

George v. Am. Std.

Superior Court of California, County of Los Angeles

July 21, 2023, Decided

20STCV08052

Reporter

2023 Cal. Super. LEXIS 45495 *

ELMER F. GEORGE, JR. v. AMERICAN STANDARD
INC., et al.

(George-20STCT08052)

Matters are called for hearing.

Notice: THIS DOCUMENT INCLUDES THE ORDER OF THE COURT. OTHER MATERIALS, SUCH AS LEGAL MEMORANDA, MAY HAVE BEEN INCLUDED BY THE COURT. ACCORDING TO LEXISNEXIS EDITORIAL POLICY, DOCUMENTS THAT ARE COMBINED AND FILED AS ONE DOCUMENT BY THE COURT ARE INCLUDED AS ONE DOCUMENT ON LEXIS ADVANCE.

The Hearing on Motion for Summary Judgment or in the Alternative Summary Adjudication for Defendant Rheem Manufacturing Company (George-20SSTCV08052) scheduled for 07/21/2023 is 'Held' for case 20STCV08052.

The Hearing on Motion for Summary Judgment or in the Alternative Summary Adjudication for Defendant J.A. Sexauer Inc. (George-20STCT08052) scheduled for 07/21/2023 is 'Held' for case 20STCV08052.

Core Terms

asbestos, products, cause of action, summary adjudication, Declaration, summary judgment motion, deposition, water heater, punitive damages, interrogatory, documents, summary judgment, shift a burden, Manufacturing, gaskets, hearsay, exposed, warn, discovery response, material fact, misrepresentation, concealed, packing, summary adjudication motion, personal knowledge, present evidence, asbestos-containing, suppressed, graphite

The Court issues a Tentative Ruling on each matter this date.

Counsel argue and submit.

The Court places each matter under submission and LATER rules as follows:

1) Hearing on Motion for Summary Judgment or in the Alternative Summary Adjudication for Defendant Rheem Manufacturing Company (George-20SSTCV08052); [*2]

Counsel: [*1] For Plaintiff(s): Danny Kim; Ana T. Reeg; Karen Goldberg; Kime H. Smith; Taylor Matsumoto and Elizabeth Bain (X);

The Court adopts the Tentative Ruling as the Final Court Order as follows:

Judges: Honorable Laura A. Seigle, Judge.

ORDER RE MOTION FOR SUMMARY JUDGMENT (RHEEM)

Opinion by: Laura A. Seigle

Opinion

Defendant Rheem Manufacturing Company filed a motion for summary judgment, and alternatively summary adjudication, arguing Plaintiffs Theodore George, Shivaun Gordon and Tammera Smith do not have evidence that Elmer George was exposed to asbestos from Defendant's products.

NATURE OF PROCEEDINGS: 1) Hearing on Motion for Summary Judgment or in the Alternative Summary Adjudication for Defendant Rheem Manufacturing Company (George-20SSTCV08052); (2) Hearing on Motion for Summary Judgment or in the Alternative Summary Adjudication for Defendant J.A. Sexauer Inc.

A defendant seeking summary judgment must "conclusively negate[] a necessary element of the plaintiff's case, or . . . demonstrate[] that under no

hypothesis is there a material issue of fact that requires the process of trial." ([Guz v. Bechtel Nat. Inc. \(2000\) 24 Cal.4th 317, 334.](#)) To show that a plaintiff cannot establish an element of a cause of action, a defendant must make the initial showing "that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." ([Aguilar v. Atlantic Richfield Co. \(2001\) 25 Cal.4th 826, 854.](#)) "The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence - as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." ([Id. at p. 855.](#)) A [*3] plaintiff's deposition testimony that the plaintiff has no knowledge of any exposure to the defendant's products may be sufficient to shift the burden to the plaintiff to demonstrate the existence of triable issues of fact. ([McGonnell v. Kaiser Gypsum Co., Inc. \(2002\) 98 Cal.App.4th 1098, 1103-1104.](#)) The plaintiff's deposition testimony that he did not recall ever working with a product manufactured by the defendant may not be sufficient to shift the burden if the plaintiff is able to prove his case by another means. ([Weber v. John Crane, Inc. \(2006\) 143 Cal.App.4th 1433, 1439.](#)) "If plaintiffs respond to comprehensive interrogatories seeking all known facts with boilerplate answers that restate their allegations, or simply provide laundry lists of people and/or documents, the burden of production will almost certainly be shifted to them once defendants move for summary judgment and properly present plaintiff's factually devoid discovery responses." ([Id. at p. 1440.](#))

A. Objections

See discussion below.

