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[1] LINDA VELLUCCI, as Executrix of the Heirs and Estates of JOHN VELLUCCI, Deceased, Plaintiff, -against- BORG WARNER CORPORATION, by its successor-in interest to Borg-Warner Morse Tee, Inc., et al., Defendants. Index No. 190201/12**

190201/12

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2015 N.Y. Misc. LEXIS 518; 2015 NY Slip Op 30261(U)

February 20, 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NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.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 Hennessey Industries, Inc. ("Hennessey"), sued herein as the successor-in-interest to Ammco Tools, Inc. ("Ammco"), moves pursuant to *CPLR 3212* for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that it is not responsible for plaintiff's injuries. For the reasons set forth below, the defendant's motion is denied.

Plaintiff Linda Vellucci's allegation is that her husband, John Vellucci, sustained lifelong exposure to asbestos and asbestos-containing products in both occupational and non-occupational settings, and that such

exposure caused him to develop mesothelioma, an asbestos-related cancer. Mr. Vellucci succumbed to his illness on July 31, 2012 but was deposed prior to his death.¹ Among other things, Mr. Vellucci testified that several days each week from approximately 1974 through 1980 he socialized at a car garage in Brooklyn, New York that offered a full range of automobile services and repairs. Mr. Vellucci admitted that he did not actually perform any work at the garage: but nonetheless believed that [*2] he regularly sustained bystander asbestos exposure when the garage's employees ground brakes on their Ammco brake-arching machine, also known as an are grinding machine. Mr. Vellucci [**2] described his experiences as follows (Deposition pp. 323-325, 326-27, 350, 351-52, objections omitted):

Q. Okay. Can you walk me through a brake job?

A. Walk you through a brake job? They take the nuts off. You take the wheel off. You disconnect the clips and the whole wheel comes off. You take it to the grinder, because where there are grooves in it, it has to be ground down and smoothed out. You put it on the machine that's called the Ammoco² machine. You ground it down. When it was finished

grinding down, took it off. You put it back on, and you clipped it on, put the wheel on, put the nuts on, and you had the brake job done.

Q. You mentioned the process of grinding. I believe you mentioned it yesterday as well. You're talking about grinding the drum; is that correct?

A. Wheel drum.

Q. Right?

A. Right.

Q. Okay. So, when you spoke of grinding yesterday, that is what was being ground?

A. Right. Q. Can you just describe if you can tell the substance that made that drum? Was it metal?

Was it rubber? Was it plastic? [*3]

A. You mean whatever came off that?

Q. Well, if --

A. He used to blow it out, and asbestos that was in there blew all over the place.

* * * *

Q. Do you know firsthand what was in that dust?

A. From the brake lining, it was all asbestos on that lining.

Q. So, you believe the lining to be --

A. Yes.

Q. -- all asbestos?

A. Absolutely . . .

Q. When you removed that lining when you just said you could not tell who the manufacturer of it was --

A. Well, the way you said it. Bendix was the only stuff they used for brakes.

* * * *

[**3] Q. . . . You mentioned today the name Ammoco. I just wanted to ask you about your testimony regarding that. How are you familiar with that name?

A. That was the machine that ground down the brakes, the lining.

* * * *

Q. Do you associate asbestos with this Ammoco product?

A. Well, the brakes were made with asbestos.

Q. I'm not talking about the brakes. I'm talking about the actual -- what do you call this Ammoco product? . . .

A. It was a grinding machine to grind down the cylinder.

Q. Do you associate any asbestos with the actual grinding machine?

A. No. It was steel, ground steel.

1 A copy of Mr. Vellucci's deposition transcript is submitted as defendant's exhibit C ("Deposition").

2 The [*4] transcript refers to the defendant as "Ammoco".

It is well settled New York law that "[a] manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its products of which it knew or should have known." *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 297 (1992). A plaintiff may recover in strict products liability or negligence when a manufacturer fails to provide adequate warnings regarding the use of its product." *Id.* "Although a product be reasonably safe when manufactured and sold and involve no then known risks of which warning need be given, risks thereafter revealed by user operation and

brought to the attention of the manufacturer or vendor may impose upon one or both a duty to warn." *Cover v Cohen*, 61 NY2d 261, 275 (1984). "The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the court." *Di Ponzio v Riordan*, 89 NY2d 578, 583 (1997); *see also Fairclough v All Serv. Equip. Corp.*, 50 AD3d 576, 577 (1st Dept 2008).

