

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

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

LANGHORNE, PETER, ETAL.

INDEX NO.

101948/04

MOTION DATE

- v -

AEROFIN CORP., ETAL
(ATLAS)

MOTION SEQ. NO.

10

MOTION CAL. NO.

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED

JAN 14 2014

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1-8-14

SH
HON. SHERRY KLEIN HEITLER *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
RICHARD LANGHORNE, Individually and as
Administrator of the Estate of PETER CONSORTI,

Index No. 101948/2004
Motion Seq. No. 010

Plaintiffs,

-against-

DECISION & ORDER

AEROFIN CORPORATION, et al.,

Defendants.

FILED

-----X
JAN 14 2014

SHERRY KLEIN HEITLER, J.:

**NEW YORK
COUNTY CLERK'S OFFICE**

Defendant Atlas Turner, Inc. ("AT"), a Canadian corporation, moves pursuant to CPLR 3212 for summary judgment dismissing all claims against it in this asbestos-related personal injury and wrongful death action on the grounds (i) that this court does not have *in personam* jurisdiction over AT, and (ii) there is no competent evidence linking AT with plaintiffs' decedent's asbestos exposure. As set forth below, the motion is denied.

Plaintiffs' decedent, Peter Consorti, was President of Veteran Pipe Company ("VPC"), a family business located in the City of New York. VPC performed insulating services primarily for boilers, pipes, water tanks, air conditioning ducts and kitchen exhaust ducts in commercial and large residential buildings in the New York metropolitan area. Mr. Consorti worked as a mechanic in his family's insulation business from the time he was graduated from high school in 1956 until 1978 when his father retired from that business. He then became President of VPC, and acted as such until he died from mesothelioma on February 24, 2004 at the age of 64.

Peter Consorti was diagnosed with mesothelioma on January 16, 2004. He commenced this personal injury action against AT and others on February 6, 2004.¹ On March 9, 2004, AT served an “Acknowledgment of Service and Answer” which recites, in relevant part, that AT “answers this complaint by reference to its Standard Answer to the Standard Complaint No. 1 of the plaintiff pursuant to Judge Freedman’s Case Management Order and raises each of the affirmative defenses contained therein.” (Defendant’s Exhibit “B”).² Following Peter Consorti’s death, on August 10, 2004 plaintiffs filed an Amended Summons and Complaint which added wrongful death claims to which AT apparently did not respond. Pursuant to paragraph VI(D) of the CMO, it was AT’s obligation as a NYCAL defendant to file and serve copies of its answer containing its affirmative defenses before serving its acknowledgment of service on plaintiff. However, AT has failed to show that any such answer with affirmative defenses was filed or served by it, and has submitted nothing on this motion for summary judgment to which the court may refer to ascertain whether the affirmative defense of lack of *in personam* jurisdiction was raised herein.

Nevertheless, AT alleges that because it is not authorized to do business in New York,

¹In 1992 Peter Consorti sued defendant Atlas Turner, Inc. among others in federal court for personal injuries related to asbestosis. At the same time his brother John Consorti was suffering from malignant mesothelioma and also sought damages from Atlas Turner, Inc. and others in a separate action in the same federal court. While Peter Consorti testified on behalf of his ailing brother in John’s federal court action, he did not testify in his own federal court action.

²Paragraph VI(D) of the Case Management Order (“CMO”) referred to by defendant provides: “Defendants shall file in the NYCAL Master File and serve on plaintiffs’ Liaison Counsel a standard answer with affirmative defenses. When such standard set of defenses has been filed, a defendant may serve an acknowledgment of service on the plaintiff, by which service defendant will be deemed to have denied all material allegations contained in the plaintiff’s complaint, except as stated in such acknowledgment, and to have raised each of the affirmative defenses contained in defendants’ standard answer, except as stated in such acknowledgment. All co-defendants to which any cross-claims may apply will be deemed to have denied all material allegations contained in the cross-claims. Nothing herein shall preclude a defendant from filing an individual answer, if it so chooses.”

maintains no offices, bank accounts or real estate in New York and has no presence in the state of New York, there is no jurisdiction over AT under CPLR 301. In addition, AT asserts there is no jurisdiction over it under CPLR 302, New York's long arm statute, because there is no proof that it transacts any business in New York or contracts to supply goods and services here, nor is there any proof of AT's physical presence in this state where the tort allegedly occurred or that it otherwise caused injury to person or property within the state, or that it derives substantial revenue from interstate commerce with the state. AT asserts that plaintiffs' alleged inability to establish any of these elements is fatal to this court's exercise of jurisdiction over it.

