

<b>Smyth v A.O. Smith Water Prods., Co., Inc.</b>
2015 NY Slip Op 32110(U)
April 17, 2015
Supreme Court, New York County
Docket Number: 190232/2010
Judge: Peter H. Moulton
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SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY

HON. PETER H. MOULTON  
J.S.C.

PRESENT: \_\_\_\_\_  
Justice

PART 50

Index Number : 190232/2010  
SMYTH, THOMAS  
vs  
A.O. SMITH WATER PRODUCTS, CO  
Sequence Number : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

*decided in accordance with the attached written decision.*

**FILED**

APR 20 2015

NEW YORK  
COUNTY CLERK'S OFFICE

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Dated: 4/17/15

*[Signature]*  
HON. PETER H. MOULTON  
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

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

SUPREME COURT OF THE STATE OF NEW YORK : Part 50  
ALL COUNTIES WITHIN THE CITY OF NEW YORK

-----X  
IN RE NEW YORK CITY ASBESTOS LITIGATION  
-----X

Index 190232/2010  
Motion Seq. 002

**DECISION & ORDER**

ANNIE SMYTH, as Administratrix of the Estate of THOMAS SMYTH, and ANNIE SMYTH, Individually

Plaintiff(s)

-against-

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

Defendants

-----X  
**PETER H. MOULTON, J.:**

**FILED**  
APR 20 2015  
NEW YORK  
COUNTY CLERKS OFFICE

Plaintiff Thomas Smyth (“plaintiff”) was diagnosed with mesothelioma on February 2, 2010. His disease, he claims, is attributed to his exposure to asbestos-containing dust during his employment as a boiler mechanic from approximately 1957 until 1983. As a boiler mechanic, plaintiff often worked with and around other trades at job sites. As such, he claims to have been exposed to asbestos-containing dust from the work he and others in his presence performed working with, and cleaning up debris from asbestos-containing material used in connection with Defendant Crane Co.’s (“Crane”) pumps.

Crane moves, pursuant to CPLR § 3212, for summary judgment dismissing plaintiff’s complaint and all claims and cross claims against it. Crane’s affirmation in support of its motion states that plaintiff has “not presented any evidence that Mr. Smyth worked with or around any Crane Co. asbestos-containing product” (*see* Defendant’s Affirmation in Support at ¶ 12). As such, Crane

claims that plaintiff has “failed to produce any admissible evidence that Mr. Smyth either personally worked with products or equipment manufactured by Crane Co., or worked in the vicinity where such products were being used, and that he was exposed to asbestos emitted from such products” (*id.*).

That is not the correct standard to apply here as it is Crane, the moving party, who bears the burden of establishing a prima facie case on a motion for summary judgment.

### ARGUMENTS

Crane contends that plaintiff has not shown that he specifically came into contact with an asbestos-containing product that it manufactured and sold. Indeed, Crane alleges that plaintiff generally testified that he was exposed to a variety of asbestos-containing products and equipment during the course of his deposition. Crane goes on to state that although plaintiff offered extensive testimony regarding his alleged exposures to asbestos and identified the manufacturers of numerous pieces of equipment and products to which he alleges exposure, at no point did he identify Crane Co. as the manufacturer or supplier of any product or equipment to which he was allegedly exposed. Crane makes this contention even though it concedes that at his deposition, plaintiff did identify Crane Co. as the manufacturer of pumps that he encountered at his various work sites during the course of his career.

Plaintiff opposes Crane’s motion by highlighting the fact that during his deposition testimony, plaintiff testified that while working as a boiler mechanic he was exposed to asbestos when he and others removed and replaced Crane Co. pumps and damaged the asbestos-containing seals for those pumps. In fact, at his deposition plaintiff testified as follows:

Q: How did you know that it was Crane pumps? How were you able to identify it?

A: With the tag again.

(*see* Deposition of Thomas Smyth 235: 4-7)

Later, plaintiff went on to testify as follows:

Q: Do you believe that you were exposed to asbestos from removing the Crane pumps from the lines and sending them to the--

A: Yes.

Q: And is that from the dust in the boiler room that was just generally around the Crane pumps?

A: Yes. The seals.

(*see id.* at 419: 3-18)

Plaintiff also argues that Crane's own corporate manuals show that its pumps were asbestos-containing. As such, plaintiff submits that Crane's motion must be denied because his testimony coupled with Crane's manuals show that its pumps were asbestos-containing, creating questions of fact that can only be properly resolved by a jury. Furthermore, plaintiff argues that Crane's moving papers fail to offer evidence that their asbestos-containing products could not have contributed to his injury. Consequently, plaintiff submits that Crane's motion for summary judgment should be denied because Crane has failed to meet its initial burden of a *prima facie* showing of an entitlement to summary judgment as a matter of law.

