

**Blenkensopp v A.O. Smith Water Prods. Co.**

2011 NY Slip Op 32965(U)

November 3, 2011

Supreme Court, New York County

Docket Number: 104633/10

Judge: Sherry Klein Heitler

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: HEITLER  
Justice

PART 30

BLEUKENSOPP, ANNA E.

INDEX NO. 104633/07

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

MOTION SEQ. NO. 04

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

- v -  
A.O. SMITH WATER PRODUCTS CO.,  
ET AL.

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

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

**FILED**  
PAPERS NUMBERED

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

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

NOV 09 2011

Cross-Motion:  Yes  No

NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

*is denied as per  
the memo decision of 11.3.11*

Dated: 11.3.11

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  
ANNA E. BLENKENSOPP, Individually and as  
Executrix of the Estate of DAVID BLENKENSOPP,

Index No. 104633/10  
Motion Seq. 004

Plaintiffs,

**DECISION AND ORDER**

-against-

**FILED**

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

NOV 09 2011

Defendants.

NEW YORK  
COUNTY CLERK'S OFFICE

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

In this asbestos personal injury action, defendant Treadwell Corporation ("Treadwell") 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 Anna E. Blenkensopp, individually and as executrix of the estate of David Blenkensopp, to recover for personal injuries allegedly caused by Mr. Blenkensopp's exposure to asbestos while working as a rigger at various locations throughout New York. Mr. Blenkensopp passed away before he could be deposed. However, Mr. Blenkensopp's former coworker, Herman Lenkersdorf, was deposed in this action on January 20, 2011. His deposition transcript is submitted as defendant's exhibit A ("Deposition"). Mr. Lenkersdorf testified that from 1960 until the late 1970s he worked with Mr. Blenkensopp as a rigger for Local 170 Riggers Union in numerous powerhouse locations throughout New York, including Arthur Kill, Astoria, 14th Street, 59th Street, Northport, Ravenswood, East River,

Dunwoody, Indian Point, Newburg and Shorum. Mr. Blenkinsopp's social security records indicate that he was employed by defendant Treadwell for short periods of time in 1967, 1969 and 1971. The record also shows that he was employed on a long-term basis by other contractors who were hired to work at these powerhouses on dates that match Treadwell's involvement therewith.

Mr. Lenkersdorf testified that Mr. Blenkinsopp was exposed to asbestos in connection with his work assisting in the installation and removal of heavy equipment. The record indicates that Mr. Blenkinsopp was exposed when he removed asbestos-containing insulation from old equipment and from new equipment which was covered with asbestos-containing insulation in his vicinity.

On this motion for summary judgment, Treadwell argues that while Mr. Lenkersdorf had initially testified that Treadwell was present at all the powerhouses in which he worked, upon cross examination he admitted he could not pinpoint if Treadwell was present at any of the powerhouses. Further, Treadwell argues that since Mr. Lenkersdorf could not place Treadwell at a specific time period or a specific powerhouse, it can only be established that Mr. Blenkinsopp encountered Treadwell during those periods of time when Mr. Blenkinsopp was employed by Treadwell. Treadwell contends that even if plaintiffs were to establish Treadwell's presence at any specific site, plaintiffs' claims are barred under New York's Workers' Compensation Law. In opposition, plaintiffs contend that Mr. Lenkersdorf's deposition testimony raises issues of fact as to Treadwell's liability sufficient to preclude summary judgment, and further that Treadwell has provided no evidence that Mr. Blenkinsopp was employed by Treadwell at any powerhouse where Mr. Lenkersdorf testified that he was exposed to asbestos, rendering the Workers'

Compensation Law inapplicable herein.

### DISCUSSION

CPLR § 3212 (b) provides, in relevant part, that a motion for summary judgment “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” In *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980), the Court of Appeals held that “one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.”

In an asbestos personal injury action, a plaintiff is required to demonstrate that he was exposed to asbestos fibers released from defendant’s product. *See Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994); *see also Diel v Flintkote Co.*, 204 AD2d 53, 54 (1st Dept 1994) (“[I]n order to succeed on their claim, the plaintiffs had to establish that the decedent was exposed to the defendant’s product and that it was more likely than not that this exposure was a substantial factor in his injury.”). In this regard, the plaintiff may “show facts and conditions from which defendant’s liability may be reasonably inferred.” *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995). Mere boilerplate and conclusory allegations will not suffice. *See Zuckerman, supra.*

Defendant argues that since Mr. Lenkersdorf is unable to place Treadwell at specific powerhouses during specific time periods, or offer testimony demonstrating that Treadwell was

responsible for exposing Mr. Blenkinsopp to asbestos, summary judgment is appropriate. In support, defendant relies on, among other decisions, *Perdicaro v A.O. Smith Water Products*, 52 AD3d 300, 301 (1st Dept 2008), in which the court granted summary judgment on the ground that the plaintiff failed to offer any factual support that the insulation he saw in use at the time he was present at the powerhouse in question was asbestos-based. Here, to the contrary, plaintiffs' witness specifically described how both he and Mr. Blenkinsopp were exposed to asbestos.

