2013 WL 9816609 (N.Y.Sup.) (Trial Order)
Supreme Court, New York.
Eighth Judicial District.
Erie County

In Re EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION;
Joann H. Suttner, as Executrix of the Estate of Gerald Suttner, deceased,
and Individually as the Surviving Spouse of Gerald W. Suttner, Plaintiff,
v.
A. W. Chesterton Company, et al., Defendants.

No. 2010-12499.
March 15, 2013.

Decision and Order

Appearances: Lipsitz & Ponterio, LLC, Attorneys for Plaintiffs, By: Dennis P. Harlow, Esq., K & L Gates LLP, Attorneys for Defendant Crane Co., By: Angela DiGiglio, Esq.

John P. Lane, Judge.

***1** The court has considered the following papers: notice of motion by defendant Crane Co. to set aside the verdict and for judgment in its favor pursuant to CPLR 4404(a), dated November 6, 2012.; affirmation in support of Angela DiGiglio, Esq., dated November 6, 2012; affidavit in opposition of Dennis P. Harlow, Esq., sworn to December 6, 2012; defendant Crane Co's reply, dated January 7, 2013.

In this action, plaintiff recovered for personal injuries and wrongful death resulting from mesothelioma contracted by her decedent, Gerald W. Suttner, as a result of exposure to asbestos during his employment at the General Motors Power Train plant in Tonawanda, New York (Chevy). Plaintiff contends that Gerald Suttner's work with asbestos- containing materials used in and on valves manufactured and supplied by defendant Crane Co. (Crane) was a substantial factor in the development of his illness. This trial in matter, in which Crane was the sole remaining defendant, began on October 9, 2012. On October 23, the jury reached its verdict finding that Mr. Suttner was exposed to asbestos-containing gaskets or packing while working on Crane valves; that those valves were defective because of Crane's failure to warn of the danger of asbestos-containing gaskets or packing; and that the defective Carne valves were a substantial factor in causing Mr. Suttner's injuries. The jury awarded plaintiff executrix $1,000,000 for decedent's past pain and suffering; $ 750,000 was awarded to plaintiff individually for loss of decedent's services and society; $500,000 was awarded for past monetary loss sustained by decedent's daughter and $750,000 for 25 years for her future monetary loss. Crane's share of the responsibility for Gerald Suttner's injuries was found to be four percent.

Crane moves pursuant to CPLR 4404(a) to set aside the verdict and for judgment as a matter of law that it had no legal duty to decedent. Crane argues that New York does not recognize a duty to warn on the part of an equipment manufacturer for products it did not put into the stream of commerce; that it had no duty to warn of dangers inherent in another's product, even if use of those products with its valves was foreseeable and that the" component parts doctrine" mandates dismissal as a matter of law.

Although Crane concedes that it may have manufactured and supplied valves containing asbestos to Chevy [1] it argues that plaintiff presented no evidence that her decedent worked with any of that original material. Crane also asserts: that there was no evidence in the trial record that its valves required the use of asbestos-containing gaskets or packing to function; the record did show that other materials were suitable to seal and connect valves and were available to Chevy; and that it was Chevy's

choice, not Crane's, to use asbestos-containing material with the Crane valves. Crane maintains that it did not have any role in Chevy's use of the valves, or their incorporation into Chevy's piping systems. Crane also points out that the asbestos-containing gasket and packing material used by Mr. Suttner in his work maintaining and repairing Crane valves was supplied by Garlock, as he testified in his video-taped trial testimony. It alleges that plaintiff conceded on the record that Crane was not the source of the asbestos to which decedent was exposed.

***2** Plaintiff opposes the motion and urges the court to resist this latest of Crane's "perennial attempts" to have a New York court rule that it can not be liable for injuries resulting from the use of asbestos components with its valves. To the contrary, plaintiff argues, Crane is responsible for injuries resulting from its defective valves, that the asbestos-containing replacement parts were substantially identical to the valves' original asbestos-containing gaskets and packing supplied at the time of sale. Plaintiff maintains that Crane is liable for injuries resulting from intended or foreseeable uses of its valves. Plaintiff also takes issue with Crane's argument that the component parts doctrine insulates it from liability for its valves, asserting that the valves were finished products, not merely components. Contending that Crane mischaracterizes the facts, plaintiff maintains that the record shows that it's valves were asbestos-containing and thus dangerous at the time they were sold to Chevy. With respect to defendant's suggestion that the valves could have been used in other applications, plaintiff maintains that Crane designed and advertised its valves for high pressure steam use, fitting them with asbestos gaskets and packing before sale, expecting that the valves would be used for high pressure steam lines, and its product was used as intended. Plaintiff contends that at trial, Crane admitted that it did not know of any other material that could perform as well as asbestos for valve packing and gasketing prior to at least 1970, and that testimony at the trial revealed that asbestos was the only effective gasket material that could be used on steam lines during the relevant period.

