

Brown v Bell & Gossett Co.

2017 NY Slip Op 32598(U)

December 12, 2017

Supreme Court, New York County

Docket Number: 190415/12

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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In Re: NEW YORK CITY ASBESTOS LITIGATION
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This Document Relates To:

Index no. 190415/12

PHYLLIS BROWN, as Administratrix of the Estate of
HARRY E. BROWN, and PHYLLIS BROWN,
Individually,

DECISION AND ORDER

Plaintiff,

-against-

BELL & GOSSETT COMPANY, *et al.*,

Defendants.
-----X

BARBARA JAFFE, JSC:

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At issue here is what percentage of liability should be allocated to defendant Consolidated Edison Company of New York (Con Edison) following a jury verdict finding it partially liable for the death of Harry Brown, plaintiff's decedent whose death was proximately caused from exposure to asbestos. The parties submit competing judgments.

I. BACKGROUND

In her complaint, plaintiff advanced a claim against Con Edison pursuant to Labor Law § 200, and stated in her pleading that "having sustained a 'grave injury' as defined in Section 11 of the Workers' Compensation Law, the limitations on liability set forth in Article 16, at CPLR 1601(1), do not apply, by virtue of CPLR 1602(4), to the extent of the equitable share of

plaintiff's employer, against whom plaintiff is barred from asserting a cause of action because of the applicability of the Workers' Compensation Law." (NYSCEF 538).

At trial, plaintiff proved that between 1965 and 1966, Brown worked at Con Edison's Ravenswood powerhouse while employed by non-party Robert A. Keasbey Co. (Keasbey), and that between 1959 and 1964, he worked for another entity, Asbestos Construction, and other employers and at other worksites and other times where and when he was exposed to asbestos-containing products manufactured by entities including Keasbey, for whom he also worked at other locations during the 1970s.

Based on these facts, Con Edison sought to include Keasbey on the verdict sheet as an article 16 entity not only in its capacity as a manufacturer of asbestos-containing products but also as a contractor that employed workers who exposed Brown to asbestos while he worked nearby when he was not employed by Keasbey. As the parties had already agreed to list Keasbey on the verdict sheet as a manufacturer and given Con Edison's failure to raise the issue of Brown's so-called bystander exposure in a timely fashion, I denied its request. At no time did any party assert that the inclusion of Keasbey on the list of article 16 entities as a manufacturer of asbestos-containing products was barred by the Workers' Compensation Law (WCL). Keasbey thus appears on the verdict sheet solely in its capacity as a manufacturer of an asbestos-containing product for the purpose of apportionment.

The jury was duly instructed as to Con Edison's liability pursuant to Labor Law § 200, and on the verdict sheet, it answered the following questions in the affirmative:

- (1) was Brown exposed to asbestos at Con Edison's Ravenswood powerhouse?
- (2) did Con Edison exercise supervision and control over workers at the powerhouse?

- (3) did Con Edison fail to exercise reasonable care to make the powerhouse reasonably safe?
- (4) was Con Edison's failure to exercise reasonable care to make the powerhouse reasonably safe a substantial contributing factor in causing Brown's injuries?

The jury was also duly instructed that the defendants bear the burden of proving that the article 16 entities sold, manufactured and/or used defective products which were a substantial contributing factor in causing Brown's injury, and was asked to answer the following questions on the verdict sheet and move on to each subsequent question upon answering either "yes" or "no" to the prior question:

- (1) Was Brown exposed to asbestos from products made, sold, distributed and/or used in connection with products or equipment by any of the [article 16 entities]?
- (2) If yes, did any of the [entities] fail to exercise reasonable care by not providing an adequate warning to Brown about hazards of asbestos?
- (3) If yes, were these [entities'] failures to provide an adequate warning a substantial contributing factor in development of Brown's mesothelioma?

The jury was then duly directed to apportion liability among the defendants it found liable, including Con Edison and any non-party entities, including Keasbey, that it found liable. It found that Con Edison was 30 percent liable, Keasbey 35 percent liable, and two other entities were liable for the remaining 35 percent.

Following an appeal on other grounds, plaintiff submitted a proposed judgment in which she asserts that in addition to its 30 percent liability, Con Edison should also be held liable for Keasbey's 35 percent liability; Con Edison submitted a proposed counter-judgment which caps its liability at 30 percent. (NYSCEF 537, 542).

