

Chalco v Ajax Magnethermic Corp.
2018 NY Slip Op 31641(U)
July 13, 2018
Supreme Court, New York County
Docket Number: 190373/2016
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

AZALIA CHALCO, as Executrix for the
Estate of WILSON CHALCO, and
AZALIA CHALCO, Individually,

Index No. 190373/2016

Plaintiff

- against -

DECISION AND ORDER

AJAX MAGNETHERMIC CORPORATION, et al.,

Defendants

LUCY BILLINGS, J.S.C.:

I. INTRODUCTION

Plaintiff sues defendants to recover damages for the decedent Wilson Chalco's exposure to asbestos during 1989 to 2006 from his job as a maintenance worker at a housing complex that was owned and managed by nonparty New York City Housing Authority (NYCHA) and maintained equipment using valves manufactured by defendant Fairbanks Company. It moves for summary judgment dismissing the complaint and all cross-claims against it, C.P.L.R. § 3212(b), based on the absence of evidence that any Fairbanks Company product contributed to the decedent's exposure.

To demonstrate entitlement to summary judgment, Fairbanks Company must demonstrate unequivocally that its product did not contribute to the decedent's injury. Matter of New York City Asbestos Litig., 146 A.D.3d 700, 700 (1st Dep't 2017); Matter of New York City Asbestos Litig., 123 A.D.3d 498, 499 (1st Dep't 2014); Matter of New York City Asbestos Litig., 122 A.D.3d 520,

521 (1st Dep't 2014). Fairbanks Company may not meet its burden by merely pointing to deficiencies in plaintiff's evidence.

Ricci v. A.O. Smith Water Prods. Co., 143 A.D.3d 516, 516 (1st Dep't 2016); Koulermos v. A.O. Smith Water Prods., 137 A.D.3d 575, 576 (1st Dep't 2016).

II. IDENTIFICATION OF FAIRBANKS COMPANY VALVES CONTAINING ASBESTOS

Fairbanks Company points out that, while Chalco testified at his deposition that mechanics' work on boilers in proximity to his work on trash compactors generated dust, he also testified that he was not trained in identifying asbestos. Fairbanks Company further contends that his testimony that he did not know whether the parts on which the mechanics worked were valves and his inability to describe a valve negates his testimony that he observed "Fairbanks" written on the valves. This observation that the valves bore the name "Fairbanks" on them nevertheless raises a reasonable inference that Fairbanks Company manufactured the valves that Chalco observed. Tronlone v. Lac d'Amiante Du Quebec, 99 N.Y.2d 647, 647 (2003); Penn v. Amchem Prods., 85 A.D.3d 475, 476 (1st Dep't 2011); Taylor v. A.C. & S., Inc., 306 A.D.2d 202, 202-203 (1st Dep't 2003); Taylor v. A.C. & S., Inc., 304 A.D.2d 403, 404-405 (1st Dep't 2003). See Matter of New York City Asbestos Litig., 7 A.D.3d 285, 285 (1st Dep't 2004). Its insistence that his lack of fluency in English further undermines his ability to read "Fairbanks" on the valves ignores the fact that the name is spelled the same in English and Spanish, Chalco's native language. His inability to describe the valves

further and any other lack of knowledge regarding valves bear only on the credibility and weight of his testimony. Wein v. Robinson, 92 A.D.3d 578, 578-79 (1st Dep't 2012); Penn v. Amchem Prods., 85 A.D.3d at 476; 542 E. 14th St. LLC v. Lee, 66 A.D.3d 18, 23 (1st Dep't 2009).

Fairbanks Company's reliance on Chalco's lack of training in identifying asbestos and lack of knowledge of the substances NYCHA used in its equipment impermissibly attempts to shift the initial burden upon its motion for summary judgment from Fairbanks Company to plaintiff. Katz v. United Synagogue of Conservative Judaism, 135 A.D.3d 458, 462 (1st Dep't 2016); Pappalardo v. New York Health & Racquet Club, 279 A.D.2d 134, 140 (1st Dep't 2000). Fairbanks Company bears the initial burden to establish the absence of asbestos in any of its products used in the NYCHA buildings where Chalco worked, before the burden shifts to plaintiff to show that there was asbestos in Fairbanks Company products used in those buildings. Matter of New York City Asbestos Litig., 123 A.D.3d at 499; Matter of New York City Asbestos Litig., 122 A.D.3d at 521; Reid v. Georgia-Pacific Corp., 212 A.D.2d 462, 463 (1st Dep't 1995).