B. Summary Judgment

Defendant argues Plaintiffs' discovery responses show they have no evidence that Defendant's products contained **asbestos**. Defendant served a special interrogatory asking for a description of all Defendant's products that exposed Elmer George to **asbestos**. (Defendant's Index, Ex. C at p. 3.) In response, Plaintiffs [*4] restated its allegation that George had installed, removed and repaired water heaters made by Defendant, which contained **asbestos** flange gaskets and flues pipes, but did not cite specific evidence. (Id., Ex. G at p. 2.) Defendant served a special interrogatory asking for all evidence supporting Plaintiffs' claims against Defendant. (Id., Ex. C at p. 3.) In response,

Plaintiffs referred generally to medical and employment records and unspecified depositions and did not identify specific evidence.

Defendant also cites the deposition of Theodore George who testified Elmer George worked with Rheem water heaters in the late 1970s, but did not know the year the products were made or installed or whether they contained **asbestos**. (Id., Ex. L at pp. 398, 404, 405.) Defendant references the Declaration of Kevin McDonald stating Defendant stopped using **asbestos**-containing components in water heaters in about 1970 and did not use transite/**asbestos** flue pipes with its water heaters. (McDonald Decl., ¶¶ 14, 17.) This adequately shifted the burden to Plaintiffs.

In opposition, Plaintiffs objects to the McDonald Declaration as hearsay because the declarant does not have personal knowledge of the matters [*5] to which he testifies. In [Ramirez v. Avon Products \(2023\) 87 Cal.App.5th 939](#), the court held that a declaration by a corporate witness about activities before she started working at the corporation "cannot be based on her personal knowledge and must be hearsay." ([Id. at p. 951.](#)) In that case, the declarant had attached exhibits to her declaration, but the documents were "all hearsay with no identified exception." (Ibid.) Therefore, the witness could not testify about the contents of those documents. ([Id. at pp. 952-953.](#)) That is the situation here. McDonald started working at a different company in 1974. (McDonald Decl., ¶ 2.) His employer was purchased by Defendant in 1985. (Id., ¶ 5.) McDonald does not state he knows about Defendant's pre-1970 product line of water heaters from personal knowledge. Given that he started working for a subsidiary of Defendant in 1985, there is no reason for him to have personal knowledge of the components of Defendant's water heaters before 1970 and in the 1970s.

McDonald appears to have learned about Defendant's earlier water heaters from unidentified "Rheem historical documents, technical drawings, promotional data, parts lists, specifications, component materials and the operational characteristics of various Rheem products." [*6] (McDonald Decl., ¶ 5.) Because Defendant did not identify or seek to admit those documents into evidence, their contents are hearsay, and the witness cannot testify about the contents of those documents. ([Ramirez, supra, 87 Cal.App.5th at pp. 952-953.](#))

In addition, the witness stated he reviewed former deposition transcripts from Defendant's corporate

representative in prior cases. Plaintiffs object to the witness' testimony based on these former deposition transcripts as hearsay. Under [Evidence Code sections 1291](#) and [1292](#), evidence of former testimony is not inadmissible hearsay if the declarant is unavailable and "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing" or the party in the prior proceeding "had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing." Defendant did not show the witness who testified in the former depositions is unavailable or that the other prerequisite of [sections 1291](#) and [1292](#) are satisfied. In sum, Plaintiffs' objections [*7] to the McDonald Declaration are sustained because it is based on hearsay and lacks personal knowledge.

Also in opposition, Plaintiffs submit the Declaration of Michael Ellenbecker. (Opposition at p. 4; Plaintiffs' Index, Ex. G.) He stated that until the late 1980s, gaskets used in water heaters contained asbestos. (Plaintiffs' Index, Ex. G, ¶¶ 18, 19.) Defendant objects to the declaration as irrelevant, hearsay, and lacking foundation because he did not describe knowing about Defendant's products in particular. (Defendant's Objections; Reply at pp. 2, 7-8.) However, Ellenbecker established the non-hearsay basis for his opinion that water heater gaskets contained asbestos until the late 1980s. (See, e.g., ¶¶ 3, 8, 9, 17, 20.) Therefore, the objections are overruled.

Plaintiffs have shown the existence of disputed issues concerning whether the water heaters Elmer George worked with came from Defendant and whether they contained asbestos parts. The motion for summary judgment is denied.

