

Tobin v Aerco Intl.

2013 NY Slip Op 32916(U)

November 13, 2013

Supreme Court, New York County

Docket Number: 190337/12

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 : 190337/2012
TOBIN, DONALD G.
vs
AERCO INTERNATIONAL, INC
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. 190337/12
MOTION DATE _____
MOTION SEQ. NO. 002

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 11-13-13.**

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

Dated: 11-13-13



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

-----X
DONALD TOBIN,

Index No. 190337/12
Motion Seq. 002

Plaintiff,

-against-

DECISION & ORDER

AERCO INTERNATIONAL, et al.

Defendants.

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

In this asbestos personal injury action, defendant Crane Co. (“Crane”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that there is no evidence to show that plaintiff Donald Tobin was exposed to asbestos from Crane products. For the reasons set forth below, the motion is granted.

Mr. Tobin, now deceased, was diagnosed with pleural mesothelioma on May 10, 2012. He commenced this action on August 1, 2012 to recover for personal injuries allegedly caused by his exposure to asbestos. Mr. Tobin testified¹ that he served in the United States Navy from 1944 through 1946 as a seaman and as a storekeeper aboard the USS Montauk (“Montauk”). As a seaman, Mr. Tobin stood watch on the bridge and deck, painted, and performed general repairs. He also visited the ship’s engine room below deck where his coworkers performed work on pipes, valves, pumps, turbines, and other equipment. When he was promoted to storekeeper in or about August 1945, Mr. Tobin operated a small supply store near the mess area.

The defendant argues that Mr. Tobin has not specifically identified any product manufactured or sold by Crane as a source of his asbestos exposure while he served in the United

¹ Mr. Tobin was deposed on October 17, 2012. A copy of his deposition transcript is submitted as defendant’s exhibit C (“Deposition”).

States Navy. Plaintiff contends that Mr. Tobin's testimony, together with archived United States Navy records which show that Crane valves were installed on the USS Montauk during the relevant time period, is sufficient to preclude summary judgment. In reply, defendant asserts that even if Crane valves were approved for use on the Montauk, the documents provided by plaintiff do not indicate the presence of Crane valves in any specific location where Mr. Tobin was, nor do they reference the use of asbestos in respect of such valves.

It has long been held that the movant on a summary judgment motion must establish its defense sufficiently to warrant a court's directing judgment in its favor as a matter of law by demonstrating the absence of any material issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In asbestos-related litigation, once the moving defendant has *prima facie* established its entitlement to summary judgment, 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). While 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]), the plaintiff cannot rely on conjecture or speculation. *Roimesher v Colgate Scaffolding*, 77 AD3d 425, 426 (1st Dept 2010).

Here, Mr. Tobin testified that he was exposed to asbestos from insulation associated with pipes located throughout the Montauk and from equipment located in the Montauk's engine room. He testified to being exposed to valves but did not say where on the ship they were installed. He did not specifically identify any Crane product as a source of his exposure (Deposition pp. 55-56, 114-15, 116-17, 118, 62-63):

Q. . . . If I understand your testimony correctly, you believe you were also exposed to asbestos from other workers on the ship repairing piping located throughout the ship?

A. I could say yes to that. Yeah.

Q. Where was this piping located?

A. Below deck. Because I never been on a ship before. I just loved it down there and asked them questions about everything.

Q. Where below deck did you encounter these other workers repairing the piping?

A. The most interesting place I found was where they had great big wheels whirring and everything, and they had -- trying to give the ship more power, I guess, the way one worker told me. And I loved it down there. I asked a lot of questions. I never been on board a ship before.

Q. Did that area have a designation or room number or --

A. I would say engine room. . . .

Q. As a seaman deuce and seaman first class, on how many occasions can you recall being present in the engine room while other workers were working on piping?

A. I would say every day when I was there. I was there about a month or two before the crew came down before we got commissioned.

* * * *

Q. You told us earlier that, when the Montauk was at the Brooklyn Navy Yard, you occasionally went below deck.

A. I loved it down there.

Q. Okay. I believe you said that, for a period of time, you were -- you were --you went below deck at least every day; is that correct?

A. Yes, because I am a kid, 17-year-old, never been on a ship, I had a lot of questions.

* * * *

Q. Did you see any men working on the valves on the USS Montauk?

A. Well, a valve, to me, is something -- a wheel you turn on and off and stuff like that. That big heavy stuff, that's probably asbestos. It goes up through it, and it cuts off. Because I had to sew up the ends, you know, when they broke. Yeah....

Q. Do you believe you were exposed to asbestos as a result of yard workers' work that they performed on valves on the Montauk?

A. Positively, yeah.

Q. Do you recall seeing insulators on the Montauk when it was at the Brooklyn Navy Yard?

A. I don't know what an insulator is.

Q. Do you recall seeing pipefitters on the Montauk?

A. Yes.

Q. Did you see them performing work?

A. Yes, definitely.

* * * *

Q. Were the valves on the USS Montauk insulated with asbestos?

A. Definitely, yes.

Q. Correct me if I'm wrong, but you recall seeing men handle that asbestos material in your presence; is that correct?

A. Oh, without a doubt, yeah.

* * * *

Q. Do you have any reason to believe that you would have been exposed to any asbestos or an asbestos-containing product while serving as a storekeeper on the Montauk?

A. No, sir.

Q. So your only exposure on the Montauk would have been when you're a seaman deuce and seaman first class?

A. Yes, sir.

Plaintiff contends that the documentary evidence raises a triable issue of fact whether pipefitters worked on asbestos-containing Crane valves in his presence. The totality of such evidence submitted by plaintiff is a January 5, 1941 letter from the Ingalls Shipbuilding Corporation to a Lieutenant Wilson which outlines some of the vendors that Ingalls planned to order equipment from for the Montauk. The author lists Crane as one of several "probable vendor[s]" for globe and gate valves. (Plaintiff's exhibit 2). A November 15, 1943 letter from the Ingalls Shipbuilding Corporation to the Chief of the Bureau of Ships indicates that there was concern over an incomplete order of Crane valves which were to be used for the Montauk. (Plaintiff's exhibit 3). The route slip associated with this record includes a handwritten note that Crane would complete the order by January 1, 1944.

While these documents arguably demonstrate that Crane valves were delivered to and installed on the USS Montauk during the relevant time period, there is nothing on this motion to show that they were installed in the plaintiff's zone of exposure as opposed to any other manufacturer's valves, or that they contained asbestos. *Comeau v W.R. Grace & Co.*, 216 A2d 79, 80 (1st Dept 1995). Without more, plaintiff's claims against Crane are at best speculative.

Accordingly, it is hereby

ORDERED that Crane Co.'s motion for summary judgment is granted, and this action and any cross-claims against this defendant are severed and dismissed in their entirety; and it is further

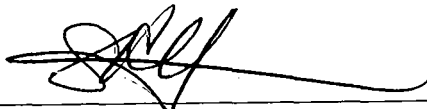
ORDERED that the remainder of the action shall continue as against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

ENTER:

DATED: 11.13.13



SHERRY KLEIN HEITLER
J.S.C.