In any event, Fairbanks Company also relies on the deposition of Everett Brumbelow, Fairbanks Company's employee since 1962, who testified that its valves were packed in asbestos and that servicing of valves included replacing their asbestos packing. He also corroborated Chalco's testimony by confirming that "Fairbanks" was stamped on the valves themselves. Robert

Lahre, Fairbanks Company's Chief Executive Officer, Secretary, and Treasurer, corroborated Brumbelow by testifying that the Fairbanks Company valves sold and shipped through the end of December 1985 probably contained asbestos.

Chalco's inability to answer "what substances the New York City Housing Authority used in its equipment," Aff. of Omar Samuel Ex. D, at 91, a question to which plaintiff objected based on its form, only presents an ambiguity whether the substance referred to was asbestos, rather than a cleaning, lubricating, or antifreeze solution, for example, or a myriad of other conceivable substances. The question did not ask about the composition of the equipment that was generating dust in Chalco's proximity. Plaintiff's objection prompted the examining attorney to reformulate a more precise question describing the substances that were the subject of the inquiry or at least to inquire further to ascertain what substances Chalco was referring to when he expressed his lack of knowledge. See 542 E. 14th St. LLC v. Lee, 66 A.D.3d at 23; Piluso v. Bell Atl. Corp., 305 A.D.2d 68, 70 (1st Dep't 2003). The inquiry regarding plural "substances," alone, suggests that it did not relate to the singular substance asbestos. Moreover, since Chalco already had been asked and had answered how he came in contact with asbestos, the further inquiry regarding the substances NYCHA used gives the impression of proceeding to another subject.

III. USE OF FAIRBANKS COMPANY VALVES AFTER 1989


Finally, Fairbanks Company claims the testimony by Chalco that he did not actually work in NYCHA buildings until 1990 and that the valves there underwent frequent maintenance demonstrates that he never observed Fairbanks Company's valves, because Brumbelow and Lahre testified that Fairbanks Company ceased manufacturing valves in 1984 and sold its valves business in 1985. Fairbanks Company contends that the frequent maintenance indicates replacement of any Fairbanks Company original valves, with valves neither manufactured nor specified by Fairbanks Company, before Chalco's exposure. See Matter of New York City Asbestos Litig., 143 A.D.3d 483, 483 (1st Dep't 2016); Peraica v. A.O. Smith Water Prods. Co., 143 A.D.3d 448, 449 (1st Dep't 2016). As maintenance is not synonymous with replacement, absent any evidence that maintenance of Fairbanks Company valves always included their replacement, such an inference is unreasonable, and, particularly in the context of Fairbanks Company's motion, may not be drawn in its favor. See Matter of New York City Asbestos Litig., 256 A.D.2d 250, 250 (1st Dep't 1998).

In fact, Chalco described the mechanics' work on valves as cleaning, in the context of cleaning boilers, and not always involving the changing of component parts. Therefore Fairbanks Company fails to present any evidence that NYCHA was not using Fairbanks Company valves during the period plaintiff claims Chalco was exposed to them. Taylor v. A.C. & S., Inc., 306 A.D.2d at 203; Taylor v. A.C. & S., Inc., 304 A.D.2d at 405.

IV. CONCLUSION

Since the record that defendant Fairbanks Company presents raises material factual issues, it fails to meet its initial burden to establish that its valves did not contribute to Chalco's injury from asbestos. Therefore the court denies its motion for summary judgment. C.P.L.R. § 3212(b); Matter of New York City Asbestos Litig., 123 A.D.3d at 499; Matter of New York City Asbestos Litig., 122 A.D.3d at 521; Esteva v. City of New York, 30 A.D.3d 212, 213 (1st Dep't 2006).

DATED: July 13, 2018



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