

<b>Corsentino v A.O. Smith Water Prods.</b>
2018 NY Slip Op 31188(U)
June 7, 2018
Supreme Court, New York County
Docket Number: 190044/2015
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

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PAULETTE KOCH CORSENTINO, as Executrix  
for the Estate of MARTIN KOCH,

Index No. 190044/2015

Plaintiff

- against -

DECISION AND ORDER

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

Defendants  
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LUCY BILLINGS, J.S.C.:

Plaintiff sues to recover damages for the decedent Martin Koch's exposure to asbestos from 1953 to 1983 from work on boilers manufactured by defendant Cleaver-Brooks, Inc. Cleaver-Brooks moves for summary judgment dismissing the complaint and all cross-claims against Cleaver-Brooks, C.P.L.R. § 3212(b), based on the absence of evidence that any Cleaver-Brooks product contributed to the decedent's exposure.

I. CLEAVER-BROOKS'S INITIAL BURDEN

To establish entitlement to summary judgment, Cleaver-Brooks must demonstrate unequivocally that its product did not contribute to the decedent's injury. Matter of New York City Asbestos Litig., 146 A.D.3d 700, 700 (1st Dep't 2017); Matter of New York City Asbestos Litig., 123 A.D.3d 498, 499 (1st Dep't 2014); Matter of New York City Asbestos Litig., 122 A.D.3d 520, 521 (1st Dep't 2014). Cleaver-Brooks may not meet its burden by merely pointing to deficiencies in plaintiff's evidence. Ricci v. A.O. Smith Water Prods. Co., 143 A.D.3d 516, 516 (1st Dep't

2016); Koulermos v. A.O. Smith Water Prods., 137 A.D.3d 575, 576 (1st Dep't 2016). Koch claims asbestos exposure from his work applying asbestos paste and installing and removing internal asbestos firebrick and refractory cement on Cleaver-Brooks boilers. Cleaver-Brooks contends that its boilers did not expose Koch to asbestos because his description of the boilers he worked on and their location in primarily residential buildings demonstrates that he did not work on Cleaver-Brooks boilers.

To support the motion, Cleaver-Brooks relies on affidavits by John Tornetta, a Technical Services Manager for Cleaver-Brooks, who attests that he "worked hands on with Cleaver-Brooks boilers . . . manufactured before 1985," Aff. of William J. Downes Ex. F ¶ 4, and "trained others about our boilers." Id. Ex. G ¶ 2. These affidavits demonstrate his personal knowledge regarding Cleaver-Brooks boilers sufficiently to support summary judgment. E.g., Pintor v. 122 Water Realty, LLC, 90 A.D.3d 449, 451 (1st Dep't 2011); Karczewicz v. 473 Owners Corp., 272 A.D.2d 137, 137 (1st Dep't 2000).

Insofar as Tornetta also bases his knowledge of the information in his affidavits on "research at the office" or "investigation," Downes Aff. Ex. G ¶ 2, that entailed discussions with Cleaver-Brooks employees, however, it is inadmissible hearsay. Id. Ex. F ¶ 4. See, e.g., Mermelstein v. Singer, 85 A.D.3d 440, 440 (1st Dep't 2011); Wen Ying Ji v. Rockrose Dev. Corp., 34 A.D.3d 253, 254 (1st Dep't 2006); Muller v. New York State Div. of Hous. & Community Renewal, 263 A.D.2d 296, 308 (1st

Dep't 2000). Tornetta further bases the facts and conclusions in his affidavits on review of unspecified Cleaver-Brooks documents, but does not present them. His recitation of their contents is also hearsay and "not an acceptable substitute" for the documents themselves. People v. Joseph, 86 N.Y.2d 565, 570 (1995). See BP A.C. Corp. v. One Beacon Ins. Group, 8 N.Y.3d 708, 716 (2007); Shanmugam v. SCI Eng'g, P.C., 122 A.D.3d 437, 438 (1st Dep't 2014); Williams v. Esor Realty Co., 117 A.D.3d 480, 480-81 (1st Dep't 2014); Ainetchi v. 500 W. End LLC, 51 A.D.3d 513, 515 (1st Dep't 2008). While Tornetta concludes in his Supplemental Affidavit dated March 25, 2014, that Cleaver-Brooks did not sell cast iron boilers until 1985, this conclusion fails to show that Koch did not work on Cleaver-Brooks boilers, given his deposition testimony, also presented by Cleaver-Brooks, that he did not know the metal composition of the boilers he worked on.

