

**Sadowski v A.O. Smith Water Products**

2012 NY Slip Op 31866(U)

July 12, 2012

Sup Ct, New York County

Docket Number: 190215/11

Judge: Sherry Klein Heitler

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

PRESENT: HON. SHERRY KLEIN HEITLER  
*Justice*

PART 190215/11

Index Number : 190215/2011  
SADOWSKI, EDWARD  
vs.  
A.O. SMITH WATER PRODUCTS  
SEQUENCE NUMBER : 004  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 004

*(L. SADOWSKI)*

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

*is decided in accordance with the  
memorandum decision dated 7.13.12*

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

## FILED

JUL 17 2012

NEW YORK  
COUNTY CLERK'S OFFICE

J.S.C.

HON. SHERRY KLEIN HEITLER

Dated: 7.13.12

- 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  
EDWARD SADOWSKI and ALBERTA SADOWSKI,

Index No. 190215/11  
Motion Seq. 004

Plaintiffs,

**DECISION & ORDER**

- against -

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

**FILED**

Defendants.

JUL 17 2012

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

NEW YORK  
COUNTY CLERK'S OFFICE

Defendant Lennox Industries Inc. ("Lennox") 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**

Plaintiff Edward Sadowski was diagnosed with mesothelioma in May of 2011. On or about June 3, 2011, Edward Sadowski and his wife Alberta Sadowski ("plaintiffs") commenced this action to recover damages for personal injuries allegedly caused by Mr. Sadowski's exposure to asbestos from 1955 to 1983 when he worked as a carpenter in various locations in New York City and Long Island. Mr. Sadowski worked primarily in the commercial construction industry. Plaintiffs contend that Mr. Sadowski was exposed to asbestos while in the presence of workmen who installed and disassembled products manufactured by Lennox, among others. At his deposition<sup>1</sup>, Mr. Sadowski specifically testified that boiler-workers covered Lennox boilers with

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<sup>1</sup> Mr. Sadowski was deposed over three consecutive days from June 20 to June 22, 2011. Copies of his deposition transcripts are submitted as defendant's exhibits 6-8. He passed away in September of 2011

asbestos in his presence. He also testified that Lennox boilers were disassembled in his presence. These activities created asbestos dust to which he was exposed as a bystander.

Lennox seeks summary judgment on the ground that plaintiffs have not shown that Mr. Sadowski was exposed to an asbestos-containing product manufactured or distributed by Lennox. In particular, Lennox asserts that it did not manufacture boilers before 1992 and therefore Mr. Sadowski could not have been exposed to asbestos from Lennox-made boilers at any point during his career. In opposition, plaintiffs contend that Mr. Sadowski's testimony concerning the Lennox products from which he claims to have been exposed presents a question of fact that should be determined by a jury.

### **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. *See Tronlone v Lac d'Aminate du Quebec, Ltee*, 297 AD2d 528, 528-29 (1st Dept 2002). To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law, and must tender sufficient evidence to demonstrate the absence of any material issues of fact. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); CPLR 3212(b).

In asbestos-related litigation, once the movant has made a prima facie showing of its entitlement to summary judgment, the plaintiff must then demonstrate that there was exposure to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this context, the plaintiff need only show "facts and conditions from which the defendant's liability may be reasonably inferred." *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995).

Mr. Sadowski's testimony with regard to his alleged exposure from Lennox equipment is as follows (Deposition 91, 93):

Q: Are there any other ways in which you believe you were exposed to asbestos during your lifetime?

A: Yes. When boilers were being installed or taken apart, with all the asbestos that was covering the boilers.

\* \* \* \*

Q: You talked about boilers being installed or taken apart and you also talked about the block that was on the boilers, do you know who manufactured any of the boilers that you observed on any of your job sites?

A: Yeah. Burnham, Weil-McLain. . .

\* \* \* \*

A: Burnham, Weil-McLain. More boilers?  
Mr. Roberts: All the ones you recall.

A: Peerless, Lennox, Kohler, Cleaver Brooks. That's it.

The defendant says that it did not manufacture boilers until 1992, well after the time period as to which Mr. Sadowski claimed exposure. In support defendant submits the affidavit of Lennox's Corporate Service Manager of Residential Heating Products William Drake, sworn to March 26, 2012, who served as such until 1989. Mr. Drake says, "I do not believe that the heating equipment that Mr. Sadowski identified during his deposition was manufactured by Lennox." Defendant's Exhibit 9, ¶ 4. Notably, it appears Mr. Drake was not certain with respect to his conclusions, which, in and of itself raises a triable issue.

In any event, and consistent with defendant's argument herein, Mr. Drake also avers that Lennox did not manufacture boilers prior to 1992 and that Lennox never manufactured boilers which contained asbestos. But the Drake affidavit does not speak to the fact that Lennox manufactured a line of furnaces, which in terms of purpose and appearance are very similar to

boilers. Further, Mr. Sadowski was not questioned with respect to the differences between furnaces and boilers. Indeed, Mr. Sadowski testified that he never worked on boilers or had any training with them. Mr. Sadowski plainly did not have the professional background to describe the equipment that he was exposed to with technical knowledge. (Deposition p. 433):

Q: Sir, I know you've never worked on any boiler during the course of your career. Have you ever received any training with respect to boilers at all during your lifetime?

A: No.

In light of this testimony that defendant did not explore Mr. Sadowski's understanding of boilers versus furnaces, which for all intents and purposes serve the same function (i.e., to heat a building), Lennox has not shown that it could not have manufactured the heating equipment to which Mr. Sadowski alleges that he was exposed.

This decision is consistent with this court's previous decision in *Horn v A.W. Chesterton*, Index No. 190281/09 (Sup. Ct. NY. Co. Oct 15, 2010). There Lennox argued it was entitled to summary judgment because it did not manufacture HVAC units that matched the description of the types of HVAC units given by the plaintiff at his deposition. Among other reasons the court denied Lennox's motion because the plaintiff's description of the HVAC units at issue was not explored in sufficient detail by the defendant so as to demonstrate that the units could not have been manufactured by Lennox.

The facts of this case are similar to *Penn v Amchem*, 85 AD3d 475 (1st Dept 2011), wherein the First Department held that the evidence presented at trial was sufficient to permit the jury to rationally conclude that the asbestos-containing dental liners to which the injured plaintiff was exposed were distributed by the defendant, even though the plaintiff's description of the

dental liners differed from the descriptions given by the defendant's corporate representatives.

While Mr. Sadowski claimed to have been exposed to asbestos from Lennox boilers, the fact is that Lennox manufactured similar types of heating equipment, including furnaces. In light of Mr. Sadowski's lack of technical expertise in this area, this case turns on Mr. Sadowski's credibility, which as a matter of law must be determined by a jury. *See Dollar v W.R. Grace and Co.*, 225 AD2d 319 (1st Dept 1996).

Accordingly, it is hereby

ORDERED that Lennox Industries Inc.'s motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: 7.12.12

  
\_\_\_\_\_  
SHERRY KLEIN HEITLER  
J.S.C.

**FILED**

JUL 17 2012

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