

Amato v A.O. Smith Water Prods. Co.

2011 NY Slip Op 30548(U)

March 7, 2011

Supreme Court, New York County

Docket Number: 190391/09

Judge: Sherry Klein Heitler

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

PRESENT: HON. SHERRY KLEIN HEITLER

PART 30

Index Number : 190391/2009

AMATO, NICHOLAS J.

INDEX NO. 190391/09

vs
A. O. SMITH WATER PRODUCTS

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. 002

SUMMARY JUDGMENT

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

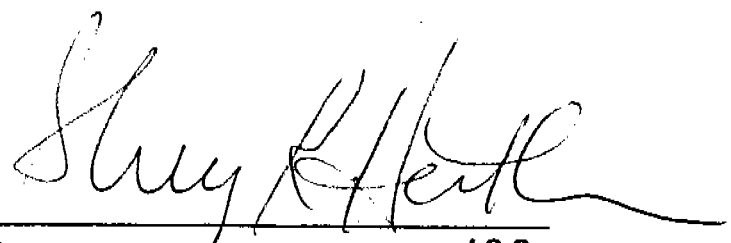
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the memorandum decision dated 3/7/11.

FILED

MAR 09 2011

NEW YORK
COUNTY CLERK'S OFFICE



Dated: 3/7/11

HON. SHERRY KLEIN HEITLER ^{J.S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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
NICHOLAS AMATO and EILEEN AMATO,

Plaintiffs,

-against-

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

Defendants.
----- X

SHERRY KLEIN HEITLER, J.:

Index No. 190391/09
Motion Seq. 002

DECISION AND ORDER

FILED

MAR 09 2011

NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendant Siemens Industry, Inc., as successor in interest to Siemens Energy & Automation, Inc. (hereinafter "SE&A"), moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all cross-claims against it. For the reasons set forth below, the motion is granted in part and denied in part.

BACKGROUND

This action was commenced by plaintiffs Nicholas Amato and Eileen Amato to recover for personal injuries allegedly caused by Mr. Amato's exposure to asbestos-containing products manufactured by defendant SE&A. Specifically at issue are SE&A's electrical equipment products sold under the Murray Electrical Distribution Equipment ("Murray") and Pushmatic ("Bulldog") brand names. Mr. Amato was deposed on December 15, 2009, December 22, 2009, December 23, 2009, January 4, 2010, January 5, 2010, and January 6, 2010. His deposition transcripts are submitted as defendant's exhibits E-J ("Deposition"). Mr. Amato alleges that he was exposed to asbestos while working as an electrician at various job sites throughout New York City during the years 1949-1993. He testified that he was exposed to asbestos in this

capacity while wiring panels, and that the source of his exposure was from the “Bakelite boards inside the panels” (Deposition, p. 95).

Mr. Amato testified that he worked with several brands of electrical equipment, including Murray and Bulldog. Plaintiffs maintain that defendant SE&A is liable for claims arising from its Murray and Bulldog electrical equipment products. Plaintiffs allege that during the relevant time period Murray and Bulldog products were made with the asbestos-containing molding compounds Rosite, Bakelite and Genal.

SE&A contends that it is not liable for the Murray and Bulldog products as to which Mr. Amato alleges asbestos exposure. Defendant claims that it is entitled to summary judgment because, among other things, its purchase and sale agreements with I-T-E Industries Ltd. (“I-T-E”) and Cooper Industries, Inc. (“Cooper”) limit its liability for Bulldog and Murray products, respectively; Mr. Amato failed to identify any specific asbestos-containing Bulldog products that he worked with or around during the time of his alleged exposure; and plaintiffs failed to show that any Murray products that Mr. Amato worked with or around contained asbestos.

DISCUSSION

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, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *See Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR § 3212[b]. Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual

issue requiring a trial of the action. *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986].

