

Friedman v A.O. Smith Corp.
2013 NY Slip Op 31420(U)
June 26, 2013
Supreme Court, New York County
Docket Number: 190187/12
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHERRY KLEIN HEITLER
Justice

PART 30

STANLEY FRIEDMAN and PHYLLIS FRIEDMAN,

INDEX NO. 190187/12

Plaintiffs,

MOTION DATE _____

- v -

MOTION SEQ. NO. 003

A.O. SMITH CORPORATION, et al.,

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

This motion is decided in accordance with the memorandum decision dated 6.26.13

Dated: 6.26.13

SHERRY KLEIN HEITLER J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----- X
STANLEY FRIEDMAN and PHYLLIS FRIEDMAN,

Plaintiffs,

Index No. 190187/12
Motion Seq. 003

DECISION & ORDER

-against-

A.O. SMITH CORPORATION, et al.,

Defendants.

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

In this asbestos personal injury action, defendant Graybar Electric Co. Inc., (“Graybar”), which is a seller and distributor of electrical supplies manufactured by others, moves pursuant to CPLR 3212 for summary judgment dismissing the complaint against it on the ground that plaintiffs have failed to show that plaintiff Stanley Friedman was exposed to asbestos by any product manufactured, distributed, supplied, or sold by Graybar.

Plaintiff Stanley Friedman was diagnosed with mesothelioma on February 27, 2012. Mr. Friedman commenced this action along with his wife Phyllis Friedman on April 12, 2012 to recover damages for personal injuries allegedly caused by Mr. Friedman’s exposure to asbestos-containing products. Mr. Friedman was deposed over the course of five days between May 9 and May 17, 2012.¹ He provided a *de bene esse* videotaped deposition on May 17, 2012.²

Mr. Friedman worked as a professional electrician at various commercial locations

¹ Mr. Friedman’s deposition transcripts are submitted collectively as defendant’s Exhibit C.

² Mr. Friedman’s *de bene esse* deposition transcript is submitted as plaintiffs’ Exhibit C.

throughout New York City from 1957 to approximately 2007. From 1957 to approximately 1983 he worked for J & M Electric and Mage Electric, respectively. From approximately 1983 to 2007 Mr. Friedman ran his own company, Can Do Electric. Plaintiffs allege that Mr. Friedman was exposed to asbestos over the course of his career while working with an array of products which included wires, cables, panels, and circuit breakers, as well as specialty and explosion-proof equipment. Among other things, Mr. Friedman testified that he purchased electrical supplies and equipment from Graybar. In this regard, Mr. Friedman testified as follows (plaintiffs' exhibit B, pp. 491-93):

- Q. Okay. Graybar was a supplier that was used while you were working at J & M?
- A. Minimal amount, really minimum.
- Q. Do you recall while you were working at J & M what was purchased from Graybar?
- A. No.
- Q. Do you recall while you were working at Mage what was purchased from Graybar?
- A. No.
- Q. When you had your own company, do you recall what you would have purchased from Graybar?
- A. There was mostly special equipment, but I don't remember what. They weren't a regular supplier.
- Q. Any of the special equipment that you purchased from Graybar, do you believe any of that equipment would have exposed you to asbestos? . . .
- A. From what I understand now, yes, probably.
- Q. What in particular with regards to this special equipment -- what piece of equipment do you believe caused you to be exposed to asbestos . . . that you purchased from Graybar?
- A. No, I don't know. I am not a metallurgist or any such thing.
- Q. When you say special equipment, can you be more specific as to what you purchased from Graybar?
- A. I don't remember. I can't believe it, but I don't.
- Q. That's fine. Does your company have an account with Graybar?

- A. No. It was -- that's why I say I didn't buy much from them. It was just by check I bought the equipment I paid for.
- Q. Of this specialty equipment that you purchased at Graybar while you had your own company, do you know whether or not Graybar was the manufacturer of any of that equipment?
- A. No.
- Q. No, you don't know or no, they were not the manufacturer?
- A. I don't know.
- Q. Do you know Graybar to be a manufacturer of any equipment?
- A. Not that I know of, no.

