

Pettinelli v A. C. & S., Inc.

2014 NY Slip Op 31194(U)

May 6, 2014

Supreme Court, New York County

Docket Number: 118400/98

Judge: Sherry Klein Heitler

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: SHERRY KLEIN HEITLER
Justice

PART 30

MICHAEL PETTINELLI and DAVID PETTINELLI, as
Co-Administrators for the Estate of ROMEO A.
PETTINELLI, deceased,

INDEX NO. 118400/98

MOTION DATE _____

Plaintiffs,

MOTION SEQ. NO. 001

- v -

MOTION CAL. NO. _____

A. C. & S., Inc., et al.,

FILED

Respondent.

MAY 08 2014

The following papers, numbered 1 to _____ were read on this motion.

**NEW YORK
COUNTY CLERK'S OFFICE**

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

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

This motion is decided in accordance with the
annexed memorandum decision dated 5.6.14.

FILED

MAY 08 2014

**NEW YORK
COUNTY CLERK'S OFFICE**

Dated: 5.6.14


SHERRY KLEIN HEITLER J.S.C.

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Check if appropriate: DO NOT POST

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

----- X
MICHAEL PETTINELLI and DAVID PETTINELLI,
as Co-Administrators for the Estate of ROMEO A.
PETTINELLI, deceased,

Index No. 118400/98
Motion Seq. No. 001

DECISION & ORDER

Plaintiffs,

- against -

A. C. and S. INC., et al.,

Defendants.

FILED

MAY 08 2014

NEW YORK
COUNTY CLERK'S OFFICE

SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury and wrongful death action, defendants the Goodyear Tire & Rubber Company and Goodyear Canada Inc. (collectively "Defendants" or "Goodyear") move pursuant to CPLR 3212(b) for summary judgment dismissing the complaint and all cross-claims asserted against them on the ground that plaintiffs have not shown that plaintiffs' decedent Romeo Pettinelli was exposed to asbestos fibers released from a Goodyear product. For the reasons set forth below, the motion is denied.

CPLR 3212(b) provides, in relevant part, that a motion for summary judgment shall be granted if "the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." However, summary judgment is a drastic remedy that must not be granted if there is any doubt about the existence of a triable issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]) and all reasonable inferences are to be resolved in plaintiffs' favor. *See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dept 1990). 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).

Romeo Pettinelli worked as a union carpenter for BS McCarey Construction in Rome, New York from 1965 to 1987. He was diagnosed with lung cancer on October 22, 1996 and passed away on November 5, 1996. Mr. Pettinelli's wife commenced this action on October 13, 1998 to recover for personal injuries allegedly caused by her husband's occupational exposure to asbestos.¹ Mr. Pettinelli was not deposed before his death, but his son and former co-worker, Michael Pettinelli, was deposed on July 2, 2013.² Michael Pettinelli testified he worked together with his father for BS McCarey Construction from 1975 to 1980 where they were exposed to various asbestos-containing products, including Goodyear sheet gasket material (Deposition pp. 63-64, 69, 71, 75-77, 80-81, 95-96, 242-243, objections omitted):

Q. Okay. Now, I believe you previously told me that the next time you worked with your father was when you worked with him in commercial construction between 1975 and 1980; is that correct?

A. Correct.

Q. Now, at that time did you and your father work for the same employer?

A. Yes.

Q. And which employer was that?

A. B S McCarey Construction Company.

* * * *

Q. . . . As you sit here today, do you remember the name of a building or anything like that where you and your father worked?

¹ Mr. Pettinelli's sons were appointed co-administrators of their father's estate after their mother's death.

² A complete copy of Michael Pettinelli's deposition transcript is submitted as Defendants' exhibit B ("Deposition").

A. Rome Cable, General Cable.

* * * *

Q. Do you recall any work your father did at Rome Cable.

A. I know that we -- we would work with Rome boilers. A lot of boilers. A lot of pumps. Gould pumps, Ingersoll Rand pumps. A lot of gasket replacement. Goodyear gaskets. We would have to cut the seal for the pump. We would build the staging to hold the pumps and the pipes until they disconnected, put the new seals on. . . .

* * * *

Q. You mentioned that you replaced seals on pumps and replaced lines and so forth. Did you tell me everything that you believe your father did on pumps at Rome Cable? . . .

A. I think we all had our hands in, whether it be scraping the old gaskets off, preparing the surface to receive the new gaskets, whether it be cutting out the new gasket. . . .

Q. Okay. And do you recall the brand name, trade name, or manufacturer of any gaskets your father may have worked with or around at Rome Cable?

A. I remember a lot of Goodyear gaskets.

* * * *

Q. Do you know if your father's work in connection with any of the gaskets you described would have exposed him to asbestos?

A. Yes.

Q. And how?

A. Well, we all handled the sheets of asbestos for the gaskets, we all pulled off the old lagging, we all scraped off the old gaskets.

* * * *

Q. Okay. You talked about the replacement of gaskets. Can you tell me how your father would have been exposed to asbestos from the replacement of gaskets at the Varflex location?

A. Scraping off the old gaskets and installing the new.

Q. Do you know the brand name, trade name, or manufacturer of any of the old gaskets that your father had to scrape off?

A. No.

Q. Do you know the brand name, trade name, or manufacturer of any of the replacement or new gaskets that your father would have had to put back on?

A. Goodyear gaskets.

Q. And how would -- how do you believe your father would have been exposed to asbestos from the installation of new gaskets?

A. Often we had to cut out the gaskets from the sheets of asbestos.

* * * *

Q. You also testified that your father was exposed to asbestos from Goodyear gaskets?

A. Yes.

Q. How was he exposed to asbestos from Goodyear gaskets?

A. By cutting out the gaskets from the sheets of -- asbestos sheets for the gasket, cleanup after, installing the gasket, exposed with other workers doing the same thing, creating dust, breathing the asbestos, contaminated air.

Q. What's the basis for your belief that the gaskets contained asbestos?

A. We knew they were asbestos. There was no guessing about it. We knew they were asbestos. We knew, but we did not know the harm the asbestos was causing.

The Defendants assert that the Goodyear gasket material Mr. Pettinelli worked with must have been asbestos-free because Goodyear Tire ceased production of all asbestos-containing sheet gaskets in 1969 and Goodyear Canada ceased production of asbestos-containing sheet gaskets in 1973, two years before Michael Pettinelli started working with his father at BS McCarey Construction. However, the First Department has recognized that industrial products can be residually available in the marketplace. *Taylor v A.C. &S*, 304 AD2d 403, 404 (1st Dept 2003). In this case Goodyear has not submitted any evidence to show when it stopped selling and distributing its asbestos-containing sheet gasket material. Thus, it is certainly possible - there is no evidence to show otherwise - that Goodyear's asbestos-containing sheet gasket material was still available to be purchased during the relevant time period.

Notwithstanding, Michael Pettinelli's unequivocal and repeated testimony that the Goodyear gaskets with which he and his father worked contained asbestos is sufficient to raise a triable issue of fact. *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996). In the

face of such evidence, the Defendants' argument that it ceased the production of asbestos gaskets in 1973 really goes to the weight to be given to Michael Pettinelli's testimony at trial. *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).

Accordingly, it is hereby

ORDERED that the motions by the Goodyear Tire & Rubber Company and Goodyear Canada Inc. for summary judgment are denied in their entirety.

This constitutes the decision and order of the court.

DATED: 5-6.14



SHERRY KLEIN HEITLER
J.S.C.

FILED

MAY 08 2014

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COUNTY CLERK'S OFFICE**