Summary judgment is a drastic remedy that must not be granted if there is any doubt about the existence of a triable issue of fact. *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 462 [1st Dept 1995]. Where the facts are undisputed but susceptible to more than one permissible inference, the choice between those inferences should not be made as a matter of law, but should be submitted to the trier of fact. *Ace Wire & Cable Co. v Aetna Casualty & Surety Co.*, 60 NY2d 390, 401 [1983]. If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978].

In a personal injury action arising from a plaintiff's alleged exposure to asbestos or an asbestos-containing material, the plaintiff is required to demonstrate that he was actually exposed to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994]. In such cases it is sufficient for plaintiff "to show facts and conditions from which defendant's liability may be reasonably inferred." *Reid, supra*, 212 AD2d at 463.

However, mere boilerplate and conclusory allegations will not suffice. *Cawein, supra*, 203 AD2d at 105.

A. SE&A's Liability for Bulldog Products

Mr. Amato testified that he worked with Murray and Bulldog brand electrical equipment between the years 1949-1993 as an electrician at over 1,000 job sites (Deposition, p. 999):

Q: What are the brand names, trade names or manufacturers' names of the electrical equipment that you worked at these over 1,000 job sites?

A: Electrical Equipment?

Q: Yes.

A: Brand names?

Q: Yes.

A: Allen Bradley, Bulldog, Cutler Hammer, GE . . . Johnson Controls . . .
Honeywell, Murray, Square D, Westinghouse.

However, when asked specifically about what Bulldog equipment he worked with, Mr. Amato was unable to identify any Bulldog products or recall any location where he worked with such products (Deposition, pp. 668-69):

Q: Can you tell me any specific place where you ever worked with any Bulldog product?

A: It's impossible to tell you that.

Q: So you can't?

A: I can't.

Q: Can you tell me what products that you associate with the name Bulldog that you personally worked with?

A: I can't recall.

Since Mr. Amato was unable to identify any Bulldog products, plaintiffs have failed to show facts from which it can be reasonably inferred that Mr. Amato was exposed to asbestos from same. *Reid, supra*, 212 AD2d at 463. Accordingly, summary judgment should be granted to SE&A in this regard.

In any event, it appears that SE&A does not bear liability for Bulldog products manufactured before 1983, which period covers the time frame of Mr. Amato's alleged exposure.¹ SE&A's responsibility for Bulldog products is purportedly limited by the January 31, 1983 Agreement for the Purchase and Sale of Assets by and between Siemens-Allis, Inc.² as

¹ Mr. Amato could not recall working with any Bulldog products during the time he worked with National States Electric, from 1982 to June 1993 (Deposition, pp. 645, 668).

² SE&A is the successor in interest to Siemens-Allis, Inc.

purchaser and Gould Inc. and I-T-E (hereinafter "I-T-E Agreement") as sellers. According to defense counsel, the right to manufacture Bulldog products was among those rights SE&A acquired in the I-T-E Agreement. However, the full I-T-E Agreement was not submitted to the court.

Plaintiffs do not dispute that under the I-T-E Agreement SE&A is not liable for I-T-E products manufactured before January 31, 1983, which purportedly includes all Bulldog products. However, plaintiffs' theory of SE&A's liability for Bulldog products revolves around a document labeled "Stab Support" dated July 2, 1970 (Plaintiffs' Exhibit 35). According to plaintiffs, this document shows that I-T-E was a division of SE&A in July 1970. Written on the document's top left corner is "a division of Siemens-Allis, Inc." beneath the words "I-T-E Electrical Products." Plaintiffs assert that this document shows that I-T-E was a division of SE&A at the time. Plaintiffs contend that if I-T-E was a division of Siemens in 1970, tort claims for Bulldog products manufactured since 1970 must be SE&A's responsibility. In other words, SE&A is responsible for pre-1983 Bulldog products because they were manufactured by SE&A's own division since at least 1970.

