

Feinstein v Armstrong Intl., Inc.
2013 NY Slip Op 33478(U)
December 24, 2013
Supreme Court, 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**

Justice

PART 30

Index Number : 190195/2012

FEINSTEIN, EDWARD

VS.

ARMSTRONG INTERNATIONAL, INC.

SEQUENCE NUMBER : 011

DISMISS ACTION

(COB/ Westinghouse)

INDEX NO. 190195/12

MOTION DATE _____

MOTION SEQ. NO. 011

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 _____

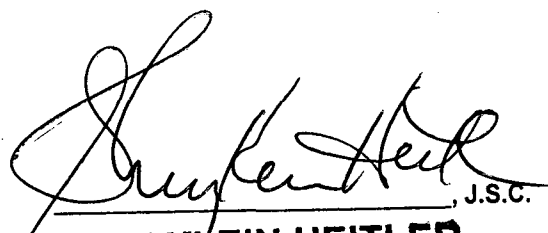
No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**is decided in accordance with the
memorandum decision dated 12-24-13,**

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

Dated: 12-24-13


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 A
TRUSTEE OF THE EDWARD FEINSTEIN LIVING TRUST,

Index No. 190195/12
Motion Seq. 011

Plaintiff,

DECISION & ORDER

-against-

ARMSTRONG INTERNATIONAL, INC. et al.,

Defendants.
-----X

SHERRY KLEIN HEITLER, J:

In this asbestos personal injury and wrongful death action, defendant CBS Corporation¹ (hereinafter "Westinghouse") 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 plaintiffs' decedent Edward Feinstein was exposed to asbestos fibers released from a Westinghouse product. As more fully set forth below, the motion is denied.

Edward Feinstein served in the United States Navy from 1943 to 1946. On April 16, 2012 Mr. Feinstein commenced this action to recover for injuries caused by his alleged exposure to asbestos-containing products during his naval service. Mr. Feinstein's discovery and *de bene esse* depositions were conducted in June of 2012.² He died on September 21, 2012. Thereafter plaintiffs amended the complaint to include a wrongful death claim.

Mr. Feinstein testified that he served as an Assistant Supply Officer and Disbursing Officer for the United States Navy. He spent approximately 18 months at the Brooklyn Navy

¹ CBS Corporation is sued herein as "CBS Corporation, f/k/a Viacom, Inc., merger to CBS Corporation [sic], f/k/a Westinghouse Electric Corp."

² Copies of Mr. Feinstein's deposition transcripts are submitted as defendant's exhibit B.

Yard aboard the USS Brooklyn delivering equipment and supplies to that ship's engine and boiler rooms while the ship was being overhauled. While Mr. Feinstein identified various manufacturers and types of equipment that he believed contributed to his asbestos exposure, it is undisputed that he did not explicitly identify Westinghouse as a manufacturer or supplier of any such equipment. Relevant to this issue is the following testimony (Deposition, pp. 70-72, 73-75, 88; Video Deposition, pp. 47-48, objections omitted):

Q. What products, supplies, and materials do you believe contained asbestos that caused your exposure?

A. Pumps, valves, boilers, gaskets, insulation.

Q. Anything else, sir?

A. No. That pretty much covers equipment.

Q. Okay.

A. Turbines. Engines.

Q. How do you believe you were exposed to asbestos from the pumps?

A. Well, everything that was needed in the boiler room or the engine room, which was separate areas, and the ship had been hit by a mine, as I say, and there were repairs needed.... But I was told, you know, whenever the boiler room needed, or the engine room, or whoever needed supplies, I was told to go down - excuse me. Go down and get an invoice of what they needed. They'd fill out an invoice, tell me this is what we need, and then I would have to go and get it, order it, and then see that it was delivered, see that it was installed, see that the old stuff was taken out, the new stuff was put in, and that what I had gotten was satisfactory.

Q. At any time serving on the U.S.S. Brooklyn, did you ever do any hands-on work on any of the equipment you identified?

A. Well, not hands on. But I was delivering it, and I was, you know, if I had my crew there of stewards mates taking away the old stuff, bringing out new stuff, and once in a while, yeah. Once in a while, I'm sure I helped unpack. . . .

