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

PRESENT: HAGLER Justice

PART 30

INDEX NO. 104325/08

MOTION DATE

MOTION SEQ. NO. 23

MOTION CAL. NO.

MARY FLYNN

- V -

A.O. SMITH WATER PRODUCTS

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 9.30.09

FILED
OCT 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9.30.09

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

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

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MARY E. FLYNN, Individually,
and as Executrix of the
Estate of THOMAS L. FLYNN, Deceased,

Plaintiffs,

Index No. 104375/08

DECISION AND ORDER

-against-

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

Defendants.

----------X

SHERRY KLEIN HEITLER, J.:

In this asbestos wrongful death case, the defendants, American President Lines ("APL") and Farrell Lines, Incorporated, move for summary judgment dismissing the complaint on the ground that as ship owners, they did not have actual or constructive knowledge of the hazards of asbestos to crew members as required by the Jones Act. Defendants also contend that plaintiff cannot prove that the vessels were unseaworthy as the use of asbestos-containing insulation products on vessels was mandated through the U. S. Coast Guard. Defendants further allege that plaintiffs' causes of action for maintenance and cure must be dismissed because Thomas Flynn's mesothelioma did not present itself until after his employment and that a cause of action for loss of consortium is not recoverable in a Jones Act seaman's action. Finally, defendants argue that the remaining causes of action (1-8, 13-14 and 16) are not applicable to ship owner defendants. The plaintiffs oppose this application as it relates to the Jones Act and unseaworthy claims.[1]

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[1] The plaintiffs agree that this matter is subject to maritime law and do not oppose dismissal of the maintenance and cure cause of action, loss of consortium cause of action or the dismissal of the remaining causes of action (1-8, 13-14 and 16). As such, defendants' motion is granted relative to those claims.

In1955, Thomas Lawrence Flynn enrolled at the United States Merchant Marine Academy in Kings Point, New York. He spent his sophomore year working on commercial vessels including the USS President Adams and USS Extavia owned respectively by American President Lines and Farrell Lines (known collectively as Defendants).

Mr. Flynn spent approximately three and a half months on the USS President Adams, a passenger cargo ship and two to three months on the USS Extavia, a cargo ship. On each vessel, he was assigned to be a "watch stander" with the ship's engineers in the engineer room and learned how to operate the boilers and turbines; he also packed valves, stems and leaky joints. Plaintiffs allege, and defendants do not deny, that Mr. Flynn was exposed to asbestos on the ships as he cut and scraped the valves in preparation for their packing and installation.

Upon graduating from the United States Merchant Marine Academy, he began working for the U.S. Navy in September 1959. He served in the Navy for three months before attending "damage control school" at the Philadelphia Naval Base. Upon completion, Thomas Flynn joined the USS Atka as an ensign and was assigned the position of "Assistant Damage Control Officer." He left the Navy in June 1960 and in 1961 he began working for general electric as an engineer. He held this job until his retirement in 1996 after more than 30 years with the company.

Mr. Flynn was diagnosed with mesothelioma which he states was a result of exposure to asbestos while, *inter alia*, he was serving in the U.S. Merchant Marines. In March 2008, Plaintiff commenced this action and he died on December 31, 2008.

Defendants argue that plaintiffs' cause of action under the Jones Act must be dismissed because they had no actual knowledge of the dangers of asbestos to crewmen in 1956 and 1957. According to defendants, the U.S. Coast Guard ("Coast Guard"), which regulates the commercial shipping industry including employment and personnel safety, did not issue its first formal

notification about possible asbestos hazards until 1980. Thus, Defendants argue, since the Coast Guard did not have any formal regulations regarding employees' exposure to asbestos in 1956 and 1957, when Mr. Flynn worked on defendants' vessels, defendants had no actual knowledge of the dangers of asbestos.

Defendants also argue that the shipping industry did not have constructive knowledge about the dangers of asbestos exposure until the 1970s or 1980s. Defendants cite to the testimony of plaintiff's maritime expert in another suit where he testified that the shipbuilding industry and sailors were not aware of the effects of asbestos exposure on sailors until the mid-1970s.

Finally, defendants contend that since the Coast Guard required the use of asbestos containing products on vessels in 1956 and 1957, plaintiffs' cause of action for unseaworthiness should be dismissed. The President Adams was built in 1953 and the Extavia in 1941. According to defendants, at the time of the construction, the Coast Guard mandated the use of asbestos-containing insulation. Rear Admiral Bell, former Chief of the Office of Merchant Marine Safety of the United States Coast Guard, testified in February 1980 before the House of Representatives that "[A]sbestos was an indispensable ingredient in structural fireproofing used aboard merchant vessels, particularly commercial vessels." Defendants argue that at the time plaintiff sailed aboard their vessels, the Coast Guard continued to mandate the use of asbestos products on commercial vessels. It was not until 1979 that the government prohibited asbestos containing insulation for use on new ships and did not outline procedures for handling asbestos-containing insulation until 1980. Thus, defendants argue, since they complied with the governing body's regulations, their vessels were seaworthy.

