SUPREME COURT OF THE STATE OF NEW YORK : Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK

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IN RE NEW YORK CITY ASBESTOS LITIGATION

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Index 190224/2014
Motion Seq. 010

MARK RICCI,

Plaintiff

-against-

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

Defendants

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Plaintiff Mark Ricci ("plaintiff") was diagnosed with pleural mesothelioma in 2014. He claims his disease is connected to his secondhand exposure to asbestos through his father Aldo Ricci's work designing and overseeing the installation of heating, air conditioning and ventilation systems. Throughout his career, Aldo Ricci testified that he was exposed to asbestos from, among other things, working around others handling asbestos-containing valves manufactured by defendant Defendant Crane Co. ("defendant" or "Crane"). Aldo Ricci further testified that asbestos dust associated with Crane valves would get on his clothes. His son, in turn, would be exposed to that dust when Aldo Ricci returned home wearing those work clothes.

Crane is alleged to have manufactured and sold valves in which the asbestos-containing materials were installed. Plaintiff asserts that Crane was negligent in failing to warn about the known dangers of those products, and that Crane encouraged them to be used in conjunction with its valves.

Crane moves, pursuant to CPLR § 3212, for summary judgment dismissing plaintiff's complaint and all claims and cross-claims against it. Defendant argues that plaintiff has failed to

prove that he was "exposed to asbestos from any asbestos-containing product that was manufactured or supplied by Crane Co." (Defendant's Affirm in Support at ¶ 4). Crane states that because Aldo Ricci did not identify a Crane product as the source of his alleged asbestos exposure during lead examination at his deposition, it should be entitled to judgment as a matter of law regarding plaintiff's secondhand exposure. Furthermore, *citing Matter of New York City Asbestos Litig. (Konstantin)* (121 AD3d 230 [1st Dept 2014]), defendant asserts that "there is no record evidence that Crane Co. placed into the stream of commerce any of the asbestos-containing materials that may have been used near Aldo Ricci during his career" (Defendant's Reply Affirm in Support at ¶ 16).[1] In short, there was nothing unsafe about defendant's "bare metal" product.

Arguments

Crane contends that it has satisfied its burden here by showing that plaintiff failed to produce any evidence that Crane manufactured, supplied or otherwise placed into the stream of commerce a product that released any asbestos fibers to which Aldo Ricci, and by extension plaintiff, may have been exposed. Crane further contends that plaintiff has produced no evidence that Crane exercised any role, let alone a significant role, interest, or influence, over the insulation products that third

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[1] *Matter of New York City Asbestos Litig.* contains a detailed analysis concerning the orbit of responsibility for a "bare metal" product. The term "bare metal" product is used to refer to a defense that the product (normally made of metal) was placed in the stream of commerce without asbestos-containing materials, i.e., was made of bare metal only (*see Matter of New York City Asbestos Litig.*, 2013 NY Slip Op 32846 (U) [New York County 2013]). The decision was appealed to the Court of Appeals (Docket Number APL-2014-00209), and will likely be argued in September or October, 2015. Briefs are available on the Court of Appeals website under https://www.nycourts.gov/ctapps/courtpass/Docket.aspx After citing (with approval) *Matter of New York City Asbestos Litig.*, defendant argues for the first time in reply that the case was incorrectly decided and is inconsistent with *Rastelli v Goodyear Tire & Rubber Co.* (79 NY2d 289 [1992]). The court will address this argument, even though it was made in reply. It presents no new issues of fact but merely involves the correct interpretation of the law, and, cases which are well known to all who practice in the area.

parties applied to its valves.

To meet its prima facie case, defendant cites to the testimony of Anthony Pantaleoni, its corporate representative in other asbestos litigation. In prior cases, Pantaleoni has testified to the effect that Crane valves did not have to be insulated (although they could be) and that Crane did not supply its valves with insulation (*see* Anthony Pantaleoni Transcript in *Dul, et al. v. Crane Co., et al.*, dated May 30, 2014, Ex. E, Defendant's Affirm In Support, at 1860:24 to 1860:26; 1861:13 to1862:3). Pantaleoni has also testified that those who chose to insulate Crane valves could have selected from a variety of available insulating materials (*id.* at 1861:13 to 1861:23). Crane further submits that Pantaleoni has testified that boilers did not have to be insulated and that pumps can function with asbestos or non-asbestos gaskets or packing (*see* Anthony Pantaleoni Transcript in *Herbert v. Alfa Laval., Inc., et al.*, October 12, 2007, Ex. H, Defendant's Affirm In Support, at 32:7 to 32:10). In response to the question "Have you ever seen a Crane Co. document recommending asbestos insulation for use on pumps and valves?" he responded "No, just boilers." Pantaleoni has also testified that it was the "customer" who would make the ultimate decision as to whether to insulate a boiler, pump, or valve (*see* Anthony Pantaleoni Transcript in *McCurdy v. John Crane-Houdaille, Inc., et al.*, dated September 20, 2010, Ex. G, Defendant's Affirm In Support, at 22:8 to 22:10).

