

<b>Romero v A.C. &amp; S., Inc.</b>
2012 NY Slip Op 31240(U)
May 2, 2012
Supreme Court, New York County
Docket Number: 113260/01
Judge: Sherry Klein Heitler
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER  
Justice

PART 30

- Index Number : 113260/2001  
MC CARTHY, JOSEPH  
vs.  
A.C. & S.  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. 113260/01  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001

*(COANE)*

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

is decided in accordance with the  
memorandum decision dated 5.2.12

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

## FILED

MAY 11 2012

*Sherry Klein Heitler*  
NEW YORK COUNTY CLERK'S OFFICE  
HON. SHERRY KLEIN HEITLER, J.S.C.

Dated: May 2, 2012

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

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

----- X  
EILEEN A. ROMERO as Executrix for the Estate  
JOSEPH McCARTHY,

Index No. 113260/01  
Motion Seq. 001

Plaintiff,

**DECISION AND ORDER**

-against-

A.C. and S., Inc., et al.

**FILED**

Defendants.

MAY 11 2012

----- X  
**SHERRY KLEIN HEITLER, J.:**

NEW YORK  
COUNTY CLERK'S OFFICE

Defendant Crane Co. moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all other claims asserted against it. For the reasons set forth below, the motion is denied.

**BACKGROUND**

Plaintiff's decedent Joseph McCarthy worked at various Consolidated Edison powerhouses throughout New York City from 1947 to 1989. He was diagnosed with malignant mesothelioma on December 22, 2000 and died on February 14, 2001. Thereafter, his estate commenced this action to recover for personal injuries and wrongful death allegedly caused by his exposure to asbestos-containing products. Plaintiff produced several of Mr. McCarthy's former powerhouse co-workers - Mr. Lutz Behr, Mr. Bernard Allen, and Mr. Roberto Mercer - to testify regarding his work history and alleged exposure, each of whom stated that Mr. McCarthy was exposed to asbestos from his work on valves. Messrs. Allen and Behr generally talked about Mr. McCarthy's work with asbestos-containing packing, insulation, and gaskets. However, Mr.

Mercer<sup>1</sup> specifically testified to his observing Mr. McCarthy having been exposed to asbestos from insulation and gaskets associated with Crane Co. valves when they worked together at Consolidated Edison's 59th Street Powerhouse from 1963 until 1989.

Crane Co. moved for summary judgment on the ground that it is not liable for asbestos-containing products that it did not manufacture, supply or specify for use with its products. Crane Co. also submits that the plaintiff failed to present sufficient evidence to demonstrate that Mr. McCarthy was exposed to asbestos fibers in connection with alleged work on Crane Co. valves. Plaintiff's position is that the testimony provided by Joseph McCarthy's former co-workers sufficiently establishes the connection between Mr. McCarthy's exposure to asbestos and Crane Co. valves, and that Crane Co. knew or should have known that asbestos-containing components would be integrated with its products for their intended use.

#### DISCUSSION

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law, and must tender sufficient evidence to demonstrate the absence of any material issues of fact. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); CPLR 3212(b). In asbestos litigation, once the movant has made a *prima facie* showing of its entitlement to summary judgment, the plaintiff must then demonstrate that there was exposure to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this respect, "the plaintiff is not required to show the precise cause of his damages, but only to show

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<sup>1</sup> Mr. Roberto Mercer was deposed on December 12, 2011. A copy of his deposition is submitted as Exhibit A to plaintiff's supplemental opposition brief ("Deposition").

facts and conditions from which defendant's liability can be reasonably inferred." *Reid v Georgia-Pacific Corp.*, 212 Ad2d 462, 463 (1st Dept 1995).

Crane Co. argues that Mr. Mercer has no specific memory of Mr. McCarthy working on its products. In support, Crane Co. relies on his testimony with regard to three Crane Co. stop valves which he associated with boilers at the 59th street powerhouse (Deposition pp. 174-75) (objections omitted):

Q: Now, you were asked the brand of these regulator valves associated with this Foster Wheeler boiler and I believe you said Crane and Fisher. As you sit here today, are you sure which brand it was -- what brand regulator valves were associated with this Foster Wheeler boiler?

\* \* \* \*

A: Fisher was one of the valves.

Q: So it was a Fisher regulator valve?

\* \* \* \*

A: You have a stop valve now. Before the regulator was a Crane valve. It's a manual valve.

Q: There was one manual Crane stop valve associated with this Foster Wheeler boiler?

\* \* \* \*

A: Yes, on the three boilers.

