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[1] THOMAS BRIGANTINO and PHYLLIS BRIGANTINO, Plaintiffs, -against-
A.O. SMITH WATER PRODUCTS CO., et al., Defendants. Index No. 190390/12**

190390/12

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2015 N.Y. Misc. LEXIS 847; 2015 NY Slip Op 30403(U)

March 11, 2015, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

JUDGES: [*1] SHERRY KLEIN HEITLER, J.S.C.

OPINION BY: SHERRY KLEIN HEITLER

OPINION

DECISION & ORDER

SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, industrial equipment supplier W.W. Grainger, Inc. ("Defendant" or "Grainger") moves pursuant to *CPLR 3212* for summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it. In opposition, plaintiffs allege that Grainger is liable herein because it sold plaintiff Thomas Brigantino several of the asbestos-containing products to which he was exposed. As more fully set forth below, Grainger's motion is denied.

Mr. Brigantino has been diagnosed with lung cancer. He and his wife plaintiff Phyllis Brigantino commenced this action on August 29, 2012. The complaint was amended on January 14, 2013 to add Grainger, among

others, as defendants. Mr. Brigantino was then deposed over the course of four days and testified¹ that he spent the majority of his professional career in the heating service business.² From 1971 through 1984 he was employed by several boiler installation and repair companies, first as an apprentice and then as a service technician. In or about 1985 Mr. [**2] Brigantino purchased a small fuel company in the Bronx which he sold a few years [*2] later. He started another fuel company in or about 1990. He sold that business in 2005 and retired from the heating industry altogether. (Deposition pp. 82, 111-112, 144-145, 153-156).

1 Portions of Mr. Brigantino's deposition transcripts are submitted as Defendant's exhibits F & G and as plaintiffs' exhibits 1-3 ("Deposition").

2 During the 1960s Mr. Brigantino worked as a cook at a diner in the Bronx.

Plaintiffs assert that Grainger's liability arises from the fact that it sold Mr. Brigantino some of the asbestos-containing products that he used throughout his career and that these products contributed to his injuries. *See 86 NY Jur 2d, Products Liability § 108* ("The theory behind strict liability is that those who market a product have undertaken a special responsibility to any member of the consuming public who may be injured by it. The rule is applicable to, among others, manufacturers, distributors, retailers, processors, and makers of component parts"); *see also Fernandez v Riverdale*

Terrace, 63 AD3d 555, 555-556 (1st Dept 2009); *Perillo v Pleasant View Assoc.*, 292 AD2d 773, 774 (4th Dept 2002); *Joseph v Yenkin Majestic Paint Corp.*, 261 AD2d 512, 512 (2d Dept 1999).

At issue on this motion are two cement-based products identified by Mr. Brigantino as sources of his asbestos exposure, "Stic-Tite" and "Do-All"³ (Deposition pp. 100-103, 104-05, 590, objections omitted):

Q. Can you tell us some of the work you did during the [*3] service calls?

A. Yes. Changing oil pumps, changing circulators. Overhaul of the burners. Checking chambers inside the boilers. That's about it.

Q. During any of the service calls, did you come into contact with any form of asbestos during those calls?

A. Yes, sometimes we'd have to seal up different boilers. Sometime it would create fumes from sections....

Q. During the service calls, if you had to seal a boiler, take us through that process of what was involved.

[**3] A. Sometimes we'd have to remove the jackets and the sections of the boiler So you'd get a lot of fumes coming out of that. You'd have to seal up the whole side or each different plate with asbestos. We used to use Do-All cement for that.

Q. What is Do-All cement?

A. It's an asbestos. As it's heated up, it turns into a concrete.

Q. Is Do-All the name of the product or is it a trade name? . . .

A. Do-All. That's it. It comes in gallon cans most of the time, already premixed.

* * *

Q. Why do you believe that this cement contained asbestos?

A. It said it on the can....

Q. Did you see the name asbestos on the can, or the word asbestos on the can?

A. It had asbestos on the can, yes.

Q. Did you see any warnings on the can?

A. No.

Q. Do [*4] you know where Mr. LoRusso purchased that product from? . . .

A. The supply houses we dealt with was Automatic Heating, Grainger, Supreme, Westchester Square Plumbing, Sid Harvey.

* * * *

Q. With respect to the Stic-Tite material, is that a cement material?...

A. Yes, yes.

Q. Can you approximate, again, the same question as previously, a percentage of how much Stic-Tite you bought from Grainger versus another supply house?

A. Twenty percent.

3 Mr. Brigantino testified that he was also exposed to asbestos from Grundfos circulators which were purchased from several supply houses, including Grainger (Deposition pp. 291-293).

There is some dispute regarding the year during which Mr. Brigantino first encountered these products. The Defendant asserts that Mr. Brigantino first recalled hearing the name Grainger while reviewing catalogs during the mid-1970s and did not actually encounter any Grainger products until 1980. (Deposition pp. 570, 574-75). Plaintiffs counter that Mr. Brigantino used asbestos-containing products purchased from Grainger as

early as 1971 while he was still an [**4] apprentice. (Deposition pp. 101-105, 291-293, 354-360).⁴ Regardless, Mr. Brigantino testified that he personally bought [*5] products from Grainger's Bronx storefront beginning in or about 1980 and that he returned approximately fifty times over the next fifteen years (Deposition pp. 574-575).⁵

4 To the extent Mr. Brigantino's testimony in this regard is inconsistent, this arguably presents a material issue of fact sufficient to preclude summary judgment. *See Johnson v Ann-Gur Realty Corp.*, 117 AD3d 522, 522 (1st Dept 2014); *Dallas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996).

5 Mr. Brigantino continued to purchase products from Grainger between 1995 and 2005 (Deposition pp. 581-582), but he does not believe that he was exposed to asbestos after 1990 (Deposition p. 156).

The Defendant argues that it did not, contrary to Mr. Brigantino's testimony, distribute either "Stic-Tite" or "Do-All" during this 1980-1995 time period. In support, Grainger relies exclusively on a certification from its Associated Product Manager, Tim Adams,⁶ who states in relevant part as follows:

4. The Plaintiff testified that he or his employers purchased the following products from Grainger during his employment from 1980 until 1995 at Roy Rasol, Petro Oil, United Heating Service and New Age Fuel: motors, burner motors, overhead heaters, fans, radiators, tools, controls, relays, and hot water controls. Plaintiff also testified that he used a product called [*6] Do-All and using gaskets for Grundfos circulators. Plaintiff testified to using "pipe-dope" of an unknown manufacturer but claims it was obtained from Grainger and two other supply houses. Plaintiff could not offer any testimony that these products contained asbestos.

5. I am familiar with all relevant catalog information, product specifications, and corporate knowledge for the products at issue.

6. Each and every product which Grainger offers for sale at its various warehouse stores would be listed in the Grainger catalogs.

7. There is no indication, evidence, or suggestion in any such record that the products that match this description which were distributed by Grainger utilized any asbestos-containing components.

8. Further, Plaintiff testified to using "Stic-Tite" and "Do-All" which he claimed were purchased from Grainger during the time period of 1980 until 1995.

9. I can state that Grainger did not manufacture[], sell, or distribute a product called "Stic-Tite" or a product called "Do-All" from 1980-1995.

6 Mr. Adams' certification, sworn to December 24, 2013, is submitted as Defendant's exhibit H.

[**5] The First Department recently confirmed in *DiSalvo v A.O. Smith Water Products*, 123 AD3d 498 (1st Dept 2014) that conclusions made via affidavit which [*7] lack any factual basis cannot form the basis of a summary judgment motion. *Id.* at 499 (citing *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384-385 [2005]). Here, not a single Grainger catalog, invoice, or otherwise relevant document has been made part of the record. The Defendant attempts to deflect this omission towards plaintiffs, whose counsel apparently inspected Grainger's document repository on October 31, 2014 and made copies of certain records maintained therein. But, as this is a summary judgment motion, it is not plaintiffs' burden to prove their case, but rather the defendant's burden "to unequivocally establish that its product could not have contributed to the causation of plaintiff's injury". *Berensmann v 3M Company*, 122 AD3d 520, 521 (1st Dept 2014) (quoting *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995]); *see also Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *Santelises v Town of Huntington*, 124 AD3d, 863, 865 (2d Dept 2015).

As the record currently stands, the court essentially has before it nothing more than conflicting assertions: on

the one hand Mr. Brigantino's deposition testimony that he purchased asbestos-containing Stic-Tite and Do-All from Grainger from 1980-1995, and on the other Mr. Adams' certification that Grainger did not sell Stic-Tite or Do-All during this time period. Under well-settled New York law, the respective weight to be given to such competing assertions must be decided by a jury at trial. *See Asabor v [*8] Archdiocese of N.Y.*, 102 AD3d524, 527 (1st Dept 2013) (quoting *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 255 [1986]) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge...."); *Dollas, supra*, at 320 ("The deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaint....The assessment of the value of a witnesses' testimony

constitutes an issue for [**6] resolution by the trier of fact, and any apparent discrepancy between the testimony and the evidence of record goes only to the weight and not the admissibility of the testimony.").

In light of the foregoing, it is hereby

ORDERED that W.W. Grainger Inc.'s motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: 3-11-15

/s/ Sherry Klein Heitler

SHERRY KLEIN HEITLER, J.S.C.