Cleaver-Brooks does present documents in the form of boiler designs, which are admissible as ancient documents because they are more than 30 years old and not claimed to be fraudulent or invalid. Essig v. 5670 58 St. Holding Corp., 50 A.D.3d 948, 949 (2d Dep't 2008); Szalkowski v. Asbestospray Corp., 259 A.D.2d 867, 868 (3d Dep't 1999). The designs themselves, however, do not independently demonstrate that Cleaver-Brooks did not manufacture cast iron boilers before 1985, since the earliest date of the designs is December 14, 1984. Similarly, in reply, Cleaver-Brooks presents invoices from September 1985 that, while also admissible as ancient documents, do not substantiate

Cleaver-Brooks's claim that it did not ship cast iron boilers before then. Moreover, as explained above, both these sets of documents are irrelevant given Koch's lack of knowledge regarding the composition of the boilers he worked on. Cleaver-Brooks's documentary evidence thus fails to demonstrate conclusively that its boilers did not cause his asbestos exposure. See Spiconardi v. Macy's E., Inc., 83 A.D.3d 472, 473 (1st Dep't 2011); Lewis v. Baker, 1 A.D. 3d 217, 217 (1st Dep't 2003).

Finally, Cleaver-Brooks points to Koch's description of the locations where he worked on boilers as primarily residential buildings and his inability otherwise to identify any specific worksites where he observed Cleaver-Brooks boilers. Tornetta concludes that Cleaver-Brooks did not manufacture boilers suitable for residences from 1952 to 1984, but he does not articulate whether this conclusion is based on his personal experience with Cleaver-Brooks boilers from that period or is marred by his reliance on hearsay documents and discussions. Nor does he show how he necessarily worked "hands on" with all boilers that Cleaver-Brooks used during that period. Koch identified Cleaver-Brooks boilers by the Cleaver-Brooks name plate on them. While this testimony does not directly rebut Tornetta's conclusion, plaintiff need only show facts and conditions from which Cleaver-Brooks's liability may be inferred. Matter of New York City Asbestos Litig., 7 A.D.3d 285, 285 (1st Dep't 2004); Reid v. Georgia-Pacific Corp., 212 A.D.2d 462, 463 (1st Dep't 1995). Since Koch identified Cleaver-Brooks boilers

by one set of facts, based on his personal observations, and Tornetta concludes that Cleaver-Brooks boilers were not used where Koch worked, even if Tornetta's conclusion is based exclusively on his personal observations as well, it only raises a factual issue in juxtaposition to Koch's testimony.

## II. PLAINTIFF'S OPPOSITION

Even if Tornetta's affidavits satisfy Cleaver-Brooks's initial burden in the face of Koch's testimony, plaintiff presents further evidence that raises a material factual issue. First, plaintiff points to Koch's observations of "Cleaver-Brooks" in bold letters on the boilers he worked on, Aff. of Adam Dreksler Ex. B, at 160, and described them as rectangular and large enough for a person to walk into, a size suitable for large residential buildings or for commercial buildings. Koch also testified that the packaging for the cement and paste he used on Cleaver-Brooks boilers was marked "asbestos," *id.* at 129, 381, and that, based on his experience with boiler maintenance, asbestos was necessary because it was heat retardant.

Plaintiff then presents Tornetta's trial testimony from another action where he confirmed that all Cleaver-Brooks boilers bore nameplates with the corporation's name and admitted that Cleaver-Brooks boilers were not limited to commercial locations. He also confirmed that Cleaver-Brooks boilers contained cement and putty with asbestos. Cleaver-Brooks's answers to interrogatories further admitted its boilers' use of both gaskets and refractories containing asbestos.

III. CONCLUSION

Thus, even accepting Tornetta's affidavits as based on his personal knowledge, plaintiff's evidence raises factual issues regarding Koch's exposure to asbestos from Cleaver-Brooks boilers. Tronlone v. Lac d'Amiante Du Quebec, 99 N.Y.2d 647 (2003); Matter of New York City Asbestos Litig., 7 A.D.3d at 285; Taylor v. A.C. & S., Inc., 306 A.D.2d 202, 202 (1st Dep't 2003); Taylor v. A.C. & S., Inc., 304 A.D.2d 403, 404 (1st Dep't 2003). Therefore the court denies the motion by defendant Cleaver-Brooks, Inc., for summary judgment. C.P.L.R. § 3212(b). This decision constitutes the court's order.

DATED: June 7, 2018



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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C.