Plaintiff opposes the motion on several grounds. First, plaintiff argues that based on Crane's interrogatory responses and Aldo Ricci's testimony, reasonable jurors could find that Crane valves were manufactured with asbestos-containing products. Second, plaintiff argues that even if Crane valves may not have been manufactured containing asbestos, an issue of fact is raised as to plaintiff's allegations that Crane recommended, endorsed and specified that asbestos products be

used with its valves where its valves certainly needed such insulation to function in a normal and correct manner (Plaintiff's Affirm In Opp ¶ 19-20). Further, plaintiff maintains that Crane knew or should have known of the dangers of asbestos due to its historical affiliations with, and leadership roles in, numerous safety organizations (*id.* at ¶ 17-19).

To support his arguments that Crane valves contained asbestos and that Crane recommended, endorsed and specified the use of asbestos products with its valves, plaintiff submits numerous manuals, catalogs, specifications and other documents from 1923 onwards. Indeed, plaintiff cites to a 1925 course study manual which explained why insulation is needed on equipment such as boilers (it cuts down on heat loss). Plaintiff also cites to 1923, 1945, and 1953 Crane catalogs for the proposition that Crane sold asbestos-containing materials throughout its corporate history, including gaskets, packing, pipe-covering, millboard, block and insulating cement (*see* Crane "Valves and Fittings for all Pressure and Purposes," Catalog No. 51, June 1923, Aff In Opp, Ex. 7; "Crane Industrial Supplies," Catalog 45J, 1945, Plaintiff's Affirm In Opp, Ex. 8; "Crane Valves Fittings Pipe Fabricating Piping," Catalog No. 53, 1953, Plaintiff's Affirm In Opp, Ex. 9). Plaintiff additionally points out that in marketing Johns-Manville asbestos cement, Crane wrote in its catalog that such cement was "...well known for [its] excellent coverage, good finish and insulating properties" (*see* "Crane Industrial Supplies," Catalog 45J, 1945, Plaintiff's Affirm In Opp, Ex. 8). As plaintiff points out, the same catalog goes on to state that "[Johns-Manville] cements are especially suitable for insulating irregular surfaces where it is impractical to apply sectional insulation, sheets or blocks" (*id.* at 141). To be certain that a buyer knew where to apply Johns-Manville asbestos cement, Crane wrote in a subsequent catalog "Johns-Manville cements are unexcelled for insulation of irregular surfaces such as on valves, flanges, pipe fittings, etc., or as a

surface finish over block or sheet insulations in order to seal joints and to provide a smooth, durable finish" (*see* "Crane Valves Fittings Pipe Fabricating Piping," Catalog No. 53, 1953, Aff In Opp, Ex. 9, at pg. 455).[2]

In reply, defendant does not dispute that Crane sold asbestos-containing products at certain times in its corporate history, and that Crane manufactured metal equipment like valves and pumps that were compatible with the use of asbestos-containing materials (as well as non-asbestos-containing varieties of the same materials). Nevertheless, defendant asserts that it is not liable for products it did not sell, and that sales of asbestos products does not translate into Crane endorsing the use of such products with its valves. Moreover, defendant notes that some of plaintiff's evidence predates his employment, and that evidence concerning Crane boilers, pumps and Cranite brand sheet gaskets has nothing to do with its valves. Finally, defendant makes further arguments regarding plaintiff's alleged inability to identify Crane values as the specific source of his exposure.

Discussion

A. Duty To Warn

Generally, a manufacturer has no duty to warn "about another manufacturer's product when the first manufacturer produces a sound product which is compatible for use with a defective product of the other manufacturer" and where the manufacturer had "no control of the production . . . no role

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[2] The court notes that in addition to highlighting these materials, plaintiff has previously made similar applications in response to defendant Crane's motions for summary judgment wherein plaintiff annexes additional manuals, catalogs, specifications and other Crane documents spanning from 1925 to 1981 for purposes of highlighting Crane's alleged recommendation, endorsement and specification of the use of asbestos products with its own. It is unclear why those additional documents are not annexed to plaintiff's opposition in connection with the instant motion.

in placing that [product] in the stream of commerce, and derived no benefit from its sale" (*Rastelli v Goodyear Tire Co.*, 79 NY2d at 297-298 [1992]) [a tire manufacturer has no liability for a defective rim which exploded because the defendant did not manufacturer the rim which was later attached by a third party to its tire after the tire was sold]).

