

**Matter of New York City Asbestos Litig.**

2010 NY Slip Op 32933(U)

October 6, 2010

Sup Ct, NY County

Docket Number: 122594/00

Judge: Sherry Klein Heitler

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# HON. SHERRY KLEIN HEITLER

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

Index Number : 122594/2000

PART 30

**KLINE, NELDA**

vs.

**A.C. & S.**

INDEX NO. 122594/00

SEQUENCE NUMBER : 001

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

SUMMARY JUDGMENT

MOTION SEQ. NO. 001

MOTION CAL. 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 \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided as*

*per the memo decision  
of 10.6.10.*

**FILED**

OCT 15 2010

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 10.6.10

**HON. SHERRY KLEIN HEITLER** *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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  
In Re: New York City Asbestos Litigation

NYCAL

----- X  
NELDA KLINE, as Administrator for the Estate of  
SIDNEY P. KLINE, Individually

Index No. 122594/00  
Motion Seq. 001

Plaintiff(s),  
- against -

DECISION AND ORDER

A.C. & S, INC., et al.,

Defendants.

**FILED**  
OCT 15 2010  
COUNTY CLERK'S OFFICE  
NEW YORK

----- X

**SHERRY KLEIN HEITLER, J:**

In this asbestos personal injury action, defendant Crane Co. ("Crane Co." or "Defendant") moves pursuant to CPLR § 3212 for an order granting it summary judgment dismissing the complaint and all cross claims against it. For the reasons set forth below, the motion is granted.

**BACKGROUND**

This is an action commenced by Nelda Kline and Sidney P. Kline ("Mr. Kline"), against Crane Co., a manufacturer of industrial products, to recover damages for personal injuries allegedly caused by exposure to asbestos-containing valves while on board the USS Cone. Mr. Kline was enlisted in the United States Navy from January 31, 1944 to May 19, 1946. Beginning November 21, 1945, he served for several months as a Navy fireman aboard the USS Cone. From his discharge in 1946 until 1986, Mr. Kline worked as a civilian construction worker at various locations in York, Pennsylvania. Mr. Kline died on February 25, 2002 as a result of mesothelioma.

The depositions of all key fact witnesses were to be completed by August 1, 2009. Plaintiff did not produce any witnesses for deposition in this case, including Mr. Kline, who passed away before he could be deposed. In accordance with the New York City Asbestos Litigation Case Management Order, Defendant served a request for a No Opposition Summary Judgment Motion and Order upon Plaintiff on or about December 21, 2009. Plaintiff declined to voluntarily dismiss Crane Co. from this case based on its assertion that Crane Co. valves containing asbestos were approved for use on the USS Cone, where Mr. Kline served.

On April 22, 2010, Defendant filed the instant motion for summary judgment alleging, among other things, that: (1) Plaintiff offered no evidence or testimony that Crane Co. products were installed on the USS Cone; and (2) There is no evidence that Mr. Kline was exposed to asbestos during the time he served on board the USS Cone. In opposition, Plaintiff alleges that: (1) Crane Co.'s own interrogatory responses demonstrate that asbestos containing valves were approved for use on the USS Cone; and (2) As a Navy fireman, Mr. Kline would have been exposed to Crane Co. valves while working in the engine and boiler rooms aboard the ship.

### 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 Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR § 3212[b]. Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the

existence of a factual issue requiring a trial of the action. See *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986].

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 a particular defendant's product. See *Cirwein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994]. Mere boilerplate and conclusory allegations will not suffice. *Id.* The plaintiff is not required, however, to "show the precise causes of his damages, but only to show facts and conditions from which defendants' liability may reasonably be inferred." *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995].

Defendant Crane Co. has made a *prima facie* showing of its entitlement to summary judgment by showing that no evidence, admissible or otherwise, has been presented which establishes that Crane Co. valves were present on the USS Cone during the relevant period and no evidence has been presented that Mr. Kline himself was exposed to valves or to asbestos fibers released from any product manufactured, sold, or supplied by Crane Co.

