

Lowe v AERCO Intl., Inc.
2013 NY Slip Op 30391(U)
February 20, 2013
Supreme Court, New York County
Docket Number: 110194/04
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 : 110194/2004

LOWE, JEANNE

VS.

A.O. SMITH WATER PRODUCTS

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

CRANE

INDEX NO.

110194/04

MOTION DATE

MOTION SEQ. NO.

003

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 2-20-13.

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

FILED

FEB 26 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2-20-13



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
JEANNE LOWE, as Executrix for the Estate of
ROBERT A. LOWE, and JEANNE LOWE, Individually

Index No. 110194/04
Motion Seq. 003

Plaintiffs,

DECISION & ORDER

-against-

AERCO INTERNATIONAL, INC. et al.

FILED

Defendants.

FEB 26 2013

-----X
SHERRY KLEIN HEITLER, J.:

NEW YORK

COUNTY CLERK'S OFFICE

In or about July 13, 2004, plaintiffs commenced this asbestos personal injury action against defendant Crane Co. ("Crane"), among others, to recover for injuries allegedly caused by plaintiffs' decedent Robert Lowe's exposure to asbestos. Mr. Lowe was diagnosed with mesothelioma in or about July 2002. He died on October 19, 2002. He was not deposed prior to his death, but his co-worker, Daniel Young, was deposed on April 24, 2012.¹

Mr. Young testified that for about a year in the early 1980's he worked as a boiler man/maintenance man at St. Francis Hospital in Olean, New York under Mr. Lowe, who was his maintenance supervisor. Plaintiffs allege that Mr. Lowe sustained bystander exposure to asbestos in his capacity as such maintenance supervisor while his workmen removed insulation from boilers, valves, pipes and fittings or applied insulation thereto, replaced gaskets on valves, and replaced stair and floor tiles in other parts of the facility. Mr. Young also testified that some of the valves in the St. Francis Hospital boiler room were Crane valves. He testified that Mr. Lowe sometimes would work right alongside his men.

Crane moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims against it on the ground that Mr. Young's testimony does not specifically identify a

¹ Mr. Young's deposition transcript is submitted as defendant's exhibit C ("Deposition").

Crane product as a source of Mr. Lowe's exposure. In this regard, Crane argues that Mr. Young had no actual knowledge whether the valves on which he said he worked were Crane valves, as opposed to Yarway or Gates valves, or that he worked on Crane valves in Mr. Lowe's presence (Deposition, pp 117-119, 146, objections omitted):

Q. Now, were the valves you're replacing, were they Crane and Yarway?

A. I couldn't say for sure what ones they were.

Q. I'm sorry, when you say you can't say for sure, what can't you say for sure? . . .

[A] . . . If it was a Crane or Yarway at the time I was doing it. There was all kinds of valves up there, I'm assuming. It could have been a Gates. . . .

Q. . . . And do you know how many valves you replaced during the one year that Mr. Lowe also worked there with you?

A. I have no clue.

Q. And would you agree with me that it could have been one or two?

A. Correct.

Q. And is it true that as you sit here today you don't have a clear recollection during that one-year period that Mr. Lowe was working there that the valve that you replaced or the valves that you replaced were actually Crane valves, correct? . . .

[A] . . . Correct

Q. And during this one-year period when Mr. Lowe was there and you removed the packing, do you know if they were Crane valves?

A. I can't say for sure, no.

Q. Could they have been Yarway valves?

A. It could have been Yarway or any other valve, correct.

* * * *

Q. In the one-year period Mr. Lowe was there, do you specifically remember removing insulation from a valve that you believe to be manufactured by Crane Company?

A. I couldn't say for sure.

Q. And do you have a specific recollection of at any point removing insulation from any valve and Mr. Lowe being there?

[A] . . . I can't say for sure.

Plaintiffs oppose on the grounds that Mr. Lowe would likely have been exposed to asbestos from workers creating dust when they disturbed asbestos-containing insulation on

valves in his presence, and that Crane was one of those valves (Deposition, pp.40-41, 43-44, 153-154):

Q. When you mixed up that product was Bob around?

A. He was from time to time, yes.

Q. Okay. When you mixed up that product would it create any dust in the air?

A. Yes.

Q. Were you able to see that dust?

A. Yes.

Q. Do you believe that Bob ever inhaled any of that dust that was created from mixing up that product?

A. Oh yes.

Q. ...Any other way that you believe that the plaintiff, Mr. Lowe, was exposed to any asbestos while in the boiler room at St. Francis Hospital?

A. Well, in the boiler room, no. It had to be the insulation from the pipes or the boilers or hot water tanks, stuff around the valves.

* * * *

Q. How do you believe that Mr. Lowe was exposed to any asbestos from any work that was done on valves in the boiler room at St. Francis Hospital?

A. Once again, a lot of these valves were overhead, and if we're working on them and he's down below then and powder is going down on him. . . .