Based on this testimony, the defendant correctly asserts that plaintiffs have not created a reasonable inference that any Graybar product was a source of Mr. Friedman's asbestos exposure. On September 18, 2012, Graybar served the notice of motion herein on plaintiffs. On September 21, 2012, Graybar responded to plaintiffs' request for a copy of Graybar's Standard NYCAL Interrogatory Responses, which document is dated May 14, 2010.³ These responses refer NYCAL plaintiffs "to the Graybar catalog for any information . . . regarding any asbestos containing products" that it may have sold,⁴ including a Supplemental Answer dated May 10, 2005 by which Graybar produced a list of its catalogs for inspection. These catalogs were made available to all plaintiffs' counsel.

Submitted as Exhibit G to plaintiffs' opposition is an affidavit by Mr. Friedman, sworn to January 16, 2013 ("Friedman Affidavit"), in which he avers that he reviewed Graybar's General Catalog No. 106⁵ and recalled that many of the products therein were representative of the types

³ Graybar's Standard Answers to Interrogatories are submitted as Exhibit E to plaintiffs' papers.

⁴ Plaintiffs' Exhibit E, pp. 7-8.

⁵ Plaintiffs' Exhibit F.

of products he had purchased from Graybar throughout his career. Specifically, he states that among the products shown in Graybar's catalog, he personally purchased the Chico A Sealing Compound, the Chico X Fiber, the Apelco Sealing Cement and the Asbestos Fiber Filler during the 1960's and 1970's. (*Id.* at ¶5). With respect to these products, Mr. Friedman averred that he was exposed to asbestos in the following manner (*Id.* at ¶6):

The Chico X Fiber and Asbestos Fiber Filler were used to fill dams in the explosion proof fittings before pouring in the Chico A Sealing Compound or Apelco Sealing Cement. Both the Chico X Fiber and Asbestos Fiber Filler were powder products. I removed the powder from the Asbestos Fiber Filler to stuff into the explosion-proof fitting. I saw visible dust in the air where I was breathing when I used the Asbestos Fiber Filler. I used the Chico X Fiber the same way.

Graybar argues that the court should not consider Mr. Friedman's affidavit because it is self-serving and after the fact, and because it directly contradicts Mr. Friedman's earlier deposition testimony.

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law, and must tender sufficient evidence to demonstrate the absence of any material issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In asbestos-related litigation, once the moving defendant has made a *prima facie* showing of entitlement to judgment as a matter of law, the plaintiff must then demonstrate that there was actual exposure to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this regard, it is sufficient for the plaintiff to show facts and conditions from which the defendant's liability may be reasonably inferred. *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995). Speculative or conjectural evidence of the manufacturer's identity is not sufficient to raise an

issue of fact. *Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596, 602 (1st Dept 1996).

Moreover, the First Department has consistently held that “[a]n affidavit submitted in opposition to a motion for summary judgment does not raise a triable issue of fact where the affidavit ‘can only be considered to have been tailored to avoid the consequences of . . . earlier testimony’ . . .” *Fields v Lambert Houses Redevelopment Corp.*, 105 AD3d 668, 671 (1st Dept 2013) (citing *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [1st Dept 2000]); *see also Telfeyan v City of New York*, 40 AD3d 372, 373 (1st Dept 2007) (citing *Harty v Lenci*, 294 AD2d 296, 298 [1st Dept 2002]) (“Affidavit testimony that is obviously prepared in support of ongoing litigation that directly contradicts deposition testimony previously given by the same witness, without any explanation accounting for the disparity, ‘creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment’ . . .”)

In accordance with prevailing law (*see Fields, supra; Telfeyan, supra*), Mr. Friedman’s testimony that he only occasionally relied upon Graybar as a supplier is clearly insufficient to defeat Graybar’s motion. Significantly, he could not recall the types of products he purchased therefrom or describe how they contributed to his asbestos exposure. *See Cawein, supra; Reid, supra.*

Accordingly, it is hereby

ORDERED that Graybar Electric Co., Inc.’s motion for summary judgment is granted; and it is further

ORDERED that the Clerk of the Court is directed to sever and dismiss this action and any cross-claims against Graybar Electric Co., Inc. in their entirety; and it is further

ORDERED that the action shall continue as against the remaining defendants; and it is

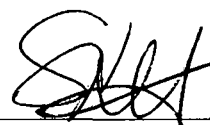
further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

ENTER:

DATED: 6.26.13



SHERRY KLEIN HEITLER
J.S.C.