

All Craft Fabricators, Inc. v ATC Assoc., Inc.

2017 NY Slip Op 30183(U)

January 30, 2017

Supreme Court, New York County

Docket Number: 156897/13

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ Justice

PART 13

ALL CRAFT FABRICATORS, INC., and DONALDSON INTERIORS, INC.,

Plaintiff

INDEX NO. 156897 /13

MOTION DATE 01-25-2017

-Against-

ATC ASSOCIATES, INC., CARDNO ATC, SKANSKA USA BUILDING INC., CERTIFIED MOVING AND STORAGE CO., LLC, HLW INTERNATIONAL LLP, WING INC., SPECIALTY TRADES, TERRASAN ENVIRONMENTAL SOLUTIONS, INC., PINNACLE ENVIRONMENTAL CORP., THE MANHATTAN COMPANY OF NEW YORK LLC, UNITED STATES PLYWOOD CORPORATION, CHAMPION INTERNATIONAL CORPORATION, OWENS CORNING, RPM INTERNATIONAL INC., DAP PRODUCTS, INC., MASONITE CORPORATION, INTERNATIONAL PAPER COMPANY and OWENS-ILLINOIS, INC.,

MOTION SEQ. NO. 10

Defendant.

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion /for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-2

Answering Affidavits — Exhibits

3-4

Replying Affidavits

5

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is ordered that this motion by defendants INTERNATIONAL PAPER COMPANY and OWENS-ILLINOIS, INC., for summary judgment is granted, the claims and cross-claims asserted against these defendants are severed and dismissed.

“All craft Fabricators, Inc., (hereinafter “All Craft”) was hired to do millwork for the refurbishment of the United Nations Headquarters. The project included work on wood panels and doors from the Under-Secretary General (USG) offices at the work site. All Craft was issued a change order by the general Contractor to use salvaged wood panels and doors from the USG offices to perform millwork for the project. Crates were sent to All Craft’s offices containing the wood panels and doors that were to be salvaged and refurbished pursuant to the change order.” (See moving papers Exhibit A ¶¶74-76, C ¶ 105-106, H ¶¶14-15, complaints). Donaldson Interiors, Inc., (hereinafter “Donaldson”) shared offices with All Craft.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

It is alleged that the wood panels and doors contained a core material that consisted of Asbestos. "During May 2012 and June 2012, All Craft performed work on and to the wood panels and doors, which were to be used as interior cabinets at the United Nations Building. During the course of that work being done on the wood panels and doors, asbestos fibers and /or dust containing asbestos spread around the facility where All Craft performed its work. External testing performed by All Craft confirmed that the powdered material was from asbestos contained in the wood panels and doors on which All Craft's work was done."(See moving papers, Joint Statement of Facts dated January 10, 2014, All Craft and Donaldson v. Hartford, 13 Cv 00971, EDNY).

Ronald Bielinski, a Professional Engineer, submitted an affidavit in the Federal case against Hartford Insurance where he states, under oath, "that I understand that the asbestos event occurred at the facility whereby wooden doors and panels from the United Nations construction project were ordered by the owner and general contractor to be reworked and finished by All Craft at the facility. I also understand that the reworking and the refinishing of the wooden doors and panel included the re-sizing the doors, which, as one might expect, involved the cutting of the doors and panels, and work on the wood, using saws, blades, sanders, drills and other woodworking cutting and finishing equipment." (see moving papers, Bielinski Affidavit ¶5, Exhibit F).

"The Cabinet doors contained asbestos as an integral component, for a specific purpose (to provide a fire rating to the doors). The asbestos contained within the doors was not a "waste" and it was not a contaminant. The doors were received by All Craft for refurbishment, after which, they would have been placed back in service. The doors, themselves, were not a "waste", but a work in process." (See moving papers, Bielinski Affidavit ¶8, Exhibit F).

An unsigned letter from the Office of Legal Affairs of the United Nations dated December 5, 2014 states that... "the organization's architects for the project recommended salvaging wood products from the building to be reused and refashioned into cabinetry and office furnishings for the renovated premises. For these purposes Skanska entered into a subcontract with All Craft Fabricators to create new wood furniture from wood materials salvaged from the Secretariat building.... All Craft alleges that the contamination occurred when All Craft workers at the factory began refabricating wood salvaged from the Secretariat building." (see moving papers Exhibit D).

The change order dated June 11, 2012 required that "All Craft provide labor and material to refurbish salvaged wood panels and millwork, formerly installed in the Secretariat fabricate as designated in PCR 095 dated 19 December 2011, at a total of 13 locations at the USG/ASG offices..."(see moving papers Exhibit V).

