

**Murphy-Clagett v A.O. Smith Water Prods.**

2017 NY Slip Op 32310(U)

October 23, 2017

Supreme Court, New York County

Docket Number: 190311/2015

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

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IN RE: NEW YORK CITY  
ASBESTOS LITIGATION

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This Document Relates to:

MARY MURPHY-CLAGETT, as Temporary  
Administrator for the Estate of  
PIETRO MACALUSO,

Index No. 190311/2015

Plaintiff

- against -

DECISION AND ORDER

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

Defendants

-----x  
LUCY BILLINGS, J.S.C.:

Defendant Peerless Industries, Inc., moves for summary judgment dismissing all claims against Peerless Industries, C.P.L.R. § 3212(b), on two grounds. First, the decedent Pietro Macaluso's removal of Peerless Industries' boilers from residences when working in Kings County during 1972-82, by separating them into sections with a crowbar and sledgehammer to dismantle and them and carry them out of the residences, was not a reasonably foreseeable use of the boilers. Second, Macaluso would not have heeded a warning regarding the hazards of exposure to asbestos when working near Peerless Industries' boilers. For the reasons more fully explained on the record October 23, 2017, the court denies Peerless Industries' motion.

Peerless Industries has failed to establish that Macaluso's

removal of boilers by separating them into sections with a crowbar and sledgehammer to dismantle and then carry them out of the residences was not a reasonably foreseeable use of the boilers. Unlike the salvaging of valves as scrap metal in Hockler v. William Powell Co., 129 A.D.3d 463, 465 (1st Dep't 2015), it was foreseeable to Peerless Industries that its boilers would be removed from residences at the end of the boilers' useful life to install new boilers in the old boilers' place for continued heating. Macaluso testified at his deposition that it was necessary to break the boilers down into pieces to remove them from the residences, due to the boilers' weight or unwieldiness or to the size of the spaces through which it was necessary to haul the boilers. Although he may not have been questioned specifically about the reasons for breaking apart the boilers to remove them, nothing in the inquiry suggested that he was reckless or careless in breaking them apart or that it was not standard removal procedure to break them apart.

Peerless Industries also has failed to meet its burden, upon its motion for summary judgment, to establish that Macaluso would not have heeded a warning regarding the hazards of exposure to asbestos when working near Peerless Industries' boilers.

Peerless Industries relies on Reis v. Volvo Cars of N. Am., Inc., 73 A.D.3d 420, 423 (1st Dep't 2010), where the plaintiff, in opposing the defendants' motion for summary judgment dismissing a claim of failure to warn about the absence of a starter interlock on their motor vehicle, did not rebut their evidence from his

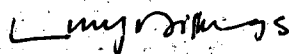
deposition that he did not consider it necessary to read the vehicle manual because he understood how the vehicle operated. Thus the defendants presented affirmative evidence that, had they provided a warning about the risks without the device, the plaintiff would not have heeded such a warning.

Peerless Industries also relies on Mulhall v. Hannafin, 45 A.D.3d 55, 61 (1st Dep't 2007). There the plaintiff, in opposing the defendant's motion for summary judgment dismissing a claim of inadequate warning about the risks of a fixation device implanted during surgery, did not rebut its evidence from her deposition that she did not read the consent forms warning of risks and that reading the forms would not have dissuaded her from the surgery. Similarly, in Sosna v. American Home Prods., 298 A.D.2d 158, 158 (1st Dep't 2002), the defendants' motion for summary judgment dismissing an inadequate warning claim confronted the plaintiff with his deposition testimony that he did not read the warning provided with their product until after he stopped using it. Again in each action the defendants presented affirmative evidence that, had they provided adequate warnings about the risks of their products, the plaintiffs would not have heeded such a warning.

Here, no party inquired of Macaluso at his deposition about whether, had he been provided a warning about the risks of the products he worked with, he would have heeded them. Thus Peerless Industries is without any prima facie evidence of Macaluso's failure to heed a warning essential to this defense to

plaintiff's claim of Peerless Industries' failure to warn about the risks of exposure to asbestos while working with its boilers. See Voss v. Netherlands Ins. Co., 22 N.Y.3d 728, 734 (2014); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005). Its motion for summary judgment places the initial burden on Peerless Industries, unlike the trial, where plaintiff will bear the initial burden to show that he would have heeded a warning. See Sweberg v. ABB, Inc., 143 A.D.3d 483, 484 (1st Dep't 2016); Peraica v. A.O. Smith Water Prods., 143 A.D.3d 448, 450 (1st Dep't 2016); Santos v. Ford Motor Co., 69 A.D.3d 502, 503 (1st Dep't 2010). Therefore Peerless Industries has failed to meet its prima facie burden, upon its motion for summary judgment, to establish either of its grounds for dismissal. C.P.L.R. § 3212(b).

DATED: October 23, 2017



LUCY BILLINGS, J.S.C.

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J.S.C.