. Again, with the insulation.

Q. Okay. Do you know the brand name, trade name or manufacturer's name of the insulation around the valves?

A. No.

Q. Do you know the brand name, trade name or manufacturer's name of the valves themselves?

A. No.

To establish that the valves Mr. Skelton encountered at these powerhouses were manufactured by Crane, plaintiffs submit portions of the deposition transcripts of NYCAL plaintiffs Joseph Koehler and Germano Kuhn, each of whom testified in their own asbestos personal injury

actions that they were exposed to Crane valves during the general time period at issue, Mr. Koehler at the Arthur Kill powerhouse and Mr. Kuhn at the 14th Street powerhouse.³ Crane asserts that plaintiffs' failure to designate Messrs. Koehler and Kuhn as fact witnesses renders their deposition transcripts inadmissible at trial. The court may nevertheless consider such transcripts for summary judgment purposes in light of plaintiffs' other submissions herein, specifically Mr. Schulhoff's deposition testimony and Crane's interrogatory responses filed in unrelated asbestos matters in which Crane admits that some of its valves incorporated asbestos gaskets and packing and that it was one of Con Edison's valve suppliers.⁴ *See Zimble v Resnick 72nd St Assoc.*, 79 AD3d 620 (1st Dept 2010) (The court may consider hearsay evidence in opposition to a summary judgment motion so long as it does not form the sole basis for the court's determination); *DiGiantomasso v City of New York*, 55 AD3d 502 (1st Dept 2008); *Oken v A.C.&S.*, 7 AD3d 285, 285 (1st Dept 2004); *Wertheimer v New York Prop. Ins. Underwriting Ass'n*, 85 AD2d 540, 541 (1st Dept 1981); *cf Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

The role of the court on a motion for summary judgment is to determine whether evidence sufficient to require a trial of any issue of fact exists. *See State v Metz*, 241 AD2d 192, 198 (1st Dept 1998). 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 Lac d'Amiante Du Quebec*, 297 AD2d 528, 528-29 (1st Dept 2002).

Taken together, the transcripts and documents submitted by plaintiffs in this case are sufficient to establish a triable issue of fact whether the decedent was exposed to asbestos associated

³ Plaintiffs' exhibits E & F.

⁴ Plaintiffs' exhibit A & B.

with Crane valves. *See Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995) (to successfully oppose a summary judgment motion in an asbestos personal injury case the plaintiff need only show facts and conditions from which the defendant's liability may be reasonably inferred).

Accordingly, it is hereby

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

This constitutes the decision and order of the court.

DATED: 4.3.14



SHERRY KLEIN HEITLER, J.S.C.

FILED
APR 04 2014
NEW YORK
COUNTY CLERK'S OFFICE