

**Lindsay v Air & Liquid Sys. Corp.**

2013 NY Slip Op 31185(U)

May 29, 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  
*Justice*

PART 30

Index Number : 190074/2012  
LINDSAY, WILLIAM J.

INDEX NO. 190074/12

vs.  
A.O. SMITH WATER PRODUCTS  
SEQUENCE NUMBER : 005  
SUMMARY JUDGMENT

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 005

(LEVITON)

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 5-29-13

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

**FILED**  
MAY 31 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5-29-13

  
\_\_\_\_\_, 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  
WILLIAM LINDSAY and PATRICIA LINDSAY,

Index No. 190074/12  
Motion Seq. 005

Plaintiffs,

**DECISION & ORDER**

- against -

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

Defendant(s).

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

Defendant Leviton Manufacturing Co., Inc. ("Leviton") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims against it on the ground that plaintiff's identification of Leviton lighting and electric products as a source of his asbestos exposure is speculative. As discussed below, the motion is denied.

**FILED**

**MAY 31 2013**

**BACKGROUND NEW YORK  
COUNTY CLERK'S OFFICE**

Plaintiff William Lindsay was diagnosed with mesothelioma on or about January 27, 2012. On or about February 10, 2012, Mr. Lindsay and his wife Patricia Lindsay commenced this action to recover for personal injuries allegedly caused by his exposure to asbestos containing products. 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 exhibits A through E ("Deposition").

Mr. Lindsay worked as an electrician from 1963 until 1978 when he became his union's business representative. He testified that as such he worked with asbestos containing products manufactured by Leviton throughout his career. He specifically recalled working with Leviton fixture wire, and in this regard testified in relevant part as follows (Deposition pp. 210-12, 841-42, 846, 848-49, objections omitted):

- Q. How do you believe you were exposed to asbestos from installing the recessed lighting?
- A. The electrical fixtures were wired with asbestos wire.
- Q. These are pre-existing electrical fixtures that are already hanging?
- A. No, we installed new ones.
- Q. In the installation of those new electrical fixtures, did you have to disturb any of the asbestos wiring?
- A. You had to hook up to the fixtures, yes, you had to take them apart, you had to skin the wire, shape the wires, connect the wires.
- Q. In the process of doing that, did you disturb any asbestos materials?
- A. Yes.
- Q. What particular material did you disturb?
- A. The wire insulation . . . .
- Q. Do you know the manufacturer of any of that wiring?
- A. Not specifically, but again, Leviton made a lot of them fixtures. . . .
- Q. I'm wondering, the wiring within the fixtures, do you believe that the wiring itself was manufactured by Leviton?
- A. Yes. I don't know whether it was manufactured, but it was part of the fixture.

\* \* \* \*

- Q. You testified Leviton made a lot of light fixtures. Are you 100 percent certain that Leviton manufactured light fixtures during your tenure as an electrician? . . .
- A. Yes.

\* \* \* \*

- Q. Now, did all of the fixtures you work with come prewired? . . .
- A. The fixture itself always came prewired. It was called a whip, the conductors that went directly from the fixtures to a local junction box sometimes was prewired at the factory, sometimes it wasn't and we added it.

\* \* \* \*

- Q. Now, I think your testimony was you believed that these wires that were in the fixtures were asbestos wires; is that correct?
- A. Yes.
- Q. How do you know that? . . .
- A. The asbestos insulation on the wire was kind of unique, it's always like a gummy substance and if you put it under a magnifying glass, the wire itself is rated and it has a code. I don't really attest to my electrical knowledge, it's been so many

years but the code, there was a code for asbestos insulation. And the years, I don't know whether they still use it or they don't but the years I was in the trade, they always used asbestos wiring inside the fixture because especially with recessed fixtures, it got very hot and asbestos was what could withstand a higher temperature than other type of wire.

Mr. Lindsay also testified that he was exposed to asbestos by chipping new Leviton outlets and by replacing old Leviton outlets that had shorted out (Deposition pp. 826-827, 1063-65, objections omitted):

- Q. When you first put an outlet into the wall, there's no wires on it, correct?
- A. Well, you put a box in the wall and you attach either a cable, BX or Romex and lower the conduit. And then you -- if it's a conduit you pull a wire through the conduit into the box or else you fasten the Romex or BX to the box and then you skin the wire and put it on the outlet. . . .
- Q. Now, you don't believe from that process that you were exposed to asbestos, do you? . . .
- A. Well, on occasion we would chip the outlet and the outlet was formed with asbestos, so yeah, I do believe it.

\* \* \* \*

- Q. Do you believe you were exposed to outlets on these troubleshooting maintenance jobs? . . .
- A. The same thing, you know. At times the outlet would blow up, short out, it would destroy the outlet, it would literally turn to dust.
- Q. During those times what would you have to do?
- A. We would check to see if there was still power in the box, most of the time there wasn't. You'd take out the deteriorating outlet, put in a [new] one. Repair the wire, sometimes the wires were burnt.
- Q. When you took out the deteriorated outlet, what if anything did you observe? . . .
- A. Dust.
- Q. Did you breathe that dust?
- A. Yes.
- Q. Did breathing that dust cause you to be exposed to asbestos?
- A. Yes. . . .
- Q. What were the brand names of the outlets . . . that were deteriorated that you needed to remove at the job sites where you were troubleshooting? . . .
- A. . . . One I recall the most is Leviton.