Defendant asserts that the words "a division of Siemens-Allis, Inc." were placed on that document after the I-T-E Agreement became effective. Defendant points to the fact that the document is labeled "Revision C" and bears an approval stamp dated July 16, 1996. Further documentation provided by defendant shows that this particular stab support marked Revision C was preceded by two previous stab supports marked Revisions A and B for the same product. Revision A was made in 1970 and approved in 1981. Revision C was approved in 1996. There is no mention of Siemens-Allis on Revision A (Defendant's Exhibit O). Defendant asserts that

the words "a division of Siemens-Allis, Inc." must have been placed on Revision C, upon which plaintiffs rely, in 1996, after the 1983 acquisition. Defendant contends that it would have been illogical for SE&A to purchase I-T-E in 1983 if it already owned I-T-E in 1970.

While the documentary evidence (or lack thereof) does not unequivocally relieve SE&A from liability in respect of its Bulldog brand, the fact remains that plaintiffs have failed to identify Bulldog as a source of Mr. Amato's exposure to asbestos, and in this regard summary judgment in SE&A's favor is appropriate as to plaintiffs' claims of exposure from Bulldog products.

B. SE&A's liability for Murray products

SE&A acquired Murray by an April 21, 1992 Asset Purchase Agreement between SE&A as purchaser and Cooper Industries, Inc. as seller (hereinafter "Cooper Agreement"). While Mr. Amato was unable to specify a particular location at which he worked with Murray products, he testified that he worked with Murray products at most of his jobs and he was able to identify the particular products with which he worked as follows (Deposition, pp. 659-660):

Q: Are you able to tell me a specific location where you worked with any products that you think were made by Murray?

A: All over. I mean, I can't recall the location. Used Murray products a lot.

* * * *

Q: Can you tell me what products you worked with that you think were made by Murray?

A: Panels, mostly panels.

Q: Anything but panels?

A: Can't recall.

Q: When you say panels is there a specific type of panel that you recall being manufactured by Murray?

A: Circuit panels.

Q: Other than circuit panels did you work with any other kind of panel made by Murray?

A: I can't recall.

* * * *

Q: Were there a specific size of circuit panel that you associate with Murray?

A: Come in all different sizes.

Q: What's the range of sizes from smallest to largest that you worked with?

A: Six circuit panels and there were 52 circuit panels.

Mr. Amato also testified as to how his work with the Murray circuit panels caused him to be exposed to asbestos. Specifically, Mr. Amato testified that he modified the panels (Deposition, p. 1002):

Q: What kinds of modifications would you make to the panels?

* * * *

A: Moving equipment around like ground bars, bus bars, neutral bars. Scraping the backboard to install relays that needed a flat surface by scraping and trying to smooth out the backboard using maybe some kind of a sandpaper to smooth it out so you could install it on a flat surface. Cutting the asbestos backboard.

Mr. Amato testified that the panels' circuit breakers were made of Bakelite. When asked how he knew the panels were made of Bakelite, Mr. Amato testified that "it was just common knowledge throughout the industry that everything was made out of – all the internal parts of the panel were made out of Bakelite." (Deposition, p. 663). Mr. Amato also testified that other electricians he worked with (whose names he did not know) told him that the panels contained Bakelite.

According to the Environmental Protection Agency in the Federal Register, Bakelite contains a phenolic resin material and is used in many items, including electrical equipment (Plaintiffs' Exhibit 22, p. 5158). Some, but not all, Bakelite contains asbestos. Asbestos-

containing Bakelite includes General Purpose Bakelite, Heat Resistant Bakelite, and High Impact Heat Resistant Bakelite. The Federal Register provides that these asbestos-containing classes of Bakelite were marketed for use in electrical equipment by the Union Carbide Corporation between the years 1939-1974.

