

Adler v 3M Co.

2014 NY Slip Op 31472(U)

June 4, 2014

Sup Ct, New York County

Docket Number: 190392/12

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 30

----- X
 JOHN W. ADLER and ELAINE ADLER,

Plaintiffs,

-against-

3M COMPANY, et al.,

Defendants.
 ----- X

Index No. 190392/12
 Motion Seq. 031

DECISION & ORDER

SHERRY KLEIN HEITLER, J.:

In this personal injury action, defendant Gardner Denver, Inc. (“Gardner Denver”) moves pursuant to CPLR 3212 for an order dismissing plaintiffs’ complaint and all cross-claims asserted against it on the ground that there is no evidence to show that plaintiff John Adler was exposed to asbestos from a Gardner Denver product. As more fully set forth below Gardner Denver’s motion is denied.

Plaintiffs commenced this action to recover for injuries¹ allegedly caused by Mr. Adler’s occupational exposure to asbestos on September 18, 2012. Issue was joined by Gardner Denver on October 17, 2012. Mr. Adler was deposed in October and November of 2012 and again in January of 2013.² He testified that he was exposed to asbestos while working as an electrician from the late 1950’s through the early 1970’s. Relevant to this motion is Mr. Adler’s service as an electrician’s mate aboard a converted US Navy mine sweeper, the USS Prevail (“Prevail”), from March of 1957 through June of 1960. As part of his job responsibilities Mr. Adler stood watch in each of the

¹ Mr. Adler has been diagnosed with mesothelioma.

² Copies of Mr. Adler’s deposition transcripts are submitted as defendant’s exhibits D (“Deposition”).

Prevail's two engine rooms while the ship was being converted from a mine sweeper to a survey ship. Mr. Adler testified that he was exposed to asbestos during these watches from asbestos-insulated equipment which civilian shipyard workers repaired in his presence (Deposition pp. 440-42, 463-64, 1693, 1706, objection omitted):

Q. You said that when you first boarded the ship it was still undergoing a conversion, correct?

A. Yes. . . .

Q. Let me ask you this: Do you have any reason to believe that you would have been exposed to asbestos in your capacity as a second class?

A. Well, yes, I do.

Q. How do you believe you were exposed to asbestos in your capacity just as a second class?

A. Well, irregardless of my rating I would be in the engine room on watch. They were working, civilians were working on engines and the boiler, evaporator, even on the switchboards, that was our function to operate. They were, they were performing work on them and it was, it was a lot of dirt and it was a lot of work going on. . . .

* * * *

Q. What I want you to do is take a minute and think about everything you told me and I want to know is there any other equipment that the yardbirds were working on in your presence that you believe may have caused you to be exposed to asbestos aside from what you told me already?

A. There was air compressors down there, they used, they used air to start the main engines. They would have been working doing maintenance on these air compressors or overhauling them.

Q. Where are the air compressors located? . . .

A. In the forward engine room, it was on the port side of the engine room. And there was a big accumulator tank associated with that thing and it was all covered white with asbestos.

* * * *

Q. You've testified throughout your various days of your deposition about the equipment that was present in the engine room and those spaces while you served on the USS Prevail. Do you believe that you were exposed to asbestos from the work that you've just described that you performed prior to the ship setting sail to Cuba?

A. There was an air compressor in the engine room and if it started up, it would cause vibration. And there was an accumulator tank associated with that compressor and

that tank was covered with asbestos, I would have been exposed.

* * * *

- Q. How do you believe you were exposed to asbestos from the time that you were in the engine room during the times the degaussing tests were going on? . . .
- A. Because everything down there would have been running more or less. The engines, the ship's generator, the air compressors, all the equipment would be vibrating. The equipment was covered with asbestos, much of it, and therefore I would have been exposed to asbestos.

It is undisputed that Mr. Adler did not explicitly identify a Gardner Denver product as a source of his exposure. For this reason the defendant forwarded two partially executed No Opposition Summary Judgment Motion's ("NOSJM") to plaintiffs' counsel for signature. In response plaintiffs' counsel advised it would not execute the NOSJM's in light of a report from its expert, Mr. Arnold Moore, who stated that the air compressors aboard the Prevail were manufactured by Gardner Denver.³ This motion followed.

The defendant's moving papers, filed on February 19, 2014, complain that plaintiffs had not produced any of the Naval records upon which Mr. Moore relied in forming his conclusions. Such records were subsequently provided to the defendant and are submitted by plaintiffs herein.⁴ They indicate that the Prevail's air compressor units were in fact manufactured by Gardner Denver, specifically "two (2) Gardner Denver Co., 600 P.S.I. 10 C.F.M. capacity, vertical type, two stage motor-driven air compressors used for engine starting and one (1) Gardner Denver Co., 30 C.F.M. at 100 P.S.I., vertical, two stage, motor driven air compressor used for ships service. Air compressors were reported to be in good condition. Neither of these units were open for inspection."⁵

The defendant argues that it would be unreasonable to infer Mr. Adler's exposure to asbestos

³ Mr. Moore's report is submitted as defendant's exhibit G.

⁴ Plaintiffs' exhibit 6.

⁵ *Id.* at VII-3

from such air compressors, noting that at one point in his deposition Mr. Adler described the air compressors aboard the *Prevail* as having been manufactured by “Fairbanks Morse”.⁶ At other times, though, Mr. Adler testified that he did not know who manufactured the *Prevail*’s air compressors.⁷ Regardless, the documents make it abundantly clear that in 1956, only one year before the relevant time period began, there were Gardner Denver air compressors aboard the *Prevail*. There is no evidence to show that these Gardner Denver air compressors were replaced either before or during Mr. Adler’s service. As such the weight to be given to Mr. Adler’s testimony is a matter to be determined by the trier of fact and does not entitle the defendant to 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, 320 (1st Dept 1996). The defendant also faults the Moore report for not addressing the asbestos-content of the *Prevail*’s air compressors. As set forth above, however, Mr. Adler explained that they were covered with asbestos insulation.

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*

⁶ Deposition p. 464.

⁷ *Id.* at 127, 1693-94.

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). 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]), but cannot rely on conjecture or speculation. *Roimesher v Colgate Scaffolding*, 77 AD3d 425, 426 (1st Dept 2010).

In light of the foregoing, the court finds that there is a triable issue of fact whether Mr. Adler was exposed to asbestos from Gardner Denver air compressors. *See Reid, supra; Cawein, supra.*

Accordingly, it is hereby

ORDERED that Gardner Denver, Inc.'s motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 6-4-14


SHERRY KLEIN HEITLER, J.S.C.