Here, Ammco claims that it had no duty to warn of the hazards associated with asbestos because its are grinding machines did not contain asbestos parts and were designed to grind brake shoes regardless of their asbestos content.

Plaintiff responds that Ammco knew its are grinding machines would be used primarily to grind asbestos-containing brake shoes, knew that asbestos dust [*5] would be released into the air when its [**4] machines were used for their intended purpose, knew that asbestos was hazardous, and designed a dust collector for its machines that failed in terms of preventing the spread of asbestos-laden dust. In this regard, plaintiff relies primarily on a transcript from the March 12, 2013 deposition of Hennessey corporate representative Craig Mountz.³ Consistent with plaintiffs position herein, Mr. Mountz concedes that Ammco's are grinding machine altered the dimensions of brake shoes so that they could fit onto the brake drum, that this process would necessarily create dust, and that any mechanic working with brakes during the relevant time period would have likely come across asbestos-containing brakes (Mountz Deposition pp. 14-16, 28, 50-53, objections omitted):

Q. So each of these machines were designed specifically for one purpose, and that purpose was to sand off or abrade some part of the friction material on the brake drum show so that it would fit these drums; correct? . . .

A. Yes, that is true.

Q. . . . And by virtue of its design when its operated the way it's supposed to operate, it's going to generate dust? . . .

A. As the machine grinds the [*6] brake shoe lining, yes, the dust will be created from the linings.

Q. . . . Because the dust is what's coming off as the abrasive material from your are grinder is being applied to that shoe, right? . . .

A. Yes.

* * * *

Q. Now, would you agree with me that in 1972, individuals at AMMCO knew that overexposure to asbestos could cause disease? . . . A. I don't know exactly who knew what at that time. But I do know that is when the OSHA regulations came out. So at that time, they would have known.

* * * *

. . . You would agree that AMMCO certainly knew that individuals using their machine were going to be grinding asbestos containing brakes; correct? . . .

A. Yes, we were aware that asbestos containing brakes were on the market.

[**5] Q. . . . In fact . . . the dust collection mechanism that was put on your machine was called an asbestos dust collector; correct? . . .

A. That's what the document says . . .

Q. And so AMMCO knew that if - this is back in 1973. AMMCO knew that if you used this arcing machine on a brake, you're likely to introduce asbestos dust into the environment; correct? . . .

A. That's why we employed the hygienists who tested to make sure that we were complying with the OSHA regulations. [*7]

Q. . . . That's why you called it an asbestos dust collector, correct, because you knew that the dust that was going to be generated from arcing brakes was going to contain asbestos; correct? . . .

A. That it was possible. Not saying that all brakes are, but yes.

Q. . . . Well, but I'm not misrepresenting anything I said that the logo that you put on your advertisement is, No shop is complete without this effective asbestos dust collector. The AMMCO Model 8925 dust collection system provides a highly efficient means of collecting, containing, and disposing of dangerous asbestos dust. That's what you wrote, correct? . . .

A. That's what the document says.

Mr. Mountz did not dispute the plaintiff's contention that a mechanic using Ammco's dust collection system still faced the possibility of asbestos exposure (*id.* at 81-82). In fact, testing performed by Ammco during the 1970s and again during the 1980s revealed that an Ammco are grinding machine fitted with a dust collection attachment created very high concentrations of asbestos dust⁴ (*id.* at 60, 65-66, 113-114):

Q. . . . Now, the first test that was ever done on an AMMCO are grinder occurred January 30, 1973; correct?

Q. You would agree with me that when they took a measurement [*8] one inch from the bag itself while they ground four shoes using a small bag and a standard neck, the concentration was 15.2 fibers per milliliter, correct? . . .

