

Acevedo v A.P. Green Indus., Inc.
2013 NY Slip Op 30488(U)
March 8, 2013
Supreme Court, New York County
Docket Number: 116194/02
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 : 116194/2002
ACEVEDO, LUIS
vs.
A.P. GREEN INDUSTRIES
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 116194/02
MOTION DATE _____
MOTION SEQ. NO. 001

(L. ENNOX)

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 3-8-13.

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

FILED
MAR 11 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3-8-13


_____, 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
LUIS ACEVEDO and SUSAN ACEVEDO,

Plaintiffs,

- against -

A.P. GREEN INDUSTRIES, Inc., *et. al.*,

Defendants.

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

Index No. 116194/02
Motion Seq. 001

DECISION & ORDER

In this asbestos personal injury action, defendant Lennox Industries, Inc. ("Lennox") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it. Plaintiffs Luis Acevedo and Susan Acevedo oppose on the ground that there is an issue of fact whether Mr. Acevedo worked with asbestos-containing Lennox-brand furnaces sufficient to preclude summary judgment.

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. *See Tronlone v Lac d'Aminante du Quebec, Ltee*, 297 AD2d 528, 528-29 (1st Dept 2002). 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. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). 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). In asbestos-related litigation, should the moving defendant establish its *prima facie* 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 this regard, 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).

Mr. Acevedo was diagnosed with asbestosis on April 6, 2002 and with lung cancer on March 1, 2012. He was deposed in connection with this action on May 22, 2012.¹ Mr. Acevedo testified that he was exposed to asbestos from a myriad of products throughout his career as a gas line worker. Relevant to this motion is his testimony that he worked in and around boilers and the steam pipes associated therewith (Deposition pp. 54, 56):

Q You mentioned earlier that you did work around boilers. Am I correct that that would be during the time that you did the work that was related to buildings?

A Yes.

Q Do you believe that there was anything about the work that you did around boilers that caused you to be exposed to asbestos?

A Yes, I do.

Q How so?

A Well, I'd go to some of these buildings and they're pretty old boilers and they're actually falling apart, some of these boilers, and you have to keep your eye on some of these boilers to get to the gas pipes. You have to remove some of these items out of the way and some of it could be asbestos flying through the air. . . .

Q . . . – do you believe that there was anything else that caused you to be exposed to asbestos when you worked around the boilers or have you told me everything?

A Well, the boiler itself, I would think some of them were lined with asbestos on the inside and that could've been frail and dry.

¹ A copy of Mr. Acevedo's deposition transcript is submitted as defendant's exhibit 2 ("Deposition").

Mr. Acevedo identified the defendant as one of several brands of boilers that he worked around and testified that dried, asbestos-containing insulation flaked off such boilers into his vicinity (Deposition pp. 59-60):

Q With respect to the old boilers that were sitting there, do you know the brand name, trade or manufacturer name of the old boilers that were sitting there?

A I know some of them. American Standard, Burnham, Crown, Dunham, Lennox, Pacific, Superior, Weil-McLain. That's the ones I remember. . . .

Q . . . Did you ever see the asbestos that you believe was located on the inside of any of the old boilers?

A Yes, I have.

Q What did it look like?

A It was white and it's flaking off and it's dry.

Q What form did it take?

A Airborne. What do you mean form?

Q What form did it take? What shape did it take?

A Like a lining around -- around the boiler.

The defendant's position on this motion is that it began manufacturing boilers in the early 1990's, long after the time period as to which plaintiffs claim Mr. Acevedo was exposed to asbestos, and that such boilers never even contained asbestos components.²

However, Lennox manufactured a line of furnaces which were similar in appearance to boilers and which served the same general purpose as boilers, a fact which this court recognized in *Sadowski v A.O. Smith Water Products*, Index No. 190215/11 (Sup. Ct. NY Co. July 12, 2012, Heitler, J.). These Lennox furnaces integrated asbestos containing gaskets, rope, tape, cement, and board. (Plaintiffs' exhibit 4).

² See affidavit of Lennox's former Corporate Service Manager of Residential Heating Products William Drake, sworn to July 26, 2012, submitted as defendant's exhibit 3.

Similar to *Sadowski, supra*, Mr. Acevedo was never asked to differentiate between a furnace and a boiler, even though he used both the terms "boiler" and "furnace" when describing his alleged exposure (see Deposition p. 57). In light of same, as well as defendant's admission that it sold asbestos-containing furnaces during the relevant time period, there remains a material issue of fact whether Lennox furnaces contributed to plaintiffs' injuries.

Accordingly, it is hereby

ORDERED that Lennox Industries, Inc.'s motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED:

3-8-13



SHERRY KLEIN HEITLER
J.S.C.

FILED

MAR 11 2013

COUNTY CLERK'S OFFICE
NEW YORK