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

PRESENT: HON. SHERRY KLEIN HEITLER PART 30

Index Number : 190350/2009

WILLIAMS, THOMAS

VS

A W CHESTERTON CO.

Sequence Number : 006

SUMMARY JUDGMENT

INDEX NO. 190350/09

MOTION DATE

MOTION SEQ. NO. 006

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 as per the memo-decision of today's date.

FILED

OCT 20 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: Oct 17, 2011

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

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THOMAS WILLIAMS and KATHLEEN WILLIAMS,

Plaintiffs,

– against –

AW CHESTERTON CO., et. al.,

Defendants.

----------X

Index No. 190350/09
Motion Seq. 006

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant Gerosa Inc., ("Gerosa") 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

This action was commenced by Thomas Williams and his wife Kathleen Williams to recover for personal injuries caused by Mr. Williams' alleged exposure to asbestos-containing products. Relevant to this motion is plaintiffs' claim that Mr. Williams was exposed to asbestos-laden dust released when Gerosa employees installed and removed equipment at the Arthur Kill powerhouse ("Arthur Kill") in New York City where he was employed as an electrician for three months in 1967 and 1968.

Plaintiff Thomas Williams was deposed on June 30, 2010, July 26, 2010, August 23, 2010, August 30, 2010, September 13, 2010, and October 29, 2010. His deposition transcripts are annexed to the moving papers as Exhibit A ("Deposition"). Mr. Williams testified that he worked in the immediate vicinity of Gerosa workers as they installed, removed, and otherwise

disturbed asbestos-containing products at Arthur Kill. He testified that he was exposed to asbestos from this work insofar as his job duties required him to pass by the Gerosa work site and storage area which was filled with asbestos-containing dust.

On this motion, defendant argues that there is no evidence that Mr. Williams was exposed to any asbestos-containing products which were either manufactured, distributed, sold, or installed by Gerosa or its employees. Defendant also argues that Mr. Williams has failed to demonstrate that the equipment being moved by Gerosa employees contained or included asbestos-containing material. Plaintiffs argue that while Gerosa did not produce any asbestos-containing products, the work performed by its employees nevertheless substantially contributed to plaintiffs' injuries. Plaintiffs claim that there are genuine issues of material fact as to whether Gerosa employees acted negligently in Mr. Williams' vicinity and whether it violated its duty to warn him of the dangers associated with the asbestos-laden dust that Gerosa allegedly released into his vicinity.

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). Once the movant has made a *prima facie* showing, a plaintiff is then required "to show facts and conditions from which defendant's liability may be reasonably inferred." *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995).

Defendant's argument that Mr. Williams did not know whether the equipment to which

he was allegedly exposed contained asbestos is without merit. Although he could not recall the manufacturer of the products to which plaintiffs allege he was exposed, Mr. Williams was able to describe the manner in which he was exposed:

Q: Are there any other ways that you came into contact with asbestos at Arthur Kill?

A: There was a Gerosa Contracting that was removing tons of -- you know, whatever renovation they were doing. So you had to deal with them coming and going, you know, not work with them directly, but deal around them, not work with them, but they were aggressive in their removal.

Q: What were they removing?

A: You know, metal parts, insulation board, old piping with insulation on it, you know, some kind of demolition type work, which I wasn't involved with, so I don't – (Deposition pp. 121-22).

* * * *

Q: How exactly, what exactly were they doing that you believe caused you to be exposed to asbestos?

A: I don't know exactly what they were doing. They were installing equipment, removing, I guess, existing equipment, installing it in the area where you have to pass loading and unloading.

Q: Do you believe you were exposed to asbestos from them installing equipment or do you believe you were exposed to asbestos from them removing equipment

Mr. Berry: Or both?

Q: Or both?

A: Both.

Q: How exactly do you believe you were -- withdrawn. What exactly from their work of installing equipment do you believe caused you to be exposed to asbestos?

A: I would be in the area when they were making installation. The installation was noisy, very disruptive with the air. The equipment was being, I guess, I don't know if you call it rigged, but, banged around, and general dirt and dust was being created both with the area and the equipment. (Deposition, p. 879-880)

* * * *

Q: And the equipment they were installing, was it new equipment?

A: They were bringing whether it was used, being used or new, but they were bringing in equipment. Again, I don't know. It wasn't rusted out. It wasn't, and

it wasn't shiny new. You know, it was equipment. What was being removed was stuff that was being torn out.

Q: But you don't know whether or not this old material contained asbestos, correct?

