

Skelly v A.C.&S., Inc.
2011 NY Slip Op 31527(U)
June 7, 2011
Sup Ct, NY County
Docket Number: 107095/01
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER Justice

PART 30

Index Number : 107095/2001
SKELLY, EDWARD R.
vs.
A.C. & S. (~~GEORGIA PACIFIC~~)
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 107095/01
MOTION DATE _____
MOTION SEQ. NO. 001
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 _____

FILED
PAPERS NUMBERED
JUN 09 2011

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the
memorandum decision dated
6.7.11

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

Dated: 6.7.11

[Signature]
J.S.C.

HON. SHERRY KLEIN HEITLER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

----- X
EDWARD SKELLY and BARBARA SKELLY

Index No. 107095/01
Motion Seq. 001

Plaintiff,

-against-

A.C.&S., Inc., et al.,

Defendants.

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

**DECISION AND ORDER
FILED**

JUN 09 2011

NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendant Georgia-Pacific, LLC ("Georgia-Pacific") moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all other claims and cross-claims asserted against it. For the reasons set forth below, the motion is denied.

BACKGROUND

This action was commenced by plaintiffs Edward Skelly and Barbara Skelly to recover for personal injuries caused by Mr. Skelly's alleged exposure to asbestos-containing sheetrock and joint compound manufactured by Georgia-Pacific during the 1960's and 1970's. Mr. Skelly was deposed on August 4, 2010. A copy of his deposition transcript is submitted as defendant's exhibit B ("Deposition"). Mr. Skelly testified that he was exposed to asbestos from Georgia-Pacific sheetrock and spackle in connection with three renovation projects which he performed on two different residences in the mid-1960's and in 1979.

Defendant moves for summary judgment on the ground, among other things, that: (1) Georgia-Pacific never manufactured asbestos-containing sheetrock or asbestos-containing pre-mixed joint compound as described by Mr. Skelly; (2) Georgia-Pacific did not sell asbestos-

containing joint compound under the “Georgia-Pacific” or “G-P” brand name until late 1965; and
(3) Georgia-Pacific ceased manufacturing all asbestos-containing joint compound in 1977.

Plaintiffs assert that Georgia-Pacific failed to show that its asbestos-containing joint compound and sheetrock were not used residually in the marketplace after production ceased and contend that affidavits submitted by defendant on this motion contain contradictory, unsubstantiated, and conclusory assertions which raise triable issues of fact so as to require denial of the motion.

DISCUSSION

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. *Tronlone v Lac d'Aminate du Quebec, Ltee*, 297 AD2d 528, 528-29 [1st Dept 2002]; *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 462 [1st Dept 1995]. To obtain summary judgment, a movant must establish its cause of action or defense sufficiently to warrant judgment in its favor as a matter of law, and must tender sufficient evidence to demonstrate the absence of any material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR § 3212[b]. Mere boilerplate and conclusory allegations will not suffice. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994]. Should the moving party fail to present a *prima facie* case, the court need not consider the sufficiency of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]

Here, Georgia-Pacific has failed to establish its *prima facie* entitlement to summary judgment insofar as it claims that it never packaged asbestos containing pre-mixed joint compound in plastic containers. In support, defendant submits the affidavits of former Georgia-Pacific employees Howard A. Schutte (“Jan. 7 Schutte Affidavit”) and Charles W. Lehnert, both of which were sworn to January 7, 2010 (Exhibit D). Mr. Schutte’s affidavit provides, in relevant

part, that (Jan. 7 Schutte Affidavit ¶ 4-5):

I have previously testified, based solely on my memory of events that occurred over 30 years ago, as to the time period that Georgia-Pacific first packaged Ready Mix in plastic buckets. Without reviewing any historical documents or otherwise refreshing my recollection prior to such testimony, my initial recollection was that Georgia-Pacific began transitioning to plastic buckets during the time that Georgia-Pacific was manufacturing asbestos-containing Ready Mix. However, as the timing of this transition has begun to frequently come into question, I have now reviewed documentation of Georgia-Pacific's product packaging brochures and product packaging photographs, as well as other historical documentation All of this data indicates that during the time Georgia-Pacific manufactured asbestos-containing Ready Mix, Ready Mix was packaged in metal cans. I saw no data indicating that Georgia-Pacific's asbestos-containing Ready Mix was ever packaged in plastic buckets.

Mr. Schutte's admission that he adopted somewhat divergent views in several previously sworn statements is enough to raise issues of fact. In any event, defendant has failed to submit a single document on which Mr. Schutte allegedly relied on in reaching his conclusions. This court may not consider unsupported, uncross-examined testimony as the basis of a motion for summary judgment.¹

Although the court need not consider the sufficiency of plaintiff's opposition papers, plaintiff has also raised additional issues of fact sufficient to defeat defendant's motion.

In an asbestos-related personal injury action, the plaintiff is required to demonstrate that he was actually exposed to asbestos fibers released from a defendant's product. *Cawein, supra*, 203 AD2d at 106. In this regard, it is sufficient for plaintiff "to show facts and conditions from which defendant's liability may be reasonably inferred." *Reid, supra*, 212 AD2d 462, 463 [1st Dept 1995]. 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].

¹ Mr. Lehnert's affidavit is similarly not probative. Defendant's purported reliance thereon is predicated solely on the content of the Jan. 7 Schutte affidavit.

