

**Houston v A.O. Smith Water Prod. Co.**

2014 NY Slip Op 32505(U)

September 17, 2014

Sup Ct, New York County

Docket Number: 190119/12

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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THOMAS HOUSTON and ELLEN HOUSTON,

Index No. 190119/12  
Motion Seq. No. 011

Plaintiffs,

- against -

**DECISION & ORDER**

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

Defendants.

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**SHERRY KLEIN HEITLER, J.:**

In this asbestos personal injury action, defendant Mario & DiBono Plastering Co., Inc. ("M&D") moves for summary judgment (see CPLR 3212; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) on the ground that it did not cause plaintiff Thomas Houston to be exposed to an asbestos-containing product. For the reasons set forth below, M&D's motion is denied.

Mr. Houston worked as a union mason and bricklayer from the early 1960's through the early 1970's at a number of unspecified office buildings, hospitals, and commercial construction sites throughout Manhattan. Relevant to this motion, Mr. Houston testified that he was exposed to asbestos as a bystander from laborers employed by the sites' general contractors who swept up fireproofing spray insulation residue in his presence. Mr. Houston further testified that M&D was the spray fireproofing subcontractor at many of these construction sites.<sup>1</sup>

It is not, as M&D asserts, speculation to infer that such insulation contained asbestos. In fact, the evidence submitted herein demonstrates that all of the products used by M&D in

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<sup>1</sup> Plaintiffs' exhibit E, pp. 329-335; plaintiffs' exhibit G, p. 42.

Manhattan for spray insulation purposes, including W.R. Grace Zonolite Monokote and U.S. Mineral Products Co. CAFCO, contained asbestos through at least 1970.<sup>2</sup>

Similarly misplaced is M&D's contention that Mr. Houston's safety was the responsibility of the various general contractors whose laborers were tasked with cleaning up insulation residue. Significantly, M&D did not hang canvas or utilize other protective measures in the stairwells and floor openings for containment purposes even though CAFCO contained a label warning against the harmful effects of asbestos exposure.<sup>3</sup> Given these facts and circumstances, a jury could reasonably infer that M&D's alleged negligence contributed to plaintiffs' injuries. See *Matter of New York City Asbestos Litig. [Kestenbaum]*, 116 AD3d 545 (1st Dept 2014); *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995); *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994).

The court also rejects M&D's position that it cannot be held strictly liable for plaintiffs' injuries because its activities were outside the stream of commerce. In *Suklijan v Charles Ross & Son Company, Inc.*, 69 NY2d 89 (1986), the Court of Appeals expressly held that strict liability may be imposed on those who have a continuing relationship with a product's manufacturer (*Id.* at 95):

Policy considerations have also been advanced for the imposition of strict liability on certain sellers, such as retailers and distributors of allegedly defective products. Where products are sold in the normal course of business, sellers, by reason of their continuing relationships with manufacturers, are most often in a position to exert pressure for the improved safety of products and can recover increased costs within their commercial dealings, or through contribution or indemnification in litigation; additionally, by

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<sup>2</sup> See plaintiffs' exhibit H, pp. 28-30; plaintiffs' exhibit M, p. 2 & "Exhibit A"; plaintiffs' exhibit N, product appendix, nos. 20-24.

<sup>3</sup> Plaintiffs' exhibit E, p. 318; plaintiffs' exhibit F, pp. 384-85.

marketing the products as a regular part of their business such sellers may be said to have assumed a special responsibility to the public, which has come to expect them to stand behind their goods.

Importantly, it is of no moment that M&D did not technically “sell” spray insulation. New York law “counsels against such a restrictive understanding of the [strict liability] doctrine.” *Tedone v H.J. Heinz Co.*, 686 F. Supp.2d 300, 314-315 (SDNY 2009) (citing *Jaramillo v Weyerhaeuser Co.*, 12 NY3d 181 [2009]). Where a defendant’s activities “involve it so substantially, if not pervasively, in introducing” a product into the stream of commerce “it is fair to say that it is a mandatory link in [the] distributive chain; hence, it may properly be held liable in strict products liability.” *Brumbaugh v Cejj, Inc.*, 152 AD2d 69, 72 (3d Dept 1989). This is because the burden of injuries caused by defective products is “better placed on those who produce and market them, and should be treated as a cost of business against which insurance can be obtained.” *Sprung v MTR Ravensburg, Inc.*, 99 NY2d 468, 473 (2003).

