

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

2011 NY Slip Op 30637(U)

March 14, 2011

Sup Ct, NY County

Docket Number: 190433/09

Judge: Sherry Klein Heitler

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

HON. SHERRY KLEIN HEITLER

PRESENT.

PART 30

Index Number : 190433/2009

MORAN, LEROY V.

vs

A.O. SMITH WATER (TREADWELL)

INDEX NO. 190433/09

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

Sequence Number : 005

MOTION SEQ. NO. 005

SUMMARY JUDGMENT

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

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

PAPERS NUMBERED

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

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 3-14-11.

FILED

MAR 17 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3-14-11

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  
LEROY V. MORAN, JR. and  
LINDA MORAN

Index No. 190433/09  
Motion Seq. 005

Plaintiffs,

**DECISION AND ORDER**

-against-

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

Defendants.  
----- 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 plaintiffs Leroy Moran, Jr. and Linda Moran to recover for personal injuries allegedly caused by Mr. Moran’s exposure to asbestos-containing products. Mr. Moran was deposed on January 13, 2010 and portions of his deposition transcript are submitted as defendant’s exhibit B (“Deposition”). Mr. Moran testified that he worked for Robert A. Keasbey from 1963 to 1990 as a steamfitter, mechanic, and manager. Mr. Moran testified that as a steamfitter and mechanic he worked in many powerhouses located throughout New York City, including Ravenswood, E.F. Barrett, Astoria, Arthur Kill, Northport, 14th Street, 39th Street, 59th Street, Kent Avenue, and Hellgate. He testified that he was exposed to asbestos-containing products such as gaskets, rope, and packing used by members of other trades employed by Treadwell in his vicinity.

**FILED**

**MAR 17 2011**

Treadwell filed the instant motion for summary judgment on the ground that Mr. Moran could not identify in which powerhouses he allegedly worked in the vicinity of Treadwell employees or when any specific incident of exposure allegedly occurred. In opposition, plaintiffs contend that Mr. Moran's deposition testimony clearly identifies Treadwell as a source of his asbestos exposure.

### DISCUSSION

In order 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, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *See, e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].

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. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *see also Reid v Georgia Pacific Corp.*, 212 AD2d 462, 462 [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].

In a personal injury action arising from a plaintiff's alleged exposure to asbestos or an asbestos-containing material, the plaintiff is required to demonstrate that he was actually exposed to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994]. 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]. Mere boilerplate and conclusory allegations will not suffice. *Cawein, supra*, 203 AD2d at 105.

Here, Mr. Moran testified that he observed Treadwell employees using asbestos-containing products in his vicinity (Deposition, pp. 697-98) (objection omitted):

- Q: Sir, one of the contractors you listed was Treadwell. I'm not sure that was discussed. What is Treadwell as far as you know?
- A: They were an erector.
- Q: And did they employ steamfitters?
- A: Yes.
- Q: Did they employ boilermakers?
- A: Yes.
- Q: Did they employ asbestos workers, pipe coverers?
- A: Pipe coverers. You know, I don't know if they did it individually.
- Q: Okay. What types of asbestos products would Treadwell use?
- A: What types of what?
- Q: Asbestos products would Treadwell use at powerhouses or wherever you saw them? . . . .
- A: Well, it would be gasketing material, packings, asbestos ropes, and so forth and so on.
- Q: Actually, it was a bad question. Where would Treadwell be, what types of places?
- A: In power plants.

The subsequent line of questions did not relate specifically to Mr. Moran's alleged exposure from Treadwell employees, but from a different contractor whose employees also allegedly worked in Mr. Moran's vicinity (Deposition p. 698-99):

- Q: Where would Courter contractors be?
- A: Powerhouses. They did other work beside powerhouses, but that was their main thrust.
- Q: Did anyone from either Courter, Treadwell, or Thomas O'Connor ever advise the asbestos workers of the dangers of gaskets, or packing, or asbestos rope.
- A: No

Defendant argues that it is entitled to summary judgment because Mr. Moran never

identified Treadwell at any specific powerhouse in which he worked. However, the court does not agree with defendant's characterization of the Deposition. Here, defense counsel provided the court with an extremely condensed version - twenty pages - of Mr. Moran's more than seven-hundred page deposition. Nowhere in the few pages of transcript provided by defense counsel or in the approximately fifty additional pages provided on this motion by plaintiffs' counsel does it appear that Mr. Moran was ever questioned in detail regarding his alleged exposure from Treadwell employees. Simply put, Mr. Moran did not identify any specific powerhouses at which Treadwell employees caused his exposure because he was never asked to enumerate any specific locations where said exposure may have occurred, i.e., his recollection of his alleged exposure was not explored in enough detail to eliminate all material issues of fact. *See, e.g., Romanowski v Yahr*, 5AD3d 985 [4th Dept 2004]; *Feldman v Dombrowsky*, 288 AD2d 605 [3rd Dept 2001]. In light of defendant's failure to establish a *prima facie* case, the court need not consider the sufficiency of plaintiffs' opposition. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].

Accordingly, it is hereby

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

This constitutes the decision and order of the court.

DATED: March 14, 2011

  
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 SHERRY KLEIN HEITLER  
 J.S.C.

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