

LISA GAVIN and EDWARD GAVIN, Plaintiffs, -against- AGCO CORPORATION, et al, Defendants.

Supreme Court of New York, Suffolk County

June 6, 2022, Decided

INDEX No. 605836/2018, CAL. No. 202200128AB

Reporter

2022 N.Y. Misc. LEXIS 2726 *

LISA GAVIN and EDWARD GAVIN, Plaintiffs, -against- AGCO CORPORATION, et al, Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

pumps, Nuclear, manufactured, exposed to asbestos, products, deposition testimony, summary judgment, asbestos, exposed, entitlement to summary judgment, nonparty witness, medical report, precise cause, power plant, prima facie, conditions, installed, exposure, inferred, injuries, clothes, damages

Counsel: [*1] For Plaintiffs: THE GORI LAW FIRM, New York, NY.

For Sterling Fluid Systems, Defendant: KELLEY JASONS McGOWAN SPINELLI, HANNA 7 REBER, LLP, New York, NY.

Judges: PRESENT: Hon. JERRY GARGUILO, Justice of the Supreme Court.

Opinion by: JERRY GARGUILO

Opinion

ORDERED that the motion by defendant Sterling Fluid Systems LLC (USA), f/k/a Peerless Pump Company, for summary judgment dismissing the complaint against it is granted.

This is an action to recover damages, personally and derivatively, for the injuries allegedly sustained by plaintiffs Lisa Gavin and Edward Gavin as a result of exposure to asbestos contained in products

manufactured or sold by defendants during their employment with Courter and Company from 1978 to 1980 while the Shoreham Nuclear Facility was under construction.

Defendant Sterling Fluid Systems LLC (USA), f/k/a Peerless Pump Company (hereinafter Sterling), moves for summary judgment dismissing the complaint against it, arguing that plaintiff did not allege asbestos exposure from pumps manufactured by it, and that there is no evidence that she encountered or was exposed to asbestos from its products. In support of the motion, Sterling submits copies of the pleadings and a transcript of plaintiff Lisa [*2] Gavin's deposition testimony. Plaintiffs oppose the motion, arguing that testimony of other tradesmen working contemporaneously with plaintiffs at the nuclear facility identified the pumps manufactured by Sterling as being present. They also argue that they are not required to show the precise causes of their damages, but only facts and conditions from which defendant's liability can be reasonably inferred. In opposition, plaintiffs submit, among other things, a pathology report, an unaffirmed medical report of Dr. Scott Lauer, an affidavit of plaintiff Edward Gavin, and transcripts of plaintiffs' deposition testimony and the deposition testimony of nonparty witness Alvin Smith.

At her examination before trial, plaintiff Lisa Gavin testified that she was employed as a clerical worker for the head inspector of Courier and Company from 1978 to 1980 during the construction of the Shoreham Nuclear Power Facility. She testified that her duties included walking to the power plant reactor to collect time sheets and that she was also exposed to workers who entered the office and brushed asbestos dust off of themselves while standing in front of her desk. She also testified that her husband, [*3] plaintiff Edward Gavin, worked as an inspector for Courier and Company during the same time frame. She testified that she was exposed to asbestos through her husband and his clothing as he was always dusty and dirty due to his

work at the power plant, and that she would wash his clothes three to four times a week.

In order to establish its entitlement to summary judgment, a defendant must make a prima facie showing that its products could not have contributed to the causation of the plaintiff's injury (see Matter of New York City Asbestos Litigation, 216 AD2d 79, 628 NYS2d 72 [1st Dept 1995]; Reid v Georgia-Pacific Corp., 212 AD2d 462, 622 NYS2d 946 [1st Dept 1995]). If this burden is met, the plaintiff must then allege facts and conditions from which the defendant's liability may reasonably be inferred, that is, that the plaintiff worked in the vicinity where the defendant's products were used and that the plaintiff was exposed to the defendant's products (see Matter of New York City Asbestos Litigation, *supra*; Scheidel v A.C. and S. Inc., 258 AD2d 751, 685 N.Y.S.2d 829 [3d Dept 1999]; see also Healey v Firestone Tire & Rubber Co., 87 NY2d 596, 663 N.E.2d 901, 640 NYS2d 860 [1996]). A plaintiff is not required to show the precise cause of his or her injuries (see Matter of New York City Asbestos Litigation, 116 AD3d 545, 984 NYS2d 45 [1st Dept 2014]; Matter of New York City Asbestos Litigation [Brooklyn Nav. Shipyard Cases], 188 AD2d 214, 593 NYS2d 43 [1st Dept 1993], *affd* 82 NY2d 821, 625 N.E.2d 588, 605 NYS2d 3 [1993]).

Sterling has established its prima facie entitlement to summary judgment as a matter of law. Here, none of the evidence, including the testimony of plaintiff Lisa Gavin and the responses to the interrogatories, identifies Sterling as a manufacturer of an asbestos-containing [*4] product to which plaintiff was exposed. In opposition, plaintiffs contend that the testimony of the nonparty witness reveals that equipment made by Peerless Pumps were installed at Shoreham Nuclear Facility where plaintiff was allegedly was exposed to asbestos. However, the transcript of Smith, which is not signed and is from a different case, is not admissible (see McDonald v Mauss, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; Santos v Intown Assocs., 17 AD3d 564, 793 NYS2d 477 [2d Dept 2005]). Moreover, while plaintiff Edward Gavin's affidavit states that he recalls seeing pumps bearing the Peerless Pumps name, when asked for the names of the manufacturers of the pumps he observed at the nuclear facility at his deposition, he testified that he could not specifically name them. Thus, the inconsistent statements appear to be an attempt to raise a feigned issue of fact in order to avoid the consequences of dismissal (see Kaplan v DePetro, 51 AD3d 730, 858 NYS2d 304 [2d Dept 2008]; Makaron v Luna Park Hous. Corp., 25 AD3d 770 809

NYS2d 520 [2d Dept 2006]). Furthermore, it is insufficient that equipment made by Peerless Pumps was installed at the Shoreham Nuclear Facility; rather, it must be shown that plaintiff was exposed to asbestos from such equipment (see Diel v Flintkote Co., 204 AD2d 53,611 NYS2d 519 [1st Dept 1994]; Cawein v Flintkote Co., 203 AD2d 105, 610 NYS2d 487 [1st Dept 1994]). Finally, the Court notes that the medical report of Dr. Lauer is inadmissible since it was unsworn and, therefore, without probative value (see Grasso v Angerami, 79 NY2d 813, 588 N.E.2d 76, 580 NYS2d 178 [1991]; Chanda v Varughese, 67 AD3d 947, 890 NYS2d 88 [2d Dept 2009]; Sutton v Yener, 65 AD3d 625, 884 NYS2d 163 [2d Dept 2009]). Accordingly, the motion by [*5] Sterling for summary judgment dismissing the complaint against it is granted.

Dated: June 6, 2022

/s/ Jerry Garguilo

J.S.C.

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