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

PRESENT: HON. SHERRY KLEIN HEITLER **PART** 30

Index Number : 190419/2009
BAXLEY, JAMES H.
vs
ANCHOR PACKING
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. 190419/09
MOTION DATE _____
MOTION SEQ. NO. 001
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 in accordance with the memorandum decision dated 2-28-11.

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

FILED
MAR 04 2011
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2-28-11

HON. SHERRY KLEIN HEITLER J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

----------X

JAMES H. BAXLEY,

Plaintiff,

-against-

ANCHOR PACKING CO., et al.,

Defendants.

----------X

Index No. 190419/09
Motion Seq. 001

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.:

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 plaintiff James H. Baxley to recover for personal injuries allegedly caused by his exposure to asbestos-containing products. Specifically, plaintiff claims that he was exposed to asbestos while employed as a boiler plant operator at Fort Benning in Georgia from 1964 through 1991. Plaintiff was deposed on April 15, 2010 and the relevant portions of his deposition transcript are submitted as defendant's exhibit D ("Deposition"). Mr. Baxley testified that he worked throughout Fort Benning and serviced approximately three hundred to four hundred boilers there. Specifically, he testified that among the ways he was exposed to asbestos was from working on, repairing, and maintaining asbestos insulated Peerless boilers.

On this motion for summary judgment, defendant argues that plaintiff had no specific recollection of any work he would have performed on a Peerless boiler at Fort Benning, and that

plaintiff's counsel improperly posed leading questions to plaintiff at his deposition. In opposition, plaintiff contends that defendant has not made a *prima facie* showing of entitlement to summary judgment, and, in any event, plaintiff's deposition testimony raises issues of fact as to Peerless' liability which precludes summary judgment

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].

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. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *see also Reid v Georgia Pacific Corp.*, 212 AD2d 462, 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].

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 the 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]. Mere boilerplate and conclusory allegations will not suffice. *Cawein, supra*, 203 AD2d at 105.

Defendant contends that plaintiff does not recall any specific work he would have performed

on Peerless boilers. At the deposition, plaintiff's counsel elicited testimony from plaintiff in which he alleged he was exposed to asbestos from Peerless boilers. Plaintiff was then cross-examined by counsel for Peerless, who asked if he could specifically recall what work he would have performed on Peerless boilers (Deposition p. 222):

> Q: Can you tell me as you sit here today any specific recollection you have of work performed on a Peerless boiler at the Fort Benning site?
>
> A: No, sir, I can't.
>
> Q: With that testimony in mind that you can't tell me specifically what you would have done, can you, as you sit here today, can you testify that you believe you were exposed to asbestos from a Peerless boiler at the Fort Benning site?
>
> A: I couldn't say.

Defendant argues that plaintiff's inability to testify as to what work he would have performed on Peerless boilers amounts to an admission that he could not testify that he was exposed to asbestos from same.

In opposition, plaintiff argues that defendant failed to demonstrate a *prima facie* entitlement to summary judgment because defendant did not "submit any statement from a person with knowledge about Peerless equipment, about the presence of Peerless equipment at the sites where plaintiff was exposed to asbestos or about any matter pertaining to Peerless." (Plaintiff's Affirmation in Opposition, dated December 9, 2010, p. 2). While it is true that defendant's motion is supported by an attorney's affirmation, it also includes several exhibits, one of which is a transcript of plaintiff's deposition. This is sufficient support for the motion. *See Alvarez v Prospect Hospital*, 68 NY2d 320, 325 [1986] ("[t]he fact that defendant's supporting proof was placed before the court by way of an attorney's affirmation annexing the deposition testimony and other proof, rather than affidavits of fact on personal knowledge, is not fatal to the motion."); *see also*

Zuckerman, supra, 49 NY2d at 563 *quoting* CPLR § 3212(b) ("[t]he affidavit or affirmation of an attorney, even if he has no personal knowledge of the fact may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form,' e.g. documents, transcripts.").

Notwithstanding, plaintiff's deposition testimony raises triable issues of fact sufficient to defeat defendant's motion. Specifically, plaintiff testified that he worked on hundreds of boilers throughout his career at Fort Benning, some of which were manufactured by Peerless (Deposition pp. 208-211)[1]:

Q: All right. Can you tell us the brand names or manufacturers' names of the boilers that you worked on?

MR. CHETTA: Objection. Asked and answered, twice.

A: You got Peerless, B and W, Kewanee, Burnham. There's more than that, but I can't think. I've got it right out of my head. There's more. I'm going to have to - -

* * * *

Q: All right. You said that one of the brands, another of the brands of boilers at Fort Benning was Peerless. Did you work on, repair, and maintain any Peerless boilers at Fort Benning?

A: Yes.

MR. CORBIN: Objection.

Q: Did that work cause you to be exposed to asbestos?

A: Yes.

MR. CORBIN: Objection.

Q: Did you work on the fire boxes of those boilers?

A: Yes.

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[1] Defendant argues that plaintiff's counsel improperly led plaintiff when he testified regarding his work on Peerless boilers at Fort Benning. While the use of leading questions at trial is a matter of discretion for the court, they are legitimately employed to facilitate depositions where opposing counsel has the opportunity to object as to form. *See* 6 Weinstein-Korn-Miller, NY Civ Prac, par 3115.03.

MR. CORBIN: Objection

Q: Did you install or remove the insulation, the asbestos insulation on Peerless boilers?

MR. CORBIN: Objection

A: Yes.

Defendant contends that Mr. Baxley's statements regarding his alleged exposure from Peerless boilers were repudiated by his later testimony on cross-examination. *See* p. 3, *supra*. However, it is unclear whether Mr. Baxley's statements on cross-examination amounted to a complete repudiation of his prior testimony or a simple admission that he could not recall any specific incidents of exposure. Indeed, it was clear from plaintiff's deposition that he was responsible for maintaining a great many boilers at Fort Benning (Deposition p. 213):

Q: Now, can you tell me a specific location at the Fort Benning site where you recall working with or around a Peerless boiler?

A: I couldn't, I couldn't for the life of me pinpoint any one boiler. Like I said, there's up to 300 boilers on that post out there, and Central Heating Section was responsible for maintaining all of them

To the extent there are discrepancies contained in the Deposition which reflect on Mr. Baxley's credibility, such issues go only to the weight and not the admissibility of Mr. Baxley's testimony. *See Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 [1st Dept 1996]. Plaintiff has therefore raised triable issues of fact regarding his exposure.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is denied

DATED: February 28, 2011

SHERRY KLEIN HEITLER
J.S.C.