

Proctor v Alcoa, Inc.

2014 NY Slip Op 32255(U)

August 21, 2014

Supreme Court, New York County

Docket Number: 190040/13

Judge: Sherry Klein Heitler

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

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JAMES AUGUSTUS PROCTOR and JOY C. PROCTOR,

Index No. 190040/13
Mot. Seq. 008

Plaintiffs,

- against -

DECISION & ORDER

ALCOA, INC., *et al*,

Defendants.

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

In this asbestos personal injury action, defendant Duro Dyne Corporation (“Duro Dyne”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that plaintiffs have failed to show that any of the Duro Dyne products plaintiff James Proctor allegedly encountered actually contained asbestos.

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 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); *see also Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994).

Mr. Proctor was diagnosed with mesothelioma on January 24, 2013. He commenced this action on February 7, 2013 and was deposed over five days in March and April of 2013.¹ At his deposition Mr. Proctor testified that he worked as a sheet metal worker from 1964 through the early 1970's and that he was responsible for the installation of ductwork for heating and air conditioning equipment. Among other things Mr. Proctor recalled that he was exposed to asbestos from two Duro Dyne products, a sealant used to prevent air from escaping from ductwork panels, and a duct connector which contained an asbestos-based fabric. It is undisputed that Duro Dyne manufactured both products during the relevant time period.²

With respect to the duct sealant Mr. Proctor testified as follows (Deposition pp. 113, 400, 401-03):

Q Okay. You mentioned a product that you called DuraDyne. What did you do with this material?

A Filled the duct work when it joined together. To keep air from escaping.

Q Are there any other ways you believe you were exposed to asbestos while at Rich's department store. . . .

A To my knowledge, that's all.

* * * *

Q Okay. Do you believe that there was a Duro Dyne sealer on the equipment that you were removing?

A I couldn't say for sure, but I would say yes, because there had to be something on the sealer that holds that gasket to the metal.

* * * *

Q You had to remove the duct work in full; is that correct?

A You removed it in sections. . . .

Q And the sealer is attached to which section?

A The sealer is attached to the plenum that fastens to the duct work. . . .

¹ A complete copy of Mr. Proctor's deposition transcript has been e-filed (see Dkt. No. 143, "Deposition").

² See Duro Dyne's July 28, 2004 Responses to Plaintiff's First Standard Set of Liability Interrogatories and Request for Production of Document, plaintiffs' exhibit 3, Attachments I.

Q Is [sic] a wet product?

A It's a wet product. You get it on your hands. It falls on the floor. You get it on your clothes. . . .

Q You had said that the sealer – the Duro Dyne sealer is sealer that you commonly used; is that correct?

A Yes.

Q Can you describe to me what the Duro Dyne sealer looks like?

A It's dark in color. You put it around the metal, attach the gasket to it, put it around the outside of the gasket and then attach the other piece of metal to it, and then you have bolts that run through it where you tighten it down tight.

Q Okay. Dark in color, as black?

A What?

Q Dark in color, do you mean black?

A It's dark, gray, black, along that line.

Q Do you know what the package of the Duro Dyne sealer looks like?

A We used quart cans, like a paint can that you opened with a screwdriver.

Q Do you know if the outside of the can read anything? Did it say anything on the outside of the can?

A Just Duro Dyne is all I remember.

Based upon Mr. Proctor's testimony that the sealant was "dark in color" the defendant argues that it could not have contained asbestos.³ In support it submits an affidavit⁴ from its current president, Randall Hinden, who states that all asbestos-containing Duro Dyne sealant available during the relevant time period was red.⁵

Several days into his testimony, however, Mr. Proctor explained that he had confused Duro Dyne with another one of the products he had encountered. He was then re-crossexamined as to such products but was not asked to describe their color (Deposition p. 422-23, 427):

³ Defendant's exhibit A, p. 403.

⁴ Randall Hinden's affidavit, sworn to February 27, 2014, is annexed to the moving papers ("Hinden Affidavit").

