

<b>Rau v Aerco Intl., Inc.</b>
2014 NY Slip Op 32368(U)
September 4, 2014
Supreme Court, New York County
Docket Number: 190414/12
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 30

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IN RE: NEW YORK CITY ASBESTOS LITIGATION  
-----X

KENNETH P. RAU,

Plaintiff,

- Against -

AERCO INTERNATIONAL, INC., *et al.*,

Defendants.  
-----X

Index No. 190414/12  
Mot. Seq. 001

**DECISION & ORDER**

**SHERRY KLEIN HEITLER, J.:**

In this asbestos personal injury action, defendant Conwed Corporation (“Conwed”) moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff Kenneth Rau’s complaint and all other claims asserted against it on the ground that there is no evidence to show that he was exposed to asbestos from a Conwed tile. Plaintiff responds that he was exposed to asbestos-containing Conwed tiles throughout his career and that his deposition testimony raises triable questions of fact in such regard sufficient to preclude summary judgment. For the reasons set forth below, Conwed’s motion is denied.

Kenneth Rau performed ceiling work as a carpenter throughout New York City and Long Island from the mid 1950’s through the 1980’s. He alleges that he developed lung cancer and pleural disease as a result of his exposure to asbestos-containing tiles throughout this time period. With respect to the defendant, Mr. Rau testified<sup>1</sup> that he was exposed to asbestos dust while replacing Conwed tiles at the Montefiore Hospital in the Bronx, and at the Exxon Building, Woolworth Building, and Empire State Building in New York City.

<sup>1</sup> Mr. Rau was deposited on December 5, 2012, December 6, 2012, January 29, 2013, and March 5, 2013. Copies of his deposition transcripts are submitted as defendant’s exhibits D, E, F, and G (“Deposition”), respectively.

Mr. Rau's alleged exposure to Conwed tiles at Montefiore Hospital and at the Woolworth Building took place during the 1960's (Deposition pp. 186-190, 453-54, 283, 287-88, 447, objections omitted):

Q. Okay. The next one I have on my list is a hospital in the Bronx. Do you know the name of the hospital?

A. Montefiore. Something like that, I think. . . .

Q. What was the work you were doing?

A. We were changing -- changing existing tile out to a different type of tile. I don't remember what was coming down, whether it was Celotex, or Conwed, Armstrong. I don't know. . . .

Q. Okay. Do you believe you were exposed to asbestos from installing new ceiling tiles?

A. Yes. . . .

Q. Can you tell me the brand name, trade name, or manufacturer of those tiles?

A. It was Conwed, if memory serves me right.

Q. Any others?

A. No. Not that I remember. It was all done with one.

\* \* \* \*

Q. Now, you also did some work at Montefiore Hospital; correct?

A. Yes. . . .

Q. You mentioned Conweb<sup>[2]</sup> in connection with that hospital. Do you actually recall installing Conweb tiles there?

A. No, I don't.

\* \* \* \*

Q. When did you work at the Woolworth building?

A. Early '60's, I believe. . . .

Q. Where was the Woolworth building located?

A. Lower Manhattan. Don't remember the address.

Q. That's fine. Did you work there on one occasion or more than one occasion?

A. More than one occasion over the years.

\* \* \* \*

Q. Do you know the brand, trade, or manufacturer's name of any of the ceiling

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<sup>2</sup> The court notes that the transcript often refers to the defendant as "Conweb" as opposed to "Conwed".

tile that your men installed on that second occasion?

A. I think that one was Conwed. I'm not sure. That's my estimate, that it was Conwed. Because I know there was something different about it.

Q. What was different about it?

A. The texture. You know, on the face.

\* \* \* \*

Q. Okay. So at the Woolworth building, you remember Conweb tiles being installed?

A. I believe that's what it was.

Q. Do you know for sure?

A. Educated guess.

Q. It could have been, but it also could not have been Conweb tiles? . . .

A. Yeah.

Mr. Rau initially testified that he only installed Armstrong tiles at the Exxon Building, but later clarified that he installed both Armstrong and Conwed tiles there (Deposition 193-94, 202, objections omitted):

Q. Very good. So, what were you doing when you were working at the Exxon building?

A. Doing ceiling work. Concealed Z ceiling.

Q. Was it new construction or renovation?

A. All new.

Q. All new. Was the work that you did back and forth over the years the same?

A. Yes.

Q. Were you always installing concealed Z ceilings?

A. Yes.

Q. Do you believe you were exposed to asbestos from the installation work that you did of the ceilings?

A. Yes. . . .

Q. Can you tell me the brand name, trade name, or manufacturer of the ceiling tiles?

A. I'm almost positive it was Armstrong.

\* \* \* \*

Q. Do you know any of the suppliers of the materials that you worked with?

- A. Armstrong was one of them. They were a big one. And Conwed I believe was another one.

The latest Mr. Rau believed he was exposed to asbestos from a Conwed tile was during the 1970's while performing maintenance at the Empire State Building (Deposition 449-451):

- Q. All right. You talked about working at the Empire State Building. Do you remember that?
- A. Yes.
- Q. And you worked there about ten times from the 1950s through 1970s; correct?
- A. I assume I'm correct.
- Q. Okay. And during those ten times, you did ceiling work on all ten occasions? . . .
- A. Yes.
- Q. Okay. And I believe you testified the last time you went there, you remember installing Conweb ceiling tiles. Do you remember saying that?
- A. I don't remember it. But if I got it down there, then it must be true.
- Q. Okay. Well, I'm going to represent to you that's what you said. So sitting here today, is that still true that you believe you installed Conweb ceiling tiles on the tenth time you went to the Empire State Building?
- A. Yeah.
- Q. And that would be sometime in the 1970s?
- A. I believe that's what it was.

It is well settled that a party is entitled to summary judgment only if it produces evidence which *prima facie* resolves all material issues of fact in its favor. *See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In deciding a summary judgment motion the court's role is to determine if any triable issues exist, not the merits of any such issues. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). In doing so, the court views the evidence in the light most favorable to the nonmoving party and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *Angeles v Aronsky*, 105 AD3d 486, 488-89 (1st Dept 2013).

The defendant offers several arguments in support of its motion, including that: Mr. Rau speculated that he encountered Conwed tiles at Montefiore Hospital, the Exxon Building, and the Woolworth Building; Conwed manufactured both asbestos-free and asbestos-containing tiles during the years he worked at these locations; Mr. Rau has no personal knowledge whether the tiles he encountered contained asbestos; and there is no evidence to show that Mr. Rau worked at the Empire State Building before 1974, the year in which Conwed ceased manufacturing asbestos-containing tiles altogether.

The court disagrees with the defendant's characterization of Mr. Rau's testimony and finds that it is sufficient to overcome summary judgment. Even were the court to discount Mr. Rau's alleged Empire State Building exposure as occurring post-1974, there can be no dispute that the remainder of his alleged exposure occurred while Conwed did utilize asbestos in its products. *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995); *see also Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). Any discrepancies and/or internal contradictions in Mr. Rau's recollection of such exposure goes to the weight to be given thereto by a jury at trial. *See Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 (1986); *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013); *Alvarez v NY City Hous. Auth.*, 295 AD2d 225, 226 (1st Dept 2002); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996).

The mere fact that Conwed may have manufactured both asbestos-free and asbestos-containing ceiling tiles does not entitle it to summary judgment under the circumstances of this case. In fact, the only evidence Conwed submitted in this regard, namely interrogatory responses filed in connection with an unrelated 2010 NYCAL action, are overly broad, only loosely

probative of the issues presented herein, and raise more questions than they answer (defendant's exhibit H, p. 72):

Conwed did not make asbestos products. Rather, Conwed manufactured ceiling tile, some of which, depending on the period of time, may have contained a small percentage of asbestos for use as a binder and fire retardant.

Conwed Corporation maintains documents at Iron Mountain in Minnesota. Additional documents are maintained by the Minnesota Historical Society. Documents responsive to this interrogatory exist, and are available for review upon request at a mutually agreeable time and location.

\* \* \* \*

Conwed manufactured ceiling tile, some of which may have contained a small percentage of asbestos between the years 1958 (sold 1959) to 1974 at its facility in Cloquet, Minnesota. During certain years, the product was sold under the name "Lo-Tone." The trade name "Lo-Tone" was also used to market other asbestos-free products. During the same period of time, Conwed also manufactured ceiling tiles and panels that did not contain asbestos. . . . Conwed ceased using asbestos in its manufacturing process in 1974.

Notably, Conwed did not annex any relevant documentation regarding its products to its moving papers. Nor has Conwed provided, for example, the percentage of its tiles which contained asbestos or the asbestos-content of the tiles Mr. Rau would have used as a commercial carpenter.

Far more revealing are plaintiff's submissions, specifically a transcript of the deposition testimony of former Conwed employee Frederick Bergstrom<sup>2</sup>. Mr. Bergstrom's testimony suggests that Conwed's 12 x 12 Class A and Fire Rated tiles contained asbestos as late as 1974 and that such asbestos-containing tiles were generally used in commercial applications to provide fire protection. Taken together with Mr. Rau's testimony that 12 x 12 tiles were "standard in them days"<sup>3</sup> and that he worked in commercial settings, a reasonable inference can be drawn that the Conwed tiles Mr. Rau encountered did in fact contain asbestos. *Reid, supra*.

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<sup>2</sup> See Deposition of Frederick Bergstrom, dated November 7, 1991, plaintiff's exhibit 6. Mr. Bergstrom was employed by Conwed in its Research and Development Department from 1944 until his retirement in 1977.

<sup>3</sup> Deposition p. 345.

The court has considered the defendant's remaining arguments and finds them to be without merit.

Accordingly it is hereby

ORDERED that Conwed Corporation's motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED:

Sept. 4, 2014

  
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SHERRY KLEIN HEITLER, J.S.C.