

Izbicki v Advance Auto Supply
2015 NY Slip Op 30147(U)
January 28, 2015
Supreme Court, New York County
Docket Number: 190140/13
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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MADÉLINE E. IZBICKI, Individually and as Executrix
of the Estate of DONALD J. IZBICKI, Sr., deceased,

Index No. 190140/13
Motion Seq. 009

Plaintiffs,

DECISION & ORDER

-against-

ADVANCE AUTO SUPPLY, et al.,

Defendants.

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SHERRY KLEIN HEITLER, J:

In this asbestos personal injury action, defendant J.R. Clarkson Co., sued herein as the successor by merger to IMI Cash Valve, Inc. ("Cash"), moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that plaintiffs' decedent Donald Izbicki misidentified Cash valves as a source of his exposure. In the alternative, Cash moves for partial summary judgment dismissing plaintiffs' eleventh cause of action for loss of consortium. The motion is granted in part and denied in part as more fully set forth below.

Mr. Izbicki served in the United States Navy and United States Air Force for nearly 30 years. In 1955 he was assigned to work aboard the USS Butner as a fireman's apprentice and machinist's mate in respect of which he was responsible for repairing and maintaining equipment. Relevant to this motion, Mr. Izbicki testified¹ that Cash was one of several manufacturers whose valves he repaired and that his work therewith caused him to be exposed to asbestos (Deposition pp. 56, 376-379, 381-383, 386):

- Q. Do you know who manufactured any of the valves that you repaired on the Butner? . . .
- A. I remember Atwell . . . Atwell Merrill . . . I think it is . . . Let's see, Cash. I'm missing a big one there. I forget. Lonergan.

* * * *

¹ Mr. Izbicki was deposed over the course of three days in July of 2013. Copies of his deposition transcripts are submitted as defendant's exhibits E-G ("Deposition").

- Q. Did you repair, install, or replace a Cash valve?
- A. Install, repair, replace, I knew I repaired them, along with the other valves that we are talking about in this whole deposition. . . .
- Q. Can you describe a Cash valve to me? What does it look like?
- A. Well, they were either a gate -- gate valve or globe valve.
- Q. Did the valve have a wheel mechanism to shut on and turn -- or turn on and turn off the valve?
- A. Yes. . . .
- Q. . . . Was the name "Cash" on this valve?
- A. Yes.
- Q. How did the name appear?
- A. It was stamped on it.
- Q. When you say "stamped," do you mean embossed?
- A. Yes. . . .
- Q. What repairs, sir, did you do to a Cash valve?
- A. I would replace the internal gaskets and the packing.
- * * * *
- Q. Okay. The one you removed, how did you remove that gasketing from either a gate or globe Cash valve?
- A. Well, we did it before; we scraped it off and got it prepared, depending on how deteriorated the gasket itself was as to what we had to do to get the stuff off. . . .
- Q. To install the new gasket, was it preformed or was it sheet?
- A. Preformed.
- Q. Did you have to manipulate it at all?
- A. Somewhat.
- Q. What manipulation did you have to do?
- A. Make sure it was seated properly.
- Q. What does that mean, sir? I'm sorry.
- A. To place it in there so it sat on top of the bonnet, for instance, the way it should so that when you put it back together, you didn't crimp it, so that was handling it to get it on there.
- Q. Did that cause dust?
- A. Yes.
- Q. Did you breathe in that dust?
- A. I breathed in the asbestos dust, yes.

* * * *

Q. Where did the packing on the valve go?

A. Around the stem. . . .

Q. Do you believe you were exposed by the removal and installation of packing into that stem?

A. Yes.

Q. How would you remove packing from the stem of a valve?

A. Take off the handle or the wheel, if you want to call it that, you take off the packing gland nut, and then you start digging the whole packing out.

