

Palαιο v A.O. Smith Water Products

2012 NY Slip Op 30122(U)

January 13, 2012

Sup Ct, NY County

Docket Number: 190068/10

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

PALAI0
-v-
A.O. SMITH WATER PRODUCTS.
(GARDNER DENVER)

INDEX NO. 190068/10

MOTION DATE _____

MOTION SEQ. NO. 002

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the
memorandum decision dated 1.13.12.

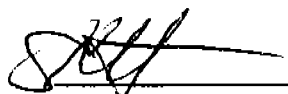
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JAN 18 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1.13.12

 _____, J.S.C.

HON. SHERRY KLEIN HEITLER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

----- X
ANNA PALAIO, as Executrix of the Estate of
DOMINICK PALAIO, and ANNA PALAIO, Individually

Index No. 190068/10
Motion Seq. 002

Plaintiffs,

DECISION AND ORDER

-against-

FILED

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

JAN 18 2012

Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

----- X

SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant Gardner Denver, Inc. ("Gardner Denver") moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all cross-claims against it. For the reasons set forth below, defendant's motion is granted.

BACKGROUND

This action was commenced by Dominick Palaio, now deceased, and his wife Anna Palaio, to recover for personal injuries allegedly caused by Mr. Palaio's occupational exposure to asbestos-containing products at the Brooklyn Navy Yard, among other locations. Relevant to this motion is plaintiffs' claim that in 1943 and 1944 Mr. Palaio was exposed to asbestos insulation that had been installed on piping and equipment aboard the USS Bon Homme Richard, the USS Bennington, and the USS Missouri, as well as Mr. Palaio's testimony that he was exposed to asbestos powder that had been installed on pumps aboard the USS Bon Homme Richard in his presence. Mr. Palaio was deposed in connection with this action on March 18, 2010 and March 22, 2010, but passed away before his deposition could be completed.

It is undisputed that Mr. Palaio did not identify any Gardner Denver products as a source of his exposure, and it is on this ground that the defendant filed the instant motion for summary judgment. Plaintiffs in opposition submit naval records which are purported to establish that Gardner Denver pumps were installed aboard the USS Bon Homme Richard and the USS Bennington during the specific years that Mr. Palaio worked on them. Plaintiffs allege that these records, combined with Mr. Palaio's deposition testimony and the deposition testimony of non-party Richard Nesbitt, raise a triable issue of fact sufficient to defeat defendant's motion.

DISCUSSION

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, and must tender sufficient evidence to demonstrate the absence of any material issue of fact. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); CPLR § 3212(b). In asbestos-related litigation, once the movant has made a *prima facie* showing of its entitlement to summary judgment, the plaintiff must then demonstrate that there was exposure to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this respect, the plaintiff's burden is to "show facts and conditions from which defendant's liability may be reasonably inferred." *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995).

In this case, Gardner Denver has *prima facie* shown that plaintiffs have failed to name its products as a source of Mr. Palaio's exposure. In addition, the only documentary evidence submitted by plaintiffs to support their position on this motion, to wit, the ships' records from the United States Naval Archive, is not sufficient evidence from which Gardner Denver's liability may be reasonably inferred, *see Reid, supra*, and plaintiffs have failed to meet their burden.

Plaintiffs' exhibit C is a copy of a letter dated October 22, 1942 addressed to Gardner Denver, which has as its subject "CV31-60-Pumps, F. W. Booster, Request for Quotation", and is submitted by plaintiffs to show that Gardner Denver pumps were installed aboard the USS Bon Homme Richard. However, that document is merely a "request for quotation." Without further clarification from plaintiffs, one must assume that denotes a standard business procedure whereby suppliers are invited to bid on specific products or services. That document neither shows whether Gardner Denver actually shipped any of its pumps to the Brooklyn Navy Yard nor does it show whether the Navy installed them on the USS Bon Homme Richard while Mr. Palaio was there so as to cause him to be exposed to asbestos.

With respect to the USS Bennington, plaintiffs rely on naval records (plaintiffs' exhibit D) which purport to show that two Gardner Denver diesel driven fire pumps were installed aboard. While these records do suggest that Gardner-Denver fire pumps were in fact installed on that ship, Mr. Palaio's testimony with regard thereto was cut off because of his illness and he was never able to testify about his work about the USS Bennington. Without more, Mr. Palaio's allegations concerning his exposure to asbestos aboard the USS Bennington remain speculative. *See Diel v Flintkote Co.*, 204 AD2d 53 (1st Dept 1994).

Plaintiffs also submit the Nov. 18, 2004 deposition transcript of Mr. Robert W. Nesbiet (plaintiffs' exhibit E), who testified in his own NYCAL case that the pumps aboard the USS Bon Homme Richard were insulated with asbestos. While Ms. Nesbiet's testimony shows that asbestos may have indeed been used to insulate pumps aboard the USS Bon Homme Richard during the relevant time period, critical to this motion is that he failed to identify Gardner Denver pumps as the source of such exposure. This testimony simply does not show that Gardner Denver pumps

were actually installed on that ship.

Accordingly, it is hereby

ORDERED that Gardner Denver Inc.'s motion for summary judgment is granted, 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.

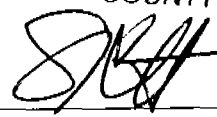
This constitutes the decision and order of the Court.

FILED

JAN 18 2012

ENTER:

NEW YORK
COUNTY CLERK'S OFFICE



DATED: 1-13-12

SHERRY KLEIN HEITLER
J.S.C.