[**1] **BRYAN HOCKLER, Plaintiff, - against - 3M COMPANY, et al., Defendants.**
Index No. 190235/13

190235/13

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2015 N.Y. Misc. LEXIS 321*; *2015 NY Slip Op 30173(U)

February 5, 2015, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

JUDGES: [*1] SHERRY KLEIN HEITLER, J.S.C.

OPINION BY: SHERRY KLEIN HEITLER

OPINION

DECISION & ORDER

SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant Aurora Pump Company ("Aurora") moves pursuant to *CPLR 3212* for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground, among others, that it had no duty to warn of the hazards associated with aftermarket asbestos insulation applied-to its pumps. For the reasons set forth below, the motion is denied.

Plaintiff Bryan Hockler worked in the shipping industry and in plant operations for the majority of his career, but he also spent approximately two years during the early 1980s working as a salvager. As part of his duties he ripped out old valves and pumps located in the basements of commercial buildings throughout New York City. Relevant to this motion, Mr. Hockler described[1] how his work caused him to be exposed to asbestos from external insulation associated with Aurora pumps.[2] Aurora argues that it is entitled to summary judgment notwithstanding because there is no evidence to show that it manufactured or supplied such [**2] insulation and because it did not specify, recommend, or advise its customers to insulate its products. [*2] Aurora also questions whether Mr. Hockler has personal knowledge regarding the asbestos-content of the insulation he encountered.

1 Mr. Hockler was deposed over the course of three days in November and December of 2013. His videotaped deposition was also taken in December of 2013. Transcripts thereof are submitted as plaintiff's exhibits 2-4.

2 Plaintiff's exhibit 2, pp. 38-40; plaintiff's exhibit 3, pp. 194, 196; plaintiff's exhibit 4, pp. 391 - 392.

To obtain summary judgment the movant must tender proof in admissible form which resolves all material issues of fact in its favor and which demonstrates its entitlement to judgment as a matter of law. *Zuckerman v City of New York, 49 NY2d 557, 562 (1980)*. The moving papers "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." *CPLR 3212(b)*. The "[f]ailure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez v Prospect Hosp*., 508 NY2d 320, 324 (1986); *see also JMD Holding Corp. v Cong. Fin. Corp., 4 NY3d 373, 384 (2005)*.

Summary judgment is a drastic [*3] remedy that should be granted only if there are no triable issues of fact. *Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012)*. Courts must view the evidence in the light most favorable to the nonmoving party and must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *Santelises v Town of Huntington, 2015 NY App. Div. LEXIS 745, at *5 (2d Dept Jan. 28, 2015)*

Despite Aurora's assertions to the contrary, this court's decision in *Peraica v A.O. Smith Water Products Co*., Index No. 190339/11, *2012 NY Misc. LEXIS 4204* (Sup. Ct. NY Co. Aug. 27, 20i2, Heitler, J.) is not controlling. In *Peraica*, as in this case, a pump manufacturer asserted that it had no duty to warn of the hazards associated with aftermarket insulation. But [**3] that manufacturer's product literature demonstrated that it actually directed its customers not to insulate its pump brackets or motors. Here, no product literature of any kind has been put forward. In fact, the only evidence on this motion to support Aurora's claims is self-serving deposition testimony from an Aurora corporative representative, Mr. Leroy Franklin, the admissibility and relevance of which are highly questionable. As it bears on this motion, Mr. Franklin testified that "[w]e didn't have any record about insulation" and "we manufactured pumps that would work perfectly [*4] fine without insulation."[3] But such testimony was given in connection with an unrelated asbestos personal injury action in Washington state of which plaintiff's counsel had no notice and did not attend. In addition, the transcript of that testimony references 80 pages of records, none of which have been submitted on this motion. Even more attenuated, the plaintiff in the Washington state case was allegedly exposed by reason of his service in the United States Navy, in respect of which Mr. Franklin testified: "I was told of three ships [plaintiff] had alleged exposure on. And I researched the information that we had for the pumps built for those ships."[4] Mr. Hockler's alleged exposure to asbestos-containing products by reason of his work as a commercial building salvager in New York City had nothing to do with Aurora business as a supplier to the United States Navy.

3 Defendant's exhibit I, pp. 59-60.

4 Defendant's exhibit I, p. 11.

Aurora has also failed to show that the insulation surrounding its pumps was asbestos-free. First and foremost, there is nothing in the record to suggest that asbestos-free alternatives were even available during the relevant time period. In this regard Mr. Hockler [*5] repeatedly testified that he did not believe the insulation surrounding the pumps and valves he encountered [**4] was composed of fiberglass.[5] Moreover, Aurora has admitted that many of its pumps incorporated asbestos-containing components. *See* plaintiff's exhibit 5-7.

5 Plaintiff's exhibit 2, pp. 23-25, 30; plaintiff's exhibit 3, p. 88-89, 191-199; plaintiff's exhibit 4, pp. 367, 373.

In sum, the evidence submitted by Aurora in support of its position that it is not responsible for asbestos-containing external insulation applied to its pumps has little or no bearing on the facts and circumstances of this case. As such, this court finds that Aurora has not *prima facie* eliminated all material issues of fact in its favor. *Zuckerman, supra.*

Accordingly, it is hereby

ORDERED that Aurora Pump Company's motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED. 2-5-15

/s/ Sherry Klein Heitler

SHERRY KLEIN HEITLER, J.S.C.