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

PRESENT: HON. SHERRY KLEIN HEITLER PART 30
Justice

JUNI, JR., ARTHUR H., ET AL.

- v -

A.O. SMITH WATER PRODUCTS (LIPE) COMPANY, ET AL.

INDEX NO. 190315/12

MOTION DATE

MOTION SEQ. NO. 05

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 9-19-13

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

Dated: 9-19-13

HON. SHERRY KLEIN HEITLER J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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ARTHUR H. JUNI, JR. and MARY JUNI,

Plaintiffs,

-against-

A.O. SMITH WATER PRODUCTS CO, et al.,

Defendants

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Index No.: 190315/12
Motion Seq. 005

DECISION & ORDER

SHERRY KLEIN HEITLER, J:

In this asbestos personal injury action, defendant Lipe Automation Corporation ("Lipe") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims against it on the ground that plaintiffs have not established that Lipe products contributed to Mr. Juni's asbestos exposure. For the reasons set forth below, the motion is denied.

Plaintiff Arthur Juni worked for Orange & Rockland from 1961 to 2009 as a high line crew member, courier, mechanic, and foreman. He was diagnosed with mesothelioma in or about June of 2012. Plaintiffs commenced this action on July 24, 2012. Mr. Juni was deposed over the course of four days in August of 2012.[1]

Relevant to this motion is Mr. Juni's testimony that from the late 1970s through the late 1980s he regularly installed new clutches manufactured by the defendant, among others, on Ford bucket trucks (Deposition pp. 129-131, 132, objections omitted):

Q. You told me that in 1979 Orange & Rockland started using the Ford C8000 bucket trucks.

A. Uh-huh.

Q. Do you remember how many bucket trucks they had in the fleet at that point in time, only if you know? If you don't know, we'll move on.

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[1] Mr. Juni's deposition transcripts were submitted by the defendant ("Deposition").

A. Sixteen to eighteen of them.

Q. Now, you told me that from '79 until the later '80s that the clutches would have to be replaced on those -- you'd be assisting with clutch jobs every other day. So are you testifying that those trucks would need new clutches every two weeks? . . .

A. We did clutches every week.

Q. On average, you told me there was sixteen to eighteen trucks. Would the trucks be getting clutches done on each truck twice a month? Does that sound accurate to you? . . .

A. It might not have been twice a month.

Q. If there are sixteen to eighteen trucks and you said you were doing clutches every other day, you're averaging three or four clutches, so about once a month on each vehicle. Does that sound correct?

A. Yeah, I'd say about once a month . . . .

Q. Do you know who manufactured any of the new clutches that were installed in those bucket trucks during that period of time?

A. Lipe, Spicer and original manufacturer and probably Borg-Warner.

* * * *

Q. Where did you obtain the parts from when you were a working foreman at Orange & Rockland? Did you go to the parts department?

A. Went in the parts room and picked them off the shelf. You charged them out.

Based on the following testimony, the defendant argues that plaintiffs' claims against it are speculative because Mr. Juni could not testify on cross-examination whether he worked on a Lipe clutch or whether he assisted others while they worked on a Lipe clutch (Deposition pp. 366-68):

Q. Okay. Let's assume that there were Lipe clutches there. Would you know if the Lipe clutches contained asbestos?

A. It's possible.

Q. But would you know?

A. Back then, most everything did contain asbestos . . .

Q. Is it your understanding that back then all clutches contained asbestos?

A. Correct.

Q. So I take it that you don't have a recollection of personally ever installing a Lipe clutch in a truck?

A. I saw a box that said Lipe on it in the parts room, but I'm not sure what it went to.

Q. So you're not even sure if there was a clutch in that box, it could've been something else;

is that correct?

A. Well, it was in the area where the clutches were or the disc, you know, the clutch discs.

Q. Did you see the word asbestos on that box?

A. Oh, I don't remember that.

Q. Back to my question. Did you ever personally install a Lipe clutch in any vehicle?

A. I can't say that I did.

Q. Did you ever personally assist anybody else who was installing a Lipe clutch, specifically a Lipe clutch?

A. I can't say that I did.

Q. Were you ever personally present observing when somebody else installed a Lipe clutch?

A. I can't say that for sure.

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). To obtain summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); CPLR 3212(b). In an asbestos-related personal injury action, should the movant establish its *prima facie* entitlement to summary judgment, the plaintiff is then required to demonstrate that there was actual exposure to asbestos fibers released from the defendant's product. *See Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this regard, the plaintiff need only "show facts and conditions from which defendants' liability may reasonably be inferred." *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995). Where the facts are disputed but are susceptible to more than one permissible inference, the choice between those inferences should not be made as a matter of law, but should be submitted to the trier of fact. *Ace Wire & Cable Co. v Aetna Casualty & Surety Co.*, 60 NY2d 223, 231 (1978). All reasonable inferences should be resolved in the plaintiff's favor. *Dauman Displays, Inc. v Masturzo,* 168 AD2d 204, 205 (1st Dept 1990).

The record in this case is sufficient to raise a material issue of fact whether Mr. Juni was exposed to asbestos from Lipe clutches. In this regard, while Mr. Juni could not specifically recall whether he personally installed a Lipe clutch, implicit in his testimony is that Lipe clutches were used interchangeably by him, and by others working in his presence, over the course of his long career with Orange & Rockland, and in particular during the 1980's while he worked as a mechanic foreman. *See Reid, supra*, at 463 (1st Dept 1995) ("plaintiff's papers identified specific brands of the subject asbestos products, including those of defendant, in use at the relevant work site during the relevant time, showed that various asbestos products were interchangeable in the work site at the time, and showed that he was heavily exposed to asbestos dust at that site during that time."). The defendant clearly raises an issue of the weight to be given to Mr. Juni's testimony. However, it would be inappropriate for the court to decide this issue on a summary judgment motion. *See Ferrante v American Lung Ass'n,* 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); *Missan v Schoenfeld*, 95 AD2d 198, 207 (1st Dept 1983).

Accordingly, it is hereby

ORDERED that Lipe Automation Corporation's motions for summary judgment is denied.

This constitutes the decision and order of the Court.

DATED: 9.19.13

SHERRY KLEIN HEITLER
J.S.C.