

<b>Reha v A.O. Smith Water Prods. Co.</b>
2018 NY Slip Op 31482(U)
June 29, 2018
Supreme Court, New York County
Docket Number: 190427/2014
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

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BARBARA REHA, as Administratrix for  
the Estate of LOUIS J. REHA, and  
BARBARA REHA, Individually,

Index No. 190427/2014

Plaintiff

- against -

DECISION AND ORDER

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

Defendants  
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LUCY BILLINGS, J.S.C.:

I. INTRODUCTION

Plaintiff sues defendants to recover damages for the decedent Louis Reha's exposure to asbestos during 1957 to 1979 from work on boilers manufactured by defendant Fulton Boiler Works, Inc. Fulton Boiler Works moves for summary judgment dismissing the complaint and all cross-claims against Fulton Boiler Works, C.P.L.R. § 3212(b), based on the absence of evidence that any Fulton Boiler Works product contributed to the decedent's exposure.

To establish entitlement to summary judgment, Fulton Boiler Works must demonstrate unequivocally that its product did not contribute to the decedent's injury. Matter of New York City Asbestos Litig., 146 A.D.3d 700, 700 (1st Dep't 2017); Matter of New York City Asbestos Litig., 123 A.D.3d 498, 499 (1st Dep't 2014); Matter of New York City Asbestos Litig., 122 A.D.3d 520, 521 (1st Dep't 2014). Fulton Boiler Works may not meet its

burden by merely pointing to deficiencies in plaintiff's evidence. Ricci v. A.O. Smith Water Prods. Co., 143 A.D.3d 516, 516 (1st Dep't 2016); Koulermos v. A.O. Smith Water Prods., 137 A.D.3d 575, 576 (1st Dep't 2016).

II. LOUIS REHA'S TESTIMONY VERSUS R. BRAMLEY PALM'S AFFIDAVIT

Fulton Boiler Works presents Reha's deposition testimony describing his work on boilers. Reha described his boiler work as mostly in industrial settings, but specifically not at dry cleaning businesses, and described Fulton Boiler Works' boilers as cylindrical. Reha also testified that he applied external insulation to boilers that he worked on.

Relying on an affidavit dated April 24, 2015, by R. Bramley Palm Jr., President, Chief Executive Officer, and former engineer at Fulton Boiler Works, it contends that Reha's description of the boiler work he performed shows conclusively that he did not work on Fulton Boiler Works' boilers. Palm attests that he has "worked in various capacities at Fulton since the 1970s," but does not specify when in the 1970s or whether he worked in any capacity that familiarized him with Fulton Boiler Works' boilers in use then. Aff. of Brian Feld Ex. F ¶ 1. His prior deposition testimony presented by plaintiff confirms that before 1979 Palm worked at Fulton Boiler Works while a high school student, in a capacity where he acquired little personal knowledge of boilers' specifications and use. Therefore he bases his conclusions regarding Fulton Boiler Works' boilers before 1979 on his "review of records, including instructional manuals for Fulton boilers,

several diagrams of Fulton Boilers, past print advertisements for Fulton boilers, . . . personal knowledge of Fulton and conversations with the former President of Fulton and other key personnel." Id. ¶ 3.

Insofar as Palm bases his personal knowledge on conversations with Fulton Boiler Works' former President and key personnel, it is inadmissible hearsay. E.g., Mermelstein v. Singer, 85 A.D.3d 440, 440 (1st Dep't 2011); Wen Ying Ji v. Rockrose Dev. Corp., 34 A.D.3d 253, 254 (1st Dep't 2006); Muller v. New York State Div. of Hous. & Community Renewal, 263 A.D.2d 296, 308 (1st Dep't 2000). Fulton Boiler Works presents several boiler manuals with diagrams, but Palm does not attest that these manuals were the ones he reviewed. His recitation of the contents of the manuals he reviewed is hearsay and "not an acceptable substitute" for the documents themselves. People v. Joseph, 86 N.Y.2d 565, 570 (1995). See BP A.C. Corp. v. One Beacon Ins. Group, 8 N.Y.3d 708, 716 (2007); Shanmugam v. SCI Eng'g, P.C., 122 A.D.3d 437, 438 (1st Dep't 2014); Williams v. Esor Realty Co., 117 A.D.3d 480, 480-81 (1st Dep't 2014); Ainetchi v. 500 W. End LLC, 51 A.D.3d 513, 515 (1st Dep't 2008).

Even if the court considers Palm's affidavit, his opinion that Fulton Boiler Works' boilers did not require external insulation does not establish that such insulation was never applied to its boilers. In fact the boiler manuals that Fulton Boiler Works presents depict interior insulation, but specify the use of a thermal refractory cement containing asbestos to be

applied to the exterior of Fulton Boiler Works' boilers as a sealant. Palm's prior testimony also confirms this use of an external sealant for maintenance of Fulton Boiler Works' boilers.

Palm's conclusion that none of Fulton Boiler Works' boilers were at the facilities of defendant Consolidated Edison Company of New York, Inc., where Reha testified that he encountered Fulton Boiler Works' boilers, is not based on personal knowledge. Palm further claims that Reha's denial of work at dry cleaning facilities shows that he did not work with Fulton Boiler Works' boilers, yet Reha further testified, as Palm acknowledges, that he worked in other industrial settings, which Palm does not deny were other settings for Fulton Boiler Works' boilers.

Reha recounted that his work applying insulation to boilers included affixing wire to tubes, but that testimony did not relate specifically to Fulton Boiler Works' boilers. Therefore Palm's description of Fulton Boiler Works' boilers as tubeless does not negate Reha's testimony that he insulated its boilers using other methods. Moreover, even if Reha did describe Fulton Boiler Works' boilers with tubes, in contrast to Palm's description, Palm's challenge to the accuracy of Reha's testimony merely would raise a factual issue. See Griffin v. Cerabona, 103 A.D.3d 420, 421 (1st Dep't 2013); Frye v. Montefiore Med. Ctr., 70 A.D.3d 15, 25 (1st Dep't 2009).

In a final attempt to show that Reha did not work on Fulton Boiler Works' boilers, Fulton Boiler Works points to his denial that he worked with boilers shaped like water heaters, in

contrast to Palm's affidavit that "the shape of Fulton boilers" was "like water heaters." Feld Aff. Ex. F ¶ 21. Absent further inquiry to assure Reha and the attorney examining Reha shared the same concept of a water heater's shape, Reha's denial that he worked on boilers so shaped is too vague to demonstrate that he never worked with Fulton Boiler Works' boilers, particularly when his testimony immediately following confirmed that he worked on boilers with the Fulton name on them in industrial settings. At that point, the examining attorney was prompted to inquire further to adduce a more specific description of the boilers Reha worked on. 542 E. 14th St. LLC v. Lee, 66 A.D.3d 18, 23 (1st Dep't 2009); Piluso v. Bell Atl. Corp., 305 A.D.2d 68, 70 (1st Dep't 2003).

### III. FULTON BOILER WORKS' MANUALS AND OTHER DOCUMENTS

The boiler manuals Fulton Boiler Works presents are admissible as ancient documents because they are more than 30 years old and not claimed to be fraudulent or invalid. Essig v. 5670 58 St. Holding Corp., 50 A.D.3d 948, 949 (2d Dep't 2008); Szalkowski v. Asbestospray Corp., 259 A.D.2d 867, 868 (3d Dep't 1999). The manuals show that Fulton Boiler Works manufactured tubeless boilers, but, as shown above, Reha does not contradict that fact. Although Fulton Boiler Works does not claim in this motion that none of Fulton Boiler Works' boilers contained asbestos, the 1965 and 1970 manuals that Fulton Boiler Works presents also show that Fulton Gas Boilers used parts and materials containing asbestos and that the parts were packaged

with asbestos.

Fulton Boiler Works also presents a document entitled "Boiler & Equipment History - Electric & Steam," Feld Aff. Ex. F, which Fulton Boiler Works' attorney identifies as a Consolidated Edison record, but it is not an ancient document because it is dated April 10, 1991. Healy v. Arp Cable, 259 A.D.2d 380, 380 (1st Dep't 1999). Fulton Boiler Works maintains that this document shows Fulton Boiler Works' boilers were not used in Consolidated Edison facilities where Reha testified that he worked. Although Reha did not limit his work with boilers to these industrial facilities alone, assuming this document's contents would support Fulton Boilers Works' defense, no witness lays a business record foundation for the document's admissibility. C.P.L.R. § 4518(a); People v. Ramos, 13 N.Y.3d 914, 915 (2010); 135 E. 57th St., LLC v. 57th St. Day Spa, LLC, 126 A.D.3d 471, 472 (1st Dep't 2015); People v. Vargas, 99 A.D.3d 481, 481 (1st Dep't 2012); Taylor v. One Bryant Park, LLC, 94 A.D.3d 415, 415 (1st Dep't 2012). Its contents do not even indicate that the document is Consolidated Edison's record. Therefore the court may not consider this document.

#### IV. CONCLUSION

For the reasons explained above, defendant Fulton Boiler Works, Inc., fails to meet its burden to establish that its products did not contribute to Reha's injury from asbestos. Therefore the court denies its motion for summary judgment. C.P.L.R. § 3212(b); Matter of New York City Asbestos Litig., 123

A.D.3d at 499; Matter of New York City Asbestos Litig., 122  
A.D.3d at 521; Esteva v. City of New York, 30 A.D.3d 212, 213  
(1st Dep't 2006). This decision constitutes the court's order.

DATED: June 29, 2018

*Lucy Billings*

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LUCY BILLINGS, J.S.C.

LUCY BILLINGS  
J.S.C.