⁵ See Hinden Affidavit ¶¶ 9, 10, 12. Annexed thereto is a list of sealants manufactured by Duro Dyne during the relevant time period and data sheets which describe Duro Dyne sealant.

A Good morning. Before we get started, I apologize for yesterday afternoon. I was confused about the Permatex and the Duro Dyne. The Permatex was joint compound used on the trowel, and the Duro Dyne was the compound used on the duct work.

Q Okay.

A I got confused when I was talking about them, so I just want to set it straight that each one, what it was for. ...

Q Okay. Tell me about the Duro Dyne product that you were just referring to.

A The Duro Dyne joint compound was to fasten the sealer with the rubber gasket to the plenum . . . I'm sorry. The Duro Dyne we used to seal the duct from air escaping. We put it on with a brush, and it would get on our hands and it would flake up. We'd have to wipe it off and then use some kind of solution to get the film off our hands. . . .

Q Is -- the Duro Dyne sealer is a wet product, you're saying? It's a combination of wet and dry. It's kind of like a paste.

* * * *

Q Do you believe that the Duro Dyne sealer exposed you to asbestos?

A Yes:

Q How so?

A When we would put it on the duct work, it would fall on our hands, the dust from brushing it on, it would be floating in the air. Generally, that was it

Given these facts and circumstances, I find that Duro Dyne's reliance on the Hinden Affidavit and the documents annexed thereto for summary judgment purposes is misplaced. They do not, as the defendant contends, obviate plaintiffs' claims as matter of law, but instead merely raise credibility issues to be decided by a jury. *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 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, 321 (1st Dept 1996).

With respect to its duct connectors, the defendant argues that Mr. Proctor's testimony was simply too inconsistent to survive summary judgment (Deposition pp. 159, 426-27, 528-29, 551, objections omitted):

Q You mentioned that you had to replace -- you were replacing duct work. Correct?

A Right.

Q You mentioned DuraDyne?

A Right.

Q Do you believe that the process -- that process exposed you to asbestos?

A Right.

Q From what product?

A From the DuraDyne product, pipe joint fitting. We would get it on our hands, on our clothes.

Q Is there anything else about that job that you believe exposed you to asbestos from your personal knowledge?

A I think the -- the sealer on the duct work.

* * * *

Q I was initially asking you about the main department store. Now I'm going to ask you about working with R. F. Knox at all for any project site. Did you use any other Duro Dyne product, other than the Duro Dyne sealer that we spoke about -- while working with R.F. Knox? . . . Any other Duro Dyne product, other than the sealer?

A To my knowledge, no.

* * * *

Q At one point in your testimony you testified that at some of the Rich's Department Stores you used an expansion joint that was manufactured by Duro Dyne. Do you recall that?

THE WITNESS: Yes.

Q Can you describe what these expansion joints looked like?

A Two pieces of metal back to back with a gasket sealer in between of heavy cloth material.

Q Okay. Do you have any reason to believe that that expansion joint contained asbestos?

A Yes, because a lot of times when the expansion joints came out, they were not the same size as we needed, and we had to cut them down and cut that fabric, and that fabric would create some dust.

Q Would you breathe in that dust?

A I would breathe in that dust, yes.

* * * *

Q How do you know that the duct connector came from Duro Dyne?

A That's who we ordered them from. . . .

Q That's who R.F. Knox ordered them from?

A Yes

Q How did you know that?


A Because the delivery man, when he delivers, he told us that that was who the manufacturer was, because we were asking him. I did not see it on the actual product.

Again, the defendant's argument is more appropriately made to the trier of fact. While Mr. Proctor's testimony may indeed contain discrepancies, a fact finder weighing such evidence (*see Asabor, supra; Dollas, supra*) could reasonably infer that Duro Dyne duct connectors contributed to his asbestos exposure. *See Reid, supra; Cawein, supra.*

Accordingly, it is hereby

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

This constitutes the decision and order of the court.

DATED: Aug 12, 2014 
SHERRY KLEIN HEITLER, J.S.C.