Under the facts of this case and the law, defendant's jurisdictional argument is without merit. As the First Department clearly instructed in *McGowan v. Hoffmeister*, 15 AD3d 297, 297 (1st Dept 2005):

[Defendants' answer]...failed to assert the affirmative defense of lack of personal jurisdiction. Nevertheless...the Hoffmeisters moved to dismiss the complaint on the grounds that the court lacked personal jurisdiction.

However meritorious the affirmative defense might have been, the law is settled that a jurisdictional defense not asserted in the first responsive pleading, whether answer or pre-answer dismissal motion pursuant to CPLR 3211, is waived (citations omitted). . . . By appearing in the action and electing to answer the complaint without an objection to jurisdiction, defendants conferred jurisdiction upon the court and waived the defense (*see Urena v. NYNEX Inc.*, 223 A.D.2d 442, 637 N.Y.S.2d 49 [1996]; *Wiesner v. Avis Rent-A-Car Inc.*, 182 A.D.2d 372, 582 N.Y.S.2d 122 [1992]).

In this case, notwithstanding AT's allegations pursuant to CPLR 301 or 302, under *McGowan, supra*, defendant's failure to assert the affirmative defense of lack of personal jurisdiction in its answer or a pre-answer dismissal motion pursuant to CPLR 3211 constitutes a waiver of its jurisdictional defense, which "cannot be nullified by a subsequent amendment to a pleading

adding the missing affirmative defense.” *McGowan, supra; see Urena v. NYNEX, supra*. It is noteworthy that defendant has only now raised the jurisdictional issue to this court after having participated in this action for more than 9 years in the form of court conferences, discovery resolution conferences, settlement conferences and pre-trial conferences. Having thus failed to preserve its jurisdictional objection, that branch of defendant’s motion which seeks dismissal of the action against it based on lack of *in personam* jurisdiction is denied.

AT also alleges that summary judgment must be awarded to it because Peter Consorti did not identify AT as a source of his asbestos exposure, and plaintiffs have not proffered any competent evidence that links AT with Mr. Consorti’s asbestos exposure. Because Peter Consorti died before he could be deposed in this case, plaintiffs rely on his 1993 deposition and trial testimony given on behalf of, and as a witness at, his brother John Consorti’s asbestos-related action in the U.S. District Court for the Southern District of New York. Plaintiffs also rely on John Consorti’s 1993 videotaped testimony in that federal action.³ Because Peter Consorti was not a party to the federal action from which his testimony is submitted in support of this case and John is not a party herein, AT contends that under CPLR 4517 Peter’s 1993 testimony and his brother John’s 1993 testimony constitute inadmissible hearsay and is insufficient to raise any triable issue of fact sufficient to defeat summary judgment.

To the contrary, where, as here, both witnesses who testified under oath in John’s federal action are dead, and the issues as to which both witnesses testified are material to the issues herein and are issues concerning which AT had the same motive, interest and opportunity to

³ Peter Consorti’s brother John died from mesothelioma in November 1993.

cross examine both Peter Consorti and John Consorti in the federal action⁴, such testimony is properly considered in this case as an exception to the hearsay rule (*see, Fleury v. Edwards*, 14 N.Y.2d 334 [1964]; *Morales v. State*, 183 Misc.2d 839 [Ct. Cl. NY Co. 2000]; CPLR 4517[a][3]; *cf.*, CPLR 3117[a][3]). Consistent therewith, the CMO, which applies to all NYCAL cases in this court, provides that “parties may utilize depositions taken in other state and federal jurisdictions and cases where a party or a predecessor or successor in interest had notice and opportunity to attend and participate as provided in CPLR 3117” and “[a]ll deposition testimony and testimony obtained and admissible in any New York federal court or in any judicial district in the State of New York shall be admissible in the state actions pending in this Court” (CMO ¶ XII[A],[D]). In this regard, AT’s objection to the competence of plaintiffs’ proofs herein is without merit.

Peter Consorti was deposed as a witness in John’s personal injury action on April 28, 1993, April 29, 1993 and May 25, 1993, the transcripts for which are submitted as defendant’s Exhibit “D”. The transcript of his July 9, 1993 trial testimony is submitted as defendant’s Exhibit “F”. The transcript of John Consorti’s April 23, 1993 videotaped testimony is submitted as defendant’s Exhibit “E”. Defendant alleges that under *Comeau v. W.R. Grace & Co.*, 216 AD2d 79 (1st Dept 1995); *Diel v. Flintkote Co.*, 204 AD2d 53 (1st Dept 1994); and *Cawein v. Flintkote Co.*, 203 AD2d 105 (1st Dept 1994) summary judgment in its favor must be granted since neither Peter Consorti nor John Consorti offered testimony that Peter was exposed specifically to an AT asbestos-containing product, that Peter specifically worked with any such

⁴It is undisputed that defendant AT was represented by counsel and participated in the examinations before trial of both John and Peter Consorti in John’s personal injury action, and personally cross examined Peter Consorti in open court at the trial of that action.

product or that he was present when others specifically worked with any such product. Thus AT contends there is no evidence sufficient to raise a triable issue of fact as to whether Peter Consorti had been exposed to any asbestos fibers released from its products.

