Matter of New York City Asbestos Litig.
2016 NY Slip Op 30841(U)
May 5, 2016
Supreme Court, New York County
Docket Number: 190406/2014
Judge: Peter H. Moulton

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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MICHAEL KOULERMOS and MARIAN KOULERMOS,

Plaintiffs

-against- Seq 006

A.O. SMITH WATER PRODUCTS, et al

Defendants

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As is relevant to this motion, Michael Koulermos ("plaintiff") contends that he developed mesothelioma as a result of working at the Northport Power Station in Northport, Long Island (the "power station") near various trades that used asbestos-containing products. O'Connor Constructors, Inc. ("O'Connor" or "defendant"), a mechanical contractor, moves for summary judgment dismissing plaintiff's claims and all cross-claims against it. The motion is opposed only by co-defendants National Grid USA and National Grid USA Service Company (the successor to Long Island Lighting Company ("LILCO") (collectively "National Grid" or "co-defendant"). The motion is denied.

In support of its motion, O'Connor does not submit an affidavit but asserts that it is entitled to summary judgment based on the absence of evidence. O'Connor points to plaintiff's alleged exposure over a thirty year period and to plaintiff's lack of identification of O'Connor in his interrogatories and deposition testimony. O'Connor also cites to *Celotex v Catrett* (477 US 317 [1986]).

In its opposition, National Grid submits the affidavits of records custodian Deborah Tamborski and engineer William Tuppeny. It maintains that plaintiff's claim that he was exposed

to asbestos while working on the initial construction Units 1 and 2 at the power station near other trades is sufficient to create an issue of fact concerning co-defendant's cross-claims.[1] National Grid points to the broad indemnification provision in a contract between O'Connor and LILCO, providing for indemnity "arising out of or in any way connected with the work" (Ex F at 6).[2]

It is undisputed that O'Connor worked on the initial construction of Unit 1 and Unit 2. National Grid points to plaintiff's testimony that he worked on the initial construction of Unit 1 and Unit 2 (Tr 171-72, 317-20, 338-39, video Tr 35-36, 91).[3] National Grid points to plaintiff's testimony that he painted the smoke stacks and worked in the boiler room at Northport Units 1 and 2 (Tr 174, 187-109). Plaintiff also testified that he believed that he was exposed to asbestos from work done in the vicinity of workers installing and insulating hot and cold water lines (Tr 197-215, 338-353, video Tr 37-52), welding pipe (Tr 207-09, video Tr 42-43) and covering pipes with mesh cloth (Tr 210-11, video Tr 43-44). National Grid points to O'Connor's work: installing and insulating dust collectors, forced-draft fans and the connection of breeching to the smoke stacks (Ex F, G at 14-18, H, I at 20-23, Ex J [Daily Construction Reports May 8- 19, 1967] and Ex L [Monthly Progress Reports April and July, 1967]). O'Connor's contract with LILCO indicates that O'Connor furnished labor, material, and equipment for the erection and insulation of the dust collectors, forced

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[1]Paragraph 43 of National Grid's Verified Answer asserts cross-claims against all defendants for contribution and contractual indemnification ("the several and joint carelessness . . . contractual indemnification, or breach of the requirements of the Labor Law or other wrongful conduct on the part of some or all of the co-defendants in this action").

[2]In *North v Air & Liquid Systems Corp.*, Index Number 190114/13, Judge Schulman held that this same clause entitled National Grid to indemnification where an O'Connor employee was injured.

[3]All transcripts references are references to plaintiff's deposition transcript.

draft fans and breeching (e.g., Ex F). National Grid points to construction and progress reports indicating that plaintiff's stated employer, George Campbell & Company, worked at the power station during the time that O'Connor did (Ex J, Ex K and Ex L). National Grid also points to construction and progress reports to demonstrate that O'Connor used asbestos products (Ex J, Ex K and Ex L).

In reply, O'Connor maintains that the construction and progress reports do not reflect that plaintiff himself worked at the power station (the reports only reference the employers). Defendant points to plaintiff's testimony that he painted smoke stacks, doors, pipes, boilers, generators and floors at the power station. However, plaintiff did not testify about the type of work that O'Connor performed involving dust collectors, force draft fans and breeching. Defendant argues that plaintiff's testimony is limited to identifying steamfitters, carpenters, plasterers, pipe covers and laborers who swept dust and debris. O'Connor asserts that plaintiff's testimony that he worked on hot and cold water lines is a reference to lines hooked up to boilers. O'Connor contends that it was never involved with erection of boilers or piping. Moreover, O'Connor employees did not weld pipes but only welded items connected to dust collectors, force draft fans and breeching. O'Connor further asserts that any insulation it applied was specific to equipment related to dust collectors, force draft fans and breeching. While conceding that the October 27, 1967 construction report reflects that O'Connor used asbestos at the power station, defendant argues that plaintiff's employer is not listed as being present that day.[4] Therefore, O'Connor contends that plaintiff could not have been exposed to asbestos on that date.