Similarly, in the asbestos context, where a defendant makes or sells a safe product, defendant does not have a duty to warn of another's asbestos-containing product "where there is no evidence that a manufacturer had any active role, interest, or influence in the types of products to be used in connection with its own product after it placed its product into the stream of commerce" (*Matter of New York City Asbestos Litig.*, 121 AD3d at 250, *supra*). However, there is such a duty "where a manufacturer does have a sufficiently significant role, interest, or influence in the type of component used with its product after it enters the stream of commerce, it may be held strictly liable if that component causes injury to an end user of the product" (*id.; see also Berkowitz v A.C. & S, Inc.*, 288 AD2d 148, [1st Dept 2001] ["While it may be technically true that its pumps could run without insulation, defendants' own witness indicated that the government provided certain specifications involving insulation, and it is at least questionable whether pumps transporting steam and hot liquids on board a ship could be operated safely without insulation, which [the defendant] knew would be made out of asbestos").

B. Summary Judgment

CPLR § 3212 (b) provides, in relevant part:

> 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 motion shall be granted if, upon all

> the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

A defendant moving for summary judgment must first establish its *prima facie* entitlement to judgment as a matter of law by demonstrating the absence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Therefore, summary judgment in defendant's favor is denied when defendant fails "to unequivocally establish that its product could not have contributed to the causation of plaintiff's injury" (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept. 1995]; *see also Matter of New York City Asbestos Litig. (Berensmann)*, 122 AD3d 520 [1st Dept. 2014]). An affidavit from a corporate representative which is "conclusory and without specific factual basis" does not meet the burden (*Matter of New York City Asbestos Litig. (DiSalvo)*, 123 AD3d 498 [1st Dept. 2014]). It is only after the burden of proof is met that plaintiff must then show "facts and conditions from which the defendant's liability may be reasonably inferred" (*Reid*, 212 AD2d at 463, *supra*). To defeat summary judgment, a plaintiff's evidence must create a reasonable inference that plaintiff was exposed to a specific defendant's product (*see Comeau v. W.R. Grace & Co.-Conn*), 216 AD2d 79 [1st Dept. 1995]). Issues of credibility are for the jury (*Cochrane v Owens-Corning Fiberglass Corp.*, 219 AD2d 557, 559-60). Where "[t]he deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaint . . . [t]he assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier fact, and any apparent discrepancy between the testimony and the evidence of the record goes only to the weight and not the admissibility of the testimony" (*Dollas v. Grace & Co.*, 225 AD2d 319, 321 [1st

Dept. 1996] [internal citations omitted]).

Because assessment of credibility is a jury function, summary judgment must be denied even where plaintiff's testimony is equivocal. In *Berensmann v 3M Co* (122 AD3d 520 [1st Dept. 2014]), the First Department affirmed the trial court's denial of defendant's motion for summary judgment where the plaintiff identified the moving defendant's product by testifying that "It might've been" a brand that he used, then testified "No I can't remember" then testified "it's likely that I did, but that's the best I could do" and ultimately, that he did not even believe the product contained asbestos (*Berensmann*, 2013 NY Slip Op 33137 (U) [Sup Ct, New York County 2013]). The First Department held that, except as to the wallboard product which "undisputedly" never contained asbestos, summary judgment was properly denied because the evidence demonstrated that the moving defendant manufactured joint compound containing asbestos at the relevant times, and failed to "unequivocally establish that its product could not have contributed to the causation of plaintiff's injury" (*Berensmann v 3M Co* (122 AD3d 520, 521 [1st Dept 2014] [citing *Reid*, 212 AD2d at 463, *supra*]).

Moreover, a defendant's contention that a plaintiff's description of the asbestos-containing product differs from the true description of that product merely raises issues of credibility for the jury (*see Penn v Amchem Products*, 85 AD3d 475 [1st Dept 2011]).

This court has queried whether a defendant, in a motion such as this where it is alleged to have encouraged the use of asbestos with an otherwise safe product, has the burden of proof on summary judgment to demonstrate that it did not have "any active role, interest, or influence in the types of products to be used in connection with its own product after it placed its product into the stream of commerce" (*Matter of New York City Asbestos Litig.*, 121 AD3d at 250, *supra*). This

question has not been squarely addressed by the New York appellate courts. However, in cases such as *Reid* (212 AD2d at 463, *supra*), which did not involve a "bare metal" product, defendant was required to establish (unequivocally) that its product could not have caused plaintiff's injury. Therefore, looking at the defendant's product in isolation, the burden appears to have been met by Crane's allegations with respect to its bare metal product being safe (*see O'Donnell v Crane Co.*, Index 601183/13 [Nassau County 2015] [assuming, arguendo, that Crane's boilers contained no asbestos, plaintiff raised an "issue of fact" regarding whether Crane intended that its boilers be used with asbestos-containing materials made or sold by others]). Nevertheless, that burden has not been met here, because Crane cannot categorically refute either Aldo Ricci's testimony or plaintiff's annexed catalogs with respect to the allegation that Crane valves may have been manufactured containing asbestos. In fact, Crane concedes in its interrogatory responses hat its valves contained asbestos parts. As such, under the facts presented in this case, Crane has failed to meet its initial burden.

