

Kestenbaum v Durez Corp.

2013 NY Slip Op 33497(U)

December 24, 2013

Supreme Court, New York County

Docket Number: 190421/11

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

Justice

KESTENBAUM, ALICE

INDEX NO. 190421/11

- v -

DUREZ CORPORATION, ET AL.
(UNION CARBIDE)

MOTION DATE _____

MOTION SEQ. NO. 02

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 12.24.13.

FILED

JAN 06 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12-24-13


HON. SHERRY KLEIN HEITLER, 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

190421/11

-----X
ALICE KESTENBAUM, as Executrix of the Estate of
FRANK KESTENBAUM,

Index No. ~~190458/11~~
Motion Seq. 002

Plaintiff,

DECISION & ORDER

-against-

DUREZ CORPORATION, et al.,

FILED

Defendants.

JAN 06 2014

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

COUNTY CLERK'S OFFICE

NEW YORK

In this asbestos personal injury action, defendant Union Carbide Corporation (UCC) moves pursuant to CPLR 3212 for summary judgment dismissing all claims and cross-claims asserted against it on the ground that there is no evidence to show that plaintiff's decedent Frank Kestenbaum was exposed to asbestos from a UCC product. UCC further moves for an order severing this case from three other individual asbestos matters that had been consolidated for trial.¹

Mr. Kestenbaum was diagnosed with pleural mesothelioma in 2011. Thereafter Mr. Kestenbaum and his wife commenced this action to recover for personal injuries caused by his alleged occupational exposure to asbestos. Relevant to this motion is the time period between 1969 and 1972 when Mr. Kestenbaum worked for Cadillac Plastic & Chemical ("Cadillac"), a large public company, as a salesman and branch manager. In this regard, Mr. Kestenbaum testified² that while working as a salesman at Cadillac's Linden, New Jersey facility he occasionally helped fabricate

¹ These matters are *Alberto Fernandez v 3M Company*, Index No. 190399/11, *Robert Spina v 3M Company*, Index No. 190321/11, and *Carmen Wilson v. 3M Company*, Index No. 190143/11. Justice Scarpulla's February 21, 2013 decision consolidating these matters for trial is the subject of a joint appeal filed by the defendants in this action and in the other actions consolidated therein. Since such consolidation is the subject of an appeal, I decline to rule on this issue herein.

² Mr. Kestenbaum was deposed on December 22, 2011, December 23, 2011, and May 10, 2012 (Defendant's exhibits 9-11). His videotaped deposition was taken on May 11, 2012 (Defendant's exhibit 12).

materials on the shop floor. Among the products that he cut were sheets, rods, and tubes made in part from phenolic resin materials. Mr. Kestenbaum associated such materials with the trade name "Bakelite" (Defendant's exhibit 9 pp. 99-101, 110-11)³ and testified that he constructed Bakelite sheets with layers of canvas, papers, and glass for his customers.

It is undisputed that UCC manufactured and sold phenolic resins under the trade name "Bakelite" during the relevant time period. Bakelite, an early form of plastic, was commonly used in electrical panels, insulators and switches due to its electrically nonconductive and heat-resistant properties. UCC also sold phenolic molding compounds under the trade name Bakelite. Some of these molding compounds contained asbestos as a filler. Most, however, used other materials as fillers, such as wood, cotton, mica, or coal.

Although Bakelite came to be known throughout the industry as a generic term for certain plastics, Mr. Kestenbaum testified that the Bakelite sheets he and his colleagues worked with at Cadillac was purchased directly from UCC (defendant's exhibit 12, p. 33, defendant's exhibit 9, p. 103):

Q. And is Bakelite a generic name or a specific trade name, to your understanding?

A. It's a trade name.

Q. Who manufactured Bakelite?

A. Union Carbide.

* * * *

Q. Do you know from where Cadillac got these sheets?

A. At that time, we used to buy it from a company called Franklin Fiber Lamitex. We used to buy it from Union Carbide. Those are the two.

Mr. Kestenbaum believed that the process of cutting and drilling those Bakelite sheets contributed to his asbestos exposure (defendant's exhibit 12, p. 22). However, he had no personal knowledge

³ The transcript incorrectly refers to Bakelite as "Bake-O-Lite."

whether those sheets actually contained asbestos (defendant's exhibit 10, pp. 148-49, objection omitted).

In or about April of 2013, plaintiff sought additional discovery from UCC's document repository in respect of Mr. Kestenbaum's claims. Plaintiff completed such inspection early in July of 2013. UCC also produced corporate witness Susan Carrington for a deposition, who testified in part as follows⁴ (defendant's exhibit 14, pp. 22-23, 54 55):

Q. Okay. So tell me what -- why you brought this exhibit today.

A. This exhibit shows -- well, I brought this exhibit because the Plaintiff talked about products that he thought came from Union Carbide and referred to them as laminates and described laminated structures. If he were -- if he were using a laminated structure, the structure itself would not have been produced by Union Carbide, but if it contained any material from Carbide, Union Carbide, and it was phenolic, it could only have been made with a solution-type resin, and those never contained asbestos, as shown by this representative formula sheet.

Q. Okay. And this shows that this resin did not contain asbestos.

A. That's correct.

Q. Okay. Is there anything -- and you said, you refer to this as a representative formula sheet?

A. Yes, because none of Union Carbide's phenolic resins ever contained fillers and nor did they contain asbestos.

* * * *

Q. Okay. And I know you talked a little bit about this before. Are you aware if any -- if Bakelite made any resins that contained asbestos?