A Statement given to OSHA by Ms. Aptheke, All Craft's executive counsel, explained that ... "on [January 23, 2012] Skanska delivered cratescontaining approximately 40 doors from the UN which required refurbishing. The employees were given work orders by their supervisor to refurbish the doors....The work included, such as, but not limited to, plugging, filling, and sanding doors....CSHO contacted Skanska and spoke to [blank]The UN made the decision to refurbish the interior doors and panels which were in storage as part of the renovation of the UN building..." (see moving papers Exhibit X).

Defendants now move for summary judgment based on the First Department decision in Hockler v. William Powell Company, (129 A.D.3d 463, 11 N.Y.S.3d 45 [1st. Dept. 2015]) wherein the Appellate Division First Department reversed the trial court, and found that “the valve manufacturer owed no duty to a worker who allegedly developed peritoneal mesothelioma as a result of his exposure to asbestos from manufacturer’s valves, inasmuch as the worker’s dismantling and salvaging of scrap metal from steam systems in a vacant buildings was not a reasonably foreseeable use of the valves.” Defendants allege that plaintiffs were engaged in “salvage” work when they undertook to turn the fire doors into cabinets, they used the product in a manner that was not intended or foreseeable, and under Hockler, Supra, the causes of action asserted in the complaint against them should be dismissed.

Plaintiffs oppose the motion by arguing that defendants have failed to come forth with evidence in admissible form sufficient to establish their entitlement to summary judgment. The Letter from the United Nations Office of legal affairs, the change order, and the OSHA investigation report (Exhibits D, V and X) are all in inadmissible form and constitute hearsay. Then they argue that the defendants have failed to establish that the refurbishment and reinstallation of the UN’s wood panels and doors was an unintended or unforeseeable use of their product. They further argue that the facts in Hockler are distinguishable and inapplicable to this action because they were not “salvaging” but “refurbishing”, and finally they argue that the refurbishment of the wood panels and doors was foreseeable.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

In Hockler, Supra the court held that “salvage work” was not an intended use of the product.” When asked to explain how he was exposed to asbestos the plaintiff testified.... “ we would rip it off, cut it off, any way we could get it off these valves and pumps, cut or smash, break any way we could get them out.”

While it is true that many of the documents provided by defendants in support of their motion are in inadmissible form and therefore cannot be considered by the court on this motion for summary judgment, the affidavit submitted by Robert Bielinski in the case against Hartford in the Federal District Court (moving papers Exhibit F) establishes that All Craft, as part of its refurbishing of the wood panels and doors was cutting the doors and panels that were delivered to its site using saws, blades, sanders, drills and other woodworking cutting and finishing equipment.

The plaintiffs have submitted the affidavits of Robert Thompson, and Robert Bielinski, who state that the term "salvaged" as it appears in the change order is not to be understood to mean that the doors and panels were junked and then retrieved by someone else and used for something else entirely different, such as firewood. They further state that the doors and panels were to be refurbished and placed back in service. However, these affidavits do not raise an issue of fact. They do not negate that as part of their refurbishing of the doors and wood panels they cut into them using saws and blades.

A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its products which it knew or should have known, which includes a duty to warn of dangers relating to unintended uses, providing that such uses are reasonably foreseeable. Whether a particular way of misusing a product is reasonably foreseeable is ordinarily a question for the jury (see Young v. Daglian 63 A.D.3d, 1050, 883 N.Y.S.2d 75 [2nd. Dept. 2009]). But a manufacturer has no duty to warn against latent dangers that do not result from foreseeable uses of its product. "To recover for injuries caused by a defective product, the defect must have been a substantial factor in causing the injury, and the product must have been used for the purpose and in the manner normally intended or in a manner reasonably foreseeable."(Hockler v. William Powell, supra, quoting Hartnett v. Chanel, Inc., 97 A.D.3d 416, 948 N.Y.S.2d 282 [1st. Dept. 2012]). Defendants have proved that Plaintiffs did not use defendants' product in a way it was intended or in a reasonably foreseeable manner. Cutting into the wood panels and doors is not an intended use of the product.

Plaintiffs have failed to come forth with evidence in admissible form sufficient to rebut defendants' entitlement to summary judgment.

Accordingly , it is ORDERED that the motion by defendants for summary judgment is granted, and it is further


ORDERED that defendants INTERNATIONAL PAPER COMPANY and OWENS-ILLINOIS, INC., are granted summary judgment dismissing all claims and cross-claims asserted against these defendants, and it is further

ORDERED that all claims and cross-claims asserted against defendants INTERNATIONAL PAPER COMPANY and OWENS-ILLINOIS, INC., are severed and dismissed, and it is further

ORDERED that the clerk of court enter judgment accordingly.

ENTER:

Dated: January 30, 2017

MANUEL J. MENDEZ
J.S.C.

Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE