

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

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JOSEPH C. FERRARO and DORINNE M. KOPFENSTEINER,
as Co-Executors of the Estate of DORIS FERARO,

Index No. 190500/12

Plaintiffs,

Motion Seq. 011

-against-

ALLEN-BRADLEY CO., et al., (Abex Corp.)

DECISION & ORDER

Defendants.,
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SHERRY KLEIN HEITLER, J.:

In this asbestos related personal injury and wrongful death action, defendant Pneumo Abex LLC, successor in interest to Abex Corporation (“Abex”), moves pursuant to CPLR 3212 for summary judgment dismissing plaintiffs’ complaint and all cross-claims asserted against it on the ground that plaintiffs have failed to identify any asbestos-containing products manufactured, distributed and/or sold by Abex to which plaintiffs’ decedent allegedly was exposed. Plaintiffs oppose on the ground that Abex was the primary supplier of asbestos products for NAPA brand brakes which were used by and in the vicinity of plaintiffs’ decedent’s sons whose work clothes plaintiffs’ decedent laundered. Under the facts herein and the law, the motion is denied.

Plaintiffs’ decedent, Doris Ferraro (“Ms. Ferraro”), was diagnosed with malignant peritoneal mesothelioma in August 2012. She and her husband commenced this action by filing a summons and complaint in this court on October 19, 2012. Ms. Ferraro was deposed on January 18, 2013 and gave a *de bene esse* deposition on March 21, 2013.¹ She alleged *inter alia*

¹Ms. Ferraro’s deposition transcripts are identified as Exhibit E to the moving papers, and are annexed as Exhibits 3 and 4, respectively, to plaintiffs’ opposition.

that her injuries were caused by her exposure to asbestos-laden work clothes which she personally laundered for her sons Joseph and Frank. Ms. Ferraro died on April 2, 2014.

Ms. Ferraro's youngest son, Joseph, was deposed in this action on April 15, 2013 and May 6, 2013.² Her older son, Frank A. Ferraro, was deposed in this action on May 7, 2013, May 8, 2013 and May 9, 2013.³

Joseph testified that in 1971-72 when he was 16 years old he worked Saturdays and Sundays at the Greeley Mobil gas station where he pumped gas, stocked shelves and did general clean up. He wore his regular street clothes. He testified that the Greeley mechanics, who worked on the weekends, performed tune-ups, brake work and clutch work, mostly on American cars such as Ford, Chevrolet, Dodge and Chrysler and they used replacement brakes supplied by a NAPA auto parts store. He testified that Greeley stocked the parts they frequently used, and it was always a box of NAPA brakes, which came two in a box, that he would go and get for the mechanics. The NAPA boxes did not identify the make, but only showed the NAPA logo and part names and numbers. Joseph testified that asbestos dust and loose fibers from brake linings would accumulate inside and emit from the NAPA boxes. The mechanics worked in Joseph's vicinity. He testified that he was exposed to asbestos dust from the brakes, and from cleaning up after the mechanics. He took his asbestos-laden clothes off at home where his mother washed them (JF at 89-96; 270-279).

²Copies of Joseph Ferraro's deposition transcripts are identified as Exhibit H to the moving papers, and are annexed as Exhibits 5 and 6, respectively, to plaintiffs' opposition (herein "JF").

³Copies of Frank A. Ferraro's deposition transcripts are identified as Exhibit G to the moving papers, and are annexed as Exhibits 7, 8 and 9, respectively, to plaintiffs' opposition (herein "FF").

Joseph further testified that when he was graduated from high school in 1974, he worked full time at the Ford dealership in Pleasantville, New York where, until 1976, he apprenticed as a helper to the mechanics, who in his presence did brake work and repairs on Fords and other mostly American makes of cars (JF 99-100, 247). In addition to using Ford relined brakes, they used NAPA, Delco and Mopar parts depending on the car (JF 107, 287-88).⁴ Joseph's mother laundered the work clothes and uniforms which he wore at the Ford dealership (JF 108).

Both Joseph and Frank testified that during the early 1970s they worked on their own cars at home, wearing jeans which their mother laundered. They purchased most of the parts they needed including brakes from the NAPA store located close to their home. Asbestos dust was collected on the brake shoes inside the box (JF 290-297). In particular, they replaced the brakes on a Chevrolet pick up truck in the driveway of their home using NAPA brakes, front and back, as to which Joseph testified there was asbestos dust and loose fibers in the NAPA box which accumulated on their clothes (JF at 307-310; see also FF at 81-84). Frank Ferraro described the boxes in which the NAPA brakes were packaged; he similarly testified that besides the NAPA logo, the maker's name was not apparent (see FF at 538, 530-532).

Defendant asserts that since Abex was one of several suppliers of brake linings to Rayloc,⁵ and since NAPA stores were free to sell and did sell brake products manufactured by other companies besides Rayloc, plaintiffs have not set forth sufficient evidence to establish that

⁴Mopar brakes were not used on General Motors cars (JF 107).

⁵Rayloc is a division of Genuine Parts Company ("GPC") which supplied NAPA brakes. As set forth in defendant's papers, "[GPC's] Rayloc division remanufactures brake parts and formerly used asbestos-containing friction material which was originally manufactured by others." (Exhibit B to defendant's reply at 5).

plaintiffs' decedent was exposed to asbestos from brakes which contained Abex friction material. Defendant further asserts that not all Abex brake linings contained asbestos. In support defendant provides the 2001 deposition testimony of GPC's corporate representative Paul LeCour⁶ in an unrelated action in Maryland, in which Mr. LeCour reports that during the 1960-1980 time period, in addition to Abex, one other company called Bendix also supplied products to Rayloc; he further testified that while Abex was Rayloc's primary supplier for relined brake shoes, Rayloc also sold new brake shoes which did not have Abex lining on them. Defendant bolsters this testimony with GPC's 2001 Answers to Interrogatories in an unrelated case in California⁷ wherein GPC's representative Paul LeCour sets forth that in addition to Abex friction materials, GPC purchased asbestos-containing friction materials from 24 other named manufacturers at various times (see Exhibit B at 10). However, no time frame is set forth, and the phrase "various times" is vague. Since GPC has been in business since 1928, for purposes of this motion such information is insufficient to refute plaintiffs' position that during the relevant period Abex was Rayloc's primary, if not exclusive supplier.

Summary judgment is a drastic remedy that should be granted only if there are no triable issues of fact. *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012). In asbestos-related litigation, if the moving defendant makes 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 from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this regard, however, it is sufficient for the plaintiff to show facts and conditions from which the

⁶See Exhibit A to defendant's reply papers ("Exhibit A").

⁷See Exhibit B to defendant's reply. Papers ("Exhibit B").

defendant's liability may be reasonably inferred. *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995). All reasonable inferences should be resolved in the plaintiff's favor.

Dauman Displays, Inc. v Masturzo, 168 AD2d 204, 205 (1st Dept 1990). The identity of a manufacturer of a defective product may be established by circumstantial evidence which is not speculative or conjectural. *See, Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596, 601 (1996).

Defendant contends that beyond speculation plaintiffs are unable to connect Abex with any asbestos-containing products to which Joseph and Frank A. Ferraro allegedly were exposed since NAPA stores were free to sell various other brands of brakes in addition to Rayloc brakes. This, coupled with the Ferraro brothers' inability to identify the make of brakes contained in the NAPA boxes described as used by them and by others in their presence, renders the Ferraro brothers' testimony in this regard irrelevant. As such, defendant contends that plaintiffs have no defense to this motion to dismiss plaintiffs' action against it.

On a motion for summary judgment, the court searches the record (*see Shechtman v Sverdrup and Parcel Consultants, Inc.*, 226 AD2d 268 [2d Dept 1996]). In this regard Mr. LeCour's Maryland deposition testimony is instructive. Mr. LeCour testified that during the relevant time period he was responsible for the friction material that Rayloc used on its brake shoes and disc pads and for the design of the container. He also testified that during the relevant time period Rayloc's general manager had the responsibility of addressing issues of hazards from exposure to asbestos (see Exhibit A at 19, 28-30). He said (Exhibit A at 31-32):

- A. The product, when it went into the box, was considered good, as far as being safe and not having excessive dust in it.

The way I know that this product was safe is we had a classification return department and our re-box department. That department took the same product that went out in the box. It now came back to us. He had to open the box up, take the shoes out, look at them, making sure that they're all good, there's nothing wrong with them, put them back in the box.

In addition to testifying that Rayloc brake products left the division in their own box, Mr.

LeCour further confirmed (Exhibit A at 37, 39):

Q. All right. Could a NAPA jobber purchase brake pads or brake shoes from the . . . Distribution Center that were not Rayloc parts?

A. Yes.

Q. Would they have the NAPA logo or insignia on the box?

A. No. . . .

* * * *

Q. . . . What brake products did Rayloc sell?

A. . . . We sold brake shoes and disc pads. That's our brake products.

Q. Were the brake shoes asbestos-containing lined brake shoes?

A. During what time period?

Q. 1960 through 1980.

A. Well, I can't speak prior to 1971. But from '71 up, they were asbestos, not 100 percent.

Q. And the disc pads, were they asbestos-containing?

A. Some.

Q. Where did Rayloc get the linings or the pads to sell?

A. The primary supplier was Abex.

While Mr. LeCour testified that Bendix was a secondary supplier of friction materials to

Rayloc between 1960 and 1980, he also confirmed that GPC preferred to use Abex over Bendix as its primary supplier. GPC considered alternative suppliers including Bendix only when Abex advised in 1987 that it was stopping production of its asbestos-containing brake parts (see Exhibit A at 122-23, 126).

Mr. LeCour also testified that during the relevant time period, Abex was GPC's exclusive provider for its standard line and its professional line of brake products (see Exhibit A at 171-174). It used other suppliers for its economy line, such as Allied-Signal, Hemisphere, FDP Conn Parts, Certified Brake, and DisTex because they were price competitive (*Id.*), but that only started in the late 1970s, which is beyond the period of time referred to herein by Joseph and Frank Ferraro.

From all of this it appears that there are sufficient facts from which a jury could infer that Joseph and Frank Ferraro used, or were in the vicinity of someone using a Rayloc brake product which contained Abex asbestos-containing friction material. *See, Reid v Georgia Pacific Corp., supra; Dauman Displays, Inc. v Masturzo, supra; Healey v Firestone Tire & Rubber Co., supra.* There are unquestionably issues of fact in this case which preclude granting summary judgment in defendant's favor. Accordingly, the defendant's motion is denied.

This is the decision and order of the court.

Dated: _____

3. 18-15



SHERRY KLEIN HEITLER, J.S.C.