A court may not set aside a verdict as a matter of law based upon insufficiency of the evidence unless no valid line of reasoning and permissible inferences could possibly lead rational jurors to the conclusion they reached (*see Cohen v Hallmark Cards, Inc.* 45 NY2d 493, 499 [1978]; *Zane v Corbett,* 82 AD3d 1603, 1606 [2011]) Evidence adduced at trial in a case such as this must be viewed in the light most favorable to the plaintiff (*see Penn v Amchem Prods.,* 85 AD3d 475 [2011]). While a trial court has discretionary authority upon review of the trial record to set aside a verdict if it finds that the jury could not have reached it on any fair interpretation of the evidence (*see Husak v 45th Ave. Hous. Co.,* 52 AD3d 782 [2008]), such a finding is not warranted here.

Crane's argument that it cannot be held liable for injuries resulting from the use of its valves' asbestos components and that it had no duty to warn under the component part doctrine fails. It is well established in 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" (*Liriano v Hobart Corp.,* 92 NY 2d, 232, 237, *citing Rastelli,* 79 NY2d 289 at 297). "A manufacturer also has a duty to warn of the danger of unintended uses of a product provided those uses are reasonably foreseeable" (*Liriano* at 237, *citations omitted*). Foreseeable uses can include modifications by third parties (see *Liriano; Baum v Eco-Tec, Inc.,* 5 AD3d 842 [2004]; *Berkowitz v A.C.& S., Inc.,* 288 AD2d 148 (2001). "A manufacturer or retailer may ... incur liability for failing to warn concerning dangers in the use of a product which come to its attention after manufacture or sale ..." (*Cover v Cohen,* 61 NY2d 261,274 [1984]). A manufacturer may be held liable where a plaintiff is injured by replacement parts, which it neither supplied nor specified, which are substantially similar to the original parts. (see *Sage v Fairchild-Swearingen Corp.,* 70 NY2d 579 [1987]; *Baleno v Jacuzzi Research Sys.,* 93 AD 2d 982 [1983]; *Call v Banner Metals,* 45 AD3d 1470 [2007]; *Penn v Jaros, Baum & Bolles,* 25 AD3d 402 [2006]; *Baum; Rogers v Sears, Roebuck & Co.,* 268 AD2d 245 [2000]; and *Village of Groton v Tokheim* Corp., 202 AD2d 728 [1994].

***3** Here, the trial record contains ample evidence from which the jury could conclude that Crane's valves were manufactured and supplied with asbestos-containing materials and that Crane had specified the use of asbestos for packing and gaskets for its valves. Evidence at trial also allowed the jury to conclude that Crane designed and marketed a product which, when used for one of its intended purposes, on high pressure steam lines, required asbestos-containing gaskets and packing. In addition, the record contained evidence that Crane knew that the packing and gaskets in its valves would need to be replaced and in fact issued manuals detailing how to perform this work on its valve. (*see, e.g.* Plaintiffs Ex. 24 Crane's Manual "Piping Pointers for

Industrial Maintenance"), so that the jury's verdict was not irrational. Plaintiffs evidence supports her claim that Crane knew routine operation of its valves would transform the asbestos in the gaskets from an encapsulated state to a friable state, creating a risk to those persons in the vicinity of the valves without giving warnings for their benefit. Furthermore, It was undisputed at trial that Crane never gave any warnings concerning the use of asbestos in and on its valves.

Crane, relying principally on *Rastelli v Goodyear Tire and Rubber,* 79 NY2d 289 (1992) for its argument that a manufacturer has no duty to warn about another manufacturer's product used in conjunction with its product and that New York imposes liability only upon the entities that put allegedly injurious products into the stream of commerce, has made this argument many times to this court, as well as others. This court has denied numerous similar motions made by Crane. In *Sawyer v A. C. & S.,* (32 Misc 3d 1237 (A) [2011]), Justice Sherry Klein Heitler denied Crane's motion for summary judgment where Crane had relied upon the same arguments it makes here, explaining:
"The Court thus finds that a manufacturer's liability for third-party component parts must be determined by the degree to which injury from the component parts is foreseeable to the manufacturer. Accordingly, the issue of Crane's liability for third-party component products rests in the degree to which Crane could or did foresee that its own products would be used with asbestos-containing components. Where Crane's products merely could have been used with asbestos-containing components, the New York Court of Appeals holding in *Rastelli* cautions against imposing liability. Yet where, as in *Berkowitz,* Crane meant its products to be used with asbestos-containing components or knew that its products would be used with such components, the company remains potentially liable for injuries resulting from those third-party manufactured and installed components."

