

**Thaut v A.O. Smith Water Prods.**

2010 NY Slip Op 32136(U)

August 9, 2010

Supreme Court, New York County

Docket Number: 190333/09

Judge: Sherry Klein Heitler

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: SHERRY KLEIN HEITLER  
Justice

PART 30

Radney Thaut + Kathryn L. Thaut  
Plaintiff,  
- v -

190333/09

A. O. Smith Water Products and  
Clark Reliance (Co.)  
Defendant.

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 05  
MOTION GAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Repeating Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

*This motion is decided  
as per the memo discussion  
of 8-9-10.*

**FILED**  
AUG 12 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 8-9-10

[Signature]  
SHERRY KLEIN HEITLER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

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

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

-----X  
RODNEY THAUT and  
KATHRYN LYNN THAUT,

Plaintiffs

- vs. -

A.O. SMITH WATER PRODUCTS, *et. al.*,  
(CLARK-RELIANCE CORP.),

Defendants.

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

Index No.: 190333/09  
Motion Seq. 005

DECISION & ORDER  
**FILED**

AUG 12 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Defendant Clark-Reliance Corporation, solely as an alleged successor to Jerguson Gage and Valve (hereinafter Clark-Reliance), moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims as against it.

Plaintiff, Rodney Thaut, claims that he was exposed to asbestos at several work sites during the course of his life, including his service in the United States Coast Guard. This exposure ultimately led to a diagnosis of mesothelioma in July 2009.

Plaintiff 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. In 1972, plaintiff served aboard the USCGC *Minnetonka*, and was assigned to maintain the ship's electrical components, including the individual motors that operated the hundreds of pumps and valves on board ship. Plaintiff contends that he was exposed to asbestos while working as an electrician's mate in the Coast Guard in close proximity to machinists who worked at changing asbestos-containing gaskets, packing, and insulation relative to the valves, pumps and boilers on board. Defendant claims that plaintiff has not produced any evidence that he was exposed to any asbestos-containing product manufactured, distributed, sold or installed by

Clark-Reliance, and further, that plaintiff has not even named Clark-Reliance as a potential source of his alleged exposure.

Plaintiff asserts that he was exposed to asbestos while working on pump and valve systems in two separate ways. First, according to plaintiff, “pretty much all” of the pumps and their accompanying valves on board were wrapped in asbestos-containing insulating blankets that produced dust and fibers during removal and installation. (See, Defendant’s Exhibit B, Deposition of Rodney Thaut, sworn to Dec. 1-3, 2009 [“Thaut Deposition”], at 69.) 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 claims exposure to asbestos-containing gaskets and packing material that were removed from and replaced within the pumps and valves. Because the gasket and packing material would become dried out and brittle and would stick to the insides of the pumps and valves, machinists often needed to scrape out the old material with a putty knife or other object and clean out the inside of the pump or valve with wire brushes before new material could be inserted. Machinists also used compressed air to blow dust out of the pumps and valves. The result, according to plaintiff was a large amount of dust and debris in the air and surrounding area.

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

\* 4]

Plaintiff testified to having been present in the boiler room of the *Minnetonka* while machinists were working on the boilers. Specifically, he stated:

Q Was the insulation on these specific pumps the same or different than the insulation you testified to with respect to the Walnut and the Glacier?

A The ones for the *Minnetonka*, they're in the boiler room, they seemed to be a little - - slightly different, but it's primarily the same thing.

Sometimes, all depending on the placement of where the pump is, some of them were literally bolted right to the boiler itself, so they would take the whole insulation - - and it would be a continuous thing, even though they would have a seam there, so that you could remove it and do your maintenance.

Q So the boiler was insulated, as well?

A Oh, yes. Yeah. You're looking at extreme heat there.

Q Were you ever present when servicemen were actually working on the boiler?

A Oh, yeah.

(Thaut deposition at 135.)

Plaintiff further supplies evidence which demonstrates that defendant's predecessor company, Jerguson Gage and Valve, supplied valves for the boilers aboard the *Minnetonka*. (See, Plaintiff's Opposition Papers, Exhibit B.) Defendant nevertheless contends that plaintiff has not provided any evidence to support his contention that work was performed on such valves connected to the boiler in his presence and thus has not sufficiently established exposure to Clark-Reliance's products.

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." Moreover, the deposition testimony of a litigant is sufficient to raise an issue of fact so as

\* 5]

to preclude summary judgment. Dollas v. W.R. Grace Co., 224 A.D.2d 319, 321 (1st Dept 1996). “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). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223, 231 (1978).

Here, plaintiff’s testimony that he was present in the boiler room of the *Minnetonka* in close proximity while machinists performed maintenance on the boilers, combined with documentary evidence that Jurgeson Gage and Valve supplied valves for the *Minnetonka*’s boilers is sufficient to raise an issue of fact as to whether plaintiff was exposed to defendant’s asbestos-containing products during this work.

Accordingly, it is hereby

ORDERED, that defendant Clark-Reliance’s motion for summary judgment to dismiss the complaint and all cross-claims against it is denied.

DATED: AUGUST 9, 2010

ENTER:



SHERRY KLEIN HEITLER  
J.S.C.

**FILED**  
AUG 12 2010  
NEW YORK  
COUNTY CLERK'S OFFICE