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

PRESENT: HON. SHERRY KLEIN HEITLER PART 30

Index Number : 190333/2009

THAUT, RODNEY

vs

A.O. SMITH WATER

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. 190333/09

MOTION DATE

MOTION SEQ. NO. 004

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

FILED
JUL 14 2010
COUNTY CLERK'S OFFICE
NEW YORK

is decided in accordance with the memorandum decision dated 7.7.10

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

Dated: 7-7-10

HON. SHERRY KLEIN HEITLER J.S.C.

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
----------X

RODNEY THAUT,

Plaintiff,

Index No.: 190333/2009
Motion Seq. 004

- vs. -

DECISION & ORDER

A.O. SMITH WATER PRODUCTS, *et. al.*,
(AURORA PUMP COMPANY)

Defendants.
----------X

SHERRY KLEIN HEITLER, J.:

Defendant Aurora Pump Company (Aurora) moves, pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims as against it.

Plaintiff claims that he was exposed to asbestos at several work sites during the course of his life, as well as during his service in the United States Coast Guard. This exposure ultimately led to a diagnosis of mesothelioma in July 2009. Plaintiff contends that he was exposed to asbestos while working as an electrician's mate in the Coast Guard, in close proximity to machinists changing asbestos-containing gaskets, packing, and insulation. Defendant claims that plaintiff has not produced any evidence that he was exposed to any asbestos-containing product manufactured, distributed, sold or installed by Aurora.

Plaintiff Rodney Thaut served in the United States Coast Guard from November 1968 to November 1972. During that time plaintiff was trained as an electrician, eventually reaching the rank of electrician's mate third class. He learned to maintain the ship's electrical components. From November 1969 to January 1971, plaintiff served aboard the USCGC Glacier – a class of ship referred to as an "icebreaker" – and was assigned to maintain the electrical components of the ship's propulsion system, including the individual motors that operated the hundreds of pumps on board.

On or about December 1969 or January 1970, the Glacier was overhauled in preparation for a voyage to Antarctica. During this time, plaintiff contends, the crew serviced most of the pumps aboard ship. Plaintiff participated in this overhaul.

Plaintiff alleges that he was exposed to asbestos while working on the pump systems in two separate ways. First, plaintiff claims that "pretty much all" of the pumps on board were wrapped in asbestos-containing insulating blankets that produced dust and fibers during removal and installation. (Plaintiff's Exhibit A, Deposition of Rodney Thaut, sworn to Dec. 1-3, 2009, at 69 [hereinafter "Thaut Deposition"].) These blankets had to be removed before work could be performed and replaced after completion. Removal and installation were often done in plaintiff's immediate presence.

Second, plaintiff contends he was exposed to asbestos-containing gaskets and packing material that were removed from and replaced within the pumps. Because the gasket and packing material would become dried out, brittle, and stuck to the insides of the pumps, machinists would often need to scrape out the old material with a putty knife or other object and clean out the inside of the pump with wire brushes before new material could be inserted. Machinists also used compressed air to blow dust out of the pumps. The result, according to plaintiff was a large amount of dust and debris in the air and surrounding area.

Although plaintiff did not specifically work on the pumps, he alleges that in order for the machinists to maintain the pump systems he would first have to disconnect or disable the motor that ran the pump. While machinists serviced the pumps, plaintiff would clean and maintain the pump motor. According to plaintiff he would often perform this maintenance while standing right next to the machinists working on the pumps. Following the completion of the machinists' work, plaintiff would then reconnect the motor and help clean the surrounding area of dust and debris.

Documentation introduced by both parties indicates that there were two Aurora feed pumps aboard the Glacier during plaintiff's service. They were part of the ship's low pressure heating boiler system and were located in the combination distiller/boiler room. In plaintiff's pretrial testimony he specifically mentions the boiler room as a place where he witnessed blankets being removed from pumps in preparation for maintenance.

> Q: Do you believe – do you know how many times you saw the other servicemen take off or replace blankets on pumps on the Glacier before you left for Antarctica?
>
> A: Oh, that was quite often, too. I mean, it was down in the boiler rooms; basically almost any place that there was pumps throughout the whole ship.

(Plaintiff's Exhibit A, Thaut Deposition at 69.)

Defendant contends however, that the Aurora pumps moved water at "essentially ambient air temperature" and thus did not require external insulating blankets, and further argues that if any asbestos containing materials can be associated with their pumps, it would only be gasket and packing materials. (Defendant's Reply Exhibit 1, Affidavit of Thomas F. McCaffery, sworn to May 26, 2010, at paragraphs 23, 25.)

Defendant further claims that even if plaintiff was exposed to asbestos from gaskets or packing material contained within the Aurora pumps on the Glacier, such materials were not manufactured, distributed, sold or installed by Aurora. The Aurora pumps were installed on the Glacier during the vessel's original construction for the United States Navy in 1955 (The ship was transferred to the Coast Guard in the 1960s). By the time plaintiff boarded the Glacier in November 1969, defendant contends that any gasket or packing material contained in the pumps would have long since been replaced with new and non-original materials as part of the routine maintenance of the pumps. In support, defendant offers evidence showing that Navy policy for packing and gaskets used in machinery installed aboard U.S. Navy ships requires that all such materials be standard Navy

packing and gasket materials that can be purchased from any of several suppliers who comply with military specifications for the product. The Coast Guard follows the same policy.