Q: So one valve per boiler?

A: Yes.

Q: Did you actually see Mr. McCarthy work on that stop valve or did he just work on the regulator valve?

A: The regulator valve. The regulator valve is not the stop valve.

Q: So he just worked on the regulator valve?

A: Regulator valve.

Q: Is that correct?

A: That's correct.

However, Crane Co. ignores Mr. Mercer's later testimony in which he described that it

was Mr. McCarthy's duty to work on all of the valves and gaskets located throughout the powerhouse (Deposition p. 48), many of which he believed were manufactured by Crane Co.

(Deposition p. 198-202) (objections omitted):

- Q: So is it fair to say that you wouldn't know what particular manufacturer's valve Mr. McCarthy may have been working on on any given time?
- A: No. If I'm on location working and see the nameplate, the name of the valve is right on there, on the body.
- Q: But as you sit here today, sir, you don't recall what manufacturer's valves Mr. McCarthy may have been working on at any point in time in the 59th Street powerhouse?
- A: Different companies, Crane was involved, Fisher, Powell.
- Q: I understand that those are valves that you mentioned that you recalled working with at the 59th Street powerhouse, but my question is different. I'm asking you, do you have a specific memory of what valves, in particular, what brand [of] valves in particular, Mr. McCarthy was working on in your vicinity?
- A: We deal with different company's valves and he worked on every one of them.
- \* \* \* \*
- Q: Now, is that how you remember the name Crane from those occasions when you had to remove the bolts from these valves?
- A: If I remember the name of Crane?
- Q: Right.
- A: No, Crane was all over the station.

Moreover, upon examination by plaintiff's counsel, Mr. Mercer specifically testified that Mr. McCarthy worked on Crane Co. valves and that such work caused him to be exposed to asbestos dust. (Deposition p. 179 – 181) (objections omitted):

- Q: And you stated that this asbestos exposure came from the valves due to the packing, gaskets, and removal of insulation; is that correct?
- A: That's correct.
- Q: Was this true for Crane Co. valves.
- A: Same thing
- Q: And was there insulation on the outside of Crane valves?

A: Yes, steam valve.

Q: And did gaskets have to be removed from Crane valves?

A: Yes.

Q: And did packing have to be removed from Crane valves?

A: Yes.

Q: And you remember Mr. McCarthy working on a Crane valve?

A: Yes.

Q: And what happened to the air when Mr. McCarthy was working on Crane valves?

A: The dust goes up and that's it.

Q: Was that asbestos dust?

A: Yes.

Contrary to the defendant's assertions, Mr. Mercer's testimony plainly indicates that Crane Co. valves were present at the 59th street powerhouse and that Mr. McCarthy's work on same may have caused him to be exposed to asbestos fibers. This is sufficient evidence to meet plaintiff's burden to put this issue before a jury. *See Reid, supra*, 212 AD2d at 463.

Crane Co. also submits that it is not liable for asbestos-containing products that it did not manufacture, supply or specify for use with its valves. However, this court previously addressed near-identical issues in *Sawyer v A.C.&S., Inc.*, Index No. 111152/99 (Sup. Ct. NY Co. June 24, 2011) and *Defazio v A.W. Chesterton*, Index No. 127988/02 (Sup. Ct. NY Co. August 12, 2011), holding in both cases that Crane Co. had an affirmative duty to warn consumers against the hazards associated with asbestos because the evidence demonstrated that Crane Co. recommended the use of asbestos-containing products in conjunction with its valves and other equipment.

As in *Sawyer, supra*, and *Defazio, supra*, the submissions on this motion show that Crane Co. designed and supplied its products to be used with asbestos-containing gaskets, packing,

insulation, and cement. Crane Co.'s assertions that its valves did not require asbestos-containing insulation to operate properly and that it did not specify the use of same on its products are therefore insufficient to shield it from suit. Accordingly, for the same reasons stated in *Sawyer* and *Defazio*, this court finds that Crane Co. had a duty to warn Mr. McCarthy of the hazards associated with asbestos. *See Liriano v Hobart Corp.*, 92 NY2d 232, 237 (1998); *Berkowitz v A.C. & S., Inc.*, 288 AD2d 148 (1st Dept 2001).

Accordingly, it is hereby

ORDERED that Crane Co.'s motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

**FILED**

MAY 11 2012

DATED: *May 2, 2012*

  
NEW YORK  
COUNTY CLERK'S OFFICE  
SHERRY KLEIN HETTLER  
J.S.C.