A. Bakelite made phenolic mold compounds that sometimes contained asbestos as a filler.

Q. I'm sorry. I asked a poor question. Any resins that would be used for laminates containing asbestos?

A. Union Carbide never made resins that contained -- that would be used for laminates that would have contained a filler like asbestos. Laminating resins didn't contain any fillers and never asbestos.

⁴ Ms. Carrington was deposed on July 18, 2013.

However, while Ms. Carrington testified that all of UCC's phenolic resins were asbestos-free, she was not familiar with certain UCC documents which appear to show that UCC manufactured "fibrous resins" that did in fact contain asbestos (*Id.* at 57-58, 61-65, objections omitted):

Q. I've given you what's been marked as Plaintiff's Exhibit 10 for identification. On the bottom you have had an opportunity to review it; correct?

A. I've just looked at it now. . . .

Q. . . . On the first page 1762, the bottom right-hand corner, there's the logo for Union Carbide; correct?

A. I see that.

* * * *

Q. Okay. If you could, before you flip over, I apologize. The first sentence says -- of the introduction says: "The Bakelite brand fibrous resins are new physical forms of thermal plastics." Did I read that correctly?

A. That's what it says.

Q. Do you know what fibrous resins are?

THE WITNESS: I don't know what they mean by that here. . . .

Q. Okay. And now, if you could flip to the second page . . . And three quarters maybe down on the page, Bates Stamp UCC 001763, it states, it says underlined, "fibrous resin -- asbestos papers and laminates." Did I read that correctly?

A. Oh, okay. I see.

Q. And underneath it says: "Asbestos fibers have been combined with fibrous resins by conventional wet hand sheet process without difficulty." Did I read that correctly?

A. Yes.

Q. Do you know what that means?

THE WITNESS: I don't know exactly what they mean by this. If somebody -- customers evaluating it, if they were looking at it experimentally. I don't know what they mean. . . .

Q. And underneath there, it looks like a table of sorts; correct?

A. Uh-huh.

Q. And the first line of the table says resin, 5 percent-C-1 asbestos, 95 percent.

A. Yes, I see that.

Q. Do you know if for fibrous resin product code SXKA-0121, if asbestos was combined with the fibrous resin? . . .

THE WITNESS: No, I don't know. . . .

Q. And it says under the paragraph under fibrous resin -- asbestos papers and laminates, the full paragraph is: "Asbestos fibers have been combined with fibrous resins by the conventional wet hand sheet process without difficulty. These sheets may be laminated directly to cardboard or wood without use of adhesive, by a hot pressing operation." Did I read that correctly?

A. Yes. . . .

Q. Is there any indication on this page or in this document that any entity other than Union Carbide combined the asbestos fibers with fiber resins in SXKA-0121? . . .

THE WITNESS: I can't tell if there was ever a product that contained asbestos with that label on from this document or that anybody combined it.

The defendant has also submitted an affidavit from polymer-science engineer Dr. John E. Moalli⁵, a Principal and Vice President of engineering consulting firm Exponent. Dr. Moalli reviewed Mr. Kestenbaum's testimony and concluded that Mr. Kestenbaum's alleged asbestos exposure would not have come from a UCC product (defendant's exhibit 16, ¶ 16):

Phenolic laminates are made with phenolic liquid resins, not phenolic molding compounds, and the reinforcements include paper, canvas, and glass. It is my understanding that Union Carbide's phenolic resins never contained asbestos, so to the extent that the plaintiff alleges there was asbestos in the layered product, it would not have come from Union Carbide, but would have been added by the manufacturer of the laminated sheet product.

Plaintiff has responded with the March 21, 2008 deposition transcript of former UCC corporate representative Carlo Martino who testified in a group of unrelated asbestos personal injury actions venued in Hawaii. Notably, Mr. Martino estimated that in 1969 40% of UCC's phenolic resin products contained asbestos (plaintiff's exhibit O, p. 44, objection omitted):

Q. In 1969, how many products did Union Carbide manufacture in the phenolic resin part of the business that actually had asbestos in it?

A. In 1969, I can't say the number without going back to the records, but my estimate was about 40 percent of our production contained asbestos.

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'Amiante Du Quebec, Ltee*, 297 AD2d 528,

⁵ Dr. Moalli's affidavit was sworn to on July 26, 2013 (defendant's exhibit 16).

528-529 (1st Dept 2002). To obtain summary judgment, the moving party 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. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Where the facts are disputed but are 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 223, 231 (1978). All reasonable inferences should be resolved in the plaintiff's favor. *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dept 1990).

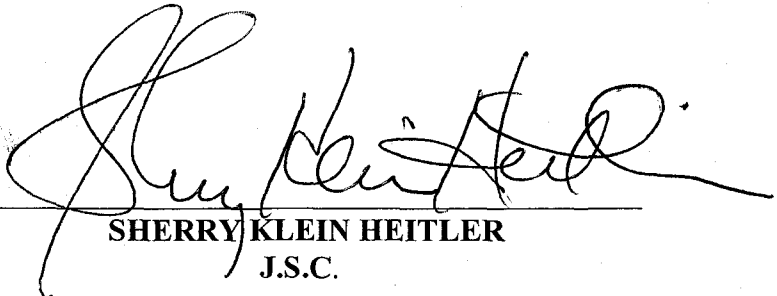
In light of the Ms. Carrington's testimony regarding UCC's fibrous resins and Mr. Martino's testimony that approximately 40 percent of UCC's phenolic resins contained asbestos in 1969, there is enough to question UCC's position that the resins Mr. Kestenbaum worked with were universally asbestos-free.

Accordingly, it is hereby

ORDERED that Union Carbide Corporation's motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: 12.24.13


SHERRY KLEIN HEITLER
J.S.C.

FILED

JAN 06 2014