

**Chiaravallotti v A.C. & S. Inc.**

2014 NY Slip Op 31276(U)

May 12, 2014

Sup Ct, New York County

Docket Number: 118278/99

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 : 118278/1999  
CHIARAVALLOTTI, ROSANN  
vs.  
A.C.&S.  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. 118278/99  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001

*COURTER*

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 5.12.14.**

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

**FILED**

MAY 19 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 5.12.14

\_\_\_\_\_, 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  
ROSANN CHIARAVALLOTTI, as Administratrix for  
the Estate of SAM CHIARAVALLOTTI, and  
ROSANN CHIARAVALLOTTI and MARK  
CHIARAVALLOTTI, as Co-Executors for the Estate of  
ANN CHIARAVALLOTTI,

Index No. 118278/99  
Motion Seq. 001

**DECISION & ORDER**

Plaintiffs,

-against-

A.C. & S. INC., *et al.*

Defendants.

**FILED**

MAY 19 2014

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

COUNTY CLERK'S OFFICE  
NEW YORK

In this asbestos personal injury action, defendant Courter & Company, Inc. ("Courter") 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 it is responsible for plaintiffs' decedent Sam Chiaravallotti's injuries. As more fully set forth below Courter's motion is granted.

Sam Chiaravallotti was diagnosed with esophageal cancer on March 9, 1998. He died on August 19, 1998 without having been deposed in this action. In his stead plaintiffs produced Mr. Chiaravallotti's co-worker, Mike Vernillo,<sup>1</sup> who testified that he first met Mr. Chiaravallotti during the early 1960's while they were employed by contractor John Lowery. Relevant to this motion, Mr. Vernillo recalled seeing Courter employees at the Channel 5 building where they worked (Mr. Vernillo as a laborer and Mr. Chiaravallotti as a foreman) for several years during

<sup>1</sup> A copy of Mr. Vernillo's August 28, 2013 deposition transcript is submitted as defendant's exhibit A ("Vernillo Deposition").

the 1970s.<sup>2</sup>

Mr. Vernillo testified that he removed asbestos insulation from oil tanks and pipes in the Channel 5 building's boiler room so that Courter steamfitters could perform repairs. He and his fellow laborers then cleaned up any materials or debris the Courter steamfitters left behind. Plaintiffs allege that Mr. Chiaravallotti was exposed to asbestos-laden dust which was disturbed during this cleanup effort (Vernillo Deposition, pp. 46-47, 69-70, objections omitted):

Q. If I understood you correctly, you mentioned you would be removing insulation from a tank and pipe covering from pipes before Courter came in?

A. Yes.

Q. You would leave, and Courter would come in and do whatever they had to do; is that correct?

A. Correct.

Q. You would not be present when Courter was doing whatever they needed --

A. Not necessarily. . . .

Q. You mentioned that you would come back after Courter had left; is that correct?

A. Yes.

Q. What would you do in the boiler room after you came back after Courter finished their work?

A. Clean up whatever rubbish that was around.

Q. What rubbish would be around?

A. Sometimes pieces of pipe or oil slick when they measure different pipes. They would use some sort of an oil. Maybe lunch bags, too. Anything, but we cleaned up the whole area and waited for the next person to come in.

\* \* \* \*

Q. You indicated there was rubbish that they left. Was any of that rubbish asbestos-related? . . .

A. I know there were gaskets around the pipes. There were oil slicks and...

Q. Were these gaskets used by Courter employees?

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<sup>2</sup> Vernillo Deposition, p. 44.

- A. Yes.
- Q. Do you know whether these were old gaskets removed or new gaskets installed or a combination. . . .
- A. Old. I would say old.
- Q. Do you know where the gaskets came from?
- A. No.
- Q. But it was related to the work done by Courter in the basement? . . .
- A. Yes.
- Q. How would Lowery employees clean up the gasket material that was left over?
- A. Shovels, brooms. If it was just a small article, maybe by hand.
- Q. Can you describe what the used gasket material looked like at that point?
- A. No. Offhand, no. No. Maybe it would look like a rubber maybe or -- I know it wasn't metal. I think it was some sort of a rubber article. I don't . . . .
- Q. Do you believe Sam was exposed to asbestos from the cleaning up . . . of the gasket material left behind by the Courter employees? . . .
- A. Of, definitely, yes.

Plaintiffs argue that this testimony shows that John Lowery workers cleaned up old asbestos-containing gaskets negligently left on the ground by Courter steamfitters, raising a triable question of fact whether Courter's activities were a substantial contributing cause of Mr. Chiaravallotti's cancer. Importantly, however, neither Mr. Vernillo nor Mr. Chiaravallotti were present while the Courter steamfitters allegedly worked with such gaskets. Also, Mr. Vernillo did not know whether such gaskets contained asbestos or whether they were even a source of dust (Vernillo Deposition, pp. 70, 73-75):

- Q. When you cleaned it up, would this create dust? . . .
- A. Definitely. Everything....
- Q. Well, I'm specifically talking about the gasket material. Do you believe dust was created from cleaning that material up?....
- A. I really wouldn't say yes or no.

\* \* \* \*

- Q. Back to Channel 5 for a few moments. I'm correct you did your work removing insulation from the tanks and the pipes before Courter got there, correct?
- A. Yes.
- Q. Once all that was done, you made sure the area was clean, correct?
- A. Correct.
- Q. And then you would leave the boiler room area and move on to another job; is that correct?
- A. I would say yes.
- Q. And then at that point Courter would come in; is that correct?
- A. Yes.
- Q. Okay. You would not be present when Courter was doing their work; is that correct?
- A. Not necessarily
- Q. When you say "not necessarily," were you there when Courter was doing their work?
- A. No.
- Q. So you never saw what Courter was actually doing?
- A. No.
- Q. At Channel 5, you came back once Courter had finished, correct?
- A. Yes.
- Q. You mentioned there were some gaskets that were still there that you had to clean up. Do you know who manufactured those gaskets?
- A. No.
- Q. Okay. Do you know what those gaskets were made of?
- A. No.
- Q. Do you know if they were even actually used by Courter employees?
- A. No.
- Q. John Lowery retained Courter; is that correct, at Channel 5?
- A. Yes.
- Q. Did John Lowery ever pass any warnings on to Courter about asbestos hazards?
- A. No.
- Q. At Channel 5, did John Lowery ever warn Sam about any asbestos hazards?

A. No.

Moreover, there is no evidence to show that Courter knew the gaskets it removed from the pipes at issue contained asbestos, or that they knew or should have known that asbestos was hazardous. As such it cannot be said that Courter was negligent in leaving behind such gaskets for the John Lowery workers to cleanup.

In asbestos-related litigation, once the movant establishes its *prima facie* entitlement to summary judgment (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]), the plaintiff must 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). Under the circumstances of this case plaintiffs have failed to meet their burden.

Accordingly, it is hereby

ORDERED that Courter & Company, Inc.'s motion for summary judgment is granted, and this action and any cross-claims against Courter are severed and dismissed in their entirety; and it is further

ORDERED that the remainder of the action shall continue as against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

ENTER:

**FILED**

MAY 19 2014

COUNTY CLERK'S OFFICE  
NEW YORK

DATED: 5.12.14

  
\_\_\_\_\_  
SHERRY KLEIN HEITLER, J.S.C.