Hockler v 3M Co.
2014 NY Slip Op 32752(U)
October 20, 2014
Sup Ct, New York County
Docket Number: 190235/13
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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IN RE: NEW YORK CITY ASBESTOS LITIGATION

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BRYAN HOCKLER,

Plaintiff,

- against -

3M COMPANY, *et al*,
(WILLIAM POWELL CO.)

Defendants.

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Index No. 190235/13
Mot. Seq. 002

DECISION & ORDER

SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, The William Powell Company ("Powell" or "Defendant") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it. Powell argues that that it owed no duty to warn plaintiff Bryan Hockler ("Plaintiff") of the hazards associated with asbestos since he was not a foreseeable user of its products, that it had no duty to warn of the dangers associated with asbestos components manufactured by third parties, and that Plaintiff's activities were not a foreseeable use or foreseeable misuse of its products. For the reasons set forth below, the motion is denied.

Plaintiff was diagnosed with mesothelioma on February 18, 2013 and commenced this action on July 8, 2013. He contends that he was exposed to asbestos during the 1980's while working as a salvager. In this regard Plaintiff testified[1] that he was responsible for retrieving salvageable metal from equipment such as valves and pumps from hospital boilers rooms and the

[1] Mr. Hockler was deposed on November 14, 2013 and November 15, 2014 ("Deposition"). His videotaped deposition was taken on December 13, 2013 ("Video Deposition"). Copies of his deposition transcripts are submitted as Plaintiff's exhibits 2-4.

like prior to demolition.[2] Plaintiff performed this work in commercial buildings throughout New York City.[3] He identified some of the valves he encountered as bearing the name W.M. Powell.[4]

Summary judgment is a drastic measure which should only be granted if the moving party resolves all triable issues of fact in its favor. *See Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 529 (1st Dept 2002) *aff'd*, 99 NY2d 647 (2003); *Andre v Pomeroy*, 35 NY2d 361, 364 (1974). Should the moving party fail to establish its *prima facie* case, the motion must be denied irrespective of the sufficiency of the non-moving party's arguments. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852 (1985); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If the moving party meets its *prima facie* burden the non-moving party must then come forth with sufficient evidentiary facts which demonstrate the existence of a triable issue. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). In asbestos litigation, a plaintiff must show 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).

A manufacturer "has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known." *Liriano v Hobart Corp.*, 92 NY2d 232, 237 (1998); *see also Rogers v Sears, Roebuck & Co.*, 268 AD2d 245 (1st Dept 2000). This includes a duty to warn of dangers relating to unintended uses, providing that such uses are reasonably foreseeable. *Liriano, supra*, at 237.

The Defendant takes the position that salvagers such as Mr. Hockler were not entitled to warnings as a matter of law because salvaging is not a foreseeable use or even a foreseeable

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[2] Video Deposition, p. 23.
[3] Deposition, p. 94
[4] Video Deposition, p. 40.

misuse of its valves. However, issues of foreseeability of use and misuse are generally considered to be material issues of fact that require fact-finding at trial. *Young v Daglian*, 63 AD3d 1050, 1051 (2d Dept 2009); *Johnson v Johnson Chem. Co.*, 183 AD2d 64, 70 (2d Dept 1992). In this case, the testimony of the Defendant's corporate representative, Mr. William J. McClure[5], plainly demonstrates that Powell knew its valves had a finite shelf life and that they would have to be maintained and eventually removed over time. Notably, Mr. McClure admitted that Powell had no procedure outlined for such removal process. He also referred to valves that were no longer in use as "scrap" (Plaintiff's Exhibit 6, pp. 40, 41, 42, 43-44, objections omitted):

Q. And there comes a point in time when a Powell valve may have to be removed from service, correct?

A. It could.

Q. Powell knew that its valves didn't really last forever, correct?

A. That's true.

* * * *

Q. Okay. Did Powell have a procedure for the disposal of old Powell valves that were no longer being used??

A. No, we didn't....

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Q. Sir, so Powell Valves never told its customers: Here is what you do—here is what you should do when you are throwing away our old valves, right?

A. No. As far as we were concerned it was scrap after they got –when they got through with it.

Q. Okay. So none of the manuals or instruction books produced by Powell discuss the ultimate removal and disposal of old Powell valves that weren't going to be used anymore, right, that were scrap?

A. That's true.

* * * *

Q. Sir, one follow-up question. Sir, from Powell's perspective, does it matter if you hit a valve that is going to be scrap metal with a sledgehammer?

A. No. If you are working with scrap metal they can use whatever.

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5 A copy of Mr. McClure's deposition transcript is submitted as Plaintiff's exhibit 6.

From this testimony it is evident that the foreseeability of exposure from the removal and scrapping of Powell valves was well within the scope of the Defendant's expectations. The Defendant's attempt to differentiate between salvagers such as Mr. Hockler from maintenance workers whose activities admittedly constituted proper use of its valves is misguided. The work performed by such trades pose a similar if not identical risk of asbestos exposure and the court would be remiss to adopt such an arbitrary distinction.

The court also rejects the Defendant's contention that it had no duty to warn Plaintiff of the dangers associated with asbestos-containing replacement parts. In the asbestos context, the First Department recently clarified that "where a manufacturer does have a sufficiently significant role, interest, or influence in the type of component used with its product after it enters the stream of commerce, it may be held strictly liable if that component causes injury to an end user of the product." *Matter of New York City Asbestos Litig.* [*Dummit*], 2014 NY App. Div. LEXIS 4964 (1st Dept July 3, 2014); *see also Liriano, supra; Rogers, supra.* Mr. McClure, who was deposed in connection with an unrelated asbestos action in 2007,[6] admitted that Powell not only sold valves which integrated asbestos gaskets and packing but also sold replacement asbestos gaskets and packing.[7] Given such testimony there can be no dispute that Powell placed asbestos-containing products into the stream of commerce. It therefore had a duty to warn of the hazards associated therewith whether or not it manufactured them.

In sum, the evidence presented points to the fact that Powell sold asbestos-containing valves, that Powell knew such valves would have to be maintained and would eventually be removed at the end of their life cycle, and that the removal process would have caused the

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[6] Mr. McClure was deposed in connection with an unrelated asbestos personal injury action venued in Los Angeles, California on or about April 4, 2007. A copy of his deposition transcript from that case is submitted as Plaintiff's exhibit 5.

[7] *Id.* at 135-144, 155-157.

release of asbestos-laden dust. Given these facts a jury could reasonably conclude that Powell breached its duty to Mr. Hockler to warn him of the hazards associated with asbestos. *See Reid, supra*; *Cawein, supra*.

Accordingly, it is hereby

ORDERED that The William Powell Company's motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: Dec 29, 2014

SHERRY KLEIN HEITLER, J.S.C.