

McDonald v A.C.&S., Inc.
2012 NY Slip Op 30967(U)
April 5, 2012
Supreme Court, New York County
Docket Number: 105389/02
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 : 105389/2002
MC DONALD, CHRISTINE A.
vs.
A.C. & S.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 105389/02
MOTION DATE _____
MOTION SEQ. NO. 001

(CRANE)

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 4.5.12

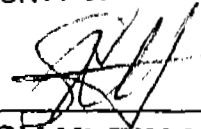
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

APR 12 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4-5-12



HON. SHERRY KLEIN HEITLER, J.S.C.

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
CHRISTINE A. MCDONALD, Individually and as
Executrix for the Estate of JAMES W. MCDONALD,

Index No. 105389/02
Motion Seq. 001

Plaintiffs,

DECISION AND ORDER

-against-

A.C.&S., INC. (ARMSTRONG CONTRACTING &
SUPPLY), et al.,

FILED

Defendants.

APR 12 2012

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

NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos personal injury and wrongful death action, defendant Crane Co. moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the grounds that plaintiffs have failed to produce any competent evidence that plaintiffs' decedent was exposed to asbestos as a result of a product that Crane Co. manufactured, supplied or distributed. For the reasons set forth below, the motion is denied.

BACKGROUND

Plaintiffs' decedent died of mesothelioma on October 16, 2000. This action was thereafter commenced by the estate of James W. McDonald to recover for personal injuries and wrongful death allegedly caused by Mr. McDonald's exposure to asbestos-containing gaskets, insulation, and dust. Relevant to this motion is plaintiffs' claim that boiler plumbers and other workers removed, repaired, and replaced Crane Co. valves in Mr. McDonald's presence while he worked as a sheet metal worker and supervised other sheet metal workers at his family's HVAC business in Schenectady, NY during the early 1970s. Plaintiffs produced Frederick Thayer ("Mr. Thayer"),

Mr. McDonald's brother-in-law and former co-worker at the HVAC business, for examination before trial to testify on Mr. McDonald's behalf.¹ Among other things, Mr. Thayer testified that Mr. McDonald was exposed as a bystander to asbestos-containing gaskets and insulation associated with Crane Co. valves. Crane Co. alleges that Mr. Thayer's testimony is speculative and should be thrown out because Mr. Thayer could not specifically identify at which work sites Crane Co. valves were located and he could not testify to a particular instance where he observed Crane Co. valves being worked on in Mr. McDonald's presence. Crane Co. also asserts that Mr. Thayer could not state whether the gaskets used on the valves where he worked contained asbestos or whether the Crane Co. valves to which he testified were insulated.

DISCUSSION

Summary judgment is a drastic remedy that must not be granted if there is any doubt about the existence of a triable issue of fact. *See Tronlone v Lac d'Aminate du Quebec, Ltee*, 297 AD2d 528, 528-29 (1st Dept 2002). 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-related 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 context, what the plaintiffs need to show are "facts and conditions

¹ Mr. Thayer was deposed on April 27, 2011, April 28, 2011, and May 12, 2011. Copies of his deposition transcripts are submitted as defendant's exhibit C. ("Deposition").

from which the defendant's liability may be reasonably inferred." *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995).

Crane Co. argues that Mr. Thayer did not explicitly identify or recall particular work sites where Mr. McDonald could have been exposed to asbestos from Crane Co. products, relying on the following testimony (Deposition p. 400):

Q: Let me finish my question. And this morning your testimony has been pretty consistent that you don't have a specific recollection of seeing a particular product at a particular site. Does the same hold true for the Crane valves?

A: Yes.

Q: So you didn't actually see any Crane valves at the psychiatric center boiler room; correct?

A: I can't say that there were or there weren't.

Q: And it's fair to say that you can't place Crane valves in any specific job site where you and Jim were working together; is that correct?

A: There was a lot of different valves and to put that one on one site, I can't say that. (Deposition pp. 403, objection omitted):

Q: So the plumbers are working with the valves while you're in the same room?

A: Sometimes.

Q: And you don't recall any specific site where that happened; is that correct?

A: No.

Q: And you don't recall a specific site where Jim was working in the same room with plumbers working with valves; is that correct?

A: That's true, yes.

But the record also indicates that Mr. Thayer worked with Mr. McDonald as a sheet metal worker in the psychiatric center at the Albany Medical Center for approximately two months in the 1970s, and that during this time there were boilers, motors, pumps, valves and insulated plumber pipes at this location (Deposition pp. 184-185).

In this regard Mr. Thayer testified that he and Mr. McDonald worked on the removal and

installation of new motors in the psychiatric center boiler room, which by disturbing the insulation on the pipes and other equipment, caused Mr. McDonald to be exposed to asbestos (Deposition pp. 187-193).

When Mr. Thayer was asked to identify, *inter alia*, the valves that were located in the psychiatric center boiler room, Mr. Thayer specifically identified Crane Co. valves (Deposition p. 203-204):

Q: All right. Do you believe that Jim was exposed to asbestos in any other way besides the motor work and the hood work?

* * * *

A: By getting near the pumps, valves, the piping, the boilers.

Q: And that's with regard to the motor work; correct?

A: Yes.

* * * *

Q: Can you identify any of the valves that were in the psychiatric center boiler room by brand, trade or manufacture's name?

A: Peerless, Crane. I think that's it.

Mr. Thayer testified how he could identify the valves as Crane Co. valves around which he and Mr. McDonald had worked (Deposition pp. 400-401, objection omitted):

Q: How did you know they were Crane valves?

A: The body usually had a label or a stamp on it or a ring.

* * * *

A: Into the body of the valve was usually the name.

* * * *

Q: Okay. And just so I understand you correctly, you saw a lot of - - you saw valves manufactured by many different companies and Crane is just one of the ones that you recall; is that correct? . . .

A: Crane was one that I recall - - that I saw.

Q: But you saw valves manufactured by other companies as well; is that correct?

A: Yes.

Mr. Thayer's testimony sufficiently identifies Crane Co. valves in the psychiatric center boiler room where he and Mr. McDonald worked together. As such, there are issues of fact from which a reasonable jury may infer that Mr. McDonald was indeed exposed as a bystander to asbestos from Crane Co. valves. *See Reid, supra*, 212 AD2d at 463.

Nevertheless, Crane Co. argues that the discrepancies in Mr. Thayer's statements require the court to dismiss his testimony as mere speculation. In support, Crane Co. points to Mr. Thayer's inability to specifically identify times, places, and sites where Mr. McDonald may have been exposed to Crane Co. valves (Deposition pp. 407-08).

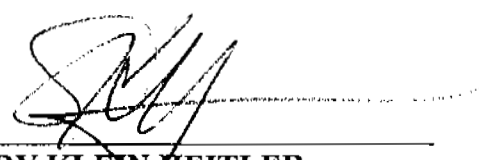
However, an internal conflict within the testimony does not eliminate all genuine issues of material fact if some of that testimony sufficiently rebuts the evidence presented in support of summary judgment. *See Carroll v A.O. Smith Water Prods.*, Index No. 129996/93, 2010 NY Misc. LEXIS 3787, at *7 (Sup. Ct. NY Cty. August 9, 2010). The "assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact, and any apparent discrepancy between the testimony and the evidence of record goes only to weight and not the admissibility of the testimony." *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996).

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.

DATED: April 5, 2012



SHERRY KLEIN HEITLER
J.S.C. **FILED**

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