In opposition, Plaintiff submits a number of documents which are alleged to show that Crane Co. valves were used on the USS Cone. The first is a memorandum from the Office of the Supervisor of Shipbuilding of the United States Navy, dated August 30, 1944 ("Navy Memorandum") which indicates that the Navy planned to use Crane Co. valves on the Sumner-class of ships. The Sumner-class of ships were a group of destroyers similar to the Gearing-class of ships to which the USS Cone belonged. The second document submitted by Plaintiff is a copy of an internet article which suggests that the two classes of ships were identical but for the fact that the Gearing-class of ships had a fourteen-foot longer hull. See Affidavit of Samuel

Meirowitz, dated June 9, 2010 (“Opposition”), Exhibit 6-7.

Taken together, these documents do not support an inference that Crane Co. valves were present aboard the USS Cone. The Navy Memorandum refers to “Main Condenser Air Ejector Valves” and Plaintiff has produced no evidence of Mr. Kline’s presence in any area of the ship where he might have been exposed to such valves. The Navy Memorandum also provides no indication that such valves contained asbestos. Similarly, Plaintiff’s reliance on the internet article for the proposition that Crane Co. valves were present on the Gearing-class of ships, including the USS Cone, is misplaced. The article simply suggests that the two classes of ships had similar designs. To infer that both classes of ships necessarily contained the same parts at the same time is speculative and cannot defeat Defendant’s application for summary judgment. *See Cawein, supra*, 203 AD2d at 106.

While the interrogatory responses might be said to shed some light on the matter, they are also too speculative in nature to raise issues of fact. While Crane did acknowledge in its interrogatories that its valves “were approved for use on the USS Cone” and that “certain of the valves had enclosed in their metal structure asbestos-containing gaskets, packing, or discs.” (Opposition, Exhibit 3, pp. 5-6), the interrogatory answers are not sufficient evidence that the valves were actually present on the USS Cone during the relevant time or where on the vessel such valves may have been installed. *See id.* Even if Crane Co.’s interrogatory responses were sufficient to establish that its valves were furnished to the USS Cone at some time, there is nothing to indicate what valves were used, whether they contained asbestos, or whether they were installed at the time Mr. Kline was on board the ship. Overall, the Navy Memorandum, internet article, and interrogatory answers are not sufficient to raise an issue of fact as to whether

Crane Co. valves were present aboard the USS Cone during the relevant time period.

Plaintiff contends that as a Navy fireman, Mr. Kline would have necessarily worked in the engine/boiler area of the ship where many of Crane Co.'s valves would be located. To support this proposition, Plaintiff relies on the affidavit of non-party Joseph Kristis, sworn to December 30, 2009. The affidavit states that from 1943 to 1946, Mr. Kristis worked as a ship's fireman. His work was performed in the ship's engine room where he was allegedly exposed to asbestos-containing products. Mr. Kristis described his duties as a ship's fireman to include packing steam valves with asbestos mixtures that he mixed on board. However, the affidavit does not specify whether Mr. Kristis was a Navy fireman, whether he was ever stationed on the USS Cone, or whether he ever knew Mr. Kline.

In further support of the proposition that Mr. Kline would have been exposed to asbestos from Crane Co. valves due to the nature of his work as a Navy fireman on the USS Cone, Plaintiff offers the deposition testimony in a separate case of Marvin Zatz, a lead man machinist who supervised repairs done to the USS Cone. Mr. Zatz testified that he joined the Navy in about 1948.

“Q: Where did you go next? . . .

A: . . . I was assigned to the Cone and Ellison. Supervisor. That's leading man, was a supervisor marine machinist. They were both destroyers

\* \* \* \*

Q: What were your duties as a leading marine machinist?

A: I was in charge of the repairs of the engine room and fire room. Talking about the Cone.

\* \* \* \*

Q: Do you believe you were exposed to asbestos while supervising this work?

A: Sure did.

Q: How?

A: I witnessed the performance of the men on each job, so while they were involved with the removal of material and the installation of material I was there. Plus the other trades were there, and we worked right along with pipefitters in the majority of the stuff down in the engine room and fire room. They were busy ripping apart lagging and insulation on the steam piping. We were there waiting for them to get finished so we could rip apart the flanges to get at the machinery. During that period there was a lot of dust all over the place."