Even if defendant had managed to make a prima-facie showing, plaintiff has demonstrated that an issue of fact is raised as to whether Crane had a "sufficiently significant role, interest, or influence in the type of component used with its product after it enters the stream of commerce" (*Matter of New York City Asbestos Litig.*, 121 AD3d at 250, *supra*). While some of the proffered evidence relates to products other than valves, a reasonable inference may be drawn from Crane's active role, interest, and influence regarding those products to the product at issue here. Further, there is specific evidence relating to valves. The fact that certain evidence relates to points in time prior to plaintiff's father's work history does not mean that such evidence cannot not be considered by a jury for a historical or a holistic context, or for other reasons.

Contrary to defendant's argument, the holding in *Rastelli v Goodyear Tire & Rubber Co.* (79 NY2d 289 [1992]) does not dictate a contrary result. The Court of Appeals in *Rastelli v Goodyear Tire Co.* specifically pointed out that the defendant in that case had "no control of the production . . . no role in placing that [product] in the stream of commerce, and derived no benefit from its sale" (*Rastelli v Goodyear Tire Co.*, 79 NY2d at 297-298 [1992]). The Court would not have gone out of its way to make this point if under all circumstances a manufacturer would not have a duty to warn when a known hazardous product is used in connection with its own safe product. The duty to warn arises from the balancing of various policy concerns. For instance, a manufacturer may have a duty to warn of the danger of a reasonably foreseeable unintended use or misuse of its own product which "arises from a manufacturer's unique (and superior) position to follow the use and adaptation of its product by consumers . . . Compared to purchasers and users of a product, a manufacturer is best placed to learn about post-sale defects or dangers discovered in use" (*Liriano v Hobart Corp*, 92 NY2d 232 [1998]). The duty turns "upon a number of factors, including the harm that may result from use of the product without notice, the reliability and any possible adverse interest of the person, if other than the user, to whom notice is given, the burden on the manufacturer or vendor involved in locating the persons to whom notice is required to be given, the attention which it can be expected a notice in the form given will receive from the recipient, the kind of product involved and the number manufactured or sold, and the steps taken, other than the giving of notice, to correct the problem" (*Cover v Cohen*, 61 NY2d 261, 276 [1984]). While *Liriano* and *Cover* involved the manufacturer's product alone, the policy considerations discussed in those cases illustrate that such policies are not inapplicable merely because a product is safe when it enters the market.

Additionally, issues of fact exist here with respect to defendant's failure to demonstrate that

its values "could not have contributed to the causation of plaintiff's injury" (*Reid*, 212 AD2d at 463, *supra*). Aldo Ricci testified that he was exposed to Crane valves that released asbestos dust into the air (*see* Aldo Ricci Deposition Transcript at 109, Ex. 3, Plaintiff's Affirm In Opp). Crane does not categorically refute this testimony or the catalogs submitted by plaintiff in support of it. Instead, defendant surmises that it would be "sheer guesswork" to conclude that Aldo Ricci came into contact with asbestos materials purportedly associated with Crane, and that he was exposed to asbestos fibers emitted from those materials. Defendant's argument has not merit. A fair reading of Aldo Ricci's testimony regarding his alleged exposure to asbestos-containing Crane valves does not support an inference that he was unsure about what he saw. When asked whether he observed people doing dust-generating valve insulation and replacement work on Crane valves, Aldo Ricci responded by saying "Yes, Crane valves" (*see* Aldo Ricci Deposition Transcript at 109, Ex. 3, Plaintiff's Affirm In Opp). In that sense, the product identification here is more forceful and less equivocal than in *Berensmann*, where the court nevertheless denied judgment in the defendant's favor. In any event, defendant's efforts to characterize and mold plaintiff's testimony regarding the identification of Crane valves in a light most favorable to it merely raises credibility issues for the jury (*see Berensmann v 3M Co*, 122 AD3d 520, *supra; Penn v Amchem Products*, 85 AD3d 475, *supra).*

It is hereby

ORDERED that Defendant's motion is denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated: October 5, 2015

HON. PETER H. MOULTON
J.S.C.