

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

2013 NY Slip Op 33443(U)

December 20, 2013

Supreme Court, New York County

Docket Number: 190358/12

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 : 190358/2012
GARBUIT, JOHN
vs.
A.O. SMITH WATER PRODUCTS CO
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT (LENNOX)

INDEX NO. 190358/12
MOTION DATE _____
MOTION SEQ. NO. 003

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 12.20.13**

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

Dated: 12.20.13


_____, 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
JOANN GARBUTT, Individually and as Administratrix for
the Estate of JOHN GARBUTT,

Index No. 190358/12
Motion Seq. 003

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 plaintiffs’ decedent John Garbutt could not have been exposed to asbestos from a Lennox boiler because it did not manufacture boilers until 1992, well after Mr. Garbutt’s alleged exposure period. In opposition, plaintiffs argue that Mr. Garbutt’s testimony that he insulated Lennox heating systems with asbestos during the late 1960's and early 1970's combined with documentary evidence showing that Lennox manufactured furnaces throughout this time period raises a triable issue of fact that precludes summary judgment.

Plaintiffs’ decedent John Garbutt was diagnosed with mesothelioma in April of 2012. He was deposed in connection with this action over the course of three days in September and October of 2012, and testified that he was exposed to asbestos while working as a union apprentice insulator from 1969 to 1973.¹ During this time frame Mr. Garbutt was primarily responsible for applying thermal insulation to piping, valves, pumps, and boilers at commercial and residential locations

¹ Copies of Mr. Garbutt’s deposition transcripts are submitted as defendant’s exhibit 2-5 (“Deposition”).

throughout New York City. With respect to the defendant, Mr. Garbutt testified that he was exposed to asbestos from the dust created when he applied asbestos insulation to Lennox heating systems (Deposition pp. 101-02, 350, 351):

Q. Do you recall the brand name, tradename or manufacturer's name of any of the heating systems associated with those elbows in which you observed insulation being installed from 1969 to '73?

A. It was A.O. Smith. Yeah, A.O. Smith, Peerless, Lennox. Lennox. Burnham, American Standard. Burnham, Burnham. I believe I said American Standard, I said Lennox, American Standard. Did I say American Standard? There were others but I am not sure. Oh, Foster Wheeler, and I think there were other brands, but I don't know offhand.

* * * *

Q. Sir, I understand you won't be able to tell me a specific job site where you may have encountered a Lennox boiler. Can you tell me what type of sites these were, commercial, residential, something else?

A. Commercial and residential.

* * * *

Q. And sir, how did you identify these boilers as being manufactured by Lennox?

A. The nameplate. They all had nameplates.

Q. And for the Lennox boilers, would you be able to tell me where on the unit the nameplate appeared?

A. Either on the head or on the side.

Q. Can you tell me, did you see the name Lennox on the nameplate?

A. Yes.

On cross-examination by counsel for Lennox, Mr. Garbutt testified that the Lennox heating systems he encountered were hot water heating systems, referred to as boilers (Deposition pp. 349):

Q. ...Sir, last time you told us that one of the heating systems that you encountered while you were an apprentice between 1969 and '73 was manufactured by a company called Lennox. Do you recall that?

A. Yes. ...

Q. Sir, were the Lennox units hot water heating systems?

A. Yes.

Q. So that would be boilers?

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).

In support of its motion the defendant relies primarily on the affidavit of Lennox's 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. Garbutt 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 does not dispute that such furnaces were available to be purchased during the relevant time period.⁴

The defendant asserts that its furnaces did not heat or circulate water or steam as described by plaintiffs' decedent. Based on his testimony, however, it is questionable whether he understood the mechanical workings of heating systems and how they operated (Deposition pp 311-12,

² Mr. Drake's affidavit, sworn to July 18, 2013, is submitted as defendant's exhibit 5.

³ *Id.* at ¶ 6.

⁴ *Id.* at ¶ 7

objection omitted):

- Q. You previously discussed hot water heaters. Do you recall that?
- A. Hot water heaters?
- Q. Yes, sir. . . .
- A. Hot water heaters? Hot water heaters you would have in a private home.
- Q. I am sorry. I don't recall the term of art you used? Hot water systems?
- A. Hot water systems.
- Q. Hot water systems. I apologize. You never had any training with reference to hot water systems, correct?
- A. No.
- Q. You never had occasion to review any manuals or instructions with reference to hot water systems. Is that correct?
- A. No.

Thus, while Mr. Garbutt testified he was exposed to asbestos from Lennox boilers, which defendant purports were not manufactured until 1992, the fact is that Lennox did manufacture heating equipment, albeit furnaces, throughout his exposure period. In light of Mr. Garbutt's questionable technical expertise regarding heating systems, the issue here is one of credibility, which as a matter of law must be determined by a jury. *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).

Accordingly, 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: 12-20-13



SHERRY KLEIN HEITLER
J.S.C.