II. APPLICABLE LAW

Pursuant to CPLR 1601(1),

[n]otwithstanding any other provision of law, when a verdict or decision in an action or claim for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable . . . and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss . . .

However, the limitations set forth in section 1601 do not

apply to claims under the workers' compensation law or to a claim against a defendant where claimant has sustained a "grave injury" as defined in section eleven of the workers' compensation law to the extent of the equitable share of any person against whom the claimant is barred from asserting a cause of action because of the applicability of the workers' compensation law provided, however, that nothing in this subdivision shall be construed to create, impair, alter, limit, modify, enlarge, abrogate, or restrict any theory of liability upon which any person may be held liable.

(CPLR 1602[4]).

Thus, the equitable share of a defendant for non-economic loss, even if its liability is found to be fifty percent or less, is not reduced by the relative culpability of another defendant or entity where a claim is made that a grave injury as defined in WCL § 11 was sustained if that defendant or entity cannot be sued by virtue of the workers' compensation law.

For a party to avoid a reduction of the liability of a defendant or entity under CPLR 1602(4), it must both "allege and prove by a preponderance of the evidence that one or more of the exemptions set forth in subdivision one of section sixteen hundred one or section sixteen hundred two applies." (CPLR 1603).

III. CONTENTIONS

A. Plaintiff

Plaintiff contends that as Keasbey was Brown's employer, she was absolutely barred from suing it and thus, Keasbey cannot be considered as a products manufacturer in order to exempt it from the workers' compensation limitation. In other words, as plaintiff is barred by WCL § 11 from suing his employer Keasbey, Keasbey's share of liability must be transferred or apportioned to Con Edison. (NYSCEF 519).

B. Con Edison

Con Edison argues that for Keasbey's share to be allocated to it, plaintiff must prove that Keasbey is liable for Brown's injuries in its capacity as his employer and through work he performed within the scope of his employment with it. On the verdict sheet, however, Keasbey is listed as a manufacturer of asbestos-containing products, not as Brown's employer, and the questions posed to the jury relate solely to Keasbey's role as a manufacturer and its failure to warn about its product. Moreover, Con Edison maintains, as Keasbey was a non-party, the only reason for placing it on the verdict sheet was for an article 16 set-off. It also contends that no issue was raised as to whether Keasbey operated in the dual capacity of manufacturer and employer as the jury questions relate solely to Keasbey's liability as a manufacturer and Brown's exposure to a Keasbey-manufactured product while employed by Asbestos Construction. In any event, Con Edison asserts that plaintiff waived the exception or limitation by failing to object to the jury charge and questions. (NYSCEF 515).

IV. PROCEDURAL BACKGROUND

By stipulation so-ordered on June 13, 2017, the parties agreed that a determination of the

judgment be stayed pending an appeal taken by defendant to the Court of Appeals from the order of the Appellate Division. (NYSCEF 531). By letter dated September 15, 2017, plaintiff advised that the Court of Appeals had dismissed Con Edison's appeal and that the judgment was ripe for determination. (NYSCEF 533). Oral argument was held on November 15, 2017. (NYSCEF 550).

V. ANALYSIS

A. Dual capacity

Pursuant to Workers' Compensation Law (WCL) § 11, a claim against an employer by an employee for an injury sustained when acting within the scope of his or her employment with the employer is barred. This statute is "designed to spread the risk of industrial accidents through the vehicle of insurance coverage and, more specifically, to 'provide a swift and sure source of benefits to the injury employee or to dependents of [a] deceased employee.'" (*Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 159 [1980] [citation omitted]). In exchange for the payment of a fixed benefit without the need for "expensive and sometimes risky litigation," the employee gives up his or her common law right to sue the employer in tort. (*Id.*).

Here, it is not disputed that on the verdict sheet and in the jury charge, Keasbey is listed in the sole capacity of a manufacturer or user of asbestos-containing products, and that the jury held it liable for failing to warn Brown about its products. Nor is it disputed that pursuant to WCL § 11, no question was asked or finding made as to whether Keasbey should be held liable as Brown's employer for injuries sustained by him within the scope of his employment with Keasbey, whether as a premises owner or the manufacturer of defective equipment.

