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| <b>McKay-O'Dea v A.O. Smith Water Prod. Co.</b>                                                                                                                                                                                                                  |
| 2013 NY Slip Op 33083(U)                                                                                                                                                                                                                                         |
| December 2, 2013                                                                                                                                                                                                                                                 |
| Sup Ct, New York County                                                                                                                                                                                                                                          |
| Docket Number: 190305/12                                                                                                                                                                                                                                         |
| Judge: Sherry Klein Heitler                                                                                                                                                                                                                                      |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                                                           |

COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
PRESENT: HON. SHERRY KLEIN HEITLER  
Justice

Margaret McKay-O'Dea  
Et Al,

PART 30

INDEX NO. 190305/12  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 2  
MOTION CAL. NO. \_\_\_\_\_

A.O. Smith Water Products  
Co. Et Al

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Order to Show Cause - Affidavits - Exhibits ...

*[Vertical text, likely a stamp or filing mark]*

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 12-2-13

Dated: 12-2-13

HON. SHERRY KLEIN HEITLER J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION  
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

-----X  
MARGARET McKAY-O'DEA, as Administratrix for  
the estate of SAMUEL McKAY,

Index No. 190305/12  
Motion Seq. 002

Plaintiffs,

**DECISION & ORDER**

-against-

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

Defendants.  
-----X

**SHERRY KLEIN HEITLER, J:**

In this asbestos personal injury action, defendant Consolidated Edison Company of New York, Inc. ("Con Edison") moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff's common-law negligence claim, Labor Law § 200 claim, and all other claims asserted against it on the grounds that there is no evidence to show that Con Edison contributed to plaintiff's decedent Samuel McKay's injuries and that plaintiff's claims are incredible.

Summary judgement 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 an asbestos personal injury action, should the moving defendant make a *prima facie* showing of entitlement to summary judgment as a matter of law, the plaintiff must 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).

Samuel McKay was diagnosed with lung cancer on October 3, 2011. On July 13, 2012, Mr.

McKay and his wife commenced this action against Con Edison, among others, to recover for personal injuries allegedly caused by his exposure to asbestos-containing products over the course of his plumbing career. Mr. McKay was deposed over the course of four days in July of 2012. He died on August 23, 2012. At his examination before trial,<sup>1</sup> Mr. McKay testified that from approximately 1953 to 1957 he was exposed to asbestos while working as a plumber on ships and in industrial buildings in the Glasgow, Scotland area. Mr. McKay emigrated to New York in 1960 where he lived and worked as a union plumber until 1980.<sup>2</sup>

Relevant to this motion is Mr. McKay's testimony that he worked at Con Edison's Astoria and Arthur Kill Powerhouses for several weeks each during the mid 1960's where he installed sinks, urinals, toilets, and bathroom fixtures. Mr. McKay testified that he was exposed to asbestos at both powerhouses from the use of asbestos-containing products in his vicinity by various trades and from the direct contribution of Con Edison personnel who cleaned up asbestos-containing debris in his presence. Con Edison argues that such claims are mere speculation (Deposition, pp. 148-49, 341-43, objection omitted):

- Q. Could you estimate for us how many, the number of these other tradesmen that were working outside of the bathroom during that one or two-week period that you were there?
- A. I would say maybe 12, something in that area.
- Q. Now, when these steamfitters were working on the pumps, were you working anywhere near them?
- A. Yeah, I would say within a ten, 15 feet area.
- Q. And were you working ten or 15 feet away from them the entire week or so that you were there?

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<sup>1</sup> Copies of the deposition transcripts are submitted as defendant's exhibit C ("Deposition").

<sup>2</sup> From 1980 until his retirement in 2006, Mr. McKay repaired roads for the New York City Department of Transportation.

- A. Yeah, just about.
- Q. You mentioned some sort of dust that was emanating from their work, correct? . . . .
- A. That is correct.
- Q. Do you know what it was that was causing this dust?
- A. I would say asbestos.
- Q. Now, that's your speculation or guess at this time? . . . .
- A. No, that's my, from my experience in the trade.
- Q. So why would you say that this dust that these steamfitters, that this dust around where the steamfitters were working was asbestos? What causes you to say that?
- A. Experience.
- Q. Well, do you know what kind of products it was that was [sic] releasing this dust?
- A. Well, some looked like it was coming from the valves like a rope type material.