Leviton seeks summary judgment on the ground, among others, that it has never manufactured lighting fixtures, and that plaintiff's testimony regarding the asbestos content of its outlets is conjectural. Leviton further claims entitlement to summary judgment because Mr. Lindsay could not establish a specific time or location during his fifteen year career that he encountered the products at issue.

### DISCUSSION

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'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 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 plaintiff's favor. *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dept 1990).

As a preliminary matter, the defendant's reliance on the fact that the plaintiff did not identify a specific year or specific location where he encountered Leviton light fixtures and outlets is unavailing. Mr. Lindsay's testimony that he regularly worked with and around Leviton light fixtures and outlets throughout his career is more than sufficient to permit a reasonable inference as to the defendant's liability. *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 one with personal knowledge of the facts); *see also Reid, supra*.

Substantively, the defendant submits the January 10, 2013 affidavit of Mr. Steve Campolo, Leviton's Vice President of Engineering, who avers that Leviton has "never manufactured or distributed lighting fixtures at any time in its history, including the timeframe during which plaintiff alleges exposure to asbestos."<sup>1</sup> The defendant also submits a Leviton product catalog from July of 1962 which advertises a number of Leviton electrical products, but not light fixtures (defendant's exhibit F, "1962 Catalog").

While Mr. Campolo's uncross-examined affidavit purports that he reviewed Leviton's UL Reports in reaching his conclusions and spoke with many of its engineers, nothing is produced to show what he actually reviewed or that he is familiar with Leviton's promotional materials, including the 1962 catalog submitted herein. It is significant that this catalog, the only historical document submitted by the defendant on this motion, predates the plaintiff's exposure period which started in 1963. Moreover, plaintiffs submit a recent screen shot of Leviton's internet website and other advertising materials which show that the company manufactured an entire line of entertainment light fixtures and other types of light fixtures. While the products portrayed may not have been the kinds of light fixtures Mr. Lindsay testified to as having worked with in the 1960's and 1970's, the fact that Leviton advertised its lighting fixtures at all raises a material question as to the accuracy of Mr. Campolo's conclusions since his position is that the company never manufactured any lighting fixtures at all.

On this issue, plaintiffs submit the 1995 deposition testimony in an unrelated action of Gilbert Dubois, a corporate representative for the American Insulated Wire Company ("AIW"), which was then a subsidiary of Leviton. Mr. Dubois testified that AIW manufactured asbestos containing fixture wire and sold such product to Leviton for use in fixtures (plaintiffs' exhibit 12,

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<sup>1</sup> Mr. Campolo's affidavit is submitted as defendant's exhibit G.

pp. 54, 58-59):

Q. Have you ever made fixture wire?

A. Yes.

Q. Do you still make fixture wire?

A. Yes.

\* \* \* \*

Q. Do you know the names of any of the manufacturers to whom American Insulated Wire has sold asbestos-containing fixture wire?

A. Off the top of my head I don't. I wasn't involved in the OEM market at the time we were making asbestos fixture wire, so I can't tell you. I know we sold a lot to our parent company.

Q. And that's Leviton?

A. Yes.

Q. Do you know to whom Leviton would sell the asbestos-containing fixture wire?

A. No, I don't . . . They didn't sell the fixture wire. They were an OEM. They put it in their starters.

Q. Do you know the brand names of any of the -

A. No, I don't.

Q. Let me finish the question -- the brand names of any of the products that they incorporated American Insulated Wire's asbestos-containing fixture wire into?

A. Leviton.

Plaintiffs also submit documentary evidence which demonstrates that AIW manufactured and sold asbestos containing fixture wires to Leviton. Plaintiffs' exhibit 13, entitled "Fixture Wire", shows that AIW manufactured felted asbestos insulation. Plaintiffs' exhibit 14 is a sales record of felted asbestos wire from AIW to Leviton dated February 8, 1973, which overlaps with Mr. Lindsay's alleged exposure period.

There is also evidence that Leviton used asbestos containing Bakelite in the manufacture of its electrical outlets. Bakelite, which was manufactured until approximately 1975, is a phenolic molding compound that has the appearance of hard plastic. As used in electrical products such as panels, outlets, insulators and switches, Bakelite often contained asbestos due to its electrically

nonconductive and heat-resistant properties. Over time, and due to its popularity, Bakelite became a generic name used in the electrical industry for most if not all asbestos containing phenolic molding compounds (see plaintiffs' exhibit 19).

Mr. Campolo gave testimony in 2007 in an unrelated asbestos personal injury action.

Among other things, he testified that Leviton outlets contained Bakelite (plaintiffs' exhibit 27, pp. 97-98):

A. Well, some of the Leviton products were made out of that type of material. I don't know if it was that particular tradename or brand, Bakelite, but that type of material.

Q. Like what products?

A. Well, switches, receptacles.

Mr. Campolo's testimony comports with Leviton's own promotional materials which show that at least some of its outlets were made from Bakelite. (See Plaintiffs' exhibit 29, which portrays a "Bakelite convenience duplex outlet.")

**CONCLUSION**

In light of the foregoing, I find that there exist material issues of fact as to whether Mr. Lindsay was exposed to asbestos from Leviton light fixtures and outlets. As such this case should proceed to a jury.

**FILED**

MAY 31 2013

**NEW YORK  
COUNTY CLERK'S OFFICE**

Accordingly, it is hereby

ORDERED that Leviton Manufacturing Co., Inc.'s motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 5.29.13

SHERRY KLEIN HEITLER  
J.S.C.