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

PRESENT: HON. SHERRY KLEIN HEITLER PART 30

Index Number : 190141/2009

ORZULAK, KRZYSZTOF

INDEX NO. 190141/09

VS

A.O. SMITH WATER PRODUCTS

MOTION DATE

Sequence Number : 001

MOTION SEQ. NO. 001

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 as per the memo decision dtd 11.29.10.

FILED
DEC 07 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11-29-10.

HON. SHERRY KLEIN HEITLER 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

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

---------- X

KRZYSZTOF ORSZULAK and ZOFIA ORSZULAK

Index No. 190141/00
Motion Seq. 001 *

Plaintiffs,

DECISION AND ORDER

- against -

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

Defendants.

---------- X

SHERRY KLEIN HEITLER, J:

In this asbestos personal injury action, defendant Kaiser Gypsum Company ("Kaiser Gypsum") 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 denied.

BACKGROUND

This is an action commenced by plaintiffs Krzsztof and Zofia Orszulak to recover for personal injuries allegedly caused by Mr. Orszulak's exposure to asbestos-containing joint compound manufactured by Kaiser Gypsum. Mr. Orszulak was born in Poland in 1941 and emigrated to the United States in 1976. From 1976 to 1979, he performed renovation and demolition work as a day laborer at various residential and commercial sites in Brooklyn, Queens, and Manhattan. Mr. Orszulak was deposed through an interpreter on July 16, 2009 and July 21, 2009 and his deposition transcript is submitted as plaintiffs' exhibit B (hereinafter "Deposition"). Mr. Orszulak was unable to recall the name "Kaiser Gypsum" or that of any other manufacturer at his deposition, but identified the defendant as the producer of asbestos-

containing joint compound with which he worked by signing his initials on a photograph depicting Kaiser Gypsum joint compound. The photograph depicting Kaiser Gypsum joint compound, along with approximately twenty others, were provided to Mr. Orszulak by plaintiffs' counsel prior to the deposition.

Defendant moves for summary judgment, arguing, among other things, that: (1) Mr. Orszulak could not have worked with asbestos-containing joint compound from 1976 to 1979 because Kaiser Gypsum ceased manufacturing asbestos containing materials in 1975; and (2) Mr. Orszulak had no independent recollection of using Kaiser Gypsum products prior to being shown the photographs by plaintiffs counsel. In opposition, plaintiffs argue, among other things, that: (1) Defendant's claim that it stopped manufacturing asbestos-containing products prior to the relevant time period is irrelevant given the theory of residual usage; and (2) The use of photographs to identify asbestos-containing products is a well-settled form of product identification.

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 Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994]. The plaintiff is required "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]. Mere boilerplate and conclusory allegations will not suffice. *Cawein*, *supra*, 203 AD2d at 105.

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. *Reid v Georgia Pacific Corp.*, 212 AD2d 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]. 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 NY2d 223, 231 [1978].

Defendant claims Mr. Orszulak could not have been exposed to asbestos as a result of Kaiser Gypsum's actions because it ceased manufacturing asbestos-containing joint compound in 1975, almost a year before Mr. Orszulak emigrated to the United States in 1976. To support this proposition, defendant relies on the deposition testimony of non-party George Kirk, given on July 13, 2006, in a separate action venued in Broward County, Florida. Mr. Kirk was Kaiser Gypsum's director of research and testified he was personally familiar with the location of Kaiser Gypsum plants and its products. Mr. Kirk testified that Kaiser Gypsum did not sell joint

compound on the east coast of the United States until 1968, when it opened a plant in Delanco, New Jersey. Mr. Kirk also testified that this plant closed in 1975 when Kaiser Gypsum ceased manufacturing joint compound altogether.

Even if Kaiser Gypsum ceased manufacturing asbestos-containing joint compound in 1975, it is possible that Kaiser Gypsum's products were still sold and used in the marketplace during the relevant time period, and that Mr. Orszulak worked with these products in the course of his employment in 1976. *See Taylor v AC&S., Inc., et al.,* 304 AD2d 403, 404-05 (1st Dept 2003); *see also Kofler v A.W. Chesteron, et. al.,* Index No. 190014/08, 2009 NY Misc LEXIS 6064, at *4 [Sup. Ct. September 2, 2009]. Mr. Orszulak testified that he was exposed to asbestos as a result of the dust created when mixing and sanding the joint compound less than one year after Kaiser Gypsum closed its New Jersey plant. Kaiser Gypsum has produced no evidence that it could not have manufactured the joint compound to which Mr. Orszulak was exposed. *Taylor v AC.&S., Inc., et. al.*, 304 AD2d 403, 404-05 [1st Dept 2003].

Defendant also claims Mr. Orszulak's testimony was based on the leading and suggestive nature of the pictures shown to him by plaintiffs counsel prior to his deposition. When asked whether Mr. Orszulak reviewed any documents prior to his deposition, plaintiffs counsel stated that he showed Mr. Orszulak twenty photographs. Out of the twenty photographs, Mr. Orszulak then placed his initials on the top of each photograph depicting a product with which he had worked. One of the photographs initialed by Mr. Orszulak portrayed a bag of Kaiser Gypsum joint compound. Specifically, Mr. Orszulak testified (Deposition, pp. 82-84):

Q: I want to direct your attention to one of the photographs that are a [sic] paragraph of Plaintiff's Exhibit 1. If you could take a look at it, please?