\* \* \* \*

- Q. When you were installing bathroom fixtures, were there any other trades working in your vicinity in the bathroom?
- A. Yeah.
- Q. What other trades?
- A. Your carpenters, electricians, laborers.
- Q. Okay. What were the carpenters doing?
- A. They were working on drywall.
- Q. And how close were you to the carpenters working on drywall?
- A. Maybe 15 feet.
- Q. Do you believe any of their work caused you to be exposed to asbestos?
- A. Yes.
- Q. How so?
- A. Well, when they were cutting it, it was floating around in the area and on the floor.
- Q. Okay. And what were the electricians doing in the bathroom?
- A. They were installing light fixtures.
- Q. And how close were you to the electricians installing light fixtures?
- A. How?
- Q. What was your proximity to the electricians installing light fixtures?
- A. I would say maybe eight, ten feet.

- Q. Okay. Do you believe any of that work caused you to be exposed to asbestos?
- A. Yeah. Because when they were putting up the fixtures, there was asbestos in the fixture area and it was rattling down.
- Q. What was the source of that asbestos in the fixture area?
- A. It was just lying there.
- Q. Was anybody actually working with that asbestos?
- A. No.
- Q. Okay. When you say there was asbestos in the fixture area, what do you mean by that?
- A. Well, like this fixture here (indicating).
- Q. Okay.
- A. Okay. If you took that cover off, there's a wide open area which allows dust and everything else to carry it in that area.
- Q. Okay. What was the asbestos connected to? What was it associated with?
- A. It was associated with work that had [to] be done in that area.
- Q. Do you believe any of the work that -- strike that. You mentioned that no work was actually being done to the asbestos in the fixture area; is that correct?
- A. That's right.
- Q. Okay. So you believe you were exposed to asbestos by virtue of the asbestos laying there in the fixture area?
- A. Correct.
- Q. Okay. Now, what were the laborers doing in the bathroom?
- A. They were cleaning up the constructions debris.
- Q. And how close were you to the laborers cleaning up the construction debris?
- A. Six, eight feet.
- Q. Do you believe any of this work caused you to be exposed to asbestos?
- A. Yes, I do.
- Q. How so?
- A. It was being distributed while they were brushing it up.

In respect of his work at Arthur Kill, Mr. McKay testified as follows (Deposition pp. 98, 153, 154-155, 186):

- Q. How do you believe you were exposed?

A. Through the steamfitters and the laborers on the clean up.

Q. Were the laborers cleaning up after the steamfitters?

A. Yes, ma'am.

\* \* \* \*

Q. And you mentioned that laborers were cleaning up, correct?

A. That is correct.

Q. Do you know who employed those laborers?

A. I believe it would be Con Ed.

Q. Now, what is your basis of your belief? Why would you say that?

A. Well, usually on major maintenance Con Ed done their own laborers.

Q. This wasn't a major maintenance, was it?

A. Well, it was a large overhaul, whatever you want to call it.

\* \* \* \*

Q. . . . Now, when you were working inside the bathrooms, was there clean up work going on?

A. Yes, there was.

Q. And who would do that clean up work?

A. I would say the laborers.

Q. Okay. Would you do any of the clean up work too?

A. No. No.

Q. And do you know who it was that employed those laborers in the bathrooms?

A. I would believe Con Ed. I'm not sure.

Q. And, once again, could you tell me what it was that caused you to believe that there would have been Con Edison laborers working in the bathroom where you were installing new fixtures?

A. Well, usually from my years I found that Con Ed was their own GC. So I take it they hire the laborers. I don't know. I could be wrong.

\* \* \* \*

Q. And how is that you believe you were exposed to asbestos from the work of the steamfitters?

A. Well, with the debris in the air and the clean up.

Q. And was that debris caused by other trades together who were working in the same vicinity?

A. Yes.

Q. So the laborers were sweeping up after the steamfitters, pipe coverers and electricians?

A. Yes.

At the Astoria Powerhouse, Mr. McKay testified that Con Edison personnel contributed to his exposure while maintaining the turbines (Deposition pp. 433-434, 435-36, objections omitted):