In *Tedone, supra*, as an example, a guest at the Borgata Hotel in Atlantic City (“Borgata”) was injured when a ketchup bottle provided with her meal broke. Borgata moved to dismiss plaintiff’s strict liability claims, arguing that it was a non-seller or mere casual seller of ketchup bottles. The court disagreed, holding that “Borgata’s provision of the ketchup bottle was not merely incidental to its business as a hotel and casino.” Quite the opposite, “the ketchup bottle automatically provided to the Plaintiff with her lunch was an integral part of her room service meal.” *Id.* at 315.

The cases relied on by M&D in this regard (*Perlmutter v Beth David Hosp.*, 308 NY 100 [1954]; *Probst v Albert Einstein Medical Ctr.*, 82 AD2d 739, 739 [1st Dept 1981]; *Gobhai v KLM Royal Dutch Airlines*, 85 AD2d 566 [1st Dept 1981]) are limited to their respective facts.

In *Perlmutter*, the plaintiff alleged that she was injured at a hospital as a result of a tainted blood transfusion she received there. In granting the hospital summary judgment, the Court of Appeals opined that if “the court were to stamp as a sale the supplying of blood - or the furnishing of other medical aid - it would mean that the hospital, no matter how careful, no matter that the disease-producing potential in the blood could not possibly be discovered, would be held responsible, virtually as an insurer, if anything were to happen to the patient as a result of ‘bad’ blood.” *Id.* at 106.

Citing only *Perlmutter*, the Court also declined to allow the plaintiff in *Probst* to amend her complaint to add strict liability causes of action against a hospital which had inserted a defective metal rod into her spinal column during surgery. *Probst, supra*, at 739 (“[t]he insertion of the metal rod was incidental to the medical services provided by the [hospital]. Since [the hospital] did not technically sell the metal rod to the plaintiff, there is no merit to the two new causes proposed against them in the amended complaint.”). Similarly, *Gobhai* arose from a slip and fall alleged to have been caused by a defective pair of slippers given to the plaintiff by an airline. The First Department awarded the airline summary judgment, noting that it was “not in the business of manufacturing or selling slippers, but . . . the business of providing air transportation for passengers and cargo.” *Id.* at 567.<sup>4</sup>

Asbestos-containing spray insulation products were anything but a mere amenity for M&D. Just the opposite, they were essential to M&D’s business model. And, as plaintiffs point

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<sup>4</sup> See also *Gobhai v KLM Royal Dutch Airlines*, 57 NY2d 839, 845 (1982) (Fuchsberg, J., dissenting) (*Perlmutter* “was a policy-laden decision, expressly responsive to the fact that blood transfusions are important, indeed lifesaving, aspects of medical care and that the presence of such impurities, at least at that time, was scientifically undetectable.”).

out, M&D specifically licensed certain sprays and maintained strong relationship with their manufacturers.<sup>5</sup> Therefore, plaintiffs' strict liability claims against M&D may stand. See *Suklijan, supra; Brumbaugh, supra; Sprung, supra.*

Summary judgment is further precluded by plaintiffs' undisputed allegation that M&D has not complied with its discovery requests.<sup>6</sup> To the extent such issues remain outstanding the parties are directed to immediately contact the Spécial Master.

Accordingly, it is hereby

ORDERED that Mario & DiBono Plastering Co., Inc.'s motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: 9-17-14

  
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SHERRY KLEIN HEITLER, J.S.C.

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<sup>5</sup> See plaintiffs' exhibit Q.

<sup>6</sup> Affirmation of Lori Benavides, Esq. dated June 5, 2014, p. 5, n. 2.