

<b>Moore v Asbeka Indus. of N.Y.</b>
2013 NY Slip Op 30135(U)
January 10, 2013
Supreme Court, New York County
Docket Number: 190144/09
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HEITLER  
Justice

PART 30

MOORE, ANGELA, ETAL.

INDEX NO. 190144/09

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

MOTION SEQ. NO. 05

MOTION CAL. NO. \_\_\_\_\_

- v -

ASBEKA INDUSTRIES OF  
NEW YORK, INC., ETAL

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 1.10.13

**FILED**  
JAN 14 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1.10.13

[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.

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

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

----- X  
ANGELA MOORE, Individually and as Executrix of the  
estate of JOHN F. MOORE,

Index No. 190144/09  
Motion Seq. 005

Plaintiff,

**DECISION AND ORDER**

-against-

ASBEKA INDUSTRIES OF NEW YORK, et al.,

Defendants.

**FILED**

JAN 14 2013

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**SHERRY KLEIN HEITLER, J.:**

Defendant Milton Roy Company ("Milton Roy") moves **NEW YORK** CPLR 3212 for summary **COUNTY CLERK'S OFFICE** judgment dismissing the complaint and all cross-claims asserted against it. For the reasons set forth below, the motion is denied.

This action was commenced by plaintiffs' decedent John Moore and his wife Angela Moore to recover for personal injuries caused by Mr. Moore's alleged exposure to asbestos-containing products. Mr. Moore was deposed on July 16, 2009 and July 17, 2009 and on September 17, 2009.<sup>1</sup> He testified that he began working for Consolidated Edison ("Con Ed") as a general utility worker in or about 1966 at Con Ed's East River powerhouse. Over the next few years, Mr. Moore continued to work exclusively at the East River powerhouse as a hot well pump operator and then as a mechanic. After completing welding school in the early 1970's, Mr. Moore worked as a welder at various Con Ed powerhouses throughout New York City. He retired from Con Ed in 1997.

Relevant to this motion is Mr. Moore's testimony that he worked with and around Milton Roy pumps at Con Ed's East River powerhouse and that he was exposed to asbestos from external

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<sup>1</sup> Copies of Mr. Moore's deposition transcripts are submitted as defendant's exhibits D and E.

insulation and gaskets used in conjunction with such products (defendant's exhibit E, pp. 18-20):

Q Do you believe you were exposed to asbestos while working as an Operating Mechanic B at the East River Plant?

A Yes, I was.

Q How were you exposed?

A The equipment that I operated on, when it was running, would be vibrating. You had a steam generator that moved the pump and pumped water. The steam turbine had insulation on it. It would be flaking off and be in the air or there would be pipes that the insulation above you, it would vibrate from the lines. And it would come down like snow and stuff like that. And then when the machinery wasn't on I had to do minor maintenance on some of the valves where I would be changing gaskets if they were leaking or if the valve was leaking steam out through the top of it I would replace some of the packing. . . .

Q How were you exposed to asbestos while working around or on pumps as an Operating Mechanic B?

A Well, some of my pumps would be on. And I'd have three pumps at this one location. Maybe one of them would be off. And there might be mechanics there pulling a pump for repair. And the debris and stuff that they would take off to get at the pump and the gaskets would be all over the air, you know. They'd use power tools and stuff. I was exposed that way from the pumps. . . .

Q Can you estimate how many pumps were present at the East River plant?

A Oh, God, hundreds.

Q Do you recall the brand names or manufacturers of any of the pumps that you worked around at the East River plant?

A Crane, Goulds, Milton Roy. That's about it I guess.

Mr. Moore also testified that he was exposed to asbestos as a bystander from work done in his presence on Milton Roy products at Con Ed's Kent Avenue facility (defendant's exhibit D, pp. 121, 223-24):

Q Do you recall the brand name, trade name or manufacturer's name of the valves that you saw the others working on at Kent Avenue? . . .

A . . . Crane, Leslie, Milton Roy.

\* \* \* \*

Q What did you observe these workers doing with the Milton Roy valves?

A The same demolition work that I was doing.

Q Do you recall what type of valves these were?

A Globe valves, gate valves, check valves . . . .

Q What types of equipment were these Milton Roy valves used on?

A Pumps, turbines and boilers, and auxiliary equipment throughout the plants.

Q Have you now told me all the ways you believe you were exposed to asbestos from Milton Roy valves . . . .

Q At Kent Avenue in the '70s?

A I believe so.

The defendant seeks summary judgment on the ground that it did not manufacture the pumps and valves Mr. Moore described as having worked with during his career. The defendant argues further that even if Mr. Moore had worked with its equipment, it had no duty to warn of the hazards associated with asbestos-containing gaskets, packing, and insulation used in conjunction therewith.

In support of its application, the defendant submits the affidavit of corporate representative James B. Carling who began working for Milton Roy as a technical sales correspondent in 1980.<sup>2</sup> He currently serves as a product manager for Milton Roy, in which capacity he maintains sales invoices, product certifications, and literature for products manufactured by the company.

Mr. Carling concedes that Milton Roy manufactured and supplied 288 pumps and 63 valves to the various Con Ed powerhouses where Mr. Moore worked. He contends that only four of such pumps contained asbestos-containing internal packing. (Defendant's Exhibit D, ¶ 7, 9). He states that the remainder of such equipment did not include asbestos-containing gaskets, packing, or insulation, and that Milton Roy did not recommend or specify that end-users use any such asbestos-containing materials with its products. (*Id.* at 8-10). He further asserts that all of the valves and pumps supplied by Milton Roy to Con Edison contained threaded connections, and did not require

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<sup>2</sup> Mr. Carling's affidavit was sworn to on August 14, 2012. A copy is attached as defendant's exhibit D.

flange gaskets, and that any such valves and pumps did not require external insulation because they circulated fluids at ambient temperatures. (*Id.*)

To obtain summary judgment, the movant must establish a cause of action or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). A conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden. *JMD Holding Corp. v Cong. Fin. Corp.*, 4 NY3d 373, 384-85 (2005). The failure to make such a prima facie showing requires a denial of the motion regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). Here, while Mr. Carling alludes to the existence of sales invoices, product manuals, and brochures as his source of information concerning the Milton Roy valves and pumps at issue, no proof or copies of same to corroborate such statements are submitted. Mr. Carling's assertions are therefore conclusory and thus insufficient to establish the defendant's prima facie entitlement to summary judgment. *Zuckerman, supra*; see also *Coleman v Maclas*, 61 AD3d 569, 569 (1st Dept 2009); *Wen Ying Ji v Rochdale Dev. Corp.*, 34 AD3d 253, 254 (1st Dept 2006).

**FILED**  
JAN 14 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

Accordingly, it is hereby

ORDERED that Milton Roy Company's motion for summary judgment is denied.

This constitutes the decision and order of the court:

DATED: 1-10-13

SHERRY KLEIN HEITLER  
J.S.C.