

**Janits v A. O. Smith Water Products**

2013 NY Slip Op 32096(U)

September 4, 2013

Sup Ct, New York County

Docket Number: 190084/12

Judge: Sherry Heitler

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

PRESENT: HON. SHERRY KLEIN HEITLER

PART 30

Justice

Index Number : 190084/2012  
JANITS, FRANK  
vs.  
A.O. SMITH WATER PRODUCTS  
SEQUENCE NUMBER : 005  
SUMMARY JUDGMENT

INDEX NO. 190084/12  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 005

*(Rheem)*

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 9-4-13.**

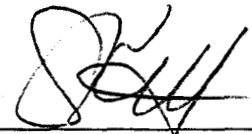
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

# FILED

SEP 09 2013

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 9-4-13



\_\_\_\_\_, 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  
FRANK JANITS and KATHLEEN JANITS,

Index No. 190084/12  
Motion Seq. 005

Plaintiffs,

**DECISION & ORDER**

- against -

**FILED**

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

SEP 09 2013

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

COUNTY CLERK'S OFFICE  
NEW YORK

Defendant Rheem Manufacturing Company ("Rheem") moves pursuant to CPLR 3212

for summary judgment dismissing the complaint against it on the ground that there is no evidence to show that plaintiff Frank Janits was exposed to asbestos fibers released from a product manufactured, sold, supplied, distributed, or specified by Rheem. Plaintiffs' position is that Mr. Janits' testimony which identifies Rheem furnaces as a source of his exposure gives rise to a triable issue of fact.

Plaintiffs commenced this action on February 16, 2012 to recover damages for personal injuries<sup>1</sup> allegedly caused by Mr. Janits' exposure to asbestos-containing products he encountered from 1965 to 2004 during his career as a roofer, water-proofer and construction worker.

Mr. Janits was deposed over the course of five days between March 27 and May 14, 2012.<sup>2</sup> He testified that he was exposed to asbestos while working in the vicinity of boilermakers and plumbers who installed, removed and repaired asbestos-containing heating systems. With

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<sup>1</sup> Mr. Janits currently suffers from colorectal disease and lung cancer.

<sup>2</sup> Mr. Janits' deposition transcripts are submitted as defendant's exhibits A-E.

respect to the defendant, Mr. Janits testified that he was exposed to asbestos from work other trades performed on Rheem equipment in his presence (defendant's exhibit E, pp. 666-68, 757-758, 765-67, objections omitted):

- Q. Throughout your testimony, you mentioned that you worked around some heating systems, correct?
- A. Yes.
- Q. One of the companies that you recalled was Lennox. Do you recall that testimony?
- A. Yes.
- Q. Are there any other heating system [*sic*] or furnaces that you recalled working around throughout your career that caused you to be exposed to asbestos?
- A. I worked around a bunch of them. Rheem.
- Q. Do you know what trades would work on Rheem furnaces? . . .
- A. I guess the mechanics. I don't know. It would have to be, I imagine their -- I don't know. I would say it would be a mechanic would do the same thing. They would call a mechanic to fix it.
- Q. What were the mechanics doing on the Rheem furnaces? . . .
- A. Well, you have to take them apart and fix them.
- Q. Do you believe you were exposed to asbestos when the mechanics would take apart and fix the Rheem furnaces? . . .
- A. Yeah, they had to take the asbestos out to get to the parts they had to get to. . . .
- Q. What about the process do you believe caused you to be exposed to asbestos? . . .
- A. The stuff floating in the air from taking out the asbestos.
- Q. Okay. Did you breathe that asbestos?
- A. Yes.
- Q. Do you believe that caused you to be exposed to asbestos?
- A. Yes.

\* \* \* \*

- Q. Can you approximate the dimension of the Rheem furnace. Let's start with the

height. How tall was it?

A. It was taller.

Q. Taller than you?

A. I believe so.

Q. How tall are you, sir?

A. Six-foot. . . .

Q. What about the width?

A. I really don't know. . . .

Q. Depth?

A. Don't know.

\* \* \* \*

Q. Now sir, other than generally saying that you just recall seeing some type of maintenance or repair work performed on a Rheem furnace, are you able to tell me what specific work you recall being performed on a Rheem furnace?

A. I don't know what they were doing inside. You pull all the insulation out of it, I know that. What they put in it or what they took out of it, I don't know.

Q. How do you know they took all the insulation out of it?

A. They took a big piece of insulation out, so I imagine they had to get it out so they could get to the part that they needed to fix, whether it was a burner or what was in there.

Q. You said they took a big piece of insulation out. You put your hands probably, I estimate, four, five feet apart, right?

