

DeRogatis v 3M Company

2013 NY Slip Op 30725(U)

April 4, 2013

Supreme Court, New York County

Docket Number: 190150/2011

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. SHERRY KLEIN HEITLER

PRESENT: _____
Justice

PART 30

Index Number : 190150/2011
DEROGATIS, FRANK
vs.
3M COMPANY
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 190150/11
MOTION DATE _____
MOTION SEQ. NO. 002

*TRANS /
AMER. STD*

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 4-4-13

FILED

APR 10 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4-4-13


_____, 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

EMILY DeROGATIS, Individually and as Executrix of,
the estate of FRANK DeROGATIS,

Index No. 190150/11
Motion Seq. 002

Plaintiffs,

DECISION & ORDER

-against-

3M COMPANY, et al.,

Defendants.

FILED

----- X

APR 10 2013

SHERRY KLEIN HEITLER, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos-related personal injury action, American Standard, Inc. formerly known as American Standard, Inc. ("American Standard") moves pursuant to CPLR 3212 for summary judgment on the ground that there is no evidence to show that plaintiffs' decedent Frank DeRogatis was exposed to asbestos from an American Standard product.

Mr. DeRogatis was deposed on June 27, 2011 and June 28, 2011.¹ He testified that beginning in 1971 he regularly cleaned ashes out of an American Standard boiler at his in-laws' residence in Queens, New York. When he and his wife Emily inherited that home in 1985, he continued to regularly maintain that boiler until approximately 1993 when they moved to another residence. Mr. DeRogatis testified that cleaning the ash pit exposed him to asbestos fibers (Deposition pp. 28, 295-297, 300-301, objections omitted):

- Q. Do you have any reason to believe that you were exposed to asbestos as a result of cleaning the boiler?
- A. I could have been.
- Q. How do you believe you could have been exposed.
- A. Cleaning ashes out of the boiler. When it got hot, there was a funny smell all the time in the house, you know, when it got too hot. Just the smell.

¹ Copies of his deposition transcripts are submitted as defendant's exhibits B & C ("Deposition").

* * * *

Q. Now, sir, is it fair to say that based upon your testimony from yesterday that you said, you could have been exposed to asbestos, that you don't have any specific personal knowledge or information that would enable you to testify that you were in fact exposed to asbestos from cleaning out the ashes from this boiler? . . .

A. . . . Knowing what I know now and what I hear about these boilers, I could have been exposed to asbestos not knowing it.

Q. Okay. How so, sir?

A. From the ashes, and the smoke and the dust that it produced.

Q. What's the basis of your belief that either the ashes or the smoke -- strike that. The dust that you're talking about, that's from the ashes. Is that right?

A. Yes.

Q. So what's the basis for your belief that the ashes or the smoke contained asbestos? . . .

A. . . . I don't have an answer for that.

Q. Now the ashes, were they inside like an access door?

A. Yes.

Q. Did you have to -- obviously you had to open that access door to remove the ashes?

A. Yes.

* * * *

Q. Now why did these ashes have to be removed?

A. For maintenance on the boiler.

Q. What was the purpose of maintaining the boiler by removing the ashes?

A. My father-in-law showed me how to do this.

Q. Now did you use some kind of dustpan and small like broom to remove the ashes?

A. Yes.

Q. Is that how it was done?

A. Yes.

Q. So it's fair to say, sir, the only way you believed you may have possibly been exposed to asbestos was in from these ashes that you had to remove from the boiler. Is that correct?
...

A. . . . Just doing regular maintenance on the boiler all the time, cleaning it.

Q. Well, we discussed -- I asked you, did you do anything else besides the ashes, besides removal of the ashes?

A. I don't recall. . . .

Q. . . . Do you know what those ashes specifically were comprised from, where they came from?

A. No.

It is undisputed that a number of American Standard products utilized asbestos components. In this regard, defendant's interrogatory responses filed in the Joint Eastern and Southern District Asbestos Litigation provide that it manufactured oil-fired boilers with a thick asbestos board to insulate the combustion chamber. (Plaintiffs' exhibit 7). American Standard product catalogs further provide that the company instructed consumers to integrate asbestos gaskets, rope, wicks, and insulation into some of its boilers and even supplied consumers with some of these components. (Plaintiffs' exhibit 4).

The defendant contends it is nevertheless entitled to summary judgment because these components were not associated with its boilers' ash pits. In opposition plaintiffs submit evidence to show that asbestos fibers would have dried and flaked into the ash-pit over time. As some examples, in 1906 Alfred Johnson of the Johnson Furnace and Engineering Company noted with respect to furnace ash-pit doors that "any packing material, even asbestos, is undesirable, inasmuch as it becomes gradually worn away." (Plaintiffs' exhibit 10, p. 2). In 1928, William Lacke of the Pullman Car and Manufacturing Corporation noted when describing his furnace grate stoker control that the "tube is insulated from the heat of the ash-pit underneath by a covering of asbestos shielded by metal sheathing to protect the asbestos from the deleterious action of the furnace heat and fumes of combustion." (Plaintiffs' exhibit 11, p.5). In a 1989 patent application describing an asbestos abatement product, the authors note that in one test they removed asbestos-containing fly ash from a boiler penthouse. (Plaintiffs' exhibit 12, p. 10). Plaintiffs also submit an undated Clemson University study entitled "Modeling the Thermal Decomposition of Chrysotile" which analyzed the decomposition of asbestos in furnace linings after they had been exposed to high temperatures. (Plaintiffs' exhibit 9). The authors conclude that chrysotile asbestos "dehydroxylized", or dried, as a result of prolonged exposure

to high heat. (*Id.* at 15). Accordingly plaintiffs contend that any asbestos contained in an American Standard boiler would have flaked into the boiler's ash pit.

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'Amiante du Quebec, Ltee*, 297 AD2d 528, 528-29 (1st Dept 2002). In asbestos-related litigation, once the moving defendant has made a *prima facie* showing of entitlement to judgment as a matter of law, the 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).

Here, the record permits a reasonable inference that asbestos integrated into an American Standard boiler would have dried and flaked into the boiler's ash pit over time. *Reid, supra*. Taken together with Mr. DeRogatis' testimony that he maintained the boiler at issue for over twenty years and breathed the dust therefrom, there is a material issue of fact whether the defendant contributed to Mr. DeRogatis' injuries.

FILED

APR 10 2013

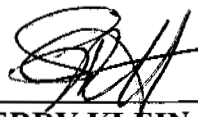
NEW YORK
COUNTY CLERK'S OFFICE

Accordingly, it is hereby

ORDERED that American Standard's motion for summary judgment is denied.

This constitutes the decision and order of the Court.

DATED: 4.4-13



SHERRY KLEIN HEITLER
J.S.C.