

**Vespe-Benchimol v A.O. Smith Water Prods.**

2011 NY Slip Op 33016(U)

November 15, 2011

Sup Ct, NY County

Docket Number: 190320/10

Judge: Sherry Klein Heitler

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# SUPREME COURT OF THE STATE OF NEW YORK COUNTY

Index Number : 190320/2010

**BENCHIMOL, MEYER**

vs.

**A.O. SMITH WATER PRODUCTS**

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

ice

PART 30

INDEX NO. 190320/10

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

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is granted in accordance with the memorandum decision dated 11/15/11

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

## FILED

NOV 17 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11-15-11

[Signature]  
\_\_\_\_\_  
J.S.C.

MON. SHERRY KLEIN HEITLER

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

----- X  
VICTORIA VESPE-BENCHIMOL, Individually and as  
Executrix of the Estate of MEYER BENCHIMOL a/k/a  
MEYER SALOM BENCHIMOL a/k/a MIKE  
CHARLES BENSON, deceased,

Index No. 190320/10  
Motion Seq. 001

Plaintiffs,

**DECISION AND ORDER**

-against-

**FILED**

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

NOV 17 2011

Defendants.

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

In this asbestos personal injury action, defendant Crane Co. moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that it is not liable for products that it did not manufacture, supply, or specify for use with its boilers. For the following reasons, the motion is denied.

**BACKGROUND**

This action was commenced by Meyer Benchimol a/k/a Mike Benson, now deceased, to recover for personal injuries allegedly caused by his occupational exposure to asbestos from, among other things, residential boilers. In this regard, Mr. Benchimol testified<sup>1</sup> that from 1973 to 1979 his job duties required him to dismantle and remove old boilers from residences, and that he was exposed to asbestos from insulation and cement which covered Crane Co. boilers.

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<sup>1</sup> Mr. Benchimol was deposed in this action on August 24-26, 2010 ("Deposition"). His de bene esse videotaped trial testimony was given on September 24, 2010.

Crane Co. does not dispute Mr. Benchimol's identification of its boilers as a source of his asbestos exposure. Instead, Crane Co. argues that it had no duty to warn Mr. Benchimol of the dangers associated with asbestos-containing products because it did not manufacture, supply, install, or place into the stream of commerce any such products to which plaintiff may have been exposed. In opposition, plaintiffs assert that Crane Co. had a duty to warn him of such hazards because it knew or should have known that asbestos-containing products would be integrated with its boilers for their intended use.

### 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. *Tronlone v Lac d'Aminated du Quebec, Ltee*, 297 AD2d 528, 528-29 (1st Dept 2002); *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).

A plaintiff "may recover in strict products liability or negligence when a manufacturer fails to provide adequate warning regarding the use of its product." *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 297 (1992); *see also Voss v Black and Decker Mfg. Co.*, 59 NY2d 102, 106 (1983). A manufacturer "has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known." *Liriano v Hobart Corp.*, 92 NY2d 232, 237 (1998); *see also Rogers v. Sears, Roebuck & Co.*, 268 AD2d 245 (1st Dept 2000); *Baum v Eco-Tec, Inc.*, 5 AD3d 842 (3d Dept 2004). Although a product may "be reasonably safe when manufactured and sold and involve no then known risks of which warning need be given, risks thereafter revealed

by user operation and brought to the attention of the manufacturer or vendor may impose upon one or both a duty to warn.” *Cover v Cohen*, 61 NY2d 261, 275 (1984). The existence and scope of an alleged tortfeasor’s duty is a legal question to be determined by the trial court. *Di Ponzio v Riordan*, 89 NY2d 578, 583 (1997); *Lynfatt v Escobar*, 71 AD3d 743, 744 (2d Dept 2010).

This court addressed similar issues in its recent decisions in *Sawyer v A.C.&S. Inc.*, Index No. 111152/99 (Sup. Ct. NY Co. June 24, 2011) and *Defazio v A.W. Chesterton*, Index No. 127988/02 (Sup. Ct. NY Co. August 12, 2011), holding in both that Crane Co. had a duty to warn users of its products of the hazards associated with asbestos where the evidence demonstrated that Crane Co. recommended the use of asbestos-containing insulation and cement in conjunction with its valves. While the circumstances of this case involve plaintiffs’ decedent’s exposure to defendant’s asbestos-insulated boilers, as opposed to its valves, the result is resoundingly the same.

In this case, the record contains ample evidence that as early as 1938, Crane Co. not only designed, specified, and supplied its boilers with asbestos insulation, but also recommended that its customers purchase and install asbestos-containing insulation on the boiler models which it sold that did not come with insulation (Plaintiffs’ Exhibit J, pp. 36, 55):

The Room Model has an uninsulated sheet steel Jacket enamelled the same colour as the Boiler when enamel finish is ordered, but the Jacket used with the Basement Boiler is *a really efficient heat conserver, being lined with asbestos on sides, top, and back* (emphasis added).

\* \* \* \*

To meet the requirements of those who wish for a metal casing only, without insulation, a competitive jacket of galvanized sheet steel is also offered but the *insulated* jacket is recommended (emphasis supplied).

Plaintiffs submit multiple undated Crane Co. catalogs in which the company describes the benefits of using asbestos insulation on its boilers. These show that Crane Co. was not only long

aware of the fact that asbestos insulation would be used with its boilers, but also that it supplied and endorsed asbestos, making the benefits of asbestos insulation an integral part of its marketing scheme. (Plaintiff's Exhibit K):

The handsome metal jacket has a heavy corrugated asbestos insulation keeping the heat inside -- assuring a boiler so cool you can keep your hand against it at any time.

\* \* \* \*

The handsome two-tone green jacket is heavily insulated with asbestos which ends heat loss.

"Crane Co. Pocket Catalogue No. 86", undated (Plaintiff's Exhibit L):

Both on account of increased efficiency and greater economy, we recommend that all Boilers be thoroughly protected by a substantial covering of asbestos.

"Plumbing and Heating For the Modern Home, Crane" (Plaintiff's Exhibit O):

The Sustained Heat Boiler together with burner is completely enclosed in an insulated steel jacket which has a heavy green enamel finish baked on.

\* \* \* \*

1 1/2" asbestos air cell insulation (listed as a feature of a Crane Co. Oil Burning Boiler)

"Crane Boilers and Radiators" (Plaintiff's Exhibit P):

Asbestos air cell insulation, 1 1/2 inches thick, is firmly attached to the heavy steel jacket, further insuring against heat loss.

Moreover, Crane Co. has failed to show that the asbestos insulation to which Mr. Benchimol was exposed was not the original asbestos used by Crane Co. on its boilers. In this respect, Crane Co. included in its catalog the prices for asbestos cement and provided a description of how to mix and apply it to its boilers. (Plaintiff's Exhibit L, p.117) The insulation described by Mr. Benchimol in his testimony matches the description of the asbestos cement in the Crane Co. catalog, raising a triable issue as to whether the asbestos to which Mr.

[\* 6]  
Benchimol was exposed was supplied by Crane Co., and not a third party, as the defense suggests. (Deposition, pp. 38-39).

Accordingly I find that Crane Co.'s motion is without merit for the same reasons as stated in my decisions in *Sawyer, supra*, and *Defazio, supra*, and it is hereby

ORDERED that Crane Co.'s motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: November 15, 2011

  
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SHERRY KLEIN HEITLER  
J.S.C.

FILED

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