A. Yeah.

Q. That means the piece of insulation came out whole. It was like a panel on the side or something?

A. Yeah, it looked like pretty much formed, a formed piece.

Q. Now, sir, when your counsel was asking you questions, you said that you recalled being present when a Rheem furnace was taken apart, and you said that there was some dust. Do you recall that?

A. Yes.

Q. Now, if you don't know the specific work that was being done, are you able to

tell me the specific source of that dust? . . .

A. Yeah, the insulation.

Q. Where did the dust emanate from the insulation, if it came out in a big piece?

A. They took it out and dropped it on the deck.

Q. On the deck?

A. On the floor.

Q. Do you have - - as you sit here today, sir, do you have any information or personal knowledge that would enable you to testify that insulation was asbestos-containing? . . .

A. It's my belief that all insulation at that time was made of asbestos.

Q. You're not aware of fiberglass being used at that time?

A. I've seen fiberglass insulation, and it wasn't fiberglass insulation.

Defendant argues that Mr. Janits' testimony is speculative because he could not recall a specific year or jobsite where he saw such work being performed, and because he had no personal knowledge that the insulation associated with such furnaces contained asbestos. Defendant further argues that Mr. Janits' testimony is not credible as a matter of law because Rheem never manufactured six-foot tall furnaces and because the insulation associated with Rheem furnaces was asbestos-free and would not have been removed in connection with any repair or maintenance work.

In support, Rheem submits the January 2, 2013 affidavit of Richard Furhman, a former Rheem employee who from 1966 to 1999 held a variety of positions at the company, including lab technician, product development specialist, lab manager and project engineer.<sup>3</sup> Mr. Furhman averred that "no Rheem furnace was six (6) feet or larger in height", that "Rheem furnaces . . .

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<sup>3</sup> Mr. Furhman's affidavit is submitted with defendant's moving papers.

did not utilize asbestos-containing form insulation as described by the plaintiff”, and that “[n]o maintenance or repair work performed on a Rheem furnace would require the removal or disturbance of any insulation material.” (Furhman Affidavit ¶¶ 16, 18, 19).

However, there is no documentary evidence to support Rheem’s assertions that it did not manufacture furnaces or asbestos-containing insulation that match Mr. Janits’ description. In this regard, the defendant’s position really goes to the weight to be accorded to Mr. Janits’ testimony at trial by the trier of fact and it is not a matter for this court to decide on a summary judgment motion. *See Ferrante v American Lung Ass’n*, 90 NY2d 623, 631 (1997); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996); *Missan v Schoenfeld*, 95 AD2d 198, 207 (1st Dept 1983). It is noteworthy, however, that plaintiffs produced numerous documents which show that Rheem did in fact supply, require, or specify the use of asbestos-containing materials with at least some of its furnaces during the relevant time period. As an example, Rheem’s April 1, 2011 standard responses to plaintiffs’ Liability Interrogatories and Request for Production of Documents provide that until 1975 certain Rheem products, including furnaces and boilers, “incorporated a limited number of encapsulated chrysotile-containing components, manufactured by third party manufacturers.”<sup>4</sup> Likewise, plaintiffs’ exhibit 4 is a copy of Mr. Furhman’s August 15, 2012 deposition testimony from an unrelated case venued in Los Angeles County wherein he identifies 1976 as the year he “can say with confidence Rheem was no longer selling any furnaces that contained any amount of asbestos.”<sup>5</sup>

Summary judgement is a drastic remedy that must not be granted if there is any doubt

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<sup>4</sup> Plaintiffs’ exhibit 3, p. 6.

<sup>5</sup> Plaintiffs’ exhibit 4, p. 76.

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, the plaintiff must then demonstrate that he was exposed to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). It is sufficient for plaintiffs to 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 the plaintiff's favor. *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dept 1990).

In light of the foregoing, it is hereby

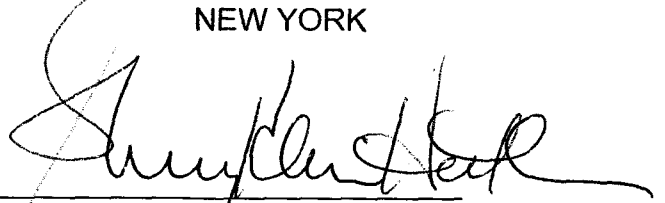
ORDERED that Rheem Manufacturing Company's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

**FILED**

SEP 09 2013

COUNTY CLERK'S OFFICE  
NEW YORK



SHERRY KLEIN HEITLER  
J.S.C

DATED:

*Sept. 4, 2013*