#### DISCUSSION

CPLR 3212 (b) provides, in relevant part:

A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that

the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

Thus, a defendant moving for summary judgment must first establish its *prima facie* entitlement to judgment as a matter of law by demonstrating the absence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Therefore, summary judgment in defendant's favor is denied when defendant fails "to unequivocally establish that its product could not have contributed to the causation of plaintiff's injury" (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995]; *Matter of New York City Asbestos Litig. (Berensmann)*, 122 AD3d 520 [1st Dept 2014]).

It is only after the burden of proof is met that plaintiff must then show "facts and conditions from which the defendant's liability may be reasonably inferred" (*Reid*, 212 AD2d at 463, *supra*). The plaintiff cannot, however, rely on conjecture or speculation (*see Roimesher v Colgate Scaffolding & Equip. Corp.*, 77 AD3d 425, 426 [1st Dept 2010]). Nor can a plaintiff rely upon the affirmation of counsel to fill in a crucial gap regarding how the plaintiff was exposed (*see Matter of Asbestos Litigation (Comeau)*, 216 AD2d 79 [1st Dept 1995] [counsel stated that the deceased plaintiff metal lather must "necessarily [have] scraped . . . W.R. Grace asbestos containing fireproofing . . . in order to perform his job"]). To defeat summary judgment, a plaintiff's evidence must create a reasonable inference that plaintiff was exposed to a specific defendant's product (*see Comeau v. W.R. Grace & Co.-Conn*), 216 AD2d 79 [1st Dept. 1995]).

In addition, issues of credibility are for the jury (*Cochrane v Owens-Corning Fiberglass Corp.*, 219 AD2d 557, 559-60). Where "[t]he deposition testimony of a litigant is sufficient to raise

an issue of fact so as to preclude the grant of summary judgment dismissing the complaint . . . [t]he assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier fact, and any apparent discrepancy between the testimony and the evidence of the record goes only to the weight and not the admissibility of the testimony" (*Dollas v. Grace & Co.*, 225 AD2d 319, 321 [1st Dept. 1996] [internal citations omitted]). This is particularly true in asbestos cases, like that in *Dollas*, where the testimony presented is often proffered by witnesses attempting to recall remote events that are years and perhaps even decades removed from the present. Furthermore, it is well-settled that in personal injury litigation, a plaintiff is not required to show the precise cause of his damages, but only facts and conditions from which a defendant's liability can be reasonably inferred (*Reid, supra*; *Matter of New York City Asbestos Litg. (Brooklyn Nav. Shipyard Cases)*, 188 AD2d 214, 225 [1st Dept], *affd* 82 NY2d 821 [1993]).

Here, Crane has failed to establish a prima facie case. No affidavit was proffered in support of the motion. Nor did Crane cite to any affirmative deposition testimony of its own which would support a prima facie case. Moreover, even if Crane had established its prima facie case, the arguments advanced in its memorandum of law with respect to plaintiff's testimony and credibility are unpersuasive, and reveal issues of fact for a jury to decide. Crane attempts to curtail Mr. Smyth's testimony with respect to his alleged asbestos exposure by stating that the testimony speaks to the presence of Crane pumps at Mr. Smyth's various work sites rather than his actual use of those products at those sites. In essence, Crane argues that even if its pumps were present at plaintiff's work sites, there is no evidence that he actually used them. As such, Crane attempts to minimize Mr. Smyth's testimony by stating that he did not specify exactly where and when he performed work with Crane products.

Crane's arguments are without merit. In fact, Mr. Smyth did testify at his deposition to the very specifics that Crane argues are missing here. Mr. Smyth's deposition testimony specifically states that he recalled being exposed to asbestos in the boiler room when clouds of dust were generated from the seals of Crane pumps. Such testimony contradicts Crane's characterizations. The weight to afford plaintiff's testimony, and the appropriate manner in which to characterize it, are not issues for this court to resolve. Crane's attempts to minimize that testimony, while offering generalized denials and no corporate affidavits or other material evidence to contradict it, presents an issue of fact for a jury to address.

It is hereby

ORDERED that Defendant Crane Co.'s motion is denied.

**This constitutes the Decision and Order of the Court.**

Dated: April 17, 2015

  
HON. PETER H. MOULTON  
J.S.C.

**FILED**  
APR 20 2015  
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COUNTY CLERKS OFFICE