***4** (*id.* [emphasis supplied; internal quotations omitted])

Justice Joan A. Madden in *In re: New York City Asbestos Lit. (Dummitt),* (36 Misc.3d 1234(A)[2012) declined to overturn a verdict against Crane in favor of a Navy veteran with mesothelioma. She Madden assessed Crane's stream of commerce argument. Crane, citing *Amatulli v Delhi Construction Corp.,* 77 NY2d 525 (1991), *Codling v Paglia,* 32 NY2d 330 (1973) and *Rastelli,* maintained in *Dummitt* as it does here, that under New York law, it had no duty to warn with respect to products it did not manufacture or place in the stream of commerce. *Dummitt* held that defendants could be liable for products it neither manufactured or supplied. Adopting the *Sawyer* analysis of *Rastelli* and *Berkowitz,* Judge Madden found that where plaintiff had demonstrated "a connection between Crane's product and the use of the defective products, and Crane's knowledge of this connection, such that, under *Berkowitz,* Crane could be potentially liable based on a duty to warn theory as a manufacturer who meant for its product to be used with a defective product of another manufacturer, or knew or should have known of such use" (*id.* at 5). The jury had sufficient evidence here to find such a connection.

Crane's argument that its valves fall within the component parts exception to strict products liability fails.
"[W]here a component part manufacturer produces a product in accordance with the design, plans and specifications of the buyer and such design, plans and specifications do not reveal any inherent danger in either the component part or the assembled unit, the component part manufacturer will be held blameless for an injury to the buyer's employee in a strict products liability action".

Leahy v Mid- West Conveyor Co., 126 AD2d 16, 18 (1986):

There was no evidence adduced at this trial that Crane manufactured or designed its valves in accordance with anyone else's plans or specifications. In addition, Crane cannot show that it had no knowledge of the inherent danger of asbestos used with its valves (*see Gray v R. L. Best Co.,* 78 ADd3d 1346 (2010).

Crane relies on some "recent" cases including the Fourth Department decision in *Drabczyk v Fisher Controls Int'l, LLC,* 92 AD3d 1259 (2012) *Iv denied* 19 NY3d 803(2012), the Southern District's decision in *Surre v Foster Wheeler, LLC,* 831 F Supp 2d 797 (2011) and Judge James W. McCarthy's letter decisions and orders in *Egelston v Air & Liquid Sys. Corp.* (Sup Ct,

Onondaga County, July 11, 2012 and *Jones v Air & Liquid Sys. Corp.* (Sup Ct, Oneida County, July 11,2012). Defendant has also cited a number of out of state cases in support if its argument.

***5** The relevant language in *Drabczyk* is" [A]lthough we agree with defendant that Supreme Court erred in charging the jury that defendant could be liable for decedent's exposure to asbestos contained in products used in conjunction with defendant's valves (see, generally *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 297-298 [1992]), we nevertheless conclude that the error is harmless". *Drabczyk* is distinguished from the case at bar. The issue there concerned exterior insulation, a product not at issue here. Judge Madden noted that defendant's counsel in *Drabczyk* had conceded that it was liable for replacement gaskets and packing, and that plaintiff's counsel maintained that there was no evidence that defendant knew that asbestos insulation would be used with its valves. (*Dummitt* at 5).

Surre is also distinguishable from this matter, it is also an insulation case. The court noted that there was no proof in the record that Crane supplied the insulation used on its boilers or had any knowledge that asbestos would be used. I note that again that *Surre* recognized that where "circumstances strengthen the connection " between the defendant's product and the defective replacement parts, "a duty to warn may arise", citing *Rogers* (831 F Supp 2d at 801). *Surre* also held that the duty to warn same duty may arise if the manufacturer knew that the defective product would be used with its product pursuant to contract specifications, citing *Berkowitz. (id.*)

With respect to Judge McCarthy's summary judgment decisions which adopt the reasoning found in *Drabczyk* and *Surre* and depart from that court's past reliance on *Berkowitz,* each is specifically restricted to the facts of the particular case. In addition, this was a full blown trial. Each side had a full and complete opportunity to elicit and to counter all the relevant facts within the confines of the trial.

Finally, I am unpersuaded by out -of-state precedent. The law in New York on this issue is clear. For the foregoing reasons, Crane's motion to set aside the verdict and for judgment in its favor is denied.

SO ORDERED

Dated: Buffalo, New York

March 15, 2013

<<signature>>

John P. Lane

Judicial Hearing Officer

Footnotes

1 For example, in a footnote in its memorandum of law, Crane states: "At the time of sale, Crane Co's valves may have contained an internal 'bonnett' gasket and internal stem packing, both of which may or may not have contained asbestos".

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