Q. Did anybody else ever work on those turbines when you were at Astoria working around the turbine floor? . . .

A. Yes.

Q. Who was working on the turbines? . . .

A. Steamfitters.

Q. Okay. Steamfitters. Anybody else?

A. Yeah, I would say electricians would be wiring.

Q. Okay. What kind of work was being performed? . . .

Q. If any?

A. They would be connecting on the pipes and the jacket.

Q. Okay. Were they doing any kind of maintenance? . . .

A. Yeah. I would say a general maintenance, Con Ed general maintenance.

Q. Okay. Was there Con Ed personnel there too? . . .

A. Yes, sir.

Q. Okay. Do you know who they were?

A. I didn't know them personally, but I seen them there, yes.

Q. Okay. What kind of conditions occurred from the work that was being performed on the turbine? . . .

A. There was a lot of dust in the atmosphere, asbestos dust.

\* \* \* \*

Q. How about Con Ed, did they have workers involved? . . .

A. Major maintenance for the Con Ed.

Q. Who's major maintenance? What's major maintenance?

A. Con Ed.

Q. What do they do?

A. They're in charge of the whole operation.

Q. What kind of work do they do? Give me something specific?

A. I would say they oversee the whole project.

Q. Okay. Did they participate in the project?

A. Yes, they do.

Q. Did they work on the boilers?

A. Yes.

Q. Did they work on the turbines? . . .

A. Yes.

Q. Did they work on the pumps and valves? . . .

A. Yes.

Q. What kind of conditions, if any, occurred from their work? . . .

A. Well, there was a lot of airborne asbestos.

Q. And where was that asbestos coming from? . . .

A. From the jacket.

Q. Did you breathe in that dust?

A. Yes, I did.

Mr. McKay maintained throughout his deposition that Con Edison workers caused him to be exposed to asbestos-containing debris at both the Astoria and Arthur Kill powerhouses. Con Edison argues that plaintiff's allegations are incredible and worthless because on cross-examination Mr. McKay could not in fact testify that he saw Con Edison workers doing physical work on boilers or turbines at either location.<sup>3</sup> However, this observation merely highlights alleged inconsistencies in Mr. McKay's testimony which are not conclusive, but rather affect the weight to be given thereto by the trier of fact. *See Asabor v Archdiocese of New York*, 102 AD3d 524, 527 (1st Dept 2013) (quoting *Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]); *Alvarez v NY City Hous. Auth.*, 295 AD2d 225, 226 (1st Dept 2002); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st

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<sup>3</sup> See, e.g., Deposition pp. 464-474.

Dept 1996). Thus, Con Edison's motion to dismiss plaintiff's common law negligence claims against it is denied.

Plaintiff further argues that Con Edison is liable for Mr. McKay's injuries under Labor Law 200<sup>4</sup> because it controlled and oversaw all aspects of work at the Astoria and Arthur Kill powerhouses. Labor Law 200 codifies the common law duty imposed on an owner or general contractor to provide construction workers with a safe work site. To pursue a Labor Law 200 claim tied to a general contractor's or property owner's supervision and control, plaintiff must show that Con Edison had the "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition," *Russin v Picciano & Son*, 54 NY2d 311, 317 (1981), or that Con Edison had actual or constructive notice of the defective condition that caused Mr. McKay's injury. *See Comes v N. Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 (1993); *cf. Lopez v Dagan*, 98 AD3d 436 (2012), *lv. app. den.* 21 NY3d 855 (2012).

This "is a 'dangerous condition' case, and not a 'methods and means' case" (*Mott v Tromel Constr. Corp.*, 79 AD2d 829, 830 [2d Dept 2010]), since Mr. McKay was alleged to be injured as a result of the conditions at Con Edison's powerhouses. In this regard, plaintiff submits the 2010 deposition transcripts of former Con Edison mechanic Mr. John Tax, who testified in an unrelated asbestos personal injury action venued in this court. The Tax deposition primarily details the work performed by Con Edison personnel and Major Maintenance gangs at various Con Edison

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<sup>4</sup> Labor Law § 200 provides in relevant part that "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section."

powerhouses, including the Astoria powerhouse (plaintiff's exhibit G, pp. 104-05). While Mr. Tax's testimony indicates that Con Edison exercised only general supervisory authority over the activities of non Con Edison personnel (*see Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]), he also testified that during the 1960's Con Edison implemented wet-down procedures to quell the release of asbestos-containing dust (plaintiff's exhibit G, pp. 171-72):

- Q. Do you recall Con Ed requiring the use of wet down procedures when asbestos material would be removed?
- A. When they first -- when people first started becoming aware that asbestos was a problem, that was one of the first steps . . . .
- Q. Can you tell me the first time you observed wet down procedures being used?
- A. I am going to say, not a procedure, but maybe after I first came in the gang and we first started doing jobs. You get a big cloud of dust and someone would go get a water hose and wet it down.
- Q. And that would have been in what decade?
- A. In the '60s.

In light of such testimony, there is an issue of fact whether Con Edison knew of the hazards associated with the use of asbestos-containing products at its powerplants.

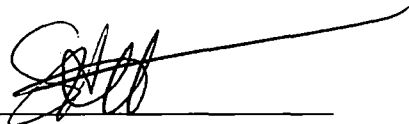
Accordingly, it is hereby

ORDERED that Consolidated Edison Company of New York Inc.'s motion for summary judgment denied in its entirety.

This constitutes the decision and order of the court.

DATED:

12-2-13

  
SHERRY KLEIN HEITLER, J.S.C.