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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER PART 30

Justice

IVO J. PERAICA

INDEX NO. 190339/11

MOTION DATE

-v-

A.O. SMITH WATER PRODUCTS CO., ET AL

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the memorandum decision dated 8.27.12

FILED

AUG 31 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8.27.12

HON. SHERRY KLEIN HEITLER J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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

----------X

IVO J. PERAICA,

Plaintiff,

- against -

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

Defendants.

----------X

Index No. 190339/11
Motion Seq. 001

DECISION & ORDER

SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant Taco, Inc. ("Taco") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it. For the reasons set forth below, the motion is granted.

BACKGROUND

Plaintiff Ivo Peraica commenced this action on or about September 13, 2011 to recover for personal injuries caused by his alleged exposure to asbestos-containing products. Mr. Peraica's answers to interrogatories provide that he was exposed to asbestos during the course of his work as an asbestos remover at various commercial sites throughout New York City. Mr. Peraica was deposed over the course of four days from September 26, 2011 to October 4, 2011. A copy of his deposition transcript is attached as defendant's exhibit D. Mr. Peraica testified that he began working as an asbestos remover in 1978 after emigrating to the United States from Croatia. His duties consisted solely of removing exterior asbestos insulation from various types of machinery and replacing it with fiberglass insulation. Mr. Peraica identified the defendant Taco as one of eight manufacturers of pumps from which he allegedly removed insulation between 1978 and 1986.

On this motion Taco argues that there are no facts to establish that Taco had a duty to warn

Mr. Peraica of the hazards of asbestos insulation that may have been used with its products. In this regard Taco submits that there are no facts to establish that it manufactured, distributed, or sold any asbestos-containing exterior insulation to which Mr. Peraica alleges he was exposed, nor did it specify that its pumps be used with any such insulation. In opposition the plaintiff contends among other things that company literature for certain models of Taco pumps evinces Taco's knowledge that their pumps would be covered with insulation, thus giving rise to a duty to warn.

DISCUSSION

A plaintiff "may recover in strict products liability or negligence when a manufacturer fails to provide adequate warnings regarding the use of its product." *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 297 (1992); *see also Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 106 (1983). A manufacturer "has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known." *Liriano v Hobart Corp.*, 92 NY2d 232, 237 (1998); *see also Rogers v Sears, Roebuck & Co.*, 268 AD2d 245 (1st Dept 2000); *Baum v Eco-Tec, Inc.*, 5 AD3d 842 (3d Dept 2004). Although a product may "be reasonably safe when manufactured and sold and involve no then known risks of which warning need be given, risks thereafter revealed by user operation and brought to the attention of the manufacturer or vendor may impose upon one or both a duty to warn." *Cover v Cohen*, 61 NY2d 261, 275 (1984). The law however cautions against holding a manufacturer liable for another's defective product where the manufacturer's sound product is merely compatible with the defective one. *Rastelli, supra*, at 297-98. The existence and scope of an alleged tortfeasor's duty is a legal question to be determined by the trial court. *Di Ponzio v Riordan*, 89 NY2d 578, 583 (1997); *Lynfatt v Escobar*, 71 AD3d 743, 744 (2d Dept 2010).

Plaintiff argues that it was foreseeable to Taco that an end-user of a Taco pump would use

asbestos-containing insulation or other asbestos-containing materials in conjunction with its pumps. Thus plaintiff contends that Taco should have warned Mr. Peraica of the dangers associated with asbestos. This court addressed similar issues in *Sawyer v A.C. & S., Inc.*, Index No. 111152/99 (Sup. Ct. NY Co. June 24, 2011). In that case the evidence demonstrated that the defendant, Crane Co., recommended the use of asbestos-containing insulation (and other asbestos-containing products) in conjunction with its valves. The unrefuted evidence in *Sawyer*, among other things, was: (1) the defendant sold valves that contained asbestos gaskets; (2) the defendant recommended asbestos-containing coverings to be used with its products in order to prevent heat loss/dissipation; (3) the defendant sold numerous asbestos-containing products in the stream of commerce designed to be used in conjunction with its piping equipment; and (4) the use of the defendant's valves without asbestos insulation in high-heat settings would have been inefficient. On these facts I held that Crane Co. had a duty to users of its products of the hazards associated with asbestos.

Here, the facts are different. Unlike *Sawyer*, no evidence has been submitted that asbestos-containing parts are or were necessary for the proper operation of a Taco pump, nor is there any evidence that Taco recommended or specified the use of asbestos-containing materials with its products. There is nothing in this case to show that Taco knew or should have known that asbestos-containing materials ought to be or would be used with its pumps.

Plaintiff particularly relies on Taco product literature for certain models of Taco pumps that instructs: "Caution: under no circumstances should any part of bracket or motor be covered with insulation" for the proposition that Taco knew its customers were covering its pumps with insulation. But the document merely shows that Taco directed its customers not to insulate the pump bracket or motor. Plaintiff's speculative inference is unsupported by the record and thus insufficient to defeat summary judgment. *See Lahara v Auteri*, 97 AD3d 799 (2d Dept 2012); *see*

also Burr v Town of Hempstead, 23 AD3d 595, 596 (2d Dept 2005).

Plaintiff's reliance on the April 1, 2002 deposition testimony of Taco corporate representative George Taber is also misplaced. Plaintiff contends that Mr. Taber's lack of personal knowledge whether asbestos cement was used on the exterior of Taco pumps gives rise to a material issue of fact. (*See* Plaintiff's exhibit 3, pp. 71-72). But Mr. Taber's testimony concerning asbestos cement is not relevant to the issue at hand in as much as there is no allegation of exposure through the use of asbestos cement. What is relevant is Mr. Taber's uncontradicted testimony that Taco did not specify the use of asbestos-containing insulation on its pumps. Insofar as the plaintiff has not provided any evidence to the contrary, there is no issue of fact in this respect. As such Taco cannot be held liable for the plaintiff's asbestos-related injuries.

Accordingly, it is hereby

ORDERED that Taco Inc.'s motion for summary judgment is granted, and this action and any cross-claims as against this defendant are severed and dismissed in their entirety, and it is further

ORDERED that this case shall continue against the remaining defendants, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 8.27.12

SHERRY KLEIN HEITLER
J.S.C.