C. Summary Adjudication of Third Cause of Action

Defendant moves for summary adjudication of the third cause of action for negligent misrepresentation on the ground that Plaintiffs do not have evidence of [*8] any misrepresentation by Defendant to Elmer George. (Motion at p. 11.) This cause of action alleges in very vague terms that Defendant made false representations to the public, purchasers and users of products, and others including Elmer George. (FAC, ¶¶ 57, 58.)

Defendant cites two depositions and discovery responses. (Undisputed Material Fact ("UMF") 23, 24.)

Theodore George and Randy Frantom testified they have no knowledge of any communication from Defendant to Elmer George. (Defendant's Index, Ex. L at p. 407; Ex M at p. 166.) The special interrogatories did not ask Plaintiffs about the third cause of action. However, Defendant also attaches Plaintiffs' response to Standard Interrogatory No. 28, which asks for details about any alleged misrepresentations made by a manufacturer or supplier of an asbestos-containing product. (Defendant's Index, Ex. B at p. 27.) Plaintiffs responded that the interrogatory was not applicable. Further, the complaint and first amended complaint do not specify a single communication or representation from Defendant to Elmer George.

Defendant has shown Plaintiffs do not have, and cannot obtain, evidence of a misrepresentation from Defendant to Elmer George, [*9] thus shifting the burden.

In opposition, Plaintiffs argue there was no warning on the water heaters. (Opposition at p. 10.) The lack of a warning is not a misrepresentation, and Plaintiffs did not allege in the third cause of action anything about a failure to warn or nondisclosure. That is the subject of the fourth cause of action.

Because Plaintiffs did not show the existence of disputed facts concerning misrepresentations to Elmer George, the motion is granted as to the third cause of action.

D. Summary Adjudication of Fourth Cause of Action

Defendant moves for summary adjudication of the fourth cause of action for fraudulent nondisclosure on the ground that Plaintiffs do not have evidence of any communication by Defendant to Elmer George or any duty to disclose. (Motion at p. 12.) The fourth cause of action alleges in very vague terms that Defendant sold its products directly to Elmer George, Defendant directly advertised its products to Elmer George, and Defendant failed to disclose the hazard of asbestos in the products. (FAC, ¶¶ 64-66.) Defendant cites the same evidence described above in connection with the third cause of action.

" [T]he elements of a cause of action for fraud [*10] based on concealment are " '(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as

he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.' " [Citation.] " ([Bigler-Engler v. Breg, Inc. \(2017\) 7 Cal.App.5th 276, 310-311.](#)) When a fiduciary duty does not exist, a duty to disclose arises only "when the defendant had exclusive knowledge of material facts not known to the plaintiff," or "when the defendant actively conceals a material fact from the plaintiff," or "when the defendant makes partial representations but also suppresses some material facts." ([Id. at p. 311.](#)) This type of relationship " 'can only come into being as a result of some sort of transaction between the parties' " and "must necessarily arise from direct dealings between the plaintiff and the defendant; it cannot arise between the defendant and the public at large." ([Ibid.](#)) Evidence that [*11] the defendant was involved in retail sales of the disputed product to consumers and profited from them can satisfy the Bigler requirement. ([Bader v. Johnson & Johnson \(2022\) 86 Cal.App.5th 1094, 1132.](#))

Defendant attached Plaintiffs' response to a request for admission that they have no evidence supporting their fourth cause of action, which Plaintiffs denied. (Defendant Index, Ex. F at p. 5; Ex. Q at p. 2.) Defendant also attached Plaintiffs' response to Form Interrogatory No. 17.1, where Plaintiffs stated Elmer George installed water heaters made by Defendant containing **asbestos** parts, there were no warnings, and Defendant knew of the dangers of **asbestos**. (Defendant Index, Ex. P at pp. 2-6.) The response did not identify any evidence of any direct dealings between Defendant and Elmer George or any evidence of that Defendant sold and advertised its products directly to Elmer George (as alleged in the FAC). Therefore, Defendant shifted the burden with the factually-devoid discovery responses.

In opposition, Plaintiffs present no evidence of any duty Defendant had to make disclosures to Elmer George. Therefore, Plaintiff failed to show the existence of disputed issues. The motion is granted.

E. Summary Adjudication of Punitive Damages

Plaintiffs [*12] state they waive their claim for punitive damages. (Opposition at p. 1 n.1.) The motion for summary adjudication of punitive damages is granted.

The motion for summary judgment is DENIED. The motion for summary adjudication of the third and fourth causes of action and request for punitive damages is GRANTED.

The moving party is electronically advised to give notice.