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[4]The report states under the name O'Connor "Continue to seal weld cold air intake duct south side. Continue to install asbestos seal ring and clamp and bolt to upper tube sheet sealing outlet tube to tube sheet dor [sic] dust collector."

O'Connor further argues that the court's prior decisions denying summary judgment to co-defendants Treadwell Corporation ("Treadwell") and Courter & Company ("Courter") are inapposite because plaintiff identified equipment associated with those defendants, but has not identified equipment associated with O'Connor.[5]

Discussion

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]). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" *(Jacobsen v New York City Health & Hosps.*

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[5]O'Connor also improperly raises for the first time in reply an argument regarding the potential inconsistencies between plaintiff's social security records and plaintiff's testimony as to when he worked at the power station. Even if this argument had been timely raised, it would have been rejected for the same reasons stated in the Courter and Treadwell decisions. Additionally, O'Connor asserts that the social security records demonstrate that plaintiff's work predates O'Connor's work, but O'Connor submits no evidence regarding when it worked at the power station.

Corp., 22 NY3d 824, 833 [2014] [internal citations omitted]). Summary judgment may not be obtained by pointing to gaps in a plaintiff's proof and therefore, a motion must be denied regardless of the sufficiency of plaintiff's opposing papers (*see Torres v Industr. Container*, 305 AD2d 136 [2003] [summary judgment denied where manufacturer did not adduce affirmative evidence that the metal drum in question, which bore a label reading sodium sulfide, was not involved in the accident, did not contain sodium sulfide or was not manufactured by it (*id.*). The First Department recently reiterated this in *Koulermos v. A.O. Smith Water Prods.*, 2016 NY Slip Op 01913 [March 17, 2016], where it was held that "pointing to gaps in an opponent's evidence is insufficient to demonstrate a movant's entitlement to summary judgment." The court further noted that the failure to present evidence, such as affidavits, which affirmatively demonstrate the merit of the defense is enough to deny summary judgment. 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*). The plaintiff cannot, however, rely on speculation (*see Roimesher v Colgate Scaffolding & Equip. Corp.*, 77 AD3d 425, 426 [1st Dept 2010]). A plaintiff is not required to show the precise cause of his damages, but only facts and conditions from which a defendant's liability can be reasonably inferred (*Reid, supra*). In addition, issues of credibility are for the jury (*Cochrane v Owens-Corning Fiberglass Corp.*, 219 AD2d 557, 559-60 [1st Dept 1995] ["Supreme Court's conclusion that plaintiff's allegations are "not credible" therefore constitutes the impermissible determination of an issue that must await trial"]).

Summary judgment is properly denied even where the plaintiff does not believe the product contained asbestos (*Berensmann*, 2013 NY Slip Op 33137 (U) [Sup Ct, New York County 2013]). On appeal in *Berensmann,* 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" (*see Berensmann,* 122 AD3d at 521, *supra* [citing *Reid,* 212 AD2d at 463, *supra*]).

O'Connor's motion is denied. No affidavit was proffered regarding the dates that O'Connor's employees worked at the power station. No affidavit was submitted demonstrating that O'Connnor's work involving dust collectors, force draft fans and breeching was not in the vicinity of the areas where plaintiff worked. Nor did O'Connor submit an affidavit that it did not use asbestos products at the power station. Instead of proffering evidentiary proof to demonstrate that its work could not have contributed to the causation of plaintiff's injury, defendant points to gaps in plaintiff's testimony. Such evidence "pointing to gaps in an opponent's evidence is insufficient to demonstrate a movant's entitlement to summary judgment" (*see Koulermos*, *supra*).[6] By not proffering affirmative evidence that its product could not have contributed to plaintiff's injury, defendant has failed to establish that its product could not have contributed to plaintiff's injury (*Reid,* 212 AD2d at 463, *supra*; *Berensmann* 122 AD3d at 521, *supra, Matter of New York City Asbestos*

[6]While the evidence connecting O'Connor to plaintiff's illness may be weaker than the evidence connecting co-defendants Courter and Treadwell to plaintiff's illness, the initial burden on summary judgment, as reiterated in *Koulermos, supra* remains the same regardless of the relative strength or weakness of the evidence.

(DiSalvo), 123 AD3d 498, *supra*).[7]

Moreover, even assuming that O'Connor had made a prima facie case, issues of fact exist for trial regarding whether plaintiff worked contemporaneously with, and in the vicinity of, O'Connor's employees and whether O'Connor should be held liable to National Grid and/or to plaintiff for plaintiff's injuries.

It is hereby

ORDERED that Defendant's motion is denied.

This constitutes the Decision and Order of the Court.

Dated: May 5, 2016

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

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[7]O'Connor's citation to *Celotex* (477 US 317, *supra*) is unpersuasive. That case was decided under Rule 56 of the Federal Rules of Civil Procedure. The summary judgment burden under Rule 56 is different from the state law burden.