

Lamberty v A.O. Smith Water Prods. Co.

2014 NY Slip Op 32071(U)

August 5, 2014

Supreme Court, New York County

Docket Number: 100988/04

Judge: Sherry Klein Heitler

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

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

LAMBERTY, ANGAL,
ET AL.

INDEX NO.

100 988/04

MOTION DATE

MOTION SEQ. NO.

04

MOTION CAL. NO.

A.O. SMITH WATER PRODUCTS CO.

- v -

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**is decided in accordance with the
memorandum decision dated**

Aug 5, 2014.

FILED

AUG 08 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: Aug 5, 2014.

[Signature]
HON. SHERRY KLEIN HEITLER *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
ANGEL LAMBERTY and CARMEN LAMBERTY,

Plaintiffs,

- against -

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

Defendants.
-----X

SHERRY KLEIN HEITLER, J.:

Index No. 100988/04
Mot. Seq. 004

DECISION & ORDER

FILED

AUG 08 2014

COUNTY CLERK'S OFFICE
NEW YORK

In this asbestos personal injury action, defendant Cleaver-Brooks, Inc. (hereinafter "Cleaver-Brooks") 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 any product manufactured, sold, installed, or supplied by Cleaver-Brooks contributed to decedent Angel Lamberty's asbestos exposure. For the reasons set forth below, the motion is denied.

BACKGROUND

Plaintiffs claim that Mr. Lamberty's malignant mesothelioma is the result of his occupational exposure to asbestos-containing dust while employed as a powerplant worker at the Otisville Correctional Facility in Otisville, NY ("Otisville"). Mr. Lamberty was not able to be deposed prior to his death. Mr. John P. Ewanciw, a co-worker of Mr. Lamberty, was produced for a discovery deposition on August 14, 2012.¹ Mr. Ewanciw testified that he was a stationary engineer at Otisville whom Mr. Lamberty assisted from the late 1970's through the early 1980's and that during that time Mr. Lamberty was exposed to asbestos while maintaining Cleaver-Brooks boilers (Deposition pp. 13-14; 15-16; 19-20; 37-39):

¹ Complete copies of Mr. Ewanciw's deposition transcripts are submitted as plaintiffs' exhibit B ("Deposition").

Q What was your job title in 1977 at Otisville when you started?

A I was -- back then we called them engineers, I guess that's the name we used, stationary engineers.

Q And Angel, what was his job title when he first started there?

A I'm not a hundred percent sure. It was either -- he came in on the entry level. It would be either power plant helper or assistant general mechanic. I'm not exactly sure which one.

Q So he worked under you?

A He worked not under me, but with me. I wouldn't say under me.

* * * *

Q What were Angel's job duties as a helper?

A Once again, Angel would assist us in cleaning boilers, making repairs, troubleshooting problems that occurred during the winter months, things of that nature.

Q Is there any type of work that you personally observed Angel performing at Otisville that you believe caused him to be exposed to asbestos?

A Again, the boilers at Otisville correctional were all old. I mean, I came onboard in 1977. The boilers were there prior to me being employed, so they may've had asbestos. Again, I'm not going to say we assumed they had asbestos, but the older ones did have it. We cleaned the fireboxes with the bricks, replacing bricks and stuff like that, which was a known fact that they did carry asbestos, as far as we know. We also repaired pumps and valves and some of the materials that we used on them was informed to us that they also carried asbestos in our later years.

Q Do you know the manufacturer of any of the boilers at Otisville?

A The only one that sticks in my head is the Cleaver Brooks ones that we used in the main boiler room. I cannot -- I mean, there was so many of them, I can't recollect all of them.

* * * *

Q The three boilers in the powerhouse, how were those fired?

A Oil-fired.

* 4]

Q Can you describe what those three oil-fired boilers looked like?

A Two were the same and they were the Cleaver Brooks. They were, I don't want to call them packaged boilers, but I guess would you call it packaged boilers, because it came in on I-beams or steel beams. The doors opened up in the front and the back where you needed to clean them. The operating mechanisms were all in the front, the firing tube, the feed lines and all that.

* * * *

Q And you testified that there were two Cleaver Brooks boilers located in the powerhouse at Otisville?

A Yes.

Q Where in the Otisville campus was this powerhouse located?

A If you came off Sanitorium Road and came up to the main road going into Otisville Correctional, you would hit a truck trap or security point where you had to check in, and once you went through the first gate, if you made a left-hand turn and went up the hill, it would be the building on the right-hand side.

Q Were the two Cleaver Brooks boilers located in the same place?

A Yes, they were.

Q Do you know what they were used for?

A They provided hot water and heat to the southern compound, south compound.

Q Now, the work that you were present for the Plaintiff performing on these Cleaver Brooks boilers, do you believe it caused him to be exposed to asbestos?

A Yes.

Q What work was that?

A Well, when we did the cleaning of the boilers, when you opened the doors, they had gasket material, you know, fire retardant material was used, and we are pretty positive that contains asbestos.

DISCUSSION

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). 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 establish its *prima facie* entitlement to summary judgment, the plaintiff can avoid summary judgment by demonstrating that there was exposure to asbestos fibers released from the defendant’s product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this context, 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). Summary judgment is not warranted where competing inferences can be reasonably drawn from the record. *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 526 (1st Dept 2013).

The defendant’s position is that Mr. Ewanciw’s testimony is mistaken; Mr. Lamberty could not have been exposed to asbestos from Cleaver-Brooks boilers because it never sold them to Otisville. In support the defendant relies primarily on an unverified two-page “boiler registry”² which purportedly “does not identify any Cleaver-Brooks boilers being present at that facility.”³ However, this document is of questionable probative value. There is no sworn statement attesting to when such registry was created, by whom it was created, and whether it reflects all of the boilers ever installed at Otisville.

² Defendant’s moving papers, exhibit E (“Boiler Registry”).

³ Affirmation of Suzanne Halbardier, Esq. dated March 25, 2014, ¶ 9.

Plaintiffs raise similar concerns in their opposition papers. In reply, Cleaver-Brooks then submitted hundreds of pages of certified records for more than 300 boilers in relation to Otisville purportedly installed between 1959 and 1986.⁴ While on their face it does not appear that any of the boilers described therein were manufactured by Cleaver-Brooks, it is not clear that such records reflect all of the boilers ever installed at Otisville. Additionally, as such records were submitted for the first time in reply, plaintiffs did not have an adequate opportunity to respond. *See DeJesus v Parkchester S. Condo. Inc.*, 2014 N.Y. Slip Op. 05016, 2014 WL 2974887, at *22 (1st Dept 2014); *Batista v Santiago*, 25 AD3d 326, 326 (1st Dept 2006); *Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 (1st Dept 1993).

Notwithstanding, the records at most create a triable issue of fact in light of Mr. Ewanciw's especially precise and unambiguous testimony regarding the presence of Cleaver-Brooks boilers at Otisville. *See Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge"); *see also Ferrante v American Lung Assn.*, 90 NY2d 623 (1997); *Asabor, supra*, at 526; *Josephson v Crane Club, Inc.*, 264 AD2d 359, 360 (1st Dept 1999).

Accordingly it is hereby

ORDERED that Cleaver-Brooks, Inc.'s motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: *Aug 5, 2014*

[Signature]
 SHERRY KLEIN HEITLER, J.S.C. COUNTY CLERK'S OFFICE
 NEW YORK

FILED

AUG 08 2014

⁴ See defendant's reply papers, exhibit A.