2) Hearing on Motion for Summary Judgment or in the Alternative Summary Adjudication for Defendant J.A. Sexauer Inc. (George-20STCT08052);

The Court adopts the Tentative Ruling as the Final Court Order as follows:

ORDER RE MOTION FOR SUMMARY JUDGMENT (J.A. SEXAUER)

Defendant J.A. Sexauer, Inc. filed a motion for summary judgment, and alternatively summary adjudication, arguing Plaintiffs Theodore George, Shivaun Gordon and Tammera Smith do not have evidence that Elmer George was exposed to **asbestos** from Defendant's products.

A defendant seeking summary judgment must "conclusively negate[] a necessary element of the plaintiff's case, or . . . demonstrate[] that under no hypothesis is there a material issue of fact that requires the process of trial." ([Guz v. Bechtel Nat. Inc. \(2000\) 24 Cal.4th 317, 334.](#)) To show that a plaintiff cannot establish an element of a cause of action, [*13] a defendant must make the initial showing "that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." ([Aguilar v. Atlantic Richfield Co. \(2001\) 25 Cal.4th 826, 854.](#)) "The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence - as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." ([Id. at p. 855.](#)) A plaintiff's deposition testimony that the plaintiff has no knowledge of any exposure to the defendant's products may be sufficient to shift the burden to the plaintiff to demonstrate the existence of triable issues of fact. ([McGonnell v. Kaiser Gypsum Co., Inc. \(2002\) 98 Cal.App.4th 1098, 1103-1104.](#)) The plaintiff's deposition testimony that he did not recall ever working with a product manufactured by the defendant may not be sufficient to shift the burden if the plaintiff is able to prove his case by another means. ([Weber v. John Crane, Inc. \(2006\) 143 Cal.App.4th 1433, 1439.](#)) "If plaintiffs respond to comprehensive interrogatories seeking all known facts with boilerplate answers that restate their allegations, or simply provide laundry lists of people and/or documents, the burden of production will almost certainly [*14] be shifted to them once defendants move for summary judgment and properly

present plaintiff's factually devoid discovery responses." (*Id.* at p. 1440.)

A. Objections

Plaintiffs' objections are overruled.

Defendant objects to the Ellenbecker Declaration. The court did not rely on that declaration. Defendant objects to Plaintiffs' Exhibit B. That objection is sustained because, among other reasons, it is not verified.

B. Summary Judgment

Defendant argues Plaintiffs' discovery responses show they have no evidence Defendant's products contained asbestos. (Motion at p. 4.) Defendant served special interrogatories asking for all facts, the identification of documents, and the identification of people with information supporting the contention that Defendant's products exposed Elmer George to asbestos. (Defendant's Index, Ex. C at p. 4.) In response, Plaintiffs restated its allegation that George was exposed to washers, gaskets, packing materials, and other sealing products from Defendant when he worked as a plumber, without citing specific evidence. (*Id.*, Ex. G at p. 2.) Plaintiffs identified themselves, unnamed friends, unnamed co-workers, and unnamed personnel at Defendant as having information. (*Id.* at [*15] pp. 5-6.) Plaintiffs did not identify specific documents. (*Ibid.*)

Defendant also cites Plaintiffs' depositions. (Motion at p. 4.) Tammera Smith and Shivaun Gordon had no information about Elmer George being exposed to Defendant's products. (*Ibid.*) Theodore George testified Elmer George worked with Defendant's products such as repair parts and packing parts in the late 1970s, he did not know whether the products contained asbestos, he did not remember parts numbers, and some products contained material they called Teflon or graphite. (Defendant's Index, Ex. P at pp. 412, 414, 416-417, 418-420, 424, 430.) Randy Frantom testified he did not know anything about Defendant. (*Id.*, Ex. Q at pp. 168-170.) Jeffrey Weston testified Elmer George worked with Defendant's parts but did not remember the specific parts other than faucet stems and shower parts, washers and gaskets. (*Id.*, Ex. R at pp. 53-54.) He has no information about whether the parts contained asbestos. (*Id.*, Ex. S at p. 98.)

Defendant submitted the Declaration of Gil Silva stating Defendant sold various types of gaskets and packing materials, the vast majority of which did not contain asbestos. (Silva Decl., ¶ 7.)

This evidence is [*16] sufficient to show Plaintiffs do not have and cannot obtain evidence that Elmer George was exposed to asbestos via Defendant's products, thereby shifting the burden.

In opposition, Plaintiffs cite depositions from different cases. (Additional Undisputed Material Facts ("UMF") 19.) The depositions state Defendant sold Teflon asbestos and graphite asbestos gaskets, graphited asbestos stem packings, asbestos wicking, treated asbestos yarn, Teflon asbestos packing, sheet packing and gaskets from the 1960s through the 1980s. (Plaintiffs' Index, Ex. C at p. 45; Ex. D at p. 37.)

