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| Feinstein v Armstrong Intl., Inc. |
| 2013 NY Slip Op 31800(U) |
| July 29, 2013 |
| Sup Ct, New York County |
| Docket Number: 190195/12 |
| 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

Index Number : 190195/2012
 FEINSTEIN, EDWARD
 vs
 ARMSTRONG INTERNATIONAL, INC.
 Sequence Number : 005
 SUMMARY JUDGMENT (INGERSOLL RAND)

INDEX NO. 190195/12
 MOTION DATE _____
 MOTION SEQ. NO. 005

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 7.29.13

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

Dated: 7.29.13


 _____, 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
BRIAN FEINSTEIN, Individually and as Trustee of the
EDWARD FEINSTEIN LIVING TRUST,

Index No. 190195/12
Motion Seq. 005

Plaintiffs,

-against-

DECISION & ORDER

ARMSTRONG INTERNATIONAL, INC., et al.,

Defendants.
-----X

SHERRY KLEIN HEITLER, J:

In this asbestos personal injury action, defendant Ingersoll Rand Company (“Ingersoll”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims against it on the ground that there is no evidence to show that plaintiffs’ decedent Edward Feinstein was actually exposed to asbestos fibers released from a product manufactured, sold, supplied, or distributed by Ingersoll. For the reasons set forth below, the motion is denied.

Mr. Feinstein commenced this action on April 16, 2012 to recover for personal injuries allegedly caused by his exposure to asbestos. Mr. Feinstein was deposed on June 26, 2013, June 27, 2013, and June 28, 2013. His *de bene esse* deposition also took place on June 28, 2013.¹ Mr. Feinstein died of complications from mesothelioma on September 21, 2012. The complaint was amended to add a wrongful death claim on March 15, 2013.

Mr. Feinstein testified that he served in the United States Navy aboard the USS Brooklyn as an Assistant Supply Officer from November of 1944 until June of 1945. Among other things, he purchased, inventoried, and delivered supplies to the USS Brooklyn while it was being

¹ Copies of Mr. Feinstein’s *de bene esse* deposition transcripts are submitted as plaintiffs’ exhibit C (“Deposition”).

overhauled at the Brooklyn Navy Yard. He delivered new equipment and supplies to the ship on a daily basis and was present in the ship's engine and boiler rooms during renovations.

(Deposition pp. 46-47, 49, 50-52, 53, 54, objections omitted):

Q. How often -- how much time would you spend in the boiler room or in the engine room?

A. Well, depending on the size of the delivery and depending on how much work was being done that particular day, but I could be in there from anywhere from one to five hours at a time.

Q. And how often would that occur?

A. Almost -- while we were in the Navy yard, almost every day. Or certainly two or three times a week. Because it was only so much stuff you could bring on at one time to the ship because they don't want it stocked all over the decks. . . .

Q. Just so it's clear, what particular items were you bringing to the boiler room or the engine room?

A. Pumps, valves, gaskets, various kinds of pumps. What they, each one did, I know most of them -- and insulation. Excuse me. And insulation. That mainly, as I remember, the main items that went there.

Q. And when you were in the boiler room or the engine room, what activity, if any, was taking place?

A. All kinds of activity. They were stripping off insulation from items that were being taken out. They were putting on insulation that items were being put in. They were scraping off the gasket, valves, or whatever the hell they were doing. But everybody -- it was busy, and the dust was flying all the time.

* * * *

Q. You mentioned that the particular -- the equipment was being taken out and replaced. The equipment that was being taken out, was it being replaced by what you were bringing in, sir?

A. Yes.

Q. And you mentioned -- well let's start with pumps, sir. How did they remove the insulation from the pumps? . . .

A. I think they cut it off most of the time. You know, I saw them cutting it off, scraping it off, peeling it off, knocking it off with a hammer. Depending on where it was.

* * * *

Q. Okay. And I know it was a long time ago, sir. And you've already testified to this in the days prior. But do you recall today any of the manufacturers of those pumps that you were around in the Navy at the Brooklyn Navy yard?

A. Yes. Some of them.

Q. Can you tell us what you remember today?

A. The names of some of them?

Q. Yeah.

A. Crane, Buffalo, Northern, Ingersoll, Goulds, DeLaval. A few others, I guess.

Q. Okay. And can you also describe to the jury -- well, take a step back for a second. Where were you when this work was taking place?

A. In the -- in the boiler room or the engine room.

Q. And can you describe to the jury what the boiler room or engine room looks like?
...

A. It's a mess. It's hot. Everything is heat. That's why there's so much insulation because they're pumping steam, and they're pumping whatever they're pumping. So, it's very hot. It's very dusty. And it's very tight quarters. Everything on the ship the size of the Brooklyn is jammed into tight quarters. You know, there's pipes, and something goes under here, and over there, and fitted in here, and fitted in there. And there's hardly -- I mean, that's whether it's the bunk room, or the engine room, or whatever. Everything fits -- fits in. It's not like you got a closet with a lot of places left over. Everything is very tight fitting.

Q. What proximity were you to the men who were working on the equipment?

A. Very close. I mean, they'd move me around. You know, they'd say "Hey, okay, ensign, get over there. Because we've got to work over here." ...

* * * *

Q. Please tell the jury what your experience was with valves when you were on the U.S.S. Brooklyn at the Brooklyn Navy Yard.

A. My experience was ordering them, and getting them, and watching them take gaskets and fit them around the valves and around the pipes. You know, make sure the -- make sure the gaskets and the valves were the right size for each other and could work.

Q. And where were these valves being worked on?

A. Where were they? Down in the engine room and the boiler room.

* * * *

Q. Okay. And do you recall today the names of any of the valves that you were around, being worked on?

- A. Yeah. I think – if I remember, I think Ingersoll was a valve producer. I don't know. I'll think in a few minutes.
- Q. Okay.
- A. Some of the pumps, the same guys -- same companies that provided pumps provided valves.

The defendant argues that it is entitled to summary judgment because Mr. Feinstein could not describe the physical characteristics, application, or maintenance history of the Ingersoll pumps and valves which he allegedly encountered and because Mr. Feinstein had no specific recollection of having been present when work was performed on an Ingersoll pump. (Deposition pp. 287-290). Plaintiffs oppose on the ground that Mr. Feinstein's testimony raises a material issue of fact.²

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, should the moving defendant make a *prima facie* showing of entitlement to judgment as a matter of law, plaintiffs 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 plaintiffs 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*

² Plaintiffs also submit Naval records to show that Ingersoll supplied air compressors for use on the USS Brooklyn. However, there is no evidence that Mr. Feinstein encountered air compressors while serving aboard on that ship. It also appears that the valves associated with these Ingersoll air compressors were not actually manufactured by Ingersoll.

Masturzo, 168 AD2d 204,205 (1st Dept 1990).

In this case, Mr. Feinstein's deposition testimony in which he identifies the defendant's pumps and valves as a source of his asbestos exposure is sufficient to meet plaintiffs' burden and overcome summary judgment. *See Reid, supra*. At most, the defendant's arguments regarding Mr. Feinstein's inability to remember the specific characteristics of the Ingersoll products he encountered goes to the weight to be accorded to his testimony by the trier of fact. *See Asabor v Archdiocese of NY*, 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) ("The assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact . . .").

Accordingly, it is hereby

ORDERED that Ingersoll Rand Company's motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED:

7.29.13



SHERRY KLEIN HEITLER
J.S.C.