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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 : 190020/2012
KRAUSS, WILLIAM E.
vs.
3M COMPANY
SEQUENCE NUMBER : 009
SUMMARY JUDGMENT (TRIVNE)

INDEX NO. 190020/12

MOTION DATE _____

MOTION SEQ. NO. 009

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 5.1.13

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

Dated: 5.1.13

HON. SHERRY KLEIN HEITLER, J.S.C.

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

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WILLIAM E. KRAUSS and JEANNE KRAUSS,

Plaintiffs,

-against-

3M COMPANY, et al.,

Defendants.

----------X

Index No.: 190020/12
Motion Seq. 009

DECISION & ORDER

SHERRY KLEIN HEITLER, J:

Plaintiff William E. Krauss ("Krauss") was diagnosed with lung cancer in June of 2011. On January 17, 2012, Mr. Krauss and his wife Jeanne Krauss commenced this action to recover for injuries allegedly caused by his exposure to asbestos containing products.

Over the course of nine days between February and April of 2012, Krauss provided deposition testimony concerning his alleged asbestos exposure.[1] His *de bene esse* deposition was held on April 10, 2012.[2] Krauss testified that he worked as a union sheet metal worker from 1951 to the early 1970's and from 1978 to 1986. Among other things he installed new air conditioning units and cooling towers at hundreds of job sites throughout New York City. He testified that he disassembled new air conditioners in order to fit them into building elevators and hallways, and reassembled them once inside. Similarly, he disassembled cooling towers so they could be hoisted to the tops of low-rise buildings piece by piece and reassembled on the roof. During the dismantling process Krauss chiselled and scraped asbestos gaskets which released asbestos-containing dust into the air around him. He then reassembled these units by cutting gaskets from a

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1 Relevant portions of Mr. Krauss's deposition transcripts are submitted as defendant's exhibits A, B, C, and D.

2 Mr. Krauss's *de bene esse* deposition transcript is submitted as defendant's exhibit E.

roll of sheet material. This also caused asbestos dust to be released into his immediate vicinity. Krauss testified that defendant Trane US, Inc. ("Trane") was one of several manufacturers of air conditioning units and cooling towers with which he worked throughout his career.

Trane now moves for summary judgment pursuant to CPLR 3212, claiming that Krauss's identification of Trane as a manufacturer of air conditioners with which he worked is unreliable. In this regard, Trane relies on testimony from Krauss's *de bene esse* deposition that he could only specifically recall encountering one or two Trane air conditioners during his career, and he could not specifically recall being exposed to asbestos from these units. Defendant further submits that because Trane did not manufacture cooling towers until 2006 Krauss misidentified Trane cooling towers as a source of his asbestos exposure.

DISCUSSION

Summary judgment is a drastic remedy that must not be granted if there is any doubt as to the existence of a triable issue of fact. *Tronlone v Lac d'Amiante du Quebec, Ltee,* 297 AD2d 528, 528-529 (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 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). All reasonable inferences should be resolved in the plaintiffs' favor. *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dept 1990).

In support of its motion Trane submits the affidavit in an unrelated case of David Dorman, Trane's Director of Compressor Technologies and Development, sworn to April 14, 2011. Based solely on his "personal knowledge, experience, [and] information availbable to [him]", Mr. Dorman

purported that Trane did not manufacture or sell cooling towers until 2006 (defendant's exhibit F). However, no documentary evidence is submitted to support Mr. Dorman's conclusions. The weight to be accorded to the conflicting assertions between the plaintiff's deposition testimony and Mr. Dorman's unsupported affidavit can not be reconciled as a matter of law, but present a question of fact to be resolved by the jury. *See Asabor v Archdiocese of NY*, 102 AD3d 524, 527 (1st Dept 2013); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996) ("The assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact . . . .").

With regard to the deposition testimony, the defendant argues that Krauss encountered a Trane cooling tower only on a single occasion, and that his alleged exposure in that instance came from external insulation which was not manufactured, sold, or supplied by Trane (defendant's exhibit C, pp. 1303-05). Trane further asserts that Krauss could not say with any reasonable degree of certainty that he was exposed to asbestos from Trane air conditioning units (defendant's exhibit E, pp. 92-93).

However, the defendant only highlights a portion of Krauss's testimony regarding his alleged exposure from Trane products. Looking further at the testimony, Krauss plainly identified the defendant's products as a source of his exposure (plaintiff's exhibit A pp. 28-30, 131-32, exhibit E, pp. 15-16, objections omitted):

Q And besides working on fans on a roof, did you work with any other equipment on rooftops?

A We used cooling towers.

Q . . . And can you tell the jury about that work, please?

A Well, in -- in a lot of cases, I mean, even if it was getting -- getting picked up by a crane, it would have to be picked up in pieces. They couldn't pick up the whole cooling tower.

Q And what would happen with those pieces?

A Well, we'd have to dismantle them. If they didn't come dismantled, we had to dismantle them on the -- on the ground. And then they'd pick it up and we'd have to put new gasketing in and rebolt it together.

Q Can -- can you describe to the jury how you -- the gasketing work that you did on these cooling towers?

A Well, the same way basically as the air conditioning units. We'd have to put the caulking to hold the gasketing in place and bolt it together.

Q And what's your understanding of what those gaskets were made of?

A It was asbestos.

* * * *

Q . . . And just to make sure that we're clear, Mr. Krauss, can you describe how you would have to remove gaskets from the cooling towers on the rooftops?

A We did it basically the same way as the -- the air conditioning units. We'd have to scrape off the old gasketing and -- and replace it with new gasketing.

Q . . . And what effect, if any, on the air did this -- this scraping process --

A Well, it would be the same as the air conditioning units, that you're creating dust and -- and basically that's -- you're basically the same as the conditioning units.

Q Okay. And who were the manufacturers of these rooftop cooling towers, cooling units?

A Basically one is -- that we worked on was Trane and Carrier.

* * * *

Q Do you believe you were exposed to asbestos from removing the old unit?

A Yes, sir.

* * * *

Q Do you know the brand name, trade name or manufacturer of the old air-conditioning unit?

A There were so many we used: Bryant, Carrier, Rheem; Trade made a small unit, also.

* * * *

Q Can you tell the -- tell the jury, please, the names of the manufacturers of the air conditioning units that you installed during your career?

* * * *

A Bryant, Trane, Carrier, Lennox, Rheem. That's about all I can remember right now without looking at the list.

The court's function on a motion for summary judgment is to determine whether there exist factual issues that require resolution at trial. *See Ferrante v American Lung Ass'n*, 90 NY2d 623, 631 (1997). Read in its entirety, Krauss's deposition testimony sufficiently identifies the defendant as a

source of his asbestos exposure. *See Reid, supra.* The fact that there are discrepancies in the record does not entitle the defendant to summary judgment. Rather, such issues go to the weight of the testimony, a determination which must be made by the trier of fact. *See Alvarez v NY City Hous. Auth.*, 295 Ad2d 225, 226 (1st Dept 2002) ("Any inconsistencies in the several accounts of the incident go to the weight of the evidence, not its competence, and the value to be accorded to the evidence is a matter for resolution by the trier of fact.").

Accordingly, it is hereby

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

This constitutes the decision and order of the court.

DATED: May 1, 2013

SHERRY KLEIN HEITLER
J.S.C.