

McGuire v A.O. Smith Water Prods. Co.

2013 NY Slip Op 33442(U)

December 23, 2013

Supreme Court, New York County

Docket Number: 190323/12

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 : 190323/2012
MCGUIRE, JAMES E.
vs.
A.O. SMITH WATER PRODUCTS CO.,
SEQUENCE NUMBER : 002
SUMMARY JUDGEMENT **(LENNOX)**

INDEX NO. 190323/12
MOTION DATE _____
MOTION SEQ. NO. 002

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

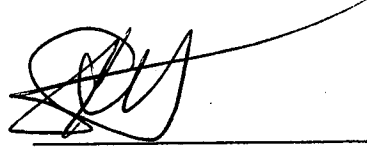
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**is decided in accordance with the
memorandum decision dated 12-23-13**

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

Dated: 12-23-13


_____, J.S.C.

HON. SHERRY KLEIN HEITLER

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
JAMES E. McGUIRE and CONSTANCE McGUIRE,

Index No. 190323/12
Motion Seq. 002

Plaintiffs,

DECISION & ORDER

- against -

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

Defendants.
----- X

SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant Lennox Industries, Inc. (“Lennox”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all other claims asserted against it on the ground that plaintiff James McGuire could not have been exposed to asbestos from Lennox’s water-based heating systems. In opposition, plaintiffs argue that Mr. McGuire’s testimony that he was exposed to asbestos when he personally wired Lennox heating units and while other trades broke down such units in his presence is sufficient to preclude summary judgment.

Mr. McGuire worked as an electrician from 1960 through 2004. He was diagnosed with lung cancer on January 18, 2012 and together with his wife commenced this action on July 25, 2012. Mr. McGuire was deposed over the course of four days in July and August of 2012.¹ He testified that he was exposed to a variety of asbestos-containing products and materials throughout his career. With respect to the defendant, Mr. McGuire testified that he personally removed asbestos-containing external insulation from Lennox heating at schools, retail, residential, and

¹ Copies of Mr. McGuire’s deposition transcripts are submitted as defendant’s exhibits 4-7 (“Deposition”).

commercial sites throughout New York City. He also explained that other trades disassembled Lennox heating units in his presence and that this work caused him to be exposed to asbestos-laden dust.

Of particular relevance to this motion is Mr. McGuire's testimony that the Lennox heating units he encountered throughout his career were water-based units referred to as boilers. In this regard, the defendant asserts that because it did not manufacture boilers until 1992, all of which were asbestos-free, plaintiffs' claim that Mr. McGuire was exposed to asbestos from a Lennox product is incredible as a matter of law. In support thereof Lennox submits an affidavit from its Corporate Service Manager of Residential Heating Products, Mr. William Drake.² Among other things, Mr. Drake states that "Lennox Industries Inc. did not sell, ship or distribute boilers, large or small, until 1992, and therefore, any testimony or implication that Mr. McGuire came into contact with a Lennox boiler or hot water heating system prior to 1992 is simply, and demonstrably, inaccurate."³ Mr. Drake admits that Lennox began to manufacture "forced air furnaces" during the 1940's, and defendant does not dispute on this motion that such furnaces were sold during the relevant time period or that they utilized asbestos components.⁴

While Lennox contends that Mr. McGuire could not have worked with its furnaces because he identified boilers which circulate water or steam, it is apparent that Mr. McGuire had no technical understanding of the mechanics of heating systems. In fact, on cross-examination by counsel for Lennox he testified that furnaces and boilers were the same thing (Deposition pp. 626-28, objection omitted):

² Mr. Drake's affidavit, sworn to July 17, 2013, is submitted as defendant's exhibit 8.

³ *Id.* at ¶ 6.

⁴ *Id.* at ¶ 7.

- Q. . . . We spoke the other day about Lennox boilers. Earlier today you mentioned Lennox furnaces. Do you remember that as well?
- A. Yes. I used - - . . .
- Q. Sir, I just want to find out more information about Lennox furnaces, okay. Where did you see Lennox furnaces?
- A. I consider a furnace and a boiler the same thing.
- Q. The same thing?
- A. Yes.
- Q. Earlier today when another attorney asked you what the difference was between a boiler and a furnace you said the size.
- A. Yes.
- Q. So, other than the size, a boiler and a furnace would have the same purpose?
- A. Yes.
- Q. Okay. And what would that be?
- A. To provide heat and hot water for a building.
- Q. Okay. Boilers and furnaces would provide heat and hot water in the same way, using the same mechanism?
- A. Yes.
- Q. And that would be true for Lennox boilers and Lennox furnaces, correct?
- A. Yes.
- Q. So when we talked about Lennox boilers yesterday at a Temple in Great Neck and an old Westbury location, you were using the term "boiler" and "furnace" interchangeably?
- A. Yes.

Summary judgement is a drastic remedy that must not be granted if there is any doubt about the existence of a triable issue of fact. *Tronlone v La d'Amiante du Quebec, Ltee*, 297 AD2d 528, 528-529 (1st Dept 2002). In an asbestos personal injury action, should the moving defendant make a *prima facie* showing of entitlement to summary judgment as a matter of law, plaintiffs must show facts and conditions from which the defendant's liability may be reasonably inferred. *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995). All reasonable inferences should be

resolved in plaintiffs' favor. *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dept 1990). Here, the fact that Mr. McGuire, a career electrician, referred to the Lennox heating units he encountered as water-based does not in and of itself entitle the defendant to summary judgment. At most, such testimony implicates the weight to be given to Mr. McGuire's testimony at trial. *See Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996).

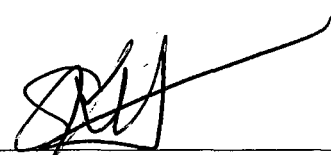
In light of the foregoing, it is hereby

ORDERED that Lennox Industries, Inc.'s motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED:

12.23.13



SHERRY KLEIN HEITLER
J.S.C.