Q: Are those your initials on the top of the page?

A: Yes.

Q: Does that indicate that you recognize this product as one that you worked with?

A: Yes.

Q: Can you tell me any specific locations where you worked with this product?

A: No.

Q: And why do you think you used this product in your work?

A: Because I worked with it.

Q: And how do you remember that?

A: Visually through photos.

Q: So, looking at this photo you recall working with the product?

A: Yes.

Q: Do you know how many times you used this product in 1976 through 1979?

A: Very often. Practically every job.

Defendant contends that Mr. Orszulak had no independent recollection of any products he used which renders the use of the photographs to refresh his recollection improper. However, defendant's contentions are misplaced. Witnesses often claim to have no recollection of a conversation or other matter. *See* Prince, Richardson on Evidence § 6-213 [11th ed.]. If so, any writing or object may be used to refresh the recollection of a witness so that the witness is subsequently able to recall the facts in sufficient detail to testify to them from memory. *Id* § 6-214. The use of photographs is a well accepted form of refreshing the recollection of a witness, *see People v Ramos*, 139 A.D.2d 775, 780-81 [2nd Dept 1988], and has been used by counsel to aid a witness in his identification of asbestos-containing products, *see Barwick v Celotex Corp.*, 736 F.2d 946, 960 [4th Cir 1984]. This procedure is only improper where it would "furnish [a witness] with imaginative materials or a false memory." *People v Ramos*, 141 Misc.

2d 930, 935 [Sup. Ct., NY Co. 1988].

Here, while Mr. Orszulak was unable to recall the manufacturers of the products with which he worked during the relevant time period without the use of the photographs provided to him by counsel, he can hardly be said to have had no independent recollection of the matter. Mr. Orszulak testified in detail regarding the nature of his job and his exposure to asbestos when working with or in close proximity to others using the joint compound depicted in the photograph. (Deposition pp. 31, 35):

Q: Am I correct, sir, you used plaster and compound on the sheetrock?

A: Yes.

Q: Did you use one type more than the other?

A: I would take, for example, the plaster and the compound, mix them together, and it would be stiffer. It would bind faster.

Q: How would you apply this material to the walls?

A: With a trowel, scraper -- with scrapers

Q: What did you do after you applied this product to the wall, if anything?

A: Afterwards, I would sand it.

* * * *

Q: Do you believe you were exposed to asbestos as a result of the compound?

A: That too because when I was sanding it there was dust coming out of it, the compound.

As plaintiffs point out, very little of this testimony could have been furnished simply by viewing a photograph of the compound. As such, counsel properly utilized the photographs to refresh Mr. Orszulak's recollection given that he already had an independent basis of knowledge regarding the matter. In fact, the use of said photographs was critical given Mr. Orszulak's inability to read, speak, or write in English.

Nor was the manner in which Mr. Orszulak identified the defendant unduly suggestive.

A photo array may be unduly suggestive if structured in a manner that creates a substantial likelihood that the defendant will be singled out for identification, *see People v Chipp,* 75 NY2d 327 [1990], or where "some characteristic of one picture draws the viewer's attention in such a way as to indicate" that counsel has made a particular selection for the witness, *see People v Lawal*, 73 AD3d 1287, 1288 [3rd Dept 2010]. The use of a single photograph to refresh a witness' identification is generally improper. *See People v Rivera*, 64 AD2d 857, 858 [2nd Dept 1980].

Here, there is nothing to indicate that the photo array was provided to Mr. Orszulak in a way that created a substantial likelihood he would single out the defendant for identification. Nor was Mr. Orszulak given only a single photograph to identify. To the contrary, counsel provided him with a group of twenty photographs prior to the deposition. Mr. Orszulak was then asked to initial the photographs portraying the products he recognized. Out of the twenty photographs, he initialed only ten. In addition, Mr. Orszulak was repeatedly asked to and did in fact separate the photographs into two piles, one containing images of products he recalled working with during the relevant time period, and one containing products he did not recall working with during the relevant time period. Mr. Orszulak consistently placed the photograph containing Kaiser Gypsum joint compound in the pile containing products Mr. Orszulak believed he worked with during the relevant time period. Nothing in the record indicates that defendant's product was singled out for identification. Consequently, the method by which the Kaiser Gypsum joint compound was identified by Mr. Orszulak was not unduly suggestive.

At best, defendant's arguments regarding Mr. Orszulak's recollection and the allegedly suggestive nature of the identification procedure go to Mr. Orszulak's credibility, and the weight

of the evidence, rather than its admissibility.

Accordingly, it is hereby

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

This constitutes the Decision and Order of the Court.

DATED: November 29, 2010

SHERRY KLEIN HEITLER
J.S.C.