In *Billy, supra*, the Court held that the limitation set forth in WCL § 11 applies where a defendant is sued both as the employer of the injured employee and as either a participant in the

manufacture and design of the equipment which allegedly injured the employee or as a premises owner where the accident occurred. The Court observed that it is “unsound” to permit common-law actions against employers in their capacities as employers and as property owners or manufacturers (51 NY2d at 159), reasoning that the expectation that an employer provide a safe workplace “cannot be separated in a logical and orderly fashion” from its duties as a premises owner or manufacturer of equipment, and that such duties are subsumed within all of the obligations arising from the employee-employer relationship. (*Id.* at 160). It explained that “the salutary social purposes underlying the existing workers’ compensation scheme” would be “undermin[ed]” if recovery outside that scheme were permitted based on “such illusory distinctions.” (*Id.*). Thus, per *Billy*, if a party is sued in its capacity as the plaintiff’s employer and as the owner of the premises where the plaintiff worked or as the manufacturer of equipment which injured the plaintiff, the Workers’ Compensation Law bars direct liability against the employer. (*See Ross v Nestle Prepared Foods Co., Inc.*, 21 AD3d 1329 [4th Dept 2005], *lv dismissed* 6 NY3d 751 [employee cannot sue employer in its dual capacity as employer and as designer of machine that injured him while working for employer]).

Here, however, Keasbey was held liable in its capacity as a manufacturer of asbestos-containing products, not as a manufacturer of equipment used by Brown in his employment for Keasbey, and the jury found that the duty violated by Keasbey was not that owed by the employer to the employee but that owed by a product manufacturer to warn a product user. Thus, the distinction between Keasbey’s status as Brown’s employer and its status as the manufacturer of an asbestos-containing product is real, not illusory, and does not implicate the salutary policy underlying the Workers’ Compensation Law.

Moreover, Brown was proven to have been exposed to the Keasbey products at issue while he was employed by another entity several years before he had begun working for Keasbey. To hold that Keasbey's article 16 liability is precluded because Brown worked for it after he was exposed to its products does not advance that salutary policy. (*Id.*). Thus, in *Gonzales v Armac Indus., Ltd.*, the Court acknowledged such an exception to WCL § 11 as "avoid[ing] inequity to a defendant left with the total bill for a plaintiff's injuries because of the mere happenstance that the other tortfeasor was the plaintiff's employer and therefore immune from direct suit." (81 NY2d 1, 8 [1993]).

Similar reasoning was employed by the Court in *Firestein v Kingsbrook Jewish Med. Ctr.*, wherein it was held that the plaintiff was not barred from seeking damages for medical malpractice even though she was employed at the hospital where the malpractice occurred, as her injuries and the alleged malpractice did not occur during the course of her employment with the hospital, notwithstanding that her injury and her employment relationship coincided. The Court construed the so-called "dual capacity" doctrine as set forth in *Billy* as follows: "an employee who is injured during the course of his employment may sue his employer for money damages if the employer 'occupies a second capacity that confers on him obligations independent of those imposed on him as employer'" (137 AD2d 34, 40 [2d Dept 1988]). Thus, the Court held that the "fundamental distinction" between the case before it and *Billy* is that "the injuries for which [the plaintiff] seeks compensation in a court of law did not occur within the scope of her employment." (*Id.* at 40; see *Matias v City of New York*, 127 AD3d 1145 [2d Dept 2015] [plaintiff could not only recover workers' compensation benefits for his on-job injury, but could also sue employer to recover damages caused by separate injuries that occurred outside scope of

his employment.)).

None of the cases cited by plaintiff addresses the issue of whether an employer may be sued as a product manufacturer with a duty to provide a safe product or adequate warnings for injuries sustained before the employment relationship began. Nor has plaintiff established that there is an absolute bar against suing an employer in a dual capacity. If it is plaintiff's position that Keasbey, by virtue of its non-coincident employment relationship with Brown, should not have appeared on the verdict sheet, she failed to register an objection which is not cured by having raised it in her complaint.

B. Ability to bring direct claim against Keasbey

Plaintiff now advances as an additional bar to the inclusion of Keasbey as an article 16 entity, WCL § 44, which provides that the total compensation due an injured employee is recoverable from the employer who last employed the employee in the employment which caused the disease and in which the disease was contracted, and that if the employee was injured while employed at an earlier time by another employer, the last employer may appeal for apportionment of the compensation before the Workers' Compensation Board. Plaintiff maintains that this statute also precludes her from bringing an action against Keasbey, as it provides that the total compensation due an injured employee is recoverable from the employer who last employed the employee. Thus, she asserts, pursuant to WCL § 11 and CPLR 1601(4), Keasbey's share of liability must be apportioned to Con Edison.

