

**Murray v A.O. Smith Water Prods. Co.**

2014 NY Slip Op 31720(U)

June 27, 2014

Supreme Court, New York County

Docket Number: 190554/12

Judge: Sherry Klein Heitler

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

-----X  
JOHN MURRAY and MARY MURRAY,

Plaintiffs,

-against-

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

Defendants.  
-----X

Index No. 190554/12  
Mot. Seq. 005

**DECISION & ORDER**

**SHERRY KLEIN HEITLER, J.:**

In this asbestos personal injury, defendant Goodrich Corporation (“Goodrich”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all other claims asserted against it on the ground that plaintiffs have not shown that Goodrich tiles were a cause of plaintiff John Murray’s asbestos exposure. For the reasons set forth below, Goodrich’s motion is denied.

Plaintiffs John and Gloria Murray commenced this action on November 30, 2012 to recover for injuries allegedly caused by Mr. Murray’s exposure to asbestos as a steamfitter and steamfitter supervisor at hundreds of jobsites around New York City from the 1950’s to the 1970’s. Mr. Murray was deposed in March and April of 2013. Relevant portions of his deposition testimony are submitted as plaintiffs’ exhibit B (“Deposition”). Plaintiffs allege that Mr. Murray was exposed to asbestos on a regular basis as a steamfitter at schools, hospitals and other commercial buildings throughout New York City. Some of that exposure was the result of workers in other trades who cut and installed asbestos-containing floor tiles in Mr. Murray’s presence which caused him to breathe the dust that arose therefrom. Mr. Murray specifically identified several brands of tile used by these

tradesmen, including Goodrich, and he recalled the name Goodrich and the word "asbestos" on the boxes.

The defendant argues that Mr. Murray misidentified Goodrich products as a source of his exposure inasmuch as he could not recall any particular jobsite where he allegedly encountered Goodrich tiles or accurately describe their appearance. In response plaintiffs assert that the defendant misinterprets Mr. Murray's testimony, which, taken as a whole, is sufficient to preclude summary judgment. Indeed, even though Mr. Murray was not able to identify any of the specific locations where he claims to have been exposed to asbestos containing products, he plainly testified that he worked in the presence of Goodrich tiles on a regular basis (Deposition, pp. 103-04, 951-52, objections omitted):

- Q. With respect to any of the tiles they were working with, do you know who manufactured any of that product?
- A. Well, Goodyear -- Goodrich, Goodrich had -- I got to remember seeing the name on the boxes all the time. . .

\* \* \* \*

- Q. During what years do you recall observing Goodrich tile being laid?
- A. That was early on that I recall...
- Q. Were you present when they cut the tile?
- A. Yes.
- Q. When they cut the tile, what if anything did you observe?
- A. The tile, the dust came off the tile.
- Q. Were you close enough to breathe the dust?
- A. Yes.
- Q. Did you breathe that dust?
- A. Yes.
- Q. Did breathing that dust cause you to be exposed to asbestos?
- A. Yes.

- Q. How did you know that it was Goodrich tile that they were laying?
- A. I believe it was labeled Goodrich. As I said, I didn't see much of it after.
- Q. Why do you believe that that tile contained asbestos?
- A. It said asbestos on the box.

In spite of Mr. Murray's specific product testimony, the defendant submits two affidavits by Goodrich consultant Joan M. Taffi<sup>1</sup>, who admits that Goodrich manufactured asbestos tiles during the relevant time period, but also states that "[n]one of the vinyl asbestos floor tile that The B.F. Goodrich Company made and sold had anything printed or stamped on the backs of the tiles."<sup>2</sup> Based thereon, the defendant argues that Mr. Murray was mistaken in his claim that he was exposed to asbestos Goodrich tiles. Notably, however, the record does not contain any documentary evidence to support such claims.<sup>3</sup> Notwithstanding, the defendant's conclusion is based on the incorrect premise that Mr. Murray identified Goodrich tiles solely by the markings he believed he saw on the back of the tiles themselves. Rather, Mr. Murray testified that he "got to remember seeing the name on the boxes all the time."<sup>4</sup>

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." Should the movant establish its *prima*

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<sup>1</sup> Ms. Taffi's first affidavit, sworn to March 6, 2013, is submitted as exhibit F to the moving papers. Ms. Taffi's amended affidavit, sworn to February 28, 2014, is submitted as exhibit B to the reply papers. The amended affidavit lists the documents Ms. Taffi purportedly reviewed in reaching her conclusions.

<sup>2</sup> March 6, 2013 affidavit, ¶ 4.

<sup>3</sup> This court has consistently held that unsupported and uncross-examined statements by a corporate representative are generally insufficient to form the basis of a summary judgment motion. See *Republic Nat. Bank of New York v Luis Winston, Inc.*, 107 AD2d 581, 582 (1st Dept 1985).

<sup>4</sup> Deposition, p. 103

*facie* entitlement to summary judgment (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]), the plaintiff must demonstrate through admissible evidence the existence of a factual issue requiring a trial of the action. *Yemette v Kenworth Truck Co.*, 48 NY2d 714, 717 (1986).

In asbestos personal injury actions the plaintiff must demonstrate that there was actual exposure to the defendant's product. See *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this regard, the plaintiff must submit "facts and conditions from which the defendant's liability may be reasonably inferred." *Reid v Georgia Pacific Corp.*, 212 AD2d 462 (1st Dept 1995); see also *Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596, 602 (1996) (a plaintiff seeking to preclude summary judgment must show that it was reasonably probable, not merely possible or evenly balance, that the defendant was the source of the offending product."). 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 light of Mr. Murray's plain testimony that he worked in the vicinity of others who cut and installed asbestos-containing Goodrich tiles, the Taffi Affidavits at best give rise to credibility issues which must be decided by a jury. *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013); see also *Ferrante v American Lung Assn.*, 90 NY2d 623, 631 (1997); *Josephson v Crane Club, Inc.*, 264 AD2d 359, 360 (1st Dept 1999).

Accordingly, it is hereby

ORDERED that Goodrich Corporation's motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED:

6.27.14

  
 SHERRY KLEIN HEITLER, J.S.C.