

**Storey v A.O. Smith Water Prods. Co.**

2015 NY Slip Op 30335(U)

March 9, 2015

Supreme Court, New York County

Docket Number: 190283/13

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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JOHN F. STOREY and CANDACE STOREY,

Plaintiffs,

-against-

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

Defendants.

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

Index No. 190283/13  
Motion Seq. 002

**DECISION & ORDER**

In this asbestos personal injury action, defendant Goodrich Corporation (“Goodrich”) moves for summary judgment pursuant to CPLR 3212 on the ground that plaintiff John F. Storey has not provided any admissible evidence that he was exposed to an asbestos-containing Goodrich floor tile. For the reasons set forth below, the motion is denied.

Mr. Storey was diagnosed with mesothelioma on or about August 5, 2013 and commenced this action on August 14, 2013. He was deposed over the course of four days.<sup>1</sup> At his deposition Mr. Storey described his work as a ceramic tile helper and ceramic tile setter at construction sites throughout New York City. He testified that he sustained asbestos exposure from the beginning of his career in 1960 through the mid-1980s, both from his personal use of such tiles and as a bystander from work performed by carpenters in his presence. Mr. Storey repeatedly identified floor tiles manufactured by Goodrich, and others, as sources of his asbestos exposure.<sup>2</sup>

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<sup>1</sup> Complete copies of Mr. Storey’s deposition transcripts have been submitted by plaintiffs as exhibits B & C (“Deposition” and “Video Deposition”).

<sup>2</sup> Deposition pp. 96-98, 105, 112, 120, 127, 638-39; Video Deposition pp. 43-44, 46-49, 113-14.

To obtain summary judgment the movant must tender proof in admissible form which resolves all material issues of fact in its favor and which demonstrates its entitlement to judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). The moving papers “shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit.” CPLR 3212(b). The “[f]ailure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *see also JMD Holding Corp. v Cong. Fin. Corp.*, 4 NY3d 373, 384 (2005).

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). Courts must view the evidence in the light most favorable to the nonmoving party and must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *Santelises v Town of Huntington*, 124 AD3d 863, 865 (2d Dept 2015).

The barebones affidavit<sup>3</sup> upon which Goodrich relies herein provides, without any factual support, that Goodrich “manufactured and sold vinyl asbestos floor tile, as well as vinyl floor tile that contained no asbestos”, and that “Goodrich exited the floor tile business entirely in 1963.” (Affidavit ¶¶ 3, 4). It makes no mention of this action, does not indicate whether the affiant read Mr. Storey’s deposition testimony, and does not set forth the basis of her personal knowledge of the matters.

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<sup>3</sup> See affidavit of Joan M. Taffi, sworn to May 29, 2014, submitted as defendant’s exhibit E (“Affidavit”).

discussed therein. Given these circumstances, and there being no other evidence in the record to support the affiant's claims, I find that Goodrich has not met its *prima facie* burden. If anything, Goodrich's claims that it manufactured both asbestos-containing and asbestos-free tiles is so broad that it actually raises material issues of fact as opposed to resolving them in its favor.

Mr. Storey explicitly testified that he was exposed to Goodrich-brand vinyl asbestos floor tiles prior to 1963.<sup>4</sup> Such testimony is sufficient to raise a triable issue of fact in and of itself. *See Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995) (plaintiff need only show "facts and conditions from which defendant's liability may be reasonably inferred"); *see also Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (court's role is to determine if any triable issues exist, not the merits of any such issues); *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 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.")

Goodrich's remaining challenges – that Mr. Storey only learned about the hazards of asbestos during union meetings and from OSHA bulletins years after his exposure, was unable to identify any specific building or location at which he remembers being exposed to Goodrich floor tiles, and could not describe the Goodrich tiles he encountered in any specific detail – are all issues that impact the weight to be given to his testimony by a jury at trial. *See Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013) (quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986])

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<sup>4</sup> Deposition pp. 638-39; Video Deposition pp. 46-49.

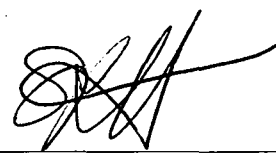
(“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . .”); *see also Dollas, supra*, at 321.

Accordingly, it is hereby

ORDERED that Goodrich Corporation’s motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: 3.9.15



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SHERRY KLEIN HEITLER, J.S.C.