This evidence shows the existence of disputed issues concerning whether Elmer George used asbestos-containing parts from Defendant, because Theodore George's testimony establishes the use of Teflon and graphite products from Defendant and Plaintiffs' evidence establishes Defendant sold Teflon and graphite products containing asbestos.

The motion is denied.

C. Summary Adjudication of Third and Fourth Causes of Action

Defendant's notice of motion includes motions for summary adjudication of the third and fourth causes of action. Plaintiffs state they waive the third and fourth causes of action. (Opposition at p. 1 n.1.) Therefore [*17] the motion is granted.

D. Summary Adjudication of Punitive Damages

Defendant contends Plaintiffs cannot prove Defendant acted with oppression, malice or fraud. When the motion targets a request for punitive damages, a higher standard of proof is at play. "Although the clear and convincing evidentiary standard is a stringent one, 'it does not impose on a plaintiff the obligation to 'prove' a case for punitive damages at summary judgment [or summary adjudication.]' [Citations.] Even so, 'where the plaintiff's ultimate burden of proof will be by clear and convincing evidence, the higher standard of proof must be taken into account in ruling on a motion for summary judgment or summary adjudication, since if a plaintiff is to prevail on a claim for punitive damages, it will be necessary that the evidence presented meet the higher evidentiary standard.' [Citation.]" (*Butte Fire Cases (2018) 24 Cal.App.5th 1150, 1158-1159.*) "Summary judgment or summary adjudication ' " 'on the issue of punitive damages is proper' only 'when no reasonable jury could find the plaintiff's evidence to be clear and

convincing proof of malice, fraud or oppression.' " ' [Citation.]" ([Id. at p. 1159.](#))

For a corporate defendant, the oppression, fraud or malice "must be on the part of [*18] an officer, director, or managing agent of the corporation." ([Civ. Code, § 3294, subd. \(b\).](#)) That requirement can be satisfied "if the evidence permits a clear and convincing inference that within the corporate hierarchy authorized persons acted despicably in "willful and conscious disregard of the rights or safety of others." ' [Citation.]" ([Morgan v. J-M Manufacturing Company, Inc. \(2021\) 60 Cal.App.5th 1078, 1090.](#)) A plaintiff also "can satisfy the 'managing agent' requirement 'through evidence showing the information in the possession of the corporation and the structure of management decisionmaking that permits an inference that the information in fact moved upward to a point where corporate policy was formulated.' [Citation.]" ([Id. at p. 1091.](#))

" '[I]ntentionally marketing a defective product knowing that it might cause injury and death is 'highly reprehensible.' [Citation.]" ([Bankhead v. ArvinMeritor, Inc. \(2012\) 205 Cal.App.4th 68, 85.](#)) Punitive damages may be available when a defendant knows the dangers of **asbestos**, took action to protect its own employees, knew that its products were likely to pose a danger to users, and did not warn them. (Pfeifer v. John Crane, Inc. (2013) 220 Cal.App.4th 1270, 1300.) Such evidence "was sufficient to show malice, that is, despicable conduct coupled with conscious disregard for the safety of others." (Id. at pp. 1300-1301.)

Defendant served an interrogatory asking for all facts supporting [*19] the request for punitive damages. (Defendant's Index, Ex. C at p. 5.) Plaintiffs responded that Elmer George worked as a plumber using Defendant's **asbestos**-containing products, Defendant had a duty to warn about the **asbestos**, Defendant knew about the dangers of **asbestos**, and Defendant failed to warn. (Id., Ex. G at pp. 2-3.) The response describes a letter Defendant sent in the 1970s to vendors and manufactures of **asbestos** products asking about the effects of **asbestos**-containing products on its employees, and the response notes Defendant's employees raised issues about **asbestos** in the products they were handling in the 1970s. (Id. at pp. 3-4.) Yet, Defendant did not test its products or follow up regarding the dangers of **asbestos**. (Id. at p. 4.) Defendant's motion does not discuss these facts set out in the interrogatory response. This response is not factually-devoid, and so the burden did not shift.

The motion is denied.

The motion for summary judgment is DENIED. The motion for summary adjudication of the third and fourth causes of action is GRANTED. The motion for summary adjudication of the punitive damages claim is DENIED.

The moving party is electronically advised to give notice. [*20]

A copy of this minute order will append to the following coordinated case under JCCP4674: 20STCV08052.

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