Q. While you were working on any of these valves, where was Bob situated? Was he in the boiler room?

A. Sometimes, yes, he was. Yes.

Q. Do you remember the brand name, trade name, manufacturer name for any of the valves that were present in the St. Francis Hospital boiler room?

A. Some of the valves were Crane, Yarway. I really can't remember anymore. We used to have steam traps, too, that we used to have to repair.

* * * *

Q. Now, you testified that you worked on valves during the year that Mr. Lowe was present at St. Francis Hospital. Correct?

A. Correct.

Q. And you testified at length about scraping of flange gaskets, the removing and reinsulation of packing and the insulation -

A. Correct.

- Q. – on the external part of these valves; is that fair to say?
- A. Correct.
- Q. Was Mr. Lowe present when this work was being done?
- A.. At times, yes.
- Q. And do you believe he would have been exposed to asbestos from this work?
- A. I believe he could have been....
- Q. And you stated earlier that the manufacturers that you associate with these valves are Crane Co and Yarway; is that fair to say?
- A. Crane, yes, and Yarway, yes.
- Q. Are there any others that come to mind or is that it?
- A. Gates.

Summary judgement is a drastic remedy that must not be granted if there is any doubt about the existence of a triable issue of fact. *Tronlone v Lac d'Aminante du Quebec, Ltee*, 297 AD2d 528, 528-529 (1st Dept 1995). Once the moving defendant has made a prima facie showing of entitlement to judgment as a matter of law, the plaintiff must then demonstrate that there was actual exposure to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In asbestos-related litigation, it is sufficient for the plaintiff to show facts and conditions from which the defendant's liability may be reasonably inferred. *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995). All reasonable inferences should be resolved in the plaintiff's favor. *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dept 1990).

For purposes of this motion, the record is sufficient to raise a material issue of fact for the jury whether the decedent was exposed to asbestos from Crane valves. That Mr. Young's testimony may contain discrepancies goes only to the weight of such testimony and not to its admissibility. *Dollas v W.R. Grace and Co.*, 225 AD2d 319, 325 (1st Dept 1996) ("The assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact") Further, while Mr. Young could not identify specific instances in which he

worked on Crane valves rather than another brand, implicit in his primary identification of Crane as one of the three brands of valves he encountered in the St. Francis Hospital boiler room during the year he worked under Mr. Lowe's supervision is that such valves were interchangeably maintained at the work site. Mr. Young testified that Mr. Lowe was exposed to asbestos dust when the insulation on such valves was necessarily disturbed by the workmen. In such circumstances, "[t]he Plaintiff is not required to show the precise causes of his damages, but only to show facts and conditions from which defendant's liability may be reasonably inferred" *Reid v Georgia Pacific Corp.*, *supra*, 212 AD2d at 463. In this regard, therefore, defendant's motion is denied.

Crane also seeks summary judgment on the ground that it is not liable for asbestos-containing products that it did not manufacture, supply or specify for use with its products, or place in the stream of commerce. Plaintiffs assert that Crane knew or should have known that asbestos-containing insulation would be integrated with such products for their intended use and that defendant had a duty to warn against same.

This court addressed near-identical issues in *Sawyer v A.C. & S., Inc., et al.*, 2011 NY Slip Op 51612U; 32 Misc.3d 1237A (Sup. Ct., NY Co. June 24, 2011). In *Sawyer*, I held that Crane had an affirmative duty to warn consumers against the hazards associated with asbestos because the evidence demonstrated that Crane recommended the use of asbestos-containing products in conjunction with its valves.

As in *Sawyer*, the submissions on this motion show that Crane designed and supplied its pumps and valves to be used with asbestos-containing gaskets, packing, insulation, and cement. Crane's assertions that such products did not require asbestos-containing insulation to operate properly and that it did not specify the use of same on its products are therefore insufficient to shield it from suit. Accordingly, for the same reasons stated in *Sawyer*, *supra*, I find that Crane

[* 7]

had a duty to warn the decedent of the hazards associated with asbestos. *See Liriano v Hobart Corp.*, 92 NY2d 232, 237 (1998); *Berkowitz v A.C. & S., Inc.*, 288 AD2d 148, 149 (1st Dept 2001).

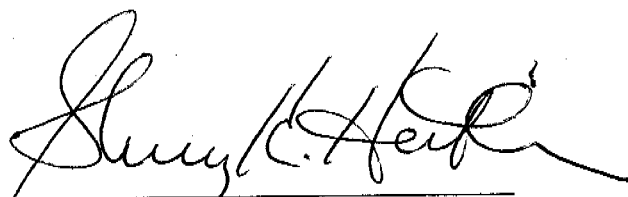
Accordingly, it is hereby

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

This constitutes the decision and order of the court.

DATED:

February 20, 2013


SHERRY KLEIN HEITLER
J.S.C.

FILED

FEB 26 2013

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