* * * *

Q. Okay, sir. You told me about pumps. Can you identify any of the pumps on the U.S.S. Brooklyn that you believe caused you to be exposed to asbestos by brand name, trade name, or manufacturer?

A. There were a number of them. Crane. Buffalo. Ingersoll Rand. Warren. Gould. I

think - you know, some others, too

- Q. You told me about valves. Can you identify by brand name, trade name, or manufacturer any of the valves you believe caused you to be exposed to asbestos while serving on the U.S.S. Brooklyn?
- A. I think Ingersoll supplied some valves. And I believe there was another company that I ordered valves from. I'm trying to think right now. Might have been Buffalo.
- Q. You told me about boilers. Can you identify the boiler or boilers on the U.S.S. Brooklyn by a brand name, a trade name, or manufacturer that you believe caused you to be exposed to asbestos?
- A. No.
- Q. You told me about gaskets. Can you tell me the brand name, trade name, or manufacturer's name of any of the gaskets that you believe caused you to be exposed to asbestos on the U.S.S. Brooklyn?
- A. Well, gaskets from a number of those same companies that I mentioned before.

* * * *

- Q. What was being done to that ship?
- A. Well, it was being -- well, we got hit by a mine. And I guess the engine rooms, the boiler rooms, I guess everything -- you know, everything was being stripped down and made better. Sixteen months over there, you know, I guess with all that steam flying around and the heat down there, burned up a lot of insulation, I guess. And they were replacing that, too.

* * * *

- 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 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 dust was flying all the time.
- Q. Could you see the dust?
- A. Oh yeah.
- Q. And did you breathe in that dust?

A. Yes.

Q. How was this dust created?

A. Well, like I say, when they peel off or take off an insulation covering, from whether it be a pump, a pipe, they, wherever they were taking it off, when they peeled it off, insulation is, you know, flaky. It was light. It was fire resistant. You know. And it was very light. And compact. When you pulled it apart, you know, it was like - spread. It wasn't like little particles of dust. It was stuff flying all over the place.

Plaintiffs submit a 1938 "Synopsis of Machinery and Hull Data" for the USS Brooklyn which shows that the defendant manufactured the ship's motors for its turbo generator and lubricating oil purifier gear pump, which were located in the ship's engine room.³ Plaintiffs also submit the defendant's August 11, 2010 interrogatory responses filed in a different case in the Superior Court of the State of California in which the company admits that some of its motors contained asbestos.⁴ On this motion, the defendant does not dispute that its equipment was in the USS Brooklyn's engine and boilers rooms or that they contained asbestos components. Instead, the defendant argues that it would be speculative to assume that Mr. Feinstein was exposed to asbestos therefrom in light of the fact that he did not explicitly name Westinghouse motors or equipment as a source of his exposure.

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 La 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, plaintiffs 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

³ Plaintiffs' exhibit A.

⁴ Plaintiffs' exhibit B, pp. 49-52.

inferences should be resolved in plaintiffs' favor. *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dept 1990).

Under the circumstances of this case plaintiffs have raised a triable issue of fact that precludes summary judgment. In this regard, it bears repeating that Mr. Feinstein served on the USS Brooklyn during a major overhaul during which all of the equipment in the engine and boiler rooms were being worked on in his presence. While Mr. Feinstein did not explicitly name Westinghouse motors as a source of his exposure, the documentary evidence shows that Westinghouse motors which may have contained asbestos powered the turbines and pumps that Mr. Feinstein did identify as sources of his exposure. The defendant's own interrogatory responses includes its motors as one of its many products known to have contained asbestos. Significantly, the defendant does not deny on this motion that its equipment on the USS Brooklyn contained asbestos. Taken together, the defendant's liability may be reasonably inferred. *See Reid, supra*.

In light of the foregoing, it is hereby

ORDERED that CBS Corporation's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED:

12-24-13


SHERRY KLEIN HEITLER, J.S.C.