



STATE OF NEW YORK
UNIFIED COURT SYSTEM
FIRST JUDICIAL DISTRICT
SUPREME COURT, CIVIL BRANCH
60 CENTRE STREET
NEW YORK, NY 10007-1474
(646) 386-3211
FAX (212) 227-2919

A. GAIL PRUDENTI
Chief Administrative Judge

SHERRY KLEIN HEITLER
Administrative Judge for Civil Matters
First Judicial District

FERN A. FISHER
Deputy Chief Administrative Judge
New York City Courts

FACSIMILE COVER SHEET

DATE: 12/13/14

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TO: MICHAEL S. CROMER, ESQ. FAX: (212) 608-8902
Barry McTiernan & Moore
MATTHEW T. MacINTYRE, ESQ. FAX: (212) 344-5461
Weitz & Luxenberg

FROM: VALERIE QUALLS
FOR: HON. SHERRY KLEIN HEITLER

RE: FALKENMEYER v. A. O. SMITH WATER PRODUCTS, et al
(CLEAVER-BROOKS)
INDEX # 190116/10 (Motion Seq. #001)

Faxed herewith is a copy of an Order signed with regard to the above referenced matter.
Please distribute to all other interested parties.

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

-----X
HELEN FALKENMEYER, as Executrix for the Estate
of WILLIAM FALKENMEYER, and HELEN
FALKENMEYER, Individually,

Index No. 190116/10
Motion Seq. No. 001

DECISION & ORDER

Plaintiffs,

-against-

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

Defendants.
-----X

SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant Cleaver-Brooks, Inc. (hereinafter “CB”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that the evidence proffered by plaintiffs in this case is insufficient to raise a triable issue of fact whether plaintiffs’ decedent was exposed to asbestos from a CB product.

CPLR 3212(b) provides, in relevant part, that a motion for summary judgment shall be granted if “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.” In asbestos-related litigation, assuming the defendant establishes its *prima facie* entitlement to judgment as a matter of law (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), the plaintiff must then demonstrate that there was actual exposure to asbestos fibers released from the defendant’s product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). While it is sufficient for the plaintiff to show “facts and conditions from which the defendant’s liability may be reasonably inferred” (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995]), the plaintiff cannot rely on conjecture or speculation. *Roimesher v Colgate Scaffolding*, 77 AD3d 425, 426 (1st Dept 2010).

Plaintiffs' decedent William Falkenmeyer spent his career working as a wire lather, laborer, truck driver and dispatcher. In May of 2008 Mr. Falkenmeyer was diagnosed with lung cancer which plaintiffs' experts have attributed to his occupational exposure to asbestos.¹ Plaintiffs produced Mr. Falkenmeyer's former co-worker, William Crocker, to testify in this matter on September 12, 2013.² At his deposition Mr. Crocker testified that he and the decedent were exposed to asbestos from boilers and burners during the summers of 1977, 1978, and 1979 while employed by Wechter Plumbing Brothers. Relying in part on the following colloquy, plaintiffs argue that there is sufficient evidence against CB to proceed to trial (Deposition p. 112, objections omitted):

Q. Do you believe that you and Mr. Falkenmeyer came into contact with burners manufactured by Beckett, Cleaver Brooks and Burnham during those jobs you did together?

A. Yes. . . .

Q. Do you believe that the two of you were exposed to asbestos from the work you were doing in relation to these burners? . . .

A. The burners, yes.

However, it is apparent that Mr. Crocker only generally knew the name "Cleaver-Brooks" from his industry experiences and that he had no personal knowledge whether he or Mr. Falkenmeyer ever actually encountered a CB boiler or burner unit (Deposition pp. 111, 137):

Q. Do you know who made any of the burners that the two of you came into contact with?

A. No. I've heard, you know, throughout the industry it was Beckett, one that started with an "M," Cleaver Brooks. I don't know if it was Burnham, something that started with a "B," you know.

Q. Now, the names that you've mentioned, were these names that you learned about through the time that you were at Wechter?

A. Yeah. Throughout the industry, you know, all the time that I've, you know, that I've been in the business.

¹ See plaintiffs' exhibit A.

² A copy of Mr. Crocker's deposition transcript is submitted as defendant's exhibit D ("Deposition"). Mr. Falkenmeyer died before he could be deposed.

* * * *

Q. . . . A few minutes ago you testified to a couple of names of burners that you recalled seeing during your career. Do you have a specific recollection of seeing Mr. Falkenmeyer work on a Cleaver Brooks burner?

A. I have no idea what we worked on.

Mr. Crocker's belief that Mr. Falkenmeyer was exposed to asbestos from a product manufactured by CB is speculative at best. *See Harris v Pitts*, 109 AD3d 790, 791 (2d Dept 2013); *Fredette v Town of Southampton*, 95 AD3d 939, 940 (2d Dept 2012); *Espinal v Trezechahn 1065 Ave. of the Ams., LLC*, 94 AD3d 611, 613 (1st Dept 2012); *Roimesher, supra*, 77 AD3d at 426. There being no other evidence linking Mr. Falkenmeyer's alleged asbestos exposure to a CB product, plaintiffs have failed to present facts and conditions from which the defendant's liability may be reasonably inferred.

Accordingly, it is hereby

ORDERED that Cleaver-Brooks, Inc.'s motion for summary judgment is granted; and it is further

ORDERED that this action and any cross-claims against Cleaver-Brooks, Inc. are severed and dismissed; and it is further

ORDERED that the remainder of the action shall continue as against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 12-12-14



SHERRY KLEIN HEITLER, J.S.C.