CPLR 3212(b) provides, in relevant part, 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.” The defendant argues that it is entitled to summary judgment because it simply did not manufacture valves as described by Mr. Izbicki. In support it relies solely on an affidavit from Doyle Lamb, Cash’s former Vice President for Applications Quality and Engineering,² who avers that it “never made valves that were capable of being opened or closed through means of a handle or wheel or which contained a valve stem.”³ He continues that Cash valves had no handles or valve stems such that packing “was not needed and could not be used.”⁴ Mr. Lamb also states that the defendant never manufactured valves that “would have been marked as ‘Cash.’”⁵

As noted by plaintiffs, however, Mr. Lamb first began working for the defendant in 1962, six years after Mr. Izbicki’s last alleged encounter with Cash valves. In addition, Mr. Lamb’s knowledge of Cash’s historical product lines is admittedly based in part upon his review of “engineering files,

² The Lamb Affidavit, sworn to June 12, 2014, is submitted as defendant’s exhibit L.

³ *Id.* at ¶ 17.

⁴ *Id.*

⁵ *Id.* at ¶ 20. Notably, Mr. Lamb does not deny that Cash’s valves utilized asbestos gaskets. He merely states that “[s]ince Mr. Izbick[i]’s testimony does not describe a product made by the Company, there is no need to address his testimony about packing and gaskets.” *Id.* at ¶ 17.

including product design and specification documents, dating back to . . . the 1920s.”⁶ Insofar as the defendant does not submit any of the documents that apparently formed the basis of Mr. Lamb’s statements, his affidavit is conclusory and cannot form the basis of the defendant’s motion. *See JMD Holding Corp. v Cong. Fin. Corp.*, 4 NY3d 373, 384-85 (2005); *Ayotte v Gervasio*, 81 NY2d 1062 (1993); *Matter of New York City Asbestos Litig. (DiSalvo)*, 2014 NY App. Div. LEXIS 8645, at *1 (1st Dept 2014); *Sirico v F.G.G. Prods., Inc.*, 71 AD3d 429, 434 (1st Dept 2010). For this reason alone, that branch of the defendant’s motion which seeks to dismiss the entire complaint as against it is denied.

Although the court need not consider the sufficiency of plaintiffs’ opposition, (*see JMD Holding Corp., supra; Alvarez v Prospect Hosp.*, 508 NY2d 320, 324 [1986]; *Winegrad v NYU Med. Center*, 64 NY2d 851, 853 [1985]), the fact remains that Mr. Izbicki clearly and repeatedly detailed his alleged asbestos exposure as it related to Cash valves. Moreover, Navy records submitted by plaintiffs demonstrate that at least one Cash valve was ordered for use aboard the USS Butner.⁷ This is at the very least sufficient evidence upon which plaintiffs may proceed to trial. *See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (summary judgment is a drastic remedy that should be granted only if there are no triable issues of fact); *Matter of New York City Asbestos Litig. (Berensmann)*, 2014 NY App. Div. LEXIS 8064, *1-2 (1st Dept 2014) (quoting *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995]) (summary judgment properly denied where the defendant failed “to unequivocally establish that its product could not have contributed to the causation of plaintiff’s injury”); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996) (“The deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the

⁶ *Id.* at ¶ 9.

⁷ Plaintiffs’ exhibit C.

complaint. . . .The assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact, and any apparent discrepancy between the testimony and the evidence of record goes only to the weight and not the admissibility of the testimony.")

That branch of the defendant's motion which seeks partial summary judgment dismissing plaintiffs' loss of consortium claims is granted without opposition and for good cause shown. There is no dispute that Mr. Izbicki's alleged exposure to Cash valves pre-dated his marriage. *See Anderson v Eli Lilly & Co.*, 79 NY2d 797, 798 (1991) ("a cause of action for loss of consortium does not lie if the alleged tortious conduct and resultant injuries occurred prior to the marriage.").

Accordingly, it is hereby

ORDERED that the defendant's motion for summary judgment is granted only to the extent of dismissing plaintiffs' eleventh cause of action against it for loss of consortium, and is otherwise denied; and it is further

ORDERED that plaintiffs' eleventh cause of action for loss of consortium is hereby severed and dismissed as against defendant J.R. Clarkson Co., successor by merger to IMI Cash Valve, Inc.; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 1.28.15



SHERRY KLEIN HEITLER, J.S.C.