

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

2014 NY Slip Op 33031(U)

November 25, 2014

Supreme Court, New York County

Docket Number: 190279/13

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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KEVIN A. NORTON and ADELE NORTON,

Plaintiffs,

- against -

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

Defendants.

----- X

SHERRY KLEIN HEITLER, J.:

Index No. 190279/13
Motion Seq. 003

DECISION & ORDER

In this asbestos personal injury action, defendant O'Connor Constructors, Inc. f/k/a/ Thomas O'Connor & Co., Inc. ("O'Connor") moves pursuant to CPLR 3212 for summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it. As more fully set forth below, the defendant's motion is granted.

CPLR 3212(b) provides 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." 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. *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). In asbestos litigation, should the defendant satisfy its *prima facie* burden, 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).

The defendant was hired as a mechanical contractor at several of the powerhouse facilities which plaintiff Kevin Norton, who has been diagnosed with mesothelioma, worked at throughout his

long steamfitter career. Plaintiffs allege that Mr. Norton's injuries are the direct result of his regular bystander exposure to asbestos from O'Connor employees who constructed the boilers at these powerhouses. Mr. Norton was deposed regarding such allegations over three days in August of 2013. Among other things he testified that he worked at powerhouses and commercial sites from 1954 until he retired in 1998. However, he did not explicitly identify O'Connor as a source of his exposure, nor could he specifically recall whether boilermakers handled asbestos materials in his presence (defendant's exhibit B, pp. 100-101, 127):

Q. Were the boilermakers using any products or materials that you believe contained asbestos at 14th Street?

A. I think we all were. I think we all were. I don't think. I know we were all exposed. Is that what you mean?

Q. No. No. My question is a little different. My question to you is: Were the boilermakers handling or working with any materials at 14th Street that you believe were asbestos-containing?

A. I really couldn't answer that. I could not answer that.

* * * *

Q. Did you have occasion to see what type of work the boilermakers were doing?

A. Well, they would be above us doing welding on the drums and stuff like that. Their work was up high.

Q. Did you see any of these boilermakers handling or working with asbestos-containing material?

A. No.

The plaintiff's brother and co-worker, Edward Norton, was also deposed in this matter. While he identified O'Connor as a contractor at several of the powerhouses at issue, and believed that his brother was exposed to asbestos used to insulate the boilers at these powerhouses, he did not attribute his brother's asbestos exposure to O'Connor (defendant's exhibit C, p. 843-846, 848, objections omitted):

Q. ... You responded to a question by your counsel in terms of the contractor O'Connor.

A. Yeah.

Q. And I believe you testified that you believe your brother was exposed to asbestos from their work. Is that correct?

A. Yes.

Q. Do you have a specific recollection of where this exposure occurred? If you know.

A. No. I'm not sure of the locations.

Q. Do you believe it's a powerhouse or a commercial site?

A. No. These were powerhouses.

Q. Do you have an idea of the time period where this would have occurred when you worked with your brother?

A. No. It was during the time I was working -- teamed up and working with my brother.

Q. Now, how do you believe your brother was exposed to asbestos from the work of O'Connor?

A. Well, O'Connor was building the boiler and all the things in previous -- said in previous testimony are applicable. They built the boiler. They -- after the tubes were all set and welded, they put on that sheet of steel. And, then, the asbestos workers come in and put in their block and paste, and generally, they worked off the buck stays. And that created all kinds of dust and particles, and flying particles, and chunks of asbestos. From -- coming from their boiler.

Q. Are you saying that the manufacturer of the boiler and O'Connor Constructors were one and the same, that O'Connor manufactured the boiler?

A. No.

Q. Okay.

A. They were the installation contractor.

Q. And is there any materials they used in your -- in the presence of your brother that you believe contained asbestos?

A. That O'Connor's people used?

Q. Yes.

A. No.

Q. So, you believe the exposure came from the pipe coverers that covered the boiler. Correct?

A. That was applying the covering to the boiler.

Q. And the boilermakers . . . how did O'Connor, who employed the boilermakers, cause exposure to asbestos from the boiler if the pipe covering was the cause of the exposure to your brother? . . .

A. Because it was on -- it was on the -- it was put in and installed on the boilermakers' work. . .

* * * *

Q. And this equipment that was on the top of the boiler, when the boilermakers or the O'Connor workers were working on it, was it covered with asbestos?

A. The entire boiler was covered with asbestos.

Q. But only after the boilermakers were finished with their work. Correct? . . .

A. Well, they were still working on the boiler after they had completed the exterior of the fire box. Which went down maybe -- . . .

Q. Do you have a specific recollection of Kevin working next to an O'Connor worker at a powerhouse, where he was exposed to asbestos?

A. Constantly while the boilermakers were working, we were up to three or four feet away.

It is apparent from such testimony that the source of Mr. Norton's asbestos exposure was the application of insulation to the boilers, not the erection of the boilers themselves. It is also apparent that such insulation work was not the defendant's responsibility. Thus, while a reasonable inference can be drawn that Mr. Norton was exposed to asbestos at the powerhouses in question, such exposure cannot be attributed to the defendant.

Accordingly, it is hereby ORDERED that defendant O'Connor Constructors, Inc. f/k/a/ Thomas O'Connor & Co., Inc.'s motion for summary judgment is granted; and it is further

ORDERED that this action and any cross-claims against this defendant are severed and dismissed in their entirety, and it is further

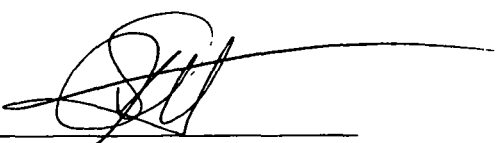
ORDERED that this case shall continue against the remaining defendants; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 11.25.14



SHERRY KLEIN HEITLER, J.S.C.