[**6] A. That's what the document says.

Q. . . . And when they had a large bag with the standard neck and they ground four shoes, which is two wheels, and they took the collection one inch from the bag itself, they had a concentration of 50.2 fibers per milliliter; correct? . . .

A. That's what the document states.

* * * *

Q. . . . Let me show you what I've marked as Exhibit 12. This is an industrial

hygiene report for AMMCO tools that was done by the National Loss Control Service Corporation in October of 1986. First, let me ask you if that's a document you've seen before . . .

A. Yes. This is our document. . . .

Q. Okay. And on the second page of this document, they indicated that when the brake shoes were ground, the exposure was 240 times the then existing permissible exposure level; correct? . . .

A. That's what the document says on that page.

Further cross-examination revealed that the collection bag became less effective as it filled up, which allowed more dust to be released into the air (*id.* at 61-62, 120-121), and that there were dangers associated [*9] with the disposal process, i.e., dumping out the collection bag. *Id.* at 73-76.

3 Mr. Mountz was deposed in connection with an unrelated asbestos personal injury action venued in California. See Plaintiff's exhibit 7 ("Mountz Deposition").

4 See *Emergency Standard for Exposure to Asbestos Dust*, 36 *Fed Reg* 23207-23208 (Dec. 7, 1971) (codified as amended at 29 *CFR* § 1910.93 [1972]) (permissible exposure level of 5 fibers per cubic centimeter as an 8-hour weighted average); *Occupational Exposure to Asbestos, Tremolite, Anthophyllite, and Actinolite*, 51 *Fed Reg* 22612 (*Jun. 20, 1986*) (codified as amended at 29 *CFR* 1910.1001 [1986]) (permissible exposure level of .2 fibers per cubic centimeter as an 8-hour weighted average).

In reliance upon *Rastelli, supra*, Ammco mistakenly argues that any foreseeability on its part that users would be injured by using its product is too attenuated to impose on it a duty to warn. In *Rastelli*, the Court of Appeals declined to impose liability on a tire manufacturer for injuries that resulted from a defective after-market rim manufactured and installed on its tires by third parties. The Court stated that "under the circumstances of this case," the manufacturer had 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." *Id.* at 297-298. The Court noted that the [*10] manufacturer had "no control of the production of the subject multipiece rim, no role in placing that rim in the stream of commerce, and derived no benefit from its sale." *Id.* at 298. The manufacturer's tires also "did not create the alleged defect in the rim that caused the rim to explode." *Id.*

[**7] Here, on the other hand, it is evident that Ammco's brake grinding machines were designed solely for the purpose of manipulating brake shoes, most if not all of which would have been asbestoscontaining during the relevant time, and that the intended operation of its machines created the exact hazardous condition at issue herein. Thus, the connection between Ammco's brake grinding machine and Mr. Vellucci's alleged asbestos exposure is anything but attenuated.

In light of the foregoing, I find that Ammco had a duty to warn of the hazards associated with asbestos exposure. In turn, Ammco has not submitted any evidence to show that it adequately warned of such hazards. As such there remains a triable issue of fact

regarding Ammco's liability for plaintiff's injuries.⁵

5 This court's holding is consistent with decisions reached by state courts in California and Connecticut. *Shields v Hennessy Industries, Inc.*, 205 Cal App 4th 782 (2012); *Bettencourt v Hennessy Industries, Inc.*, 205 Cal App 4th 1103 (2012); *Abate v Advanced Auto Parts, Inc.*, 2014 Conn. Super LEXIS 155 (Conn. Super Jan. 23, 2014).

Accordingly, it is hereby

ORDERED [*11] that defendant Hennessey Industries, Inc.'s motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: 2-20-15

/s/ Sherry Klein Heitler

SHERRY KLEIN HEITLER, J.S.C.