

Deer v Air & Liquid Sys. Corp.
2012 NY Slip Op 32876(U)
November 30, 2012
Supreme Court, New York County
Docket Number: 190261/11
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

Index Number : 190261/2011
DEER, MAXWELL

INDEX NO. 190261/11

vs
AIR & LIQUID SYSTEMS
Sequence Number : 003
SUMMARY JUDGMENT

MOTION DATE _____

MOTION SEQ. NO. 003

(CRANE)

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 11-30-12

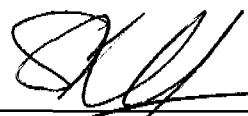
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

DEC - 5 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11-30-12



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
MAXWELL DEER AND CAROLYN DEER,

Plaintiffs,

-against-

AIR & LIQUID SYSTEMS CORPORATION, et al.,

Defendants.
----- X

Index No. 190261/11
Motion Seq. 003

DECISION & ORDER

SHERRY KLEIN HEITLER, J.:

In this asbestos-related personal injury action, defendant Crane Co. ("Crane") moves for summary judgment pursuant to CPLR 3212. For the reasons set forth below, the motion is denied.

BACKGROUND

Plaintiff Maxwell Deer was diagnosed with lung cancer in March of 2011. In July of 2011 Mr. Deer and his wife Carolyn Deer filed this action to recover for personal injuries allegedly caused by Mr. Deer's exposure to asbestos. Mr. Deer was deposed on September 13-14, 2011 and on October 17-18, 2011. Copies of his deposition transcripts are submitted as defendant's exhibit C ("Deposition").

Relevant to this motion is Mr. Deer's testimony that he was exposed to asbestos from 1946 to 1948 while serving in the United States Navy ("USN") as a seaman, fireman, and boiler tender. During this time period he served aboard the USS Rochester, USS Toledo, USS Columbus, and USS Iowa. Among other things, Mr. Deer testified that he was exposed to asbestos aboard these ships while maintaining and repairing, or being in the vicinity of others who worked on, shipboard pumps and valves. Crane argues that although Mr. Deer initially claimed to have replaced gaskets and packing on Crane valves while serving as a USN fireman and boilerman, he later testified that could not say specifically when or where he ever worked on or was present when others worked on Crane valves.

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NEW YORK
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Crane submits that Mr. Deer's identification of its valves in this regard is merely speculative and as such is insufficient to form a basis upon which liability can be attributed to it. In opposition plaintiffs submit official records which they allege confirm the presence of Crane valves aboard all four ships during the time of Mr. Deer's USN service. Plaintiffs contend that these records combined with Mr. Deer's deposition testimony raise triable issues of fact as to Crane's liability sufficient to preclude summary judgement.

DISCUSSION

To make a *prima facie* case, a party moving for summary judgment must 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, if a defendant has made a prima facie showing of entitlement to summary judgment, the plaintiff must then demonstrate actual exposure to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). Although a plaintiff is not required to show the precise cause of his damages, he is required to show facts and conditions from which a defendant's liability may be reasonably inferred. *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995).

Here, plaintiffs submit records pertaining to the USS Columbus (Plaintiffs' Exhibit B), USS Iowa (Plaintiffs' Exhibit C), USS Rochester (Plaintiffs' Exhibit D), and USS Toledo (Plaintiffs' Exhibit E) to show that Crane valves were present aboard these ships. Crane argues that these documents are irrelevant because they pre-date Mr. Deer's naval career, do not reference asbestos, and while they show that Crane valves were present on these ships, they do not show that Mr. Deer was exposed to asbestos.

Mr. Deer also described in detail how he believed he was exposed to asbestos from work performed on the valves aboard these ships. (See Deposition pp. 293-295, 400-404). At issue is

whether he sufficiently identified valves manufactured by Crane as a source of such exposure. In this regard, Mr. Deer testified on direct examination, in relevant part, as follows (Deposition pp. 58, 59, 89, 95-96, 109):

Q. When you were assigned as a fireman, do you believe that you personally worked with any products or materials that you believe contained asbestos?

A. Yes.

* * * *

Q. As a seaman, do you know the brand name or manufacturer of the valves?

A. Crane is one that comes to mind. Worthington, Ingersoll-Rand, Rockwell. That's it.

* * * *

Q. Can you tell me the brand name or manufacturer of any other products, materials or equipment that any of these people were working around you in your vicinity?

A. Okay. It depends what they was working on. If they was working on valves, there would be a Crane, Rockwell, a Yarway. Those three are the ones I can think of right now.

* * * *

Q. Do you recall the brand name or manufacturer of any of the valves that you were working on?

A. Rockwell, Yarway, Crane, Fairbanks. That's it.

* * * *

Q. You talked about performing some general maintenance and you mentioned valves. As you're sitting here right now, can you specifically recall the brand name or manufacturer of the valves that you worked on when the ship was at Long Beach?

A. Yeah. And Crane, Crane was one. Fairbanks was another. Yarway was another. Rockwell was another one.

Crane argues that on cross-examination Mr. Deer demonstrated he had no actual knowledge that he was exposed to asbestos from Crane valves (Deposition pp. 300-301, objections omitted):

Q. Okay. During day one of your testimony I'll represent to you that you mentioned or made reference to if other people were working on valves you may have been exposed to asbestos, and I'm paraphrasing, and you mentioned Crane, Rockwell and another name. As you sit here today, do you know whether or not you were ever in proximity to any Crane valve that was being worked upon on the Rochester? . . .

A. I cannot say. I was top side sailing. There's very few valves top side

Q. So the answer to my question is, you can't tell me whether you ever worked in the proximity of someone else working on any Crane valves aboard the USS Rochester? . . .

A. I cannot say that. All I can tell you is that I could have been assigned to an area where they was working on a Crane valve and I didn't know it was a Crane valve

Similar testimony was elicited from Mr. Deer with respect to the other three ships on which he served. (See Deposition pp. 302-303, 305-306).

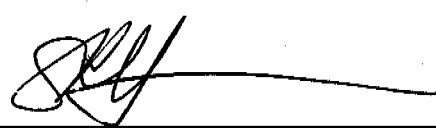
I find that the documentary evidence and Mr. Deer's testimony together raise material questions that should be determined by a jury. The documents permit a reasonable inference that Crane valves had been installed on the relevant ships during the relevant time period. Moreover, Mr. Deer's testimony on cross-examination does not render plaintiffs' claims speculative, but rather in conflict with his assertions on direct. In this regard, it is well settled that in the face of conflicting testimony the court should not access the witness' credibility. *See Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996). Ultimately, the court cannot ignore Mr. Deer's testimony that he was exposed to asbestos aboard ship from Crane valves, which under these circumstances, and in light of the record, is sufficient to defeat summary judgment.

Accordingly, it is hereby

ORDERED that Crane Co.'s motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 11-30-12



SHERRY KLEIN HEITLER
J.S.C.