In response, plaintiffs argue that defendant Farrell Lines, as a member of the National Safety Council ("NSC"), attended National Safety Congresses ("Congress") in the 1930s, where the danger of asbestos was discussed. Specifically, during the 1934 Congress, at which defendant Farrell Lines was present, there was a presentation by a Dr. Leroy Gardner on "Dust in Industry: Types of Dust that Cause Occupational Diseases". Plaintiffs thus allege that defendant Farrell Lines had actual knowledge of the dangers of asbestos in 1934. According to plaintiffs, in 1939, the NSC held another Congress where there was a presentation on "Dusts in the Rubber Industry." Defendant Farrell Lines' representative, L.J. Coughlin, who was also present at the 1939 Congress, was the Secretary of the NSC's marine section. Plaintiffs claim that since defendant Farrell Lines was present at these conferences, issues of fact exist as to defendants' actual knowledge of the dangers of asbestos exposure prior to plaintiff's exposure in 1956.

In addition, plaintiffs contend that constructive notice is established under the Jones Act by what defendants "should have known." According to plaintiffs, defendants should have known about the dangers of asbestos in the 1950s, based on the state of art at the time. Plaintiff's expert, Dr. Barry Castleman, author of "Asbestos: Medical and Legal Aspects," stated that there was extensive evidence about the dangers of asbestos in the 1930s, 1940s, and 1950s. In addition, the expert stated that in February 1948, an article about asbestos hazards entitled "Fume and Dust" was published in the Nations Safety News (NSN). He opined that someone who read the NSN regularly would "pick up" from the articles that asbestos was hazardous.

Plaintiffs also claim that the use of asbestos on the vessels rendered them unseaworthy under general maritime law, particularly where none of the seamen had protective gear of any kind. According to plaintiffs, the Coast Guard's requirement that the defendants use asbestos-containing insulation is immaterial. For plaintiffs, seaworthiness is defined by an unreasonable harm and not

what was specified for use.

For the reasons set forth below, the motion for summary judgment is denied in the following respect:

CPLR § 3212(b) provides, in relevant part: "Except as provided in subdivision (c) of this rule, the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Further, in determining whether a summary judgment motion should be granted or denied, all reasonable inferences must be drawn in favor of the party against whom summary judgment is sought (see, e.g., Millerman v. Georgia Pacific Corp., 214 A.D.2d 362, 363 [1st Dept., 1995]).

The Jones Act provides a seaman with a right of action against his employer for personal injuries sustained as a member of a vessel's crew due to the negligence of his employer (see, 46 U.S.C. § 30104 [formerly 46 U.S.C. App. § 688]). In order for a seaman to recover under the Jones Act, he must prove that his employer was negligent and that such negligence was the cause, "in whole or in part," of his injury. A "plaintiff is entitled to go to the jury if the proofs justify, with reason, the conclusion that the employer negligence played any part, even the slightest, in producing the injury... for which the damages are sought" (see, Oxley v. City of New York, 923 F.2d 22[1991], citing Diebold v. Moore McCormack Bulk Transportation Lines, Inc., 805 F.2d 55 [2nd Cir., 1986]).

The court denies defendants' application with regard to the Jones Act, finding that questions of fact exist as to whether defendants had actual or constructive knowledge of the dangers of asbestos. It is undisputed that defendants were members of the National Safety Council as early as the 1930's and 1940's and that the dangers of asbestos were addressed at conferences of this group. In addition, there is an issue as to whether or not they had constructive knowledge through what information they should have know from the state-of-the-art evidence that was available at the time (see, Turner v. Inland Tugs Co., 689 F.Supp. 612 [5th Cir., 1980]). Plaintiff's expert, Dr. Barry

Castleman, states:

> By the 1940s, it became known and recognized that asbestos exposure could cause cancers, including lung cancer and mesothelioma, and that individuals who worked with insulation materials, as well as individuals who did not work directly with asbestos products but only had relatively brief or intermittent exposures to asbestos products could develop fatal asbestos diseases.

(See, Plaintiff's Exhibit G, p.7, l.11-15.)

The court also finds that issues of fact preclude dismissing the claim on the basis of seaworthiness. The doctrine of seaworthiness provides an absolute and non-delegable duty to provide a seaworthy ship (see, Cammon v. City of New York, 95 N.Y.2d 583 [2000]). In order to support a claim of seaworthiness, the plaintiffs must establish that the vessel, or any equipment thereon, are not reasonably fit for the intended purpose or it presents an unreasonable risk of harm to seamen. A vessel with friable asbestos is unseaworthy with respect to its crew (see, Whittington v. Ohio River Co., 115 F.R.D.201 [EDNY, 1987]). Mr. Flynn testified that, on the SS Extavia, he was exposed to asbestos while using Garlock & Crane packing material to fix leaks on pumps and valves (see, Plaintiff's Exhibit A, p. 124-125) and also exposed on the USS President Adams while packing valves and pumps (see, Plaintiff's Exhibit A at 116-117). The defendants specified asbestos products on their ships and did not provide protective gear or warnings.

Accordingly, the court finds that plaintiff has provided sufficient evidence to sustain a cause of action for unseaworthiness. In addition, the court notes that the defendants in this matter have previously been held liable under an unseaworthy theory in asbestos-related actions (see, Miller v. APL, 989 F.2d 1450 [6th Cir., 1993]); Vaughn v. Farrell Lines, 937 F.2d 953 [4th Cir., 1991]).

Accordingly, it is hereby

ORDERED that the motion by APL Limited and Farrell Lines, Incorporated for summary judgment dismissing the complaint is denied with respect to the Jones Act claims and the seaworthiness claims and granted with respect to the other causes of action.

This constitutes the decision and order of the court.

DATED: SEPTEMBER 30, 2009

SHERRY KLEIN HEITLER
J.S.C.