A: My recollection is that the pipe that was laying on the side that was being, was removed and was being banged around brought out that material wrap white type or gray or whatever insulation around the parts or pieces. Transite[1] or Bakelite type boards, whatever that was for. (Deposition, p. 882)

* * * *

Q: How exactly did you encounter these workers, or where did you encounter these workers?

A: You would spend your time, you know, not the full eight-hour day or whatever it is, in the chamber. You would be outside the chamber coming and going to and from and forever be passing their work site and storage area.

Q: So throughout the course of your eight-hour day you would walk from your work location and pass by their work location?

A: To and from, as well as doing preparation work in that area. Not on top of them, but in that area. (Deposition, p. 884)

Viewing this testimony in the light most favorable to plaintiffs, as this court is required to do, a reasonable inference may be drawn that the insulation board and other insulation types testified to by Mr. Williams contained asbestos, (*see Henderson v City of New York,* 178 AD2d 129, 130 (1991); *see also Reid, supra*, 212 AD2d at 463), and that during the course of his work in the vicinity of the Gerosa workers, Mr. Williams was exposed to asbestos.

Defendant's reliance on this court's recent decision in *Moore v Asbeka Industries of New York, et. al.,* Index No. 190144/09 (Sup. Ct. NY Co. Dec 21, 2010, n.o.r.) is misplaced. In *Moore, supra*, this court granted Gerosa's summary judgment motion in an unrelated asbestos action because the record only showed that Gerosa had simply provided rigging and transportation

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[1] Transite was used as a generic term for asbestos-cement.

services, nothing more. Significantly, the papers submitted on this motion show that Gerosa was the contractor responsible for the installation of boilers at Arthur Kill, and did more than just rig and transport equipment. Indeed, in this case it is shown that Gerosa served as the "Installation Contractor" for seven projects at Arthur Kill from 1967 to 1969. For six of these projects, Gerosa is also listed as the "General Contractor." (Plaintiffs' exhibit O, pp. 18-19). In this capacity, Gerosa may be liable to plaintiffs' for failing to warn Mr. Williams of the hazards associated with asbestos used in conjunction with the installations and other piping matters associated with such boilers. *See* Labor Law § 200. The dates of installation and removal of the equipment supplied by plaintiffs suggest that Gerosa employees were in fact working at Arthur Kill during the same time as Mr. Williams. Mr. Williams identified the presence of Gerosa workers by the labels on their trucks and equipment. Deposition p.122, 883.

In addition, unlike in *Moore*, *supra*, plaintiffs assert that Gerosa's actions amounted to a breach of its duty of care.[2] *See Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 (2002) ("a party who enters into a contract to render services may be said to have assumed a duty of care . . . where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm.") (internal quotations omitted); *see also Cornell v 360 West 51st Street Realty, LLC*, 51 AD 3d 469 (1st Dept 2008) (triable issues of fact exist as to whether contractor's negligent removal of debris released hazardous substances into the air); *Vega v S.S.A. Props., Inc.*, 13 AD3d 298 (1st Dept 2004) (contractor's motion for summary judgment

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[2] Plaintiffs in *Moore* raised the issue of whether Gerosa breached its duty of care for the first time on a motion to reargue. Since courts may not consider on reargument new theories of liability not previously raised on the underlying motion, I held that consideration of this issue would have been improper. *See Moore v Asbeka Industries of New York, et. al.*, Index No. 190144/09 (Sup. Ct. NY Co. June 3, 2011, n.o.r.)

denied because triable issues of fact were raised as to whether it performed its work in a negligent manner, exposing plaintiff a toxic environment of lead dust and debris); *Prenderville v International Service Systems*, 10 AD3d 334 (1st Dept 2004) (maintenance contractor's motion for summary judgment denied because they failed to make a *prima facie* showing that their allegedly negligent removal of snow created and/or exacerbated icy conditions.).

In this case, Mr. Williams testified that "the installation was noisy, very disruptive with the air. The equipment was being . . . banged around, and general dirt and dust was being created both with the area and the equipment." Deposition p. 879-80. He also testified that the equipment appeared to be "shedding" during the transportation process, which according to plaintiffs indicates that such activities caused the asbestos-containing insulation to become detached from the equipment and released into the air. *Id.* This raises issues of fact as to whether Gerosa employees "launched" asbestos-laden dust in the performance of their work, rendering it potentially liable for plaintiffs' injuries. *See Espinal, supra*, 98 NY2d at 140.

Accordingly, it is hereby

ORDERED that Gerosa Inc.'s motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: October 17, 2011

SHERRY KLEIN HEITLER
J.S.C.