Zimmerman v A.O. Smith Water Prods.
2014 NY Slip Op 30339(U)
January 31, 2014
Sup Ct, NY County
Docket Number: 190383/12
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHERRY KLEIN HEITLER Justice PART 30

IRA ZIMMERMAN, as Administrator to the Estate of LEO ZIMMERMAN,

Plaintiff,

- v -

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

Defendants.

INDEX NO. 190383/12

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

This motion is decided in accordance with the memorandum decision dated 1-31-14

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

Dated: 1-31-14

SHERRY KLEIN HEITLER J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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IRA ZIMMERMAN, as Administrator to the Estate of LEO ZIMMERMAN,

Index No. 190383/12
Motion Seq. 003

Plaintiff,

DECISION & ORDER

- against -

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

Defendants.

----------X

SHERRY KLEIN HEITLER, J.:

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's decedent Leo Zimmerman was exposed to asbestos fibers released from a product manufactured or specified by Rheem. Plaintiff's position is that Mr. Zimmerman's deposition testimony which identifies Rheem water heaters as a source of his exposure gives rise to a triable issue of fact.

Mr. Zimmerman worked as a plumber's helper from 1939 until he joined the army in 1944. After being honorably discharged in 1946, Mr. Zimmerman joined Local 1 of the plumber's union and worked as a plumber until 1987. His duties included the installation of hot water heaters, boilers, pipes, valves, and other equipment in residences throughout Brooklyn and Queens.

Mr. Zimmerman was diagnosed with mesothelioma in May of 2012. He commenced this action on August 20, 2012 to recover damages for personal injuries allegedly caused by his

exposure to asbestos-containing products.[1] He was deposed on September 10, 2012 and September 11, 2012.[2] With respect to this defendant, Mr. Zimmerman testified that he was exposed to asbestos from the insulation jackets and flue liners associated with Rheem water heaters (Deposition pp. 274-75, 351-54, 355, 360, 361, objections omitted):

Q. And how would you be exposed to asbestos from the A.O. Smith hot water heaters and the Rheem hot water heaters?

A. Because asbestos you could see sticking up from the bottom, from the top, you know, on a ship. But it's all right, the jacket is already on though.

Q. And how would you be exposed to asbestos at times, when it leaked?

A. Because many of those jackets are asbestos. They're thick to insulate the boiler, it's this thick.

* * * *

Q. . . . Now, do you believe you were exposed to asbestos from a Rheem hot water heater?

A. Yeah. Because the jacket came on the units but under the jacket was the insulation that stuck out all over the seams and stuff like that.

Q. So, it's your testimony that this insulation was underneath the jacket, correct?

A. Yes * * * *

Q. So, in installing this unit you really wouldn't have come in contact with this insulation because you're just connecting it to the lines, correct?

A. It came in a carton, you opened the carton up and there's the product, period. . . .

Q. So, in installing these Rheem hot water heaters, it's safe to say you wouldn't be disturbing the inner portions of the jacket, correct? . . . .

A. You've moving it around. They wanted it in the basement, they drop it off, you have to bring it to the other end of the basement where the chimney is, you're handling it.

Q. You're handling the heater itself?

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1 Mr. Zimmerman died on November 12, 2012. The complaint has since been amended to add a wrongful death claim.

2 Mr. Zimmerman's deposition transcripts are submitted as defendant's exhibits D & E ("Deposition").

A. Right.

Q. This fully packaged heater?

A. Yeah.

Q. And the outer part of the heater is metal; is that correct?

A. It's metal.

Q. So, you wouldn't be touching this inner portion of the heater then. . . .

A. You have to open up the top.

Q. And why would you have to open up the top? . . . .

A. Because you have to put a rod in, that rod brings the water to the bottom so the hot and cold water doesn't mix.

* * * *

Q. Now, what's the basis of your belief that the material that was on the inner portions of the hot water heater was asbestos?

A. Asbestos.

Q. What's the basis of your belief, how do you believe that that contained asbestos?

A. Well, the asbestos is underneath the jackets and it's sticking out of the seams.

Q. Right. But how do you know that that was asbestos-containing material?

A. It was only one reason they put it there, to keep the heat in.

* * * *

Q. So now this insulation underneath the jacket of the hot water heater, is that the only way you believe you were exposed to asbestos from the Rheem hot water heaters?

A. With a Rheem, yeah. . . . we have to put the chimney in too.

Q. For a hot water heater?

A. Yeah. Anything that gives off heat has to have a chimney.

* * * *

Q. So, we've now spoken about all the ways you believe you were exposed to asbestos from the Rheem hot water heater?

A. It has asbestos covering and you were handling it, you were exposed to asbestos.

The defendant asserts that the insulation associated with its water heaters was fiberglass, not asbestos. In support the defendant submits the affidavit of Richard Furhman, sworn to March

22, 2013. From 1966 to 1999 Mr. Furhman held a variety of positions with the defendant, including that of lab technician, product development specialist, lab manager and project engineer.[3] Mr. Furhman averred that the vast majority of Rheem water heaters sold during the relevant time period utilized fiberglass, mineral wool, or polyurethane foam insulation. His conclusions are supported by two catalogs which indicate that Rheem did in fact sell fiberglass insulated gas water heaters.[4] However, these catalogs are undated, and it would only invite speculation to assume that the water heaters portrayed therein were the ones available during Mr. Zimmerman's exposure period. It is also questionable whether these two catalogs could represent the totality of all of the Rheem gas fired water heaters available during the course of Mr. Zimmerman's long career.

In this regard, plaintiffs show that Rheem's "G23" series of hot water heaters manufactured from mid-1956 to early 1958 used a piece of asbestos insulation to protect the combustion chamber access door.[5] Plaintiffs also submit a replacement parts list catalog for G23 water heaters which references the use of asbestos-containing flue liners. These submissions establish that at least some of Rheem's water heaters did in fact utilize asbestos components, including the flue liners which Mr. Zimmerman described as a source of his exposure.

The movant on a summary judgment motion must establish its defense sufficiently to warrant a court's directing judgment in its favor as a matter of law by demonstrating the absence

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3 Mr. Furhman's affidavit is submitted as an exhibit to the moving papers.

4 Defendant's exhibit F. The catalogs refer respectively to the Rheem "Series 40 automatic gas water heater" and the Rheem "Series 60 automatic electric storage water heater."

5 Plaintiff's exhibit I, p. 15.

of any material issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Here, and as set forth above, the defendant's limited and undated proofs do not conclusively demonstrate that its products could not have contributed to the plaintiff's injuries.

Accordingly, it is hereby

ORDERED that Rheem Manufacturing Co.'s motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: 1.31.14

SHERRY KLEIN HEITLER, J.S.C