

**Altuchoff v A.O. Smith Water Prods.**

2011 NY Slip Op 32016(U)

July 14, 2011

Sup Ct, NY County

Docket Number: 190058/10

Judge: Sherry Klein Heitler

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

PRESENT: SHERRY KLEIN HEITLER

PART 30

Index Number : 190058/2010

ALTUCHOFF, KENNETH WILLIAM

INDEX NO. 190058/10

vs

A.O.SMITH WATER PRODUCTS INC

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

Sequence Number : 004

MOTION SEQ. NO. 004

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 ...

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

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*was decided*

*as per the memo  
decision of 7.14.10*

**FILED**

JUL 19 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 7.14.10

*SKH*

HON. SHERRY KLEIN HEITLER <sup>J.S.C.</sup>

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  
KENNETH WILLIAM ALTUCHOFF and JOANNE  
DOLORES ALTUCHOFF,

Index No. 190058/10  
Motion Seq. 004

Plaintiffs,

**DECISION AND ORDER**

-against-

A.O. SMITH WATER PRODUCTS et al.,

Defendants.

**FILED**

JUL 19 2011

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
**SHERRY KLEIN HEITLER, J.:**

In this asbestos personal injury action, defendant Motion Control Industries, Inc., sued herein as Carlisle Motion Control Industries, Inc. and Carlisle Industrial Brake & Friction, (collectively referred to herein as "Carlisle") moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all cross-claims against it. For the reasons set forth below, the motion is denied.

**BACKGROUND**

This action was commenced by plaintiffs Kenneth William Altuchoff and Joanne Dolores Altuchoff to recover for personal injuries arising from Mr. Altuchoff's alleged exposure to asbestos from his work as a mechanic supervisor for Sea-Land Services ("Sea-Land") in Elizabeth, New Jersey. Mr. Altuchoff testified<sup>1</sup> that he worked at Sea-Land at its ship and truck terminal in Elizabeth, New Jersey between 1976 and 1990 and that between 1976 and 1985 he

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<sup>1</sup> Mr. Altuchoff was deposed on April 6,7,8, 2010. His deposition transcripts are submitted as defendant's Exhibit C ("Deposition"). His *de bene esse* videotaped trial testimony was given on October 20, 2010 and is submitted as plaintiffs' Exhibit A.

was exposed to asbestos on a daily basis from the dust blown into the air from the brake work performed in his shop. He identified Freuhauf brakes as those used in the shop while he worked at Sea-Land.

Defendant brought this motion for summary judgment on the ground that plaintiffs did not identify Motion Control Industries or any entity for which Motion Control Industries is responsible as a company that may have contributed to Mr. Altuchoff's purported asbestos exposure. In opposition, plaintiffs contend that Mr. Altuchoff clearly identified Freuhauf as the brand name of the brake linings, shoes, replacement brakes, and chassis purchased by Sea-Land and used in his shop. Plaintiffs assert that those brake linings and chassis components were manufactured by defendant Carlisle, and that Mr. Altuchoff's testimony raises issues of fact 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], *Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 Ad2d 528, 528-29 [1st Dept 2002]. 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].

Mr. Altuchoff testified that he worked on the floor of Sea-Land as a mechanic supervisor and was exposed to asbestos dust from the work his fellow mechanics performed on brakes. Mr.

Altuchoff testified that the mechanics “blew the air out or the dust out of the wheels and all over the shop.” (Deposition p. 181). Mr. Altuchoff plainly identified the Freuhauf brand when he was questioned regarding the brand of brakes that were used at the Sea-Land ship and truck terminal during the time he worked there. Mr. Altuchoff testified that Sea-land purchased replacement brakes directly from Freuhauf’s purchasing center and that Sea-Land had originally contracted with Freuhauf for all of the chassis. Mr. Altuchoff also saw Freuhauf trucks delivering components to Sea-Land (Deposition pp. 188, 189, 663, 668, 675-76):

Q: Do you believe you were exposed to asbestos from the removal of the old brakes on these chassis?

A: Yes.

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Q: Do you know the manufacturer of any of the old brakes taken off of these chassis?

A. We had a lot of Fruehauf manufactured original chassis. And Fruehauf had a Propar axle which was their manufacturer. And it was their brake shoes that we were using, Fruehauf’s brake shoes.

\*\*\*\*

Q: And you believe Fruehauf also manufactured the shoes, the brake shoes that were used on the chassis?

A: I don’t know if they manufactured the actual shoe. But they sold it under their name.

According to Freuhauf’s Director of Component Engineering and Special Projects, Arnold Prezepiora, whose deposition was taken in an unrelated case on August 25, 2010 (Plaintiffs’ Exhibit B), Freuhauf used Carlisle brake linings exclusively between 1969 and 1974. He testified that from 1974 onward Carlisle was one of only two suppliers of asbestos-containing brake linings to Freuhauf (Plaintiffs’ Exhibit B, pp. 107-113):

Q: All right. From 1969 to 1976 were new Fruehauf trailers sold with asbestos

containing brake linings installed by Fruehauf?