Mr. Skelly testified that he was first exposed to Georgia-Pacific asbestos-containing materials by way of spackle in the mid 1960's while performing renovation work on his kitchen in Brooklyn. He described the container that the spackle came in as a large white plastic tub inscribed with the Georgia-Pacific logo (Deposition pp. 62, 190-91):

Q: Were you exposed to any asbestos from the installation of the new parts of the kitchen?

A: Yes.

Q: What portion of the job caused you to be exposed to asbestos?

A: The sheetrock and the mud and the floor tiles and the ceiling tiles. We put in a dropped ceiling.

* * * *

Q: You said mud. Is that the same as spackle?

A: Yes.

Q: Do you know the brand name, trade name or manufacturer's name of the mud?

A: Georgia-Pacific.

* * * *

Q: Sir, can you describe the packaging of the Georgia-Pacific spackle any more than its weight?

A: It came in a big tub.

Q: Okay. Was the tub plastic or metal?

A: It was plastic.

Q: What color was that tub?

A: I believe it was white.

Q: And the lid on the tub, was that also white?

A: I'm sure it was.

Q: Can you tell me was, like, the sheetrock, was Georgia-Pacific written on the tub or something else?

A: I don't recall. I know the Georgia-Pacific logo was on there.

Q: That's the triangle?

A: Yeah, and GP. I don't know whether Georgia-Pacific was specifically written out on it or not.

Plaintiff testified that he used the same product while installing a bow window approximately two years after he performed the renovations on his kitchen (Deposition pp. 66-7, 69-70):

Q: Did you do any other renovation work on the Avenue M house in addition to the kitchen?

A: Yes.

* * * *

Q: When did you do that?

A: About a year, two years after the kitchen.

Q: 1965, '66?

A: Somewhere in there, yes.

* * * *

Q: Did you have to use anything else in addition to the sheetrock to finish up around the sheetrock?

A: Just the mud to seam the seams.

Q: The same kind that you used in the kitchen?

A: Yes.

Q: Do you know the manufacturer of that product?

A: Georgia-Pacific.

Mr. Skelly testified that he was exposed to asbestos a third time while building an addition to a different house in 1979 (Deposition pp. 48-9):

Q: How were you exposed from doing the sheetrock work?

A: From sanding the seams and all that kind of stuff and cutting, you know, picking up powder every time you cut the sheetrock and split it, and then when you did the seams, you'd have to sand them down to get them smooth, and all that powder was just all over.

Q: What were you sanding on the seams?

A: The spackle that you used to cover the seams so it doesn't look like there's seams, you get a nice straight wall.

* * * *

Q: Do you know the brand name, trade name, or manufacturer's name of the spackle that you used?

A: Georgia-Pacific.

Defendant argues that Mr. Skelly could not have not been exposed to Georgia-Pacific's asbestos-containing joint compound because it did not begin to manufacture or sell joint compound until 1965 and did so exclusively under the brand name "Bestwall" until late 1965. A second affidavit by Mr. Schutte, sworn to August 22, 2010 ("Aug. 22 Schutte Affidavit"), provides in relevant part that:

Bestwall, which Georgia-Pacific acquired in 1965, manufactured and sold products that contained asbestos . . . beginning in 1956. Georgia-Pacific's Gypsum Division neither sold nor manufactured such products until the Company's acquisition of Bestwall in 1965. . . . After GP's acquisition of Bestwall, Ready Mix joint compound product continued to be branded as "Bestwall Ready Mix Joint Compound" and did not include any reference to Georgia-Pacific whatsoever until late 1965. (Aug. 22 Schutte Affidavit ¶ 5-6).

Assuming, *arguendo*, that Mr. Schutte's Aug. 22nd affidavit is accurate, summary judgment still is not warranted. Mr. Skelly's alleged exposure falls directly within the relevant time period; that is, his alleged exposure in late 1965 and 1966 is within the time period that plaintiffs claim Georgia-Pacific allegedly sold asbestos-containing joint compound in packages which featured the Georgia-Pacific logo as described by Mr. Skelly.

Defendant's argument that Mr. Skelly could not have been exposed in 1979 because Georgia-Pacific ceased manufacturing all asbestos-containing joint compound in 1977 is also without merit. Even if defendant discontinued its line of asbestos-containing joint compound in 1977, it is possible that Georgia-Pacific's products were still sold and used in the marketplace thereafter, and that Mr.

Skelly worked with these products in 1979. Georgia-Pacific has produced no evidence that it could not have manufactured the joint compound to which Mr. Skelly alleges that he was exposed. *See Taylor v A.C.&S., Inc., et. al.*, 304 AD2d 403, 404-05 [1st Dept 2003]; *see also Kofler v A.W. Chesterton, et. al.*, Index No. 190014/08, 2009 Misc LEXIS 6064, at *4 [Sup Ct. NY Co. Sept. 2, 2009].

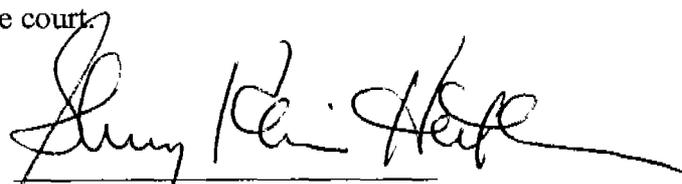
As set forth above, Georgia- Pacific has failed to eliminate all issues of material fact with regard to Mr. Skelly's alleged exposure to its asbestos-containing joint compound.

Accordingly, it is hereby

ORDERED that Georgia-Pacific's motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: June 7, 2011


SHERRY KLEIN HEITLER
J.S.C.

FILED

JUN 09 2011

**NEW YORK
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