Here again, defendants' theory of liability against Keasbey is not based on Brown's employment relationship with it or on equipment manufactured by Keasbey and used by Brown in his employment with Keasbey, but on Keasbey's defective products and its failure to warn of

those defects, and the jury awarded damages based on the latter theory only. Plaintiff's reliance on WCL § 44 is thus based solely on Keasbey's status as Brown's employer.

An issue related to whether WCL § 44 applies to the circumstances at issue here was addressed in *Konstantin v 630 Third Ave. Assocs.*, where the court denied a defendant-employer summary judgment based on WCL § 11. The defendant, plaintiff's employer for part of the time during which he was exposed to asbestos, had claimed that WCL § 44 barred the plaintiff's claim of liability against it for incidents of bystander exposure resulting from the conduct of its employees after the plaintiff was no longer employed by it. The motion court found that the facts presented were not contemplated by WCL § 44, observing that the statute's sole purpose "is to ensure that a claimant is provided with fast and total compensation while preserving a mechanism by which the last employer may [] seek apportionment from the claimant's prior employers as to the injury at issue." (2011 WL 844107, 2011 NY Slip Op 30482[U], *6 [Sup Ct, New York County 2011] [citing Minkowitz, Practice Commentaries, McKinney's Cons Laws of NY, Book 64, Workers' Compensation Law § 44, at 417-418]). The court also faulted the defendant for failing to acknowledge the "plain meaning" of WCL § 2(7), which defines injury as "only" those injuries arising out of and in the course of employment, and WCL § 10, which provides that Workers' Compensation bars only those claims arising out of and in the course of employment." The court thus held that, "incidents of exposure which did not arise out of and in the course of employment are not barred by the exclusivity provisions in § 11." (*Id.* at 7). There, as here:

The only certainty here is that Mr. Konstantin maintained two completely different roles with respect to [the defendant] over the course of his career. The WCL undoubtedly covers those claims which arose out of Mr. Konstantin's employment as a laborer for [the

defendant]. But the WCL simply does not apply to those incidents of exposure which arose from Mr. Konstantin's role as a carpenter for a different employer, who happened to be a bystander to the action of [the defendant]'s employees. Therefore, Mr. Konstantin's claims, to the extent they arise from his alleged exposure after he left [the defendant]'s employ, are not barred by statute.

(*Id.* at 9; *see also Horn v Treadwell*, 2010 WL 455283, 2010 NY Slip Op 33123[U] [Sup Ct, New York County] [Workers' Compensation Law barred claim arising from asbestos exposure during plaintiff's employment with defendant, but did not bar claim arising from bystander exposure to asbestos caused by defendant's employees before he was employed by defendant]).

Similarly, in *Pike v CBS Corp.*, the court held that as the plaintiff was suing the defendant for injuries that did not occur during his employment with the defendant, but rather for "non-employer negligence" (2014 WL 12694571 [Sup Ct, Onondaga County 2014]), WCL § 11 did not bar this claim as the determination of the applicability of the bar is dependent on the "status of the actor at the time the acts sued upon are committed." (*Id.*). Thus, the defendant could be held liable in tort for the plaintiff's injury from asbestos exposure that occurred when the plaintiff was not defendant's employee and resulted from the defendant's negligence. (*Id.*)

In *Root v AES Corp., et al.*, the trial court held that all of the plaintiff's claims against his employer were barred, whether through the employment relationship or as a product manufacturer. Its decision was solely based on the ground that the plaintiff's mesothelioma constituted a "single injury." (Sup Ct, Oswego County, Sept. 29, 2003, McCarthy, J., index No. 10302/84). As no such argument is raised here, *Root* is significantly distinguishable from the case at bar.

Even if Keasbey's "non-employer negligence" is nonetheless barred here, there is no remedy available apart from a new trial as neither this court nor the Appellate Division is in a

position to determine how the jury would have apportioned liability absent Keasbey.

Thus, for all of the foregoing reasons, plaintiff does not meet her burden of proving that the exception set forth in WCL § 11 applies in this case.

Accordingly, it is hereby

ORDERED and ADJUDGED, that plaintiff's proposed judgment is denied, and Con Edison's proposed counter-judgment is accepted; and it is further

ORDERED, that the clerk of the court is directed to enter judgment in accordance with the signed counter-judgment.

ENTER:



BARBARA JAFFE, JSC

Dated: December 12, 2017
New York, New York