

Friedman v A.O. Smith Wter Prod. Co.
2014 NY Slip Op 30886(U)
April 3, 2014
Sup Ct, New York County
Docket Number: 190187/12
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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STANLEY FRIEDMAN & PHYLLIS FRIEDMAN,

Plaintiffs,

Index No. 190187/12

Motion Seq. 008

DECISION & ORDER

- against -

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

Defendants.
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SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant Appleton Electric LLC (“Appleton”) moves pursuant to CPLR 3212 for summary judgment dismissing all claims and cross-claims asserted against it on the ground that there is no evidence that plaintiff Stanley Friedman was exposed to asbestos from an Appleton product. As set forth below Appleton’s summary judgment motion must be denied.

Summary judgment is a drastic remedy that should be granted only if there are no triable issues of fact. *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *see also Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986). In deciding a summary judgment motion the court’s role is to determine if any triable issues exist, not the merits of any such issues. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). In doing so, the court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *Angeles v Aronsky*, 105 AD3d 486, 488-89 (1st Dept 2013). In asbestos personal injury cases, should the defendant *prima facie* establish its entitlement to summary judgment, the plaintiff 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). While 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]), the plaintiff cannot rely on conjecture or speculation. *Roimesher v Colgate Scaffolding*, 77 AD3d 425, 426 (1st Dept 2010).

Stanley Friedman worked as an electrician from 1957 until his retirement in the late 2000's. On or about February 27, 2012, he was diagnosed with mesothelioma. He commenced this action on April 12, 2012 and was deposed in May of 2012 and again in March and May of 2013.¹

Mr. Friedman testified among other things that he installed "reels" in garment factories. These reels consisted of fixtures on the ceiling above garment cutting tables which contained extension cords used to power cutting machines. With respect to the defendant Mr. Friedman recalled that he was exposed to asbestos from Appleton cable reels, fiber filler, and explosion-proof fittings during this process (Friedman Deposition pp. 562-63, 573-74, 575, 886-7, 919-20, 922-23, objections omitted):

Q. In Answers to Interrogatories that were provided to you, in two of the three work history attachments, in Answers to those Interrogatories you stated that you used reels manufactured by Appleton Electric?

A. Yes.

Q. Is that correct?

A. Yes.

Q. So I am assuming that you have a recollection of working with reels manufactured by Appleton Electric?

A. Yes.

Q. Do you recall installing them?

A. Yes.

Q. Do you recall installing them primarily in the garment factories?

A. Yes. Mostly in the garment industry, I would say.

Q. Most of your work prior to 1980 was in the garment industry. Is that correct?

A. Prior to 1970, I would say.

Q. Did you use Appleton Electric Reelites --

¹ Relevant portions of Mr. Friedman's deposition transcripts are submitted as defendant's exhibits D and E. A complete copy was e-filed at the request of the court ("Friedman Deposition").

A. Yes.

Q. -- prior to 1970?

A. Yes.

* * * *

Q. . . . I am not sure if you answered this, but other than the installation of the Appleton reels at the garment factories before the 1970s, do you have any other recollection of installing Appleton reels anywhere else?

A. We have installed them. Not the type that I was talking about, but I might have installed them in certain factories that required drop lights.

Q. When you talked about might have installed them, you are not certain whether you did that or not, correct?

A. Well, I recollect, yes, now that we are talking about it, I do remember installing them in printing factories where they had to have a reel to take on the press for repairs.

* * * *

Q. Do you know whether you installed more than one?

A. Yes. I am sure I remember that, yes.

Q. Do you know whether it was more than ten?

A. No, I can't.

Q. How do you know that those were Appleton Reelites that you installed in these printing factories?

A. Appleton was the only manufacturer that we ever received units from the supply houses. They might have been the only ones who fabricated industrial type Reelites.

* * * *

Q. The explosion-proof fittings themselves, do you know the brand name, tradename or manufacturer's name of those explosion-proof fittings that you purchased from Graybar?

A. Crouse-Hinds, and I think Appleton was the other one.

Q. Just from the fitting itself -- not talking about any compound you used, but from the fittings themselves, do you believe those fittings exposed you to asbestos? . . .

A. I believe it now, yes. At the time there was no such thing as asbestos concerned in the trade.

* * * *

Q. And if I was to ask you if you ever installed an Appleton or used an Appleton asbestos or an Appleton explosion-proof fitting product, you do not have a specific recollection

of that, do you?

A. Specific job I can't tell you, no, but I do remember using that equipment.

Q. Appleton brand in particular or explosion-proof fittings in general?

A. Yes. Appleton, Crouse-Hinds, they were the -- seemed like -- as I remember, they are the only two explosion-proof type of equipment we ever used.

Q. All right. Is it your testimony now that you have a specific recollection of using Appleton explosion-proof fitting products?

A. Yes.

* * * *

Q. I don't want to make you go through this again, but I think there's some confusion in maybe the descriptions of how these products worked, and counsel before me for Crouse-Hinds I think was correct, if we will agree, that there are three components to installing an explosion-proof fitting. First of all, let's make sure the record is clear that the fitting is nothing more than a metal threaded fitting that connects two lengths of metal conduit?

A. Right, yes. . . .

Q. And the first step, then, is to install the fiber inside of this fitting through the hole that is now exposed by removing the cap, right?

