

<b>Simonovich v A.O. Smith Water Prods. Co.</b>
2011 NY Slip Op 30481(U)
March 1, 2011
Supreme Court, New York County
Docket Number: 190037/10
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT. HON. SHERRY KLEIN HEITLER

PART 30

Index Number : 190037/2010

SIMONOVICH, JR., THOMAS

vs

A.O. SMITH WATER PRODUCTS CO.

Sequence Number : 002

SUMMARY JUDGMENT (Peerless)

INDEX NO. 190037/10

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

MOTION SEQ. NO. 002

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 in accordance with the memorandum decision dated 3-1-11.

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

**FILED**

MAR 04 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3-1-11

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

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  
THOMAS SIMONOVICH and  
BARBARA SIMONOVICH,

Plaintiffs,

-against-

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

Defendants.  
----- X

**SHERRY KLEIN HEITLER, J.:**

Index No. 190037/10  
Motion Seq. 002

**DECISION AND ORDER**

**FILED**

**MAR 04 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendant Peerless Industries, Inc. ("Peerless") moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all other claims against it. For the reasons set forth below, the motion is denied.

**BACKGROUND**

This action was commenced by plaintiffs Thomas Simonovich and his wife Barbara Simonovich to recover for personal injuries allegedly caused by Mr. Simonovich's exposure to asbestos-containing cement insulation. Mr. Simonovich worked as a union asbestos insulator from 1957 through 1988 at various construction sites throughout New York City including powerhouses, schools, and hospitals. As such he insulated piping and equipment, including boilers. He was deposed over six days on March 10-12, 15, and 22-23, 2010 and his deposition transcripts are submitted as defendant's exhibit B ("Deposition"). Mr. Simonovich testified that he insulated Peerless boilers and that this process created asbestos-containing dust to which he was exposed.

Peerless filed this motion for summary judgment on the ground that it never manufactured, sold, or supplied boilers as described by Mr. Simonovich in his deposition. In opposition, plaintiffs contend that Mr. Simonovich unequivocally identified Peerless boilers as a source of his asbestos

exposure and described the Peerless boilers on which he worked in such specific detail that defendant clearly has failed to *prima facie* demonstrate that there are no material issues of fact to warrant summary judgment in its favor.

### 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, e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR § 3212[b].

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, 462 [1st Dept 1995]. Where the facts 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].

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 defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994]. It is sufficient for plaintiff "to show facts and conditions from which defendant's liability may be reasonably inferred." *Reid, supra*, 212 AD2d 462, 463 [1st Dept 1995].

Mr. Simonovich testified that the smallest boilers he worked on were ten feet high by ten feet wide, but that he also encountered larger sizes of Peerless boilers as well (Deposition pp. 448-49):

Q: Now just focus on Peerless boilers in a general sense. Do you recall the sizes of any of the Peerless boilers you encountered?

A: They were smaller than some of the other boilers.

- Q: When you say smaller, can you give me the range of size?
- A: Yeah. Maybe 10-foot by 10-foot around.
- Q: And that's the smallest?
- A: The smallest I have encountered.
- Q: Do you recall, were there any other sizes you encountered?
- A: Yeah. They made a bigger size too. In the apartment houses, they were the smaller types, if they were there.

Defendant contends that it is entitled to summary judgment because it claims never to have manufactured or sold boilers that match Mr. Simonovich's description. In support, defendant submits the affidavit of Peerless Vice President Stanley Bloom, sworn to November 10, 2010. (Defendant's Exhibit C). Mr. Bloom attests in conclusory fashion that Peerless never sold or supplied a boiler that was taller than six feet. However, defendant provided no documentary evidence in support of Mr. Bloom's assertions. Notwithstanding, the fact that Mr. Simonovich testified that the Peerless boilers were "maybe" ten feet tall does not automatically compel summary judgment in defendant's favor. *See Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 [1st Dept 1996]; *see also Horn v A.W. Chesterton*, Index. No. 190281/09 [Sup. Ct. New York Co. Oct. 27, 2010]. Even if Mr. Simonovich's recollection of the sizes of the boilers with which he worked is not entirely consistent with units manufactured by Peerless, "such a discrepancy raises, at most, an issue of credibility which must be resolved at trial." *Horn, supra*, p. 3.

Importantly, Mr. Simonovich described other aspects of the Peerless boilers in great detail (Deposition pp. 453-55):

- Q: How would you go about insulating a Peerless boiler?
- A: Put asbestos block upon the boiler, be fastened on with wires and pins, then it would be covered with chicken wire, and then two coats of asbestos cement.

\* \* \* \*

- Q: Okay. As you sit here today, do you recall any distinguishing marks on a

Peerless boiler that you came into contact with?

A: Distinguishing, other than the name?

Q: Any logos, any writing, any characteristics that would distinguish it from, say, another boiler.

A: Just a nameplate.

Q: Where was the nameplate located?

A: Usually on the front, the head of the boiler.

\* \* \* \*

Q: The metal plate, do you know what it was made of?

A: Well, the metal plate was very flexible. It had to be flexible steel or aluminum. It wasn't a hard, hard cover.

Q: Okay. The wording, do you know if that was in script, block, print?

A: That was in wording but on a plaque.

Q: Do you know what the actual lettering --

A: Peerless.

Q: Was Peerless spelled out in a block type font, a script, a print?

A: In a block type.

Mr. Simonovich also described the boilers' color and fuel source, and testified in detail with regard to the application of the asbestos insulation. Significantly, defendant does not dispute the accuracy of any of this line of testimony or the fact that it supplied asbestos-containing insulating cement for use on its boilers. Plaintiffs have therefore presented genuine issues of fact regarding Mr. Simonovich's exposure and as such the issue of liability should be resolved at trial. *Reid, supra*, 212 AD2d at 463.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is denied

DATED: March 1, 2011

**FILED**

**MAR 04 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

  
SHERRY KLEIN HEITLER  
J.S.C.