

**Graham v A.O. Smith Prods. Co.**

2011 NY Slip Op 30873(U)

April 6, 2011

Supreme Court, New York County

Docket Number: 190300/2009

Judge: Sherry Klein Heitler

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

PRESENT: HON. SHERRY KLEIN HEITLER

PART 30

Index Number : 190300/2009

GRAHAM, GEORGE

INDEX NO. 190300/09

vs

A.O. SMITH PRODUCTS CO.

MOTION DATE \_\_\_\_\_

Sequence Number : 008 (General Electric)

MOTION SEQ. NO. 008

SUMMARY JUDGMENT

MOTION CAL. NO. \_\_\_\_\_

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the memorandum decision dated 4/7/11.

FILED

APR 11 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/6/11

HON. SHERRY KLEIN HEITLER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

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

----- X

GEORGE GRAHAM,

Index No. 190300/09  
Motion Seq. 008

Plaintiff,

**DECISION AND ORDER**

-against-

A.O. SMITH PRODUCTS CO., et al.,

Defendants.

----- X

**SHERRY KLEIN HEITLER, J.:**

**FILED**  
**APR 11 2011**  
NEW YORK  
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendant General Electric Company ("GE") moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all other claims against it. For the reasons set forth below, the motion is denied.

**BACKGROUND**

This action was commenced by plaintiff George Graham to recover for personal injuries allegedly caused by his exposure to asbestos containing products. Mr. Graham was deposed over the course of eleven days from December 2009 through March 2010 and his deposition transcripts are submitted as plaintiff's exhibits 1-11 ("Deposition"). Mr. Graham testified that he was employed from 1973 to 1993 by the New York City Housing Police. As part of his duties, he routinely worked in the basements of many New York City Housing Developments including the Gun Hill Housing Developments in the Bronx. Mr. Graham testified that he was exposed to asbestos from maintenance workers who performed work on, among other things, asbestos-containing pumps, compressors, boilers, heating equipment, motors, valves, and floor tiles.

GE filed this motion for summary judgment on the ground that Mr. Graham failed to

identify any product manufactured or sold by GE as a source of his exposure. In opposition, plaintiffs argue that Mr. Graham's testimony that he was exposed to asbestos from motors combined with the alleged presence of several GE motors at the Gun Hill Housing Development raise triable issues of fact regarding Mr. Graham's exposure sufficient to preclude summary judgment.

### DISCUSSION

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. *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 462 [1st Dept 1995]. To obtain summary judgment, a movant must establish its cause of action or defense sufficiently to warrant judgment in its favor as a matter of law, and must tender sufficient evidence to demonstrate the absence of any material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR § 3212[b]. Mere boilerplate and conclusory allegations will not suffice. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994].

In a personal injury action arising from a plaintiff's alleged exposure to asbestos or an asbestos-containing material, a plaintiff is required to demonstrate that he was actually exposed to asbestos fibers released from a defendant's product. *Cawein, supra*, 203 AD2d at 106. It is sufficient for plaintiff "to show facts and conditions from which defendant's liability may be reasonably inferred." *Reid, supra*, 212 AD2d 462, 463 [1st Dept 1995].

Where the facts are undisputed but susceptible to more than one permissible inference, the choice between those inferences should not be made as a matter of law, but should be submitted to the trier of fact. *Ace Wire & Cable Co., v Aetna Casualty & Surety Co.*, 60 NY2d 390, 401 [1983]. If there is any doubt as to the existence of a triable issue of fact, the motion for

summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978].

Mr. Graham testified that he worked at the Gun Hill Housing Development for about six to twelve months in approximately 1979. He testified that the development contained seven to ten buildings, a community center, and a management office. Mr. Graham kept an office in the maintenance area of one of the Gun Hill buildings where building supplies were stored. Among other things, Mr. Graham testified that he was exposed to asbestos from motors in this maintenance area (Deposition p. 236-238, 240):

Q: What type of motors are you referring to?

A: They had big motors. They had little motors. That's my extent of knowing about motors.

\* \* \* \*

Q: And what did you observe the workmen doing with respect to motors?

A: Well, I don't know exactly [what] work they were performing, but I've seen them tearing them apart, and putting things on them, and putting them back together and, you know, having them replaced.

Q: Do you believe you were exposed to asbestos from any of the work related to the motors?

A: Yes.

Q: In what particular way?

A: Well, having watched them do their work, they would clean up the workbench afterwards. They would have all of the stuff that fell out of these motors and whatever they were working on. They would put it on the floor. They would just kind of brush it off on the floor, and they would clean it up later.

\* \* \* \*

Q: Could you give us an idea of approximately how many motors were being repaired while you were present at the Gun Hill Houses?

A: Well, it's hard to say because they'd have two, three, four of them on the workbench at one time, so I really couldn't say if they were working on all of them at once, or trying to cannibalize one to fix the other or whatever the case may be.

Plaintiff submits photographs of GE motors which were allegedly taken in the Gun Hill Housing Development where plaintiff claims to have been exposed, which, combined with his deposition testimony, raise triable issues of fact regarding his exposure even though he was unable to precisely identify any product manufactured or sold by GE. When questioned about the photographs at his deposition, plaintiff testified that the photographs were similar to pieces of equipment that he had seen throughout his career. Significantly, Mr. Graham was never asked specific questions about the GE motors depicted in the photographs, nor does defendant dispute that the motors depicted therein were in fact present in the Gun Hill Housing Developments during the relevant time period.

Instead, defendant argues, albeit for the first time on reply, that plaintiff could not have been exposed to asbestos from GE motors because they did not contain asbestos. In support, defendant submits on reply the deposition testimony in an unrelated action of Walter Martiny (exhibit F), a GE consultant who worked in GE's electric motor business for over fifty years. Mr. Martiny testified that GE electric motors are classified into four categories: small, medium, large, and very large. He testified that the only motors which may have contained asbestos-containing components were those classified as large and very large. GE also submits on reply Mr. Martiny's affidavit, sworn to January 31, 2011, in which he attests that the GE motors which are allegedly present at the Gun Hill Housing Development do not contain asbestos because they are classified as small and medium-sized. GE proffered no product catalogs, brochures, specifications, or documentary evidence of any kind in support of Mr. Martiny's conclusions.

This court may not rely on Mr. Martiny's affidavit and deposition as a basis for summary judgment because the court is prohibited from considering new arguments raised for the first

time on reply. *Schultz v Gershman*, 68 AD3d 426 [1st Dept 2009]; *see also McNair v Lee*, 24 AD3d 159, 160 [1st Dept 2005]. Defendant's moving papers only consider the identification issue. In any event, Mr. Martini's affidavit does not eliminate all issues of fact in that plaintiff was never given the opportunity to question him with regard to his basis of knowledge or examine any documents on which he may have relied. This factual shortcoming may have been remedied when at oral argument on February 1, 2011, plaintiff requested and the court recommended that GE produce a corporate representative for deposition. However, by letter dated February 9, 2011, GE informed the court that it declined to do so.

This court has reviewed the papers again carefully and determined that GE has not made a sufficient showing in its moving papers that GE motors could not have caused Mr. Graham's injuries or that Mr. Graham's claims against GE are speculative.

Accordingly, it is hereby

ORDERED that GE's motion for summary judgment is denied

This constitutes the decision and order of the court.

DATED: April 6, 2011

**FILED**  
  
 SHERRY STEIN HEITLER  
 J.S.C.

APR 11 2011  
 NEW YORK  
 COUNTY CLERK'S OFFICE