

Lindsay v Air & Liquid Sys. Corp.

2013 NY Slip Op 30706(U)

April 8, 2013

Sup Ct, New York County

Docket Number: 190074/12

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER

PART 30

Justice

William J. Lindsay

INDEX NO.

190074/12

MOTION DATE

- v -

A.D. Smith & Products

MOTION SEQ. NO.

003

MOTION CAL. NO.

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the memorandum decision dated 4.8.13

FILED

APR 09 2013

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4.8.13

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
WILLIAM LINDSAY and PATRICIA LINDSAY,

Index No. 190074/12
Motion Seq. 003

Plaintiff,

DECISION & ORDER

- against -

AIR & LIQUID SYSTEMS CORP., et. al.,

FILED

Defendant(s).

APR 09 2013

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

NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendant Kohler Co. ("Kohler") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that plaintiff William Lindsay did not sufficiently identify a Kohler product as a source of his asbestos exposure.

Mr. Lindsay worked as a union electrician from the early 1960's until 1978 when he became his union's business representative. In or about 2001 he was elected to the Suffolk County Legislature, and currently serves as that body's Presiding Officer.

Mr. Lindsay was diagnosed with mesothelioma on or about January 27, 2012, and, along with his wife Lindsay, commenced this action on or about February 10, 2012. Mr. Lindsay was deposed over the course of five days from March 26, 2012 to April 2, 2012. Copies of his deposition transcripts are submitted as defendant's exhibit B ("Deposition"). Relevant to this motion is Mr. Lindsay's testimony that he was exposed to asbestos containing products while working as an electrician. In this regard, Mr. Lindsay testified as follows (Deposition pp. 1072, 1165-66, 1187, 1189-90, objections omitted):

Q What were the brand names, trade names or manufacturers' names of the boilers that you wired up and disturbed the asbestos insulation on throughout your career?

...

A ... I remember Kohler boilers. I don't remember new installation, I remember a renovation job with Kohler boilers. I can't remember where but I do remember it. American Standard, A.O. Smith, Crane, Bryant, Foster Wheeler was the big, great big boilers. Slant/Fin, Weil-McLain, Utica, York Shipley was big ones again. Peerless. Did I say Bryant?

* * * *

Q Today you testified -- you identified Kohler as a manufacturer of boilers you saw asbestos workers applying asbestos to; do you recall that testimony?

MS. BURSHTYN: She wants to know if you remember testifying about asbestos workers putting insulation on Kohler boilers; do you recall?

A I don't. I think the Kohler boiler that I saw was an older one that we did some renovation work on.

Q You performed renovation work on a Kohler boiler?

A Not on the boiler itself but we were renovating a building where there was an old Kohler boiler

Q And do you think you were exposed to asbestos from a Kohler boiler during this renovation?

A Yes.

Q How?

A Again, the insulating material on the boiler became airborne, breathed it in. Breathed it in, breathed in the dust from the insulating material.

* * * *

Q I have one more question, I'm not sure whether it was answered. Mr. Lindsay, did you personally work on a Kohler boiler? ...

A ... Yes.

Q What work did you perform on the Kohler boiler?

A I made some modifications for the heating system.

Q Please describe these modifications, like what did you do?

A I can't.

Q You don't recall anything that you did to the Kohler boiler?

A More than 30 years ago.

Q Do you believe that you were exposed to asbestos from making modifications to the heating system?

A Yes.

Q How so?

A The insulating material was made of asbestos and in the course of our work we disturbed it, it became airborne, breathed it in.

* * * *

Q This insulating material that you said you disturbed, where was it?

A On the boiler.

Q Why would you need to touch the insulation that was on the boiler?

A If we were doing the electrical work in the boiler room.

Q But what about that electrical work would require that you touch insulation on the boiler. . . .

A . . . Running wiring by the boiler.

Q So, while you were running this wire, were you like bumping against the boiler?

A Yes.

The defendant contends that it is entitled to summary judgment because the plaintiff's testimony is contradictory and speculative. The defendant further argues that Mr. Lindsay never actually worked on or observed others working on a Kohler boiler.

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. *Tronlone v Lac d'Aminate du Quebec, Ltee*, 297 AD2d 528, 528-529 (1st Dept 2002). To overcome summary judgment in asbestos-related litigation, plaintiff need only 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).

The testimony in this case illustrates that even if Mr. Lindsay did not personally work on

the Kohler boiler at issue, there is an issue of fact whether he disturbed the insulation covering said boiler during the course of his own electrical work. See *Josephson v Crane Club, Inc.*, 264 AD2d 359, 360 (1st Dept 1999) (deposition testimony submitted in opposition to a summary judgment motion constitutes evidence in admissible form by someone with personal knowledge of the facts); *Reid, supra*, at 463 (plaintiff need only show that he was exposed to asbestos fibers to overcome summary judgment).


Moreover, to the extent the defendant challenges the plaintiff's credibility, this is an issue that, as a matter of law, requires resolution by the trier of fact. See *Ferrante v American Lung Assn*, 90 NY2d 623, 631 (1997); *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013); *Alvarez v NY City Hous. Auth.*, 295 AD2d 225, 226 (1st Dept 2002); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996).

Accordingly, it is hereby

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

This constitutes the decision and order of the court.

DATED: 4.8.13



SHERRY KLEIN HEITLER
J.S.C.

FILED

APR 09 2013

NEW YORK
COUNTY CLERK'S OFFICE