*See* Opposition, Exhibit 13, pp. 87-89. Plaintiff further relies on the deposition testimony of

Lloyd Cyr in another separate case. Mr. Cyr was a Navy Engineman who served aboard the USS

Marias in the early 1950's.

"Q: Okay. And with regard to - you said that you thought Mr. Robinson would have been exposed to asbestos from just going into the boiler room.

A: Uh - huh.

Q: Why is that?

A: Because you got constant vibration and movement going on, you know. The whole thing is moving, and there's a lot of - when the boilers are operating, there's pulsating going on, so you got to have some, some kind of exposure to - because those things are all insulated.

\* \* \* \*

Q: . . . With respect to the engine room, when the - would you say that the same effect on the equipment that you had in the boiler room from the ship vibrating and shaking, would that be also true of the engine room equipment?

A: Yes."

*See* Opposition, Exhibit 14, pp. 40-41, 101-102.

While such testimony might indicate those particular witnesses were exposed to asbestos, there is simply no evidence that Mr. Zatz and Mr. Kline worked on any of the same equipment while on board the USS Cone. In addition, Mr. Kline served aboard the USS Cone in the mid 1940's, at least two years before Mr. Zatz joined the Navy in 1948, and almost 10 years before Mr. Zatz began working at the Brooklyn Navy Yard. At no point in Mr. Zatz' deposition does he identify valves, let alone Crane Co. valves, as the source of his exposure on the USS Cone.

\*8]  
Even less apparent is any connection between Mr. Kline and Mr. Cyr. Although both individuals were Navy personnel, they held different ranks, presumably performed different tasks, and never served aboard the same vessel. The proposed connection is too attenuated to defeat Defendant's *prima facie* case.

While this Court agrees that circumstantial evidence may be used to support liability where there is a linkage between time and place to the defendant's product, *see Jamieson v A.C. & S., Inc. et al.*, 1998 WL 635549, No. 93 CV 7957, at \*3 [SDNY Sept 16, 1998], such a showing has not been made here. In *Jamieson*, the plaintiff testified that he was exposed to asbestos pipe covering while he worked at a ship yard in California. The plaintiff, who never mentioned the name of the defendant, was able to defeat the motion for summary judgment by proffering testimony of co-workers who had worked at the same facility during the relevant time period who were able to name the defendants products. Similarly, the Second Circuit in *Krepplein* noted that circumstantial evidence was sufficient to raise triable issues of fact where a co-worker who worked in the shipyard at the same time as the plaintiff identified the defendant's products and where two other workers corroborated the co-workers testimony. *See Krepplein v Celotex Corp.*, 969 F2d 1424, 1426 [2d Cir 1992].

Here, unlike in *Jamieson* or *Krepplein*, there is insufficient circumstantial evidence to defeat summary judgment. Mr. Zatz and Mr Cyr never served with Mr. Kline, did not work at the same time as Mr. Kline, and never mentioned any Crane Co. products which may have led to their ailments. Drawing every possible inference in favor of the Plaintiff, there is simply no time and place connection among Mr. Kline, Mr. Zatz, Mr. Cyr, and Crane Co. products which, taken together, may raise a factual issue as to whether Crane Co's actions constituted a substantial

factor in causing Plaintiffs injuries.

Therefore, it is hereby

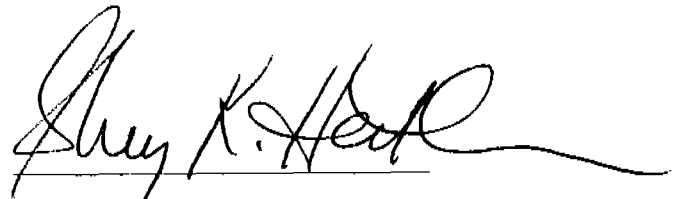
ORDERED that Defendant's motion for summary judgment is granted, and that this action against Defendant, and any cross-claims related to this defendant are severed and dismissed; and it is further

ORDERED that the remainder of the action shall continue as against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

**DATED:** October 6, 2010

  
SHERRY KLEIN HEITLER  
J.S.C.

**FILED**  
OCT 15 2010

COUNTY CLERK'S OFFICE  
NEW YORK