A: Yes.

Q: And during 1969-1976 were new Fruehauf container chasses sold with asbestos containing brake linings installed by Fruehauf?

A: Yes.

\*\*\*\*

Q: All right. From 1969 to 1976 who was the supplier of asbestos containing brake linings installed by Fruehauf?

A. Carlisle and Abex.

\*\*\*\*

Q: All right. So from 1969 to 1974 was a hundred percent of Fruehauf's sales to the after-market products for trailers and container chasses of brake linings containing asbestos 100 percent Carlisle?

A: Yes. A bunch of them, yes.

The Prezepiora deposition also raises a material issue of fact in this matter insofar as it evokes the question whether Carlisle was the exclusive provider of brake linings to Fruehauf for as long as 1977, as opposed to 1974 (Plaintiffs' Exhibit B, p. 108-110):

Q: So I have in my hand a document that is dated 11-4-77. It is an internal Abex document Bates stamped BP-011347 from L.E. Bretz, Junior, summarizing an interview with people at Fruehauf, including Mr. Prezepiora.

\* \* \* \*

Q: And down at the bottom in the last paragraph, Mr. Bretz writes: "At this time I would like to caution all members of our manufacturing group that this is a new customer. We are supplying him volumes of parts on a monthly basis for the first time in history. This change from a single source Carlisle material to a dual source utilizing Abex linings was not met with enthusiasm by all members of the Fruehauf family."

While Mr. Prezepiora denied that Carlisle was the exclusive provider to Fruehauf of brake linings through 1977, he did not dispute the existence of the above-referenced document. In this regard, therefore, it is for the finder of fact to determine when the transition from using

\* 6]

Carlisle as a single-source provider of its brake linings to using dual-source providers thereof occurred. This is crucial given Mr. Altuchoff's claim that he was exposed to asbestos from Freuhauf brake linings as early as 1976.

Ronald Creamer, Director of Supply Chain Administration for Motion Control Industries, whose deposition in an unrelated case involving Freuhauf was taken on January 7, 2004 (Plaintiffs' Exhibit C)<sup>2</sup>, indicated that Carlisle supplied asbestos containing brake linings to Fruehauf and rebranded them with the Fruehauf name in 1976 and prior thereto. Mr. Creamer stated that Carlisle specifically manufactured brake linings to fit the Fruehauf shoe and placed the name Fruehauf on the packaging. (Plaintiffs' Exhibit C, pp. 38-9, 61-2):

Q: To your knowledge, would 1949 have been the earliest date that your company put asbestos in their brake linings?

A: To my knowledge it would be, yes.

Q: And the products contained asbestos, according to this Carlisle Product Chart, as late as 1986?

A: That's correct.

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Q: So, am I correct that Carlisle would have purchased the box in which the brake lining was contained and labeled it however the customer wanted it labeled?

A: That's correct.

Q: And that would include the relationship with Fruehauf?

A: Yes. Yes. That's—I thought you were asking about the relationship with Fruehauf.

Q: Right.

A: That would have been the relationship, yeah.

Q: Do you know what Fruehauf asked Carlisle to put on the boxes?

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<sup>2</sup> According to Mr. Creamer, the terms "Motion Control" and "Carlisle" may be used interchangeably (Plaintiffs' Exhibit C, p. 9)

\* 7]

A: The years that I was—from '76, and I know sometime prior, was all Fruehauf labels were on the boxes. They were—you know, they—and the reason why I know that is because in the MIS area, somebody—you know, we had to produce the labels, print the labels. So we bought labels that were designed by Fruehauf people, and labeled them with their codes and numbers and whatever they wanted on the box. The box, it may have been unique at some point, or it may have been a common box that we were using for our products. I don't know. But, you know, they certainly would have wanted—they would have spec—they specified everything about how that product looked.

At this point defendant has not shown whether Abex brake linings were rebranded for Fruehauf in the same manner.

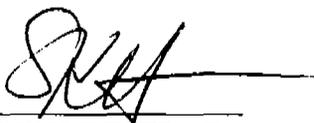
In light of the foregoing, there are material issues of fact regarding Mr. Altuchoff's exposure to Carlisle's products and/or Carlisle's liability for such exposure sufficient to preclude summary judgment. *See Reid v Georgia Pacific Corp.*, 212 AD2d 462, 462 [1st Dept 1995]; *Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994]; *see also Reed v Niagara Machine & Tool Works, Inc & Airman Pneumatics, Inc.*, 166 AD2d 567, 568 [2d Dept 1990].

Accordingly, it is hereby

ORDERED that Motion Control Industries, Inc.'s motion for summary judgment is denied.

This constitute the decision and order of the court.

DATED: July 14, 2011

  
SHERRY KLEIN HEITLER  
J.S.C.

**FILED**

JUL 19 2011

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