The essence of John Consorti's *de bene esse* testimony was that when he joined the family insulation business in June 1960 he worked as an installer of asbestos between 1960 and 1975, and as such he used asbestos products on a regular basis (Exh. E, pp. 19-20). His father Thomas and his brother Peter ordered their supplies, some of which were from government surplus and included asbestos pipe covering, blocks and cloth. The government surplus asbestos supplies were purchased in the 1960's (Exh. E, pp. 34-36, 75-76). While at VPC in the 1960's he worked on steam lines, boilers, breechings, water towers on roofs, and anything relating to pipe coverings for which he used a full range of asbestos-containing products supplied by VPC. He did not recall using non-asbestos products in the 1960's (Exh. E, pp. 56, 61-63). Significantly, he testified that (Exh. E, pp. 36-37; objection omitted):

Q And did you also work in the field with your brother Peter?

A Yes, I did.

Q Now, did you ever use any products manufactured by Atlas Asbestos?

A By Atlas Asbestos? Yeah. Yeah.

Q And on what types of jobs?

A The – Atlas did – things are starting to escape me right now.

Q Okay. When you would use these products and there would be dust created, did you do anything to prevent yourself or to try and prevent yourself from breathing the dust?

A Yeah.

Q What did you do?

A We used to wear masks, and sometimes we'd have a mask, you put a handkerchief over your face.

Q What types of masks were those?

A They were – I guess they were like a paper mask with a rubber band on them to put over.

Q Did you get those from the company?

A Yeah. . . .

Q Why did you do that?

A It was very dusty and you didn't want to breathe it in.

Peter Consorti testified that during the 1960's VPC worked for plumbing companies, air conditioning companies, and heating contractors, and did some Board of Education work and some federal government work. The work consisted of insulating boilers, pipes, water tanks, air conditioning ducts, kitchen exhaust ducts and the like. He testified that as a mechanic for VPC in the 1960's he did insulating work five days a week and worked with his brother John on big jobs including Cascade Laundry in Brooklyn, air conditioning work at 160 Water Street in Manhattan, heating contractor work at the Sherry Netherland Hotel, and at various other sites including roof jobs insulating sprinkler lines, water pipes, and air conditioning ducts. He testified that he and John did pipe covering together. (Exh. D, pp 43-44, 61-65, 109-110). At his deposition Peter Consorti described a 1978 break-in at his company's Mount Pleasant, New Jersey warehouse. Among the damaged items were packages of Newtherm insulation⁵ that were acquired by VPC through surplus sales some years before (Exh. D, pp. 367-68). As to the

⁵There is no dispute that AT is responsible for Newtherm insulation products.

Newtherm items he testified (Exh D, pp 368-69, 370-71):

Q Do you recall if this, if the product pictured in this exhibit contained asbestos?

A I think it did.

Q Well, on what do you base that belief on?

A Because most of the asbestos products went into 26 Mount Pleasant Avenue.

Q And that warehouse was for the storage of asbestos products solely?

A Yes.

Q Was there a reason why you segregated all the asbestos products into that warehouse?

A Yes.

Q Why was that?

A Because asbestos was going to be no longer used in the industry.

Q I see. So the products in that warehouse may have been purchased years before, correct?

A Yes. . . .

Q Can you identify what this is, Mr. Consorti?

A It's a list of some of the insulation that was lost on that Mount Pleasant Avenue –
* * * * You want me to start from the top or just go into Atlas and Turner?

Q Why don't we go down to –

A Atlas and Newtherm 73 pipe insulation. It was a single layer, the pipe size was 8 inch, and where I got the cross by 3 was the thickness. It was 3 inch thick insulation, made for 8-inch pipe. . . .

Q . . . And would this indicate, the three packages of Newtherm we see pictured in the exhibit, which was –

A Those three packages were a portion of what was lost.

Q A portion of the entire products that were lost in that break-in or just a portion of the Newtherm?

A Okay, that was a portion of Newtherm. There was a total Newtherm of . . . 700 feet, that you'd never fit in three boxes.

Peter Consorti also testified at the trial of John Consorti's action against AT and others.

Consistent with his deposition testimony, he testified as follows (Plaintiffs' Exhibit 15 at 2191-92):

Q. In submitting the insurance claim to your carrier, did you take photographs of the materials that were damaged in that?

A. Yes, we did. . . .

Q. Can you tell the members of the jury what is pictured in this photograph?

MR. SKOFF: Objection.