Defendant argues that Murray circuit panels never contained fifty-two circuits. In support, defendant relies on the affidavit of Brian Rusch, sworn to October 6, 2010 ("Rusch Affidavit"), an engineer who began his employment with Siemens in 1996 (*See* Defendant's Exhibit K). Mr. Rusch bases his knowledge on his experience with the company and the National Electrical Code specifications³ for circuit panels during the relevant time period. However, neither Mr. Rusch nor defendant have provided such code provisions to the court. Mr. Rusch states that at the time of Mr. Amato's alleged exposure, the National Electrical Code only permitted circuit panels to have a maximum of forty-two circuits, not fifty-two (Rusch Affidavit, ¶ 3). The Rusch Affidavit also provides that if Mr. Amato worked with fifty-two circuit panels, they were power panels and SE&A did not acquire power panels in the Cooper agreement. Defendant failed to point to any provision in the Cooper agreement which limits SE&A's acquisition of Murray to certain electrical products. Further, the deposition shows plaintiff referring to a range of sizes which *may* have included fifty-two circuit panels (Deposition, p. 660):

Q: The circuit panels that you recall as being associated with Murray, what did they look like?

A: They looked like most other panels.

³ According to defense counsel, the National Electrical Code set circuit limits for lighting and appliance panels, which included some Murray products.

Q: Were there a specific size of circuit panel that you associate with Murray?

A: Come in all different sizes.

Q: What's the range of sizes from smallest to largest that you worked with?

A: Six circuit panels and there were 52 circuit panels.

Mr. Amato also testified that the fifty-two circuit panels with which he worked did not necessarily contain that many circuits. Some panels allegedly had space for fifty-two circuits but were only comprised of forty-eight.

Notwithstanding, defendant maintains that Murray products could not have caused Mr. Amato to be exposed to asbestos. Defendant bases this assertion on the declaration of former SE&A project manager James Tirell, dated June 13, 2006 ("Tirell Declaration"⁴) (Defendant's Exhibit L). Mr. Tirell attests that he is familiar with Murray products because he worked for Murray from 1967 until his retirement in 2007⁵ and has extensive experience in the electrical distribution equipment business. He also attests that "all products ever sold under the 'Murray' brand name at any time, including MP-C type circuit breakers, were asbestos free, and never contained any asbestos fibers or any asbestos-containing component parts" (Tirell Declaration, ¶ 5).

However, the April 1952 Murray catalog shows that Murray heavy duty meter sockets contained Rosite (Plaintiffs' Exhibit 7, p. 437). An internal memo from Rostone, the manufacturer of Rosite, the testimony of a Rostone corporate representative, and a document

⁴ Mr. Tirell gave a declaration under the laws of Georgia and California, rather than an affidavit as required under CPLR § 3212. Plaintiffs argue that there are several procedural flaws with the declaration.

⁵ Murray was acquired by several companies throughout the years and Mr. Tirell remained an employee throughout those acquisitions. Mr. Tirell was employed by SE&A at the time he made his declaration, but retired in 2007.

titled "LWR and Replacement Material History" all provide that Rosite contained asbestos until 1978.⁶ The Rosite reference in the 1952 Murray catalog contradicts Mr. Tirell's statement that Murray products never contained asbestos. Indeed, in its reply to plaintiffs' opposition defendant provides an affidavit from Mr. Tirell dated December 14, 2010 which states that his previous declaration did not refer to heavy duty meter sockets, and that in any event, Mr. Amato did not work with this product (Defendant's Exhibit Q). This reply affidavit raises issues regarding Mr. Tirell's first declaration.

Accordingly, it is hereby

ORDERED that SE&A's motion for summary judgment as it relates to plaintiff's alleged exposure to the Bulldog line of products is granted, and it is further

ORDERED that SE&A's motion for summary judgment as it relates to plaintiff's alleged exposure to the Murray line of products is denied.

This constitutes the decision and order of the court.

DATED: March 7, 2011

FILED


SHERRY KLEIN HEITLER
J.S.C.

MAR 09 2011

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⁶ The Rostone internal memo is provided as Plaintiffs' Exhibit 26. The corporate representative Charles Germain is actually a corporate representative for Rockwell Automation, which acquired Rostone after merging with another company. Mr. Germain's deposition transcript is provided as Plaintiffs' Exhibit 18. A document titled "LWR and Replacement Material History" provides that "[s]ome form of asbestos was present in all of the Rostone compounds. In 1978, Rostone began to remove asbestos from the plant." (Plaintiff's Exhibit 27, p. 1).