

**Noble v A.O. Smith Water Prods. Co.**

2014 NY Slip Op 31719(U)

June 27, 2014

Supreme Court, New York County

Docket Number: 190074/13

Judge: Sherry Klein Heitler

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

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HARRIET NOBLE and ROBERT BERGER,

Plaintiffs,

- against -

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

Defendants.  
----- X

Index No. 190074/13  
Motion Seq. 001

**DECISION & ORDER**

**SHERRY KLEIN HEITLER, J.:**

In this asbestos personal injury action, defendant Lennox Industries, Inc. (“Lennox”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all other claims asserted against it on the ground that plaintiff Harriet Noble misidentified Lennox water-based boilers as a source of her asbestos exposure. As more fully set forth below Lennox’s motion is denied.

Harriet Noble was diagnosed with pleural mesothelioma on or about July 19, 2012.<sup>1</sup> She commenced this action on March 1, 2013 and was deposed in May of 2013.<sup>2</sup> Ms. Noble was employed as a social worker intern for approximately 18 months during the mid-1970s where she made field visits to homes, clinics, municipal buildings, and hospitals. From 1980 through 2013 she worked as a realtor in respect of which she attended home inspections. Ms. Noble testified that she was exposed to asbestos in both capacities from the equipment used to heat the homes she visited (Deposition pp. 785-86):

- Q. You testified that while you were an intern, you were in homes where you believe you were exposed to asbestos from boilers, correct?
- A. Correct.

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<sup>1</sup> Plaintiffs’ exhibit 1.

<sup>2</sup> Copies of Ms. Noble’s deposition transcripts are submitted as defendant’s exhibits 2-6 (“Deposition”).

- Q. And how would you be exposed to the boilers at those homes?
- A. To the asbestos from the boilers?
- Q. Yes.
- A. Yes, I was present when it was brushed -- when people brushed up against the asbestos insulation that covered the boilers.
- Q. Okay. And what, if anything, happened to the air when this occurred?
- A. It became dusty.
- Q. And did you breathe that dust? . . .
- A. Yes, I believe I did.
- Q. Let's talk about the boilers you encountered as a realtor. Okay?
- A. Yes.
- Q. How do you believe you were exposed to asbestos from the boilers you encountered as a realtor?
- A. During the inspections, inspectors would do their thing and inspect the boiler, and these boilers were covered in asbestos insulation and the air became dusty and I breathed it. . . .
- Q. Did the inspector disturb the asbestos insulation in your presence? . . .
- A. Yes, he must have to cause that, yes.
- Q. And you breathed that dust? . . .
- A. Yes, I breathed that. I breathed the air that was there that included the dust.
- Q. And do you believe that caused you to be exposed to asbestos? . . .
- A. Yes, because it had asbestos insulation that was disturbed that created the dust.

Lennox has previously admitted that it manufactured asbestos-containing heating equipment from the 1930's through the 1980's<sup>3</sup> but claims herein that it only began manufacturing water-based boilers in 1992 and that all such boilers were asbestos-free. Relying on Ms. Noble's reference to the heating units she encountered as boilers Lennox argues that her allegations of asbestos exposure to its products must be without merit. However, Ms. Noble's technical knowledge of heating units is questionable. As evidenced by her testimony, she interchangeably used the terms "boiler", "furnace", and "burner" to describe the heating equipment she encountered throughout her career (Deposition pp.

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<sup>3</sup> See Lennox's January 31, 2008 Supplemental Interrogatory Responses filed in an unrelated New Jersey action, plaintiffs' exhibit 8,

454, 542, objection omitted):

- Q. I wasn't here for the first couple of days, so I might have to repeat a couple things to make sure I understand everything correctly. I understand that you recall a couple instances in which you came across Rheem boilers and furnaces; is that right?
- A. That's correct.
- Q. Okay. That brings up an interesting point. Have you been using the term furnace and boiler interchangeably? . . .
- A. Yes.
- \* \* \* \*
- Q. Now, you just said the term burner instead of boiler.
- A. Furnace.
- Q. Well, I'm using the term boiler. Do you want me to use a different term?
- A. No, that's fine. Let's skip burner.
- Q. When you use the term burner or boiler or furnace, are you using those terms interchangeably meaning the same thing?
- A. Yes, exactly.

Despite such testimony Lennox argues that Ms. Noble clearly described water-based boilers. In support it rests on an affidavit by its Corporate Service Manager of Residential Heating Products, William Drake<sup>4</sup>, who states in relevant part as follows (Drake Affidavit ¶¶ 13, 14, 17):

. . . Ms. Noble used the term "boiler" repeatedly, and she said that she knows that boilers heat water and are connected to pipes. This describes water-based boilers, not forced air furnaces.

. . . Ms. Noble said that the "boilers" she encountered were covered with insulation. Water and steam boilers often are covered with insulation. Forced air furnaces typically are not covered with insulation; it is not a good or safe practice.

Ms. Noble could not have encountered a Lennox water-based boiler at any time before the early 1990s because Lennox did not begin to sell such equipment until around 1992. After 1992, Ms. Noble could not have been exposed to asbestos from a Lennox boiler because they did not contain asbestos components. Further, Lennox did not recommend or specify that its boilers be covered with any kind of insulation, nor did Lennox manufacture or sell asbestos insulation for any such application.

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<sup>4</sup>

Mr. Drake's affidavit, sworn to January 16, 2014, is submitted as defendant's exhibit 7 ("Drake Affidavit").

The record does not contain any of the documents on which Mr. Drake purportedly relied. This crucial omission renders Mr. Drake's assertions conclusory at best. *See Republic Nat. Bank of New York v Luis Winston, Inc.*, 107 AD2d 581, 582 (1st Dept 1985). As such Lennox has failed to meet its *prima facie* burden, thereby precluding summary judgment. *See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993); *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986); *Zuckerman v City of New York*, 49 NY2d 557 (1980); *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957).

As this court has held several times now under virtually identical facts and circumstances<sup>5</sup>, Mr. Drake's unsupported opinions merely give rise to credibility issues which must be decided by a jury. *See 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, 320 (1st Dept 1996).

In light of the foregoing, it is hereby

ORDERED that Lennox Industries, Inc.'s motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: 6.27.14

  
 SHERRY KLEIN HEITLER, J.S.C.

<sup>5</sup>

*See McGuire v A.O. Smith Water Products*, Index No. 100323/12 (Dec. 23, 2013, Heitler, J.); *Garbutt v A.O. Smith Water Products*, Index No. 190353/12 (Dec. 20, 2013, Heitler, J.); *Sadowski v A.O. Smith Water Products*, Index No. 190215/11 (July 12, 2012, Heitler, J.); *Horn v A.W. Chesterton*, Index No. 190281/09 (Oct. 15, 2010, Heitler J.).