Plaintiff offers in opposition deposition testimony from an Aurora employee, Robert Starke, given in relation to a 1995 case from the Eastern District of Michigan, Geyer v. Babcock & Wilcox Co. (No. 92 CV 70075). When asked whether a person maintaining an Aurora pump in the field would have to cut the packing to install it, Starke answered, "Not if they bought the packing from Aurora." (Plaintiff's Exhibit G, Deposition of Robert Starke, sworn to March 16, 1995, at 78.)

In the instant case, defendant's contention that any packing contained within the Aurora pumps aboard the Glacier would have been replacement material purchased from an outside manufacturer is in direct conflict with prior deposition testimony given by an Aurora employee that suggests Aurora sold replacement packing directly to end-users. Nothing in defendant's presentation shows where the Navy or the Coast Guard purchased its replacement packing, and so it is possible that such packing was purchased directly from Aurora. This constitutes a genuine issue of material fact that warrants denial of defendant's summary judgment motion.

Further, plaintiff's deposition statement that "pretty much all" the pumps aboard the Glacier were wrapped in insulation blankets, and his testimony of having seen blankets being removed from pumps in the boiler room in particular stands in direct opposition to the defendant witness's affidavit statements that the Aurora pumps in the boiler room of the Glacier were not the sort that would require external insulation. Plaintiff further stated that he recalled blankets being placed on pumps not just to insulate them but also potentially to help alleviate vibration issues. Although defendant has made a showing that insulation blankets may not have been required on its pumps aboard the Glacier, defendant has not shown conclusively that such blankets were not present. Further, no evidence contained in either party's submissions to the Court speaks to who manufactured or sold

these blankets. As such, an issue of fact as to the blankets' presence and origins still remains, and summary judgment must be denied.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Santiago v. Filstein, 35 A.D.3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." Mazurek v. Metropolitan Museum of Art, 27 A.D.3d 227, 228 (1st Dept 2006); see Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See Rotuba Extruders v. Ceppos, 46 N.Y.2d 223, 231 (1978). An issue of fact is created when a litigant's deposition testimony conflicts with evidence on the record. Dollas v. W.R. Grace Co., 224 A.D.2d 319, 321 (1st Dept 1996).

Defendant relies on Comeau v. W.R. Grace & Co., 216 A.D.2d 79 (1st Dept 1995) for the proposition that to defeat a summary judgment motion, plaintiff must present not just facts which place defendant's products at a jobsite where the plaintiff worked, but also evidence as to time periods of plaintiff's employment, the exclusivity of the use of defendant's products at the site *or* the proximity of the defendant's products as to plaintiff. Comeau, 216 A.D.2d at 80 [emphasis added]; see also Salerno v. Garlock, Inc., 212 A.D.2d 463, 463 (1st Dept 1995); Diel v. Flintkote Co., 204 A.D.2d 53, 54 (1st Dept 1994). In the instant case, plaintiff has shown that defendant's products were present aboard the Glacier, has demonstrated the possibility that such products may have been present during his service aboard the ship, and has raised an issue as to whether or not he was in sufficient proximity to those products to have been exposed to asbestos from them.

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, 362-63 (1st Dept 1995). Defendant contends that summary judgment is warranted because plaintiff's duties in the boiler room near the Aurora pumps would not take him within twelve feet of the actual pumps being serviced and thus he was not near enough to be in danger of exposure from any material contained in the pumps. However, plaintiff has testified that he often stood right next to the pumps as they were maintained and further helped in the clean up of the materials that were removed from the pumps. Plaintiff also testified that machinists often used compressed air to clean material out of the pumps, a method that created a "boatload of dust" in the air and surrounding area (Plaintiff's Exhibit A, Thaut Deposition at 83).

Given the unresolved questions of the origins of any gasket and packing material in the Aurora pumps, the disputed presence and unknown origins of any insulting blankets around the Aurora pumps, how close to the Aurora pumps the plaintiff may or may not have stood, his alleged participation in the post-maintenance cleanup, and the amount of dust blown about by the use the compressed air, there exist several issues of material fact as to whether plaintiff may or may not have been exposed to material from the Aurora pumps. "The plaintiff is not required to show the precise causes of his damages, but only to show facts and conditions from which defendants' liability may reasonably be inferred (internal citations omitted)." Reid v. Georgia-Pacific Corp., 212 A.D.2d 462, 463 (1st Dept 1995). Plaintiff has met that burden for the purpose of defeating a summary judgment motion by defendant.

Accordingly, it is hereby

ORDERED, that defendant Aurora Pump Company's motion for summary judgment to dismiss the complaint as against it and to dismiss all cross-claims against it is denied.

This constitutes the decision and order of the court.

DATED: JULY 7, 2010

SHERRY KLEIN HEITLER
J.S.C.