Hernandez-Vega v Air & Liquid Sys. Corp.
2016 NY Slip Op 31607(U)
August 22, 2016
Supreme Court, New York County
Docket Number: 190367/2014
Judge: Peter H. Moulton
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SUPREME COURT OF THE STATE OF NEW YORK: Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK
---X
IN RE NEW YORK CITY ASBESTOS LITIGATION
---X
GASPAR HERNANDEZ-VEGA,

Plaintiff,

-against-

AIR & LIQUID SYSTEMS CORP. (as Successor to Buffalo Pumps, Inc.) *et al.*,

Defendants
---X

Index 190367/2014
Motion Seq. 009

DECISION & ORDER

PETER H. MOULTON, J.S.C:

This action arises out of claims by plaintiff Gaspar Hernandez-Vega ("plaintiff") that he developed mesothelioma as a result of his alleged exposure to asbestos-containing products while working as a pipefitter. As is relevant to this motion, plaintiff alleges that during his deposition, he testified interchangeably to the fact that he worked with "Edward valves," "Vogt valves," and "Edward-Vogt valves" (collectively, "Flowserve valves") that exposed him to asbestos through his changing of the packing and gaskets applied to those valves (*see* Transcript of Deposition of Gaspar Hernandez-Vega ["Tr."], Vol. 6, at 775:24-777:9). Plaintiff further asserts that he knew he worked with Flowserve valves because the name was on a tag on the side of the valve's body (Tr., Vol. 2, at 190:8-22; Tr., Vol. 3, at 425:22-426:18). Additionally, plaintiff states that he knew that he was exposed to asbestos from working on packing and gaskets within Flowserve valves (Tr., Vol. 3, at 434:25 – 435:11; 437:21 – 439:5). While performing work on Flowserve valves, plaintiff states that he breathed in visible asbestos dust created by his work (Tr., Vol. 1, 48:6-17; Tr., Vol. 3, at 436:22 – 437:7). Plaintiff emphasizes that he identified Flowserve valves both as Edward valves and as Vogt valves at various points in his deposition. For instance, plaintiff

highlights his following answer to a question concerning the valve manufacturers that he was exposed to:

> A: **Edward, yeah**. There was Pacific – brand Pacific, Watt, Peerless – no, not Peerless. Honeywell, and there was Fishers, and there was – Fisher, Pacific, **Vogt, Vogt – valves**.
>
> (Tr., Vol. 2, at 190: 17-22 [emphasis added]).

He further emphasized that he identified those Flowserve valves as sources of his asbestos exposure during his career as a pipefitter (Tr., Vol. 2, at 190:8-22). However, during his discovery deposition, plaintiff states that Flowserve's counsel deceptively steered plaintiff into testifying about exposure to "Edward-Vogt" valves (Tr., Vol. 3, at 424:10-14). It is undisputed that Edward valves and Vogt valves have been manufactured for over 100 years. Edward Valves, Inc. began its operations in 1904, and its business was making high-pressure, high-temperature valves (*see* Exhibit 8 to Plaintiff's Opposition, Deposition of James Tucker at pp. 17:6-17; 41:13-16). Flowserve has acknowledged that it is responsible for the Edward valve line as a successor in interest (*id.* at pp. 17:1-5; 19:18-25), and that Edward valves were sold with asbestos packing already inside them (*id.* at 78:25 – 79:10). Flowserve further acknowledges that Edward valves were sold with asbestos packing and asbestos flange gaskets, and that Edward valves, Inc. sold asbestos gaskets and asbestos packing for placement in its valves until 1985 (*id.* at pp. 106:3-13; 125:20-126:2; 132:4-20). Plaintiff further states that the Vogt valve company, for which Flowserve is also a successor in interest, began manufacturing valves in the late 1890s (*see* Exhibit 9 to Plaintiff's Opposition, Flowserve Vogt catalog).

Flowserve's argument in support of it motion stems from its emphasis on the fact that plaintiff specifically identified "Edward-Vogt" valves at his discovery deposition (Tr., 190:8-16; 206:23-207:12; 209:4-10; 226:14-21; 351:1-16; 423:10-445:12; 799:8-811:10; 776:2-779:9), and

video deposition (Tr., 125:21-126:2; 157:16-158:5; 163:16-173:12). Additionally, Flowserve submits that plaintiff testified during his discovery deposition to working with "Rockwell pumps," which it would be responsible for as a successor to the Rockwell Manufacturing Company (Tr., 151:12-23; 225:21-226:7; 237:21-238:3; 311:6-23). Flowserve states that plaintiff's aforementioned testimony represents a misidentification, since Edward-Vogt valves did not come into existence until 1998 and Flowserve and its predecessor (Rockwell Manufacturing Company) never manufactured, distributed or sold pumps of any kind. In further support of its motion, Flowserve submits the affidavit of David Osbourne, who worked for the company for forty-three years in various engineering, sales, and marketing positions. Osbourne states that he is fully familiar with Flowserve's historic valve products, although he does not specify which business records, if any, he reviewed to gain his knowledge, particularly for the time period prior to his employment. He states that the Edward-Vogt valve line did not come into existence until 1998 after a merger between the Vogt Valve Company and Edward Valves, Inc. Osbourne further submits that prior to 1998, there was no valve manufactured, labeled, or branded "Edward-Vogt." As such, Flowserve argues that plaintiff could not have worked with any Edward-Vogt valves during his career as a pipefitter in the 1960s and 1970s, as they did not exist.

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.

Thus, 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. Corp.*, 22 NY3d 824, 833 [2014]). 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]). The First Department recently reiterated this in *Koulermos v. A.O. Smith Water Prods.*, 137 AD3d 575, 576 (1st Dept 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 (*id.*). 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 defendant has met its burden of proof that plaintiff must then 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, however, rely on conjecture or speculation (*see Roