

**Brigantino v A.O. Smith Water Prods Co.**

2014 NY Slip Op 32023(U)

July 29, 2014

Supreme Court, New York County

Docket Number: 190390/12

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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 THOMAS BRIGANTINO,

Plaintiff,

-against-

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

Defendants.  
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**SHERRY KLEIN HEITLER, J.:**

In this asbestos personal injury action, defendant Westchester Square Plumbing Supply Co., Inc. ("Westchester Supply") moves pursuant to CPLR 3212 for an order awarding it conditional summary judgment on its cross-claim for common law indemnification against co-defendant Weil-McLain ("Weil-McLain"). In response Weil-McLain asserts that Westchester Supply had an independent duty to warn the plaintiff of the hazards associated with asbestos and that whether or not Westchester Supply satisfied its burden is a triable question of fact.

Plaintiff Thomas Brigantino's August 29, 2012 complaint alleges that he sustained personal injuries due to his occupational exposure to asbestos. As set forth in his interrogatory responses Mr. Brigantino worked throughout New York City and Westchester County as a boiler installer and repairman from the early 1970's through the mid-1980's. Mr. Brigantino was deposed regarding such claims in February, March, and May of 2013.<sup>1</sup> Among other things he testified that he regularly purchased Weil-McLain boilers and burner motors from Westchester Supply (Deposition pp. 629-630):

- Q. Do you recall what you purchased there?  
 A. Either boilers or different parts for oil burners.

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<sup>1</sup> Copies of his deposition transcripts are submitted as exhibit D to the moving papers ("Deposition").

Q. Do you remember what kind of parts?

A. Burner motors.

Q. Anything else that you recall today?

A. Mostly . . . That's about it. Yeah.

Q. Do you remember who made the boilers that you purchased at Westchester Square?

A. They handled . . . They had Weil-McLain. They could get any boiler that you wanted. . . .

Q. I'm asking you which boilers you actually recall purchasing from Westchester.

A. Weil-McLain. . . .

Q. To your knowledge, did Westchester Square alter or modify any of the boilers that you purchased from them?

A. Not that I know.

Q. To your knowledge, did Westchester Square modify any of the motors that you purchased from them?

A. Not that I know.

Q. Do you know if Westchester Square was an authorized dealer for Weil-McLain?

A. I don't know.

On October 7, 2013, Westchester Supply tendered its defense and indemnification for this matter to Weil-McLain's counsel. In its letter counsel writes that Mr. Brigantino "acknowledged that he was not aware of any modifications or changes to the products allegedly sold to him" by Westchester Supply.<sup>2</sup> Westchester tendered a second request for indemnification on or about February 25, 2014 after plaintiff's counsel advised that they were not alleging any asbestos exposure from burner motors.<sup>3</sup> Weil-McLain did not respond to either tender letter, and this motion followed.

The right to seek common-law indemnification in New York is well-established.

*See McDermott v New York*, 50 NY2d 211, 217 (1980); *Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 (1st Dept 2010); *Lowe v Dollar Tree Stores, Inc.*, 40 AD3d 264, 265 (1st Dept 2007); *Godoy v Abamaster of Miami*, 302 AD2d 57, 62 (2d Dept 2003); *see also Brunjes v Lasar Mfg. Co.*,

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<sup>2</sup> Exhibit F to the moving papers.

<sup>3</sup> Exhibit G to the moving papers.

*Inc.*, 40 AD3d 567, 568 (2d Dept 2007); Restatement 3d of Torts: Apportionment of Liability, § 22. Common-law indemnification requires “proof not only that the proposed indemnitor’s negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence. *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 (1999). “The predicate for common-law indemnity is vicarious liability without fault on the part of the proposed indemnitee, and it follows that a party who has itself participated to some degree in the wrongdoing cannot receive the benefit of the doctrine.” *Kagan v Jacobs*, 260 AD2d 442, 443 (2d Dept 1999).

Conditional summary judgment on a cross-claim for common-law indemnification must not be granted unless the movant establishes its defense sufficiently to warrant a court’s directing judgment in its favor as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557 (1980). The party seeking summary judgment “must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). The “[f]ailure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” *Id.* at 324.

Pursuant to CPLR 3212(b), a motion for summary judgment “shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit.” The record in this case does not contain a sworn statement by someone with knowledge of Westchester Supply’s business practices setting forth whether it repackaged or altered Weil-McLain boilers and/or whether it made any representations regarding such boilers to its customers. The mere fact that Mr. Brigantino could not recall whether Westchester Supply altered its boilers is immaterial. He was a customer, not an owner or employee, and as such it would be speculative to assume that he

was personally familiar with Westchester Supply's business practices.

In any event, a retailer which does not modify its products is still chargeable with a duty to exercise reasonable care in the handling of such products. This requirement includes the duty to warn of discoverable hazards. See, e.g., *Gebo v Black Clawson Co.*, 92 NY2d 387 (1998) ("Manufacturers and sellers in the normal course of business are liable for injuries caused by ordinary negligence, and are therefore under a duty to exercise reasonable care so as to avoid the occurrence of injuries by any product which can reasonably be expected to be dangerous if negligently manufactured or sold."). The record is silent in terms of whether Westchester Supply knew of the hazards associated with asbestos during the 1970's and 1980's. It is undisputed, however, that the Occupational Safety and Health Administration first promulgated regulations for asbestos exposure in 1972. As a heating and plumbing equipment supplier, it is questionable whether Westchester knew or should have known of such regulations, and in turn the hazards of asbestos, and whether it negligently failed to warn Mr. Brigantino of said hazards. See *Polimeni v Minolta Corp.*, 227 AD2d 64, 67 (3d Dept 1997) ("in all but the most unusual circumstances, the adequacy of a warning is a question of fact"); see also *Morrow v Mackler Prods.*, 240 AD2d 175, 176 (1st Dept 1997); *Nagel v Brothers Intl. Food, Inc.*, 34 AD3d 545, 547-48 (2d Dept 2006).

Accordingly, it is hereby

ORDERED that Westchester Square Plumbing Supply Co., Inc.'s motion for a conditional order of summary judgment on its cross-claim for common law indemnification against defendant Weil-McLain is denied.

This constitutes the decision and order of the court.

DATED:

7.29.14

  
SHERRY KLEIN HENTLER, J.S.C.