

**Kelly v Airco Welders Supply**

2013 NY Slip Op 32395(U)

October 7, 2013

Sup Ct, New York County

Docket Number: 105643/08

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

HON. SHERRY KLEIN HEITLER

Index Number : 105643/2008

KELLY, DAVID

vs

AIRCO WELDERS SUPPLY

Sequence Number : 001

SUMMARY JUDGMENT

PART 30

INDEX NO. 105643/08

MOTION DATE 001

MOTION SEQ. NO. 001

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 10.7.13**

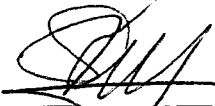
**FILED**

OCT 08 2013

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 10.7.13

 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  
DAVID KELLY, as Executor of the Estate of  
DAVID L. KELLY,

Index No. 105643/08  
Motion Seq. 001

Plaintiffs,

**DECISION & ORDER**

-against-

**FILED**

AIRCO WELDERS SUPPLY, et al.,

OCT 08 2013

Defendant(s).

-----X NEW YORK  
COUNTY CLERK'S OFFICE  
**SHERRY KLEIN HEITLER, J.:**

In this asbestos personal injury action, defendant Milwaukee Valve Company (“Milwaukee”) 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’s decedent David L. Kelly was exposed to asbestos from a product manufactured, sold or supplied by Milwaukee. For the reasons set forth below, the motion is denied.

**BACKGROUND**

David L. Kelly died on April 23, 2006. A post-mortem examination revealed a tumor on Mr. Kelly’s left lung that was consistent with mesothelioma. On April 21, 2008, Mr. Kelly’s son David Kelly (“plaintiff”) commenced this action to recover for his father’s personal injuries and wrongful death allegedly caused by his exposure to asbestos-containing products. In support of plaintiff’s claims, John Murphy, a non-party fact witness who worked with Mr. Kelly from 1968 until 1987, was deposed on April 13 and April 24, 2012.<sup>1</sup>

Mr. Murphy testified that from 1955 through 1987 he and Mr. Kelly worked as mechanics

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<sup>1</sup> Mr. Murphy’s deposition transcripts are annexed as Exhibit B to defendant’s papers (“Deposition”).

for the Consolidated Edison Company of New York (“Con Ed”). In this role, they regularly went to basements of apartment buildings, commercial premises, and warehouses in New York City in order to isolate and repair leaks in steam systems. To isolate these leaks, Mr. Kelly would shut the inlet and outlet valves to the leak and then de-energize the line by opening a valve to bleed the system. Mr. Murphy testified that the process of isolating these leaks caused Mr. Kelly to be exposed to asbestos. According to Mr. Murphy, “turning the valves to loosen the packing . . . would blow up, blow asbestos to your face. All the packing was asbestos.” (Deposition p. 23.) To fix a packing leak, Mr. Kelly would open the valve containing the faulty packing and put new packing on top of the old packing. (Deposition pp. 32-3.) Particularly relevant is Mr. Murphy’s testimony that Mr. Kelly replaced packing in Milwaukee valves at a number of different locations<sup>2</sup> while working for Con Ed.

Milwaukee contends that it is entitled to summary judgment because Mr. Murphy never specifically testified that Mr. Kelly was exposed to asbestos from Milwaukee valves but merely identified Milwaukee as a manufacturer of valves into which Mr. Kelly installed packing. In this regard, Milwaukee contends that the Milwaukee valves described by Mr. Murphy would only have used Teflon packing rather than asbestos-containing packing.

### DISCUSSION

Summary judgment is a drastic remedy that must not be granted if there is any doubt as to the existence of a triable issue of fact. *Tronlone v Lac d’Amiante du Quebec, Ltee*, 297 AD2d 528, 528-9 (1st Dept 2002). In a personal injury action arising from a person’s alleged exposure to

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<sup>2</sup> These locations included: the Empire State Building, Rockefeller Center, Madison Square Garden, Stuyvesant Town, Bellevue Hospital, St. Clare’s Hospital, Lennox Hill Hospital, the New York Life Building, the New York University Medical Center, and numerous large apartment buildings on Park Avenue. (Deposition, *passim*.)

asbestos, the plaintiff is not required to show the precise causes of his damages, but need only 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). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party, *Angeles v Aronsky*, 105 AD3d 486, 488-89 (1st Dept 2013), and any doubt must be resolved against summary dismissal. *Reid, Supra* at 463.

Mr. Murphy testified to the process that exposed Mr. Kelly to asbestos while isolating and repairing leaks (Deposition pp. 22-23; 32-34):

Q. Do you believe that the process of isolating the leak caused Mr. Kelly to be exposed to asbestos.

A. Yes.

Q. How so?

A. Usually, the leaks were mostly on gaskets. It would be blowing around the room and the room was full of asbestos. So, you would enter this room or floor area and it was just everything would be blowing, blowing around.

Q. Do you believe shutting the inlet and outlet valves would cause Mr. Kelly to be exposed to asbestos?

A. Yes.

Q. And how so?

A. By turning the valves to loosen the packing and that would blow up, blow asbestos to your face. All the packing was asbestos.

