

<b>Isernia v A.O. Smith Water Prods.</b>
2018 NY Slip Op 31438(U)
June 22, 2018
Supreme Court, New York County
Docket Number: 190071/2016
Judge: Lucy Billings
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

-----X-----  
 JOHN M. ISERNIA and FRANCES ISERNIA, Index No. 190071/2016

Plaintiffs

- against -

DECISION AND ORDER

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

Defendants

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

I. INTRODUCTION

Plaintiffs seek to recover damages for plaintiff John Isernia's injuries due to his exposure to asbestos while working for various department stores from 1958 to 1999. Plaintiffs allege that Isernia inhaled dust containing asbestos when other workers handled and installed products manufactured by Allen-Bradley Company, LLC, and when he cleaned up material and debris from this work. Defendant Rockwell Automation Inc., the successor-in-interest to Allen-Bradley Company, moves for summary judgment dismissing the complaint and all cross-claims against Rockwell Automation, C.P.L.R. § 3212(b), based on plaintiffs' inability to identify Allen-Bradley Company products as the source of Isernia's exposure to asbestos.

II. ROCKWELL AUTOMATION'S BURDEN

To establish entitlement to summary judgment, Rockwell Automation must demonstrate unequivocally that Allen-Bradley Company's product did not contribute to Isernia'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). Rockwell Automation may not meet its burden by merely pointing to deficiencies in plaintiffs' 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).

At his deposition, Isernia identified Allen-Bradley Company products as a source of his exposure to asbestos, by testifying that he observed Allen-Bradley Company's logo on "circuit breakers, switches, cables, fixtures, and all kinds of electrical equipment," Aff. of Ben Darche Ex. 2, at 730, and that he inhaled dust as workers installed this equipment in his vicinity and as he cleaned up debris from these installations. Id. at 731-32. Isernia also testified that he was exposed to dust and dirt from workers drilling through Allen-Bradley Company's panels that housed these circuit breakers, ripping the panels off the walls, and breaking the panels into pieces. Id. at 647, 655-56, 658, 660, 662. Rockwell Automation does not claim in this motion that none of the electrical equipment and fixtures, including the panels, that Isernia identified as Allen-Bradley's products contained asbestos.

Instead, Rockwell Automation maintains that Isernia misidentified Allen-Bradley Company's products as the source of his exposure to asbestos. In support of the motion, Rockwell

Automation relies solely on an affidavit by Stan Ho that he worked for Rockwell Automation from 1980 to 2016 and that Allen-Bradley Company did not manufacture, supply, or sell the circuit breakers, lighting fixtures, or wiring that Isernia described as the source of his asbestos exposure. Aff. of Stan Ho ¶¶ 10-11. Isernia testified, however, that he worked with Allen-Bradley Company's products throughout his entire career, which began in approximately 1958. Darche Aff. Ex. B, at 729, 731. Ho demonstrates no personal knowledge of Allen-Bradley Company's products to which Isernia may have been exposed during 1958-80, before Ho began working for Rockwell Automation, and thus fails to show that Isernia was never exposed to Allen-Bradley Company's products. DeCanio v. Principal Bldg. Servs. Inc., 115 A.D.3d 579, 580 (1st Dep't 2013); Rodriguez v. Board of Educ. of the City of N.Y., 107 A.D.3d 651, 652 (1st Dep't 2013); Gogos v. Modell's Sporting Goods, Inc., 87 A.D.3d 248, 253-54 (1st Dep't 2011); Casey v. New York El. & Elec. Corp., 82 A.D.3d 639, 640 (1st Dep't 2011).

Ho also bases his conclusions on his review of "historic Allen-Bradley product catalogues," but Rockwell Automation fails to present the catalogues reviewed in support of the motion. Ho Aff. ¶ 10. Thus Ho's recitation of the catalogues' contents is 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). Although in reply Rockwell Automation presents catalogues representative of the ones Ho reviewed, they are not all the catalogues he reviewed, and in any event Rockwell Automation may not use evidence first submitted in reply to establish its prima facie defense in support of summary judgment. Enjoy Realty Corp. v. Van Wagner Communications, LLC, 22 N.Y.3d 413, 422 (2013); Amtrust-NP SFR Venture, LLC v. Vazquez, 140 A.D.3d 541, 541-42 (1st Dep't 2016); Friedman v. BHL Realty Corp., 83 A.D.3d 510 (1st Dep't 2011); Kennelly v. Mobius Realty Holdings LLC, 33 A.D.3d 380, 381 (1st Dep't 2006). Insofar as Ho also bases his knowledge of the information in his affidavit on "research" regarding Allen-Bradley Company's products, Ho Aff. ¶ 7, it, too, is inadmissible hearsay. 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).

While Ho attests that Allen-Bradley Company did not manufacture, sell, or supply circuit breakers, lighting, fixtures, and wiring, he does not address whether Allen-Bradley Company manufactured, sold, or supplied light switches or metal enclosures, and whether those products contained asbestos. Thus Ho's affidavit fails to establish that Isernia was not exposed to any Allen-Bradley Company product while working during 1980-99,

as well as earlier.

III. CONCLUSION

Since defendant Rockwell Automation Inc. presents no other evidence in support of Rockwell Automation's motion for summary judgment, for all the reasons explained above, the court denies the motion. C.P.L.R. § 3212(b).

DATED: June 22, 2018

*Lucy Billings*

---

LUCY BILLINGS, J.S.C.

LUCY BILLINGS  
J.S.C.