A. Yes. . . .

Q. And the purpose of the fiber material, then, is to create a dam. Is that right?

A. Yes.

Q. In other words, once it's in there tightly inside the fitting and around the wires, you can then pour this sealant that you have made up between -- with the powder and water --

A. Yes.

Q. -- into the fitting; and the purpose of the fiber dam is to hold that liquid sealant to allow this to set up and solidify. Is that right?

A. Yes.

Relying primarily on the affidavit of James Anderson², who has been an EGS Electrical Group, LLC employee since 1998, the defendant asserts that none of the Appleton products identified by Mr. Friedman ever contained asbestos. While Mr. Anderson admits that Appleton catalogs describe its fiber filler as "Asbestos Fiber Filler" he nonetheless states that Appleton fiber fillers were at all times

² Mr. Anderson's affidavit, sworn to October 4, 2013, is submitted as defendant's exhibit H.

made from asbestos-free mineral wool. Mr. Anderson's affidavit in large part is based on the affidavit in an unrelated asbestos case by former Appleton employee Donald Knueven, sworn to April 22, 1993. The Knueven affidavit states that he is "familiar with the fiber filler sold by Appleton Electric Company since I have been with the company which is a mineral wool that does not contain asbestos".³ There are no documents annexed to the Anderson and Knueven affidavits to confirm their assertions or which specify the minerals that comprised the "mineral wool" referred to therein. If anything the documents annexed thereto actually support plaintiffs' case inasmuch as they explicitly refer to Appleton's product as an "Asbestos Fiber Filler".⁴

Mr. Knueven was deposed concerning the substance of his affidavit on April 23, 2004.⁵ It is apparent therefrom that Mr. Knueven had little if any personal knowledge regarding the chemical makeup of Appleton's fiber fillers (Knueven Deposition pp. 64, 101-102, 109-10):

- Q. Did any of the 15,000 or 20,000 products that Appleton was selling in the 1960s or more use any wires or cables?
- A. Oh, they would use wires or cables, yeah. Like for instance I think I mentioned before we had a Reelite division that made these cord take-up reels, and in there, they used various types of cabling and cables and wires and so on. Yeah.
- Q. And you don't claim to know the component of --
- A. No. I wouldn't know the make-up. I don't even know the name of the cable, you know.
- Q. Whether or not they had any asbestos in it, you're not here to comment on, one way or another.
- A. I couldn't comment on that. No.

* * * *

- Q. And the damming material that Appleton had available for sale, is it a fair statement to say that it changed in appearance somewhat over the different years?

³ Defendant's exhibit H.

⁴ Defendant's exhibit H.

⁵ Plaintiffs' exhibit C.

- A. No. No. That didn't change. It was still a -- I call it a fiber filler. It's like glorified cotton in appearance -- if you took a wad of cotton.
- Q. When's the first time that you, yourself, handled this material that you believe was like a wad of cotton?
- A. The first time I was when I started there. Shortly after I started there.
- Q. And when's the last time that you handled this material?
- A. When I left the company -- when I retired.
- Q. And when you first started there, do you remember anyone testing that material to see what the ingredients were?
- A. You mean the chemical make-up of it?
- Q. Yeah.
- A. No, I don't. I don't recall anything being done that way.
- Q. Okay. You -- I mean, you, yourself, didn't test the material to determine what it was.
- A. No. No.
- Q. Okay. As you sit here today, you can't really say for sure exactly what the material was, can you?
- A. I can just -- I -- When you say -- No, I can't. I don't have a chemical breakdown of the material. Right.

* * * *

- Q. And the material that you believe may be mineral fiber, okay, that you believe in your heart is mineral fiber, when is the first time that you, yourself, ever handled this material?
- A. It was probably -- probably in the early 60s -- 1960s.
- Q. Now, do you have any memory during the 1960s or 1970s of any laboratory technician testing this material to determine what the ingredients of this material are or was?
- A. No.
- Q. Okay. Do you only have an understanding as to the fact that it may have been mineral wool based on conversations?
- A. At one point there, through purchasing, they had confirmation from these companies that there was no asbestos in those products.
- Q. At some point.
- A. At some point, yes.
- Q. They wouldn't have sought that confirmation in the 1960s, though, right?
- A. You know, they might have, and I just don't know. I just don't know.
- Q. Okay. You just don't know specifically personally what was in the material in the

1960s? . . . In the damming material.

THE WITNESS: Personally, no. I can only say what was on those drawings.

Based on the above, it is evident there exists a question of fact which precludes summary judgment on this issue.

The defendant further claims entitlement to summary judgment on the ground that Mr. Friedman was unable to recall any specific job site or time frame during which he may have used Appleton products. However, this argument really goes to the weight to be given to Mr. Friedman's testimony at trial which as a matter of law may not be determined by this court. *See Ferrante v American Lung Assn*, 90 NY2d 623, 631 (1997); *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).

In sum, I find that there is a material issue whether Appleton's fiber fillers actually contained asbestos. The representations made by the defendant's representatives are vague and conclusory, and Appleton's own catalogs describe its fiber fillers as having been comprised of asbestos materials. These facts alone are sufficient to preclude summary judgment.

Accordingly, it is hereby

ORDERED that Appleton Electrical LLC'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.