\* \* \* \*

Q. How did you fix leaking packing at the World Trade Center site?

A. We would take the wheel off the valve, back off the gland bolts, remove the gland and apply new packing. . . .

Q. And then you just installed, you put in new packing. Is that right?

A. Put new packing on top of the old, right. . . .

Q. When you would do that, how many rings of packing would you put in?

A. It depended on the size of the valve. Some took eight rings. Some took two rings. It

depended on how much was missing.

Q. What did that packing material look like?

A. It was square and round.

Q. What color was it?

A. Usually, black.

Q. Was it covered in any type of graphite?

A. Yeah. There was a graphite – yeah. There was graphite on it, yes. . . .

Q. Were the rings pre-cut when you got them?

A. Some were, but most of the times it was [a] continuous spiral.

He further stated that the process for repairing packing leaks on Milwaukee valves was the same as the process he utilized while working at the World Trade Center (Deposition pp. 82; 92; 164-65; 173-74):

Q. Was the process for fixing a leak in valve packing the same at the Empire State Building as you described earlier?

A. Yes. . . .

Q. Do you know who manufactured any of the valves that Mr. Kelly had to install new packing into at the Empire State Building?

A. I would say, Crane, maybe Fairbanks, I think Milwaukee was another one down there, Walworth. That's about the only ones I could remember down there.

\* \* \* \*

Q. Was the process for fixing a valve packing leak at Rockefeller Center similar to what you described before?

A. Yes. . . .

Q. And do you recall who manufactured any of the valves that Mr. Kelly had to install new packing into at Rockefeller Center?

A. Yeah. Fairbanks, Crane, Milwaukee. That's all I remember right now.

\* \* \* \*

Q. Was the process for putting packing into valves at Stuyvesant Town Peter Cooper Village similar to what you have already described?

A. Yes. . . .

Q. Are you able to tell me who manufactured any of the valves that Mr. Kelly put new packing into in the Stuyvesant Town Peter Cooper Village complex?

A. Yes. It would be Chapman, Fairbanks, Jenkins, Crane, Warren, Milwaukee. That's all I remember.

\* \* \* \*

Q. Was the process for putting packing in valves at Bellevue similar to what you've already described?

A. Yes.

Q. Are you able to tell me who manufactured any of the new packing material that Mr. Kelly put into valves at Bellevue?

A. Yes. Garlock and the other two I mentioned before, Anchor, Monaco.

Q. What size lines were these valves on that Mr. Kelly had to put packing into at Bellevue Hospital?

A. Eight, ten and 12.

Q. Do you know who manufactured the valves that Mr. Kelly had to put new packing into at Bellevue?

A. Chapman, Fairbanks, Jenkins, Crane, Warren, Milwaukee. That's it.

Milwaukee argues that the type of Milwaukee valves identified by Mr. Murphy used only Teflon-based zip packing instead of asbestos-containing packing (Deposition pp. 304-05; 317-18):

Q. . . . You had talked last time about what you referred to as Zip Packing?

A. Yes.

Q. And you said it was used in really small valves?

A. Yes.

Q. What size valves would the Zip packing have been found in?

A. Usually, quarter-inch and half-inch. Maybe one inch too.

Q. Was the Zip packing always used in one-inch or are you saying some one inch valves may have used it and other times may not?

A. We usually used the Zip if we had it, brought it down with us, we would use the Zip.

\* \* \* \*

Q. Then, in general do you remember what types of applications the Milwaukee valves that you and Mr. Kelly encountered were used for?

A. I thought it was a control valve.

Q. Control valve. Now, the test valve, would you have considered that some type of control valve?

A. Right.

Q. What other types of control valves would you and Mr. Kelly have worked with during your careers?

A. Well, Jenkins was on – they were mostly globe valves. They were on all the meters. They were an angle globe valve. Then they would be on trap lines and the equalizer lines.

Q. Okay. So, the control valves would be an angle valve on a trap line and on an equalizer line?

A. Yes.

Q. Okay. What was the, if you remember, the range of sizes of equalizer lines that you and Mr. Kelly worked on?

A. The equalizer lines are usually quarter-inch to half-inch.

Q. And do you remember a range of sizes for the angle trap valve line?

A. Quarter inch, and half-inch.

Mr. Murphy testified that zip packing was used only if it was available. The clear inference from this testimony is that asbestos-containing packing was used on smaller valves when zip packing was unavailable. Also, Milwaukee addresses only the issue of the new packing which Mr. Kelly used for Milwaukee valves but does not address the fact that those valves already contained packing. In this respect, Milwaukee has not established that the original packing supplied with its valves, which created dust when valve leaks were being repaired by Mr. Kelly, was asbestos-free. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980) (“To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor . . . and must do so by tender of evidentiary proof in admissible form.”). In any event, unlike the small valves with which Mr. Kelly would try to use zip packing, Mr. Murphy also testified that some of the Milwaukee valves he and Mr. Kelly worked on were on larger lines (Deposition pp. 173-174).



Accordingly, it is hereby

ORDERED that Milwaukee Valve Company's motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: 10.7.13



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SHERRY KLEIN HEITLER, J.S.C.

**FILED**

OCT 08 2013

NEW YORK  
COUNTY CLERK'S OFFICE