THE COURT: Overruled.

A. Yes, there is two types of insulation being shown here, Atlas Newtherm and Atlas Newtherm 73 in a damaged condition. * * * *

Q. In the middle of the photograph, is this a product called New Therm by Atlas Asbestos?

MR. SKOFF: Objection.

THE COURT: The same ruling.

Q. Mr. Consorti, did the companies or the manufacturers that were selling you products send you from time to time price lists so you could price their products and hopefully buy from them?

A. Yes, we did get their discount sheets. . . .

Q. Can you tell us what this document is, Mr. Consorti?

A. This is a price list from Atlas Asbestos Company.

Q. What product is being –

A. Newtherm Pipe Covering Insulation.

Upon cross -examination by counsel for AT, he testified (Exh. F, pp. 2226-27):

Q. And as you also testified yesterday, you don't recall Atlas actually being used on any particular job site, is that correct?

A. If we had your product, we had to use it. We just wouldn't buy it for stock.

And on recross-examination he testified (Exh. F, pp. 2228-29):

Q. . . . With regard to the surplus items that were stored in the Mt. Pleasant warehouse in Newark, did you and your brother have occasion to use those?

A. We used, yes, some of those products, yes.

Q. And on what types of occasions and how would you go about using them, can you tell us?

A. We used them on steam jobs, some boiler jobs, school jobs, wherever it was required to use that type of insulation.

Q. With regard to Atlas asbestos, do you recall for all the years that you were in the business which products the companies used that were manufactured by Atlas?

.....

A. When I started from 1956 up to the sixties, I think Atlas was making the three ply air cell and also some wool felt insulation.

Q. And after that, any other products by Atlas that you recall manufacturing that were used by your companies?

A. Then they went into the block and pipe insulation.

Q. And what was that called?

A. Newtherm was an asbestos product and then they came out, I think, with Newtherm 73 which was asbestos-free.

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 or where such issue is even arguable. *Tronlone v Lac d'Amiante du Quebec, Ltee*, 297 AD2d 528, 528-29 (1st Dept 2002). 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 released 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 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, In c. 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).

In the face of both Peter Consorti's and John Consorti's testimony I find there is sufficient evidence in the record to support a reasonable inference that Peter Consorti was exposed to asbestos products manufactured by AT. It is undisputed that AT manufactured asbestos-containing insulation during the relevant time period (see defendant's Exh. G). The testimony of both John and Peter Consorti in John's federal court action establishes that AT's asbestos containing insulation was used by the Consorti brothers in their family business.

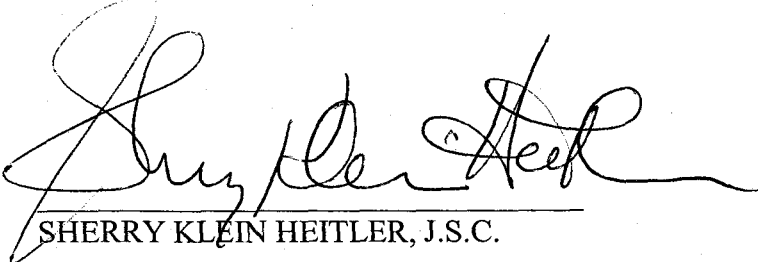
The testimony of John Consorti establishes that he and Peter Consorti worked at VPC in New York on various insulation projects during the 1960's and that they used AT asbestos containing products among others which created bad air quality which was dusty and which shouldn't be breathed in. This is corroborated by Peter Consorti's testimony that AT asbestos-containing Newtherm was a product purchased by VPC for its insulating business during the

relevant time period. In so far as the company's supply of AT stock was concerned, he testified "[i]f we had your product, we had to use it," and he testified that he and his brother had used items that were stored in the Mount Pleasant warehouse which included AT Newtherm products on steam jobs, boiler jobs, school jobs and wherever else such insulation was required to be used. Despite AT's contention that it did not ship its products into the United States, there is unrefuted evidence on this motion that VPC was supplied with price lists providing for discounts for purchase of Newthem Pipe Covering Insulation by Peter Consorti's company. Taken as a whole, the testimony presented herein that Peter Consorti worked regularly in the 1960's as an insulator using asbestos-containing insulation products supplied by VPC and during that period VPC used Newtherm asbestos-containing insulation products as part of its business raises triable issues of fact regarding defendant's liability.

Accordingly, the motion by Atlas Turner, Inc. for summary judgment dismissing the complaint against it is denied.

This constitutes the decision and order of the court.

Dated: January 8, 2014


SHERRY KLEIN HEITLER, J.S.C.

FILED

JAN 14 2014

**NEW YORK
COUNTY CLERKS OFFICE**