(Deposition pp. 121-22) (objections omitted):

Q: Why do you believe the work performed by the pipe fitters exposed the plaintiff to asbestos?

A: Because they were cutting the pieces to fit the pipes and the dust was flying all around.

\* \* \* \*

Q: Why do you believe the pipe covering exposed you to asbestos?

The Witness: Because there was white powder all around.

Q: What's the basis of your belief that this exposed you to asbestos?

A: That was the common thing for our protection and heat control.

Additionally, defendant disregards key testimony from Mr. Lenkersdorf regarding his employment history with Mr. Blenkinsopp and Treadwell. (Deposition 123-24, 181, 214)

(objections omitted):

Q: Why do you believe the pipe coverers were employed by Treadwell - I'll repeat the question. Why do you believe the pipe coverers were employed by Treadwell?

A: That was the contract we had.

Q: How do you know that was the contractor?

A: They were doing most of the powerhouses.

\* \* \* \*

Q: Sir, do you specifically recall whether Treadwell employed the pipe coverers at the State Island Powerhouse?

The Witness: Yes.

Q: Or are you just testifying generally?

A: I don't understand what she's talking.

Mr. Vazquez: That's fine. Just answer her questions

The Witness: Yes, I do. Yes, I do.

Q: Can you describe for me what the pipe coverers were wearing?

A: They usually wear white overalls.

\* \* \* \*

Q: First, how often did you see Treadwell working in an insulation capacity throughout your career?

The Witness: Every powerhouse.

\* \* \* \*

Q: And who showed you how to install the mud drum?

A: The riggers -- I think it was Treadwell's boiler -- Treadwell's mud drum, and both of us worked again side by side to install it. It goes on top of the power house. Do you want the weight?

Q: No. I'm trying to find out who instructed you on the installation of that mud drum. Was it an employee of Treadwell's?

A: I think it was, yes.

In considering a summary judgment motion, "the court should draw all reasonable inferences in favor of the nonmoving party . . . and should not pass on issues of credibility." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521-22 (1st Dept 1989) (internal citations omitted); *see also Henderson v City of New York*, 178 AD2d 129 (1st Dept 1991). Here, accepting the plaintiffs' pleadings as true, there are plainly triable issues of fact sufficient to preclude summary judgment. *Id.* Although plaintiffs' witness was unable to identify Treadwell at a specific location and specific time upon cross-examination, this goes only to the weight accorded to his testimony, in light of the remainder of the record, which is not for the court to decide on a motion for summary judgment. *See Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 [1st Dept 1996]

(“The assessment of the value of a witness’s testimony constitutes an issue for resolution by the trier of fact, and any apparent discrepancy between the testimony and the evidence of record goes only to the weight and not the admissibility of the testimony.”).

The court acknowledges defendant’s contention that plaintiffs’ Consolidated Edison exhibits which purport to show that Treadwell was present at specific sites at specific times may not be admissible at trial. However, on a motion for summary judgment the court may consider hearsay evidence so long as it does not form the sole basis for the court’s determination. As set forth in *Wertheimer v New York Prop. Ins. Underwriting Ass’n*, 85 AD2d 540, 541 (1st Dept 1981), “evidence, otherwise excludable at trial, may be considered to deny a motion for summary judgment provided that this evidence does not form the sole basis for the Court’s determination.”). In this case, it is the witness’ testimony as well as the documentary evidence on which I have relied in reaching this decision. *See Dollas, supra*.

Defendant further argues that since Mr. Lenkersdorf is unable to place Mr. Blenkensopp with Treadwell at a specific location and time, the only possible conclusion is that any relationship between Mr. Blenkensopp and Treadwell must have occurred during his brief employment with Treadwell. This argument is misplaced. It simply does not follow that because plaintiffs’ witness cannot pinpoint the exact time and location during which he and Mr. Blenkensopp worked together, he must have been exposed to asbestos from Treadwell employees only during the course of his employment with same. This is especially true in light of the evidence that Mr. Lenkersdorf worked for Gerosa, a different contractor, at the same time as Mr. Blenkensopp. Since it is not clear whether and to what extent Mr. Blenkensopp’s injuries can be attributed to his employment with Treadwell, this issue is more properly suited for a jury. *See*

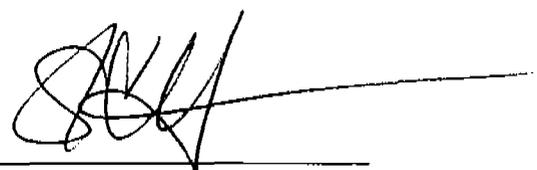
Worker's Compensation Law §§ 2(7), 10; *see also Konstantin v Third Avenue Associates*, 2011 NY Slip Op 30482U, at \*12 (Sup. Ct. NY Cty. March 4, 2011).

Accordingly, it is hereby

ORDERED that Treadwell Corporation's motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: November 3, 2011



SHERRY KLEIN HEITLER  
J.S.C.

**FILED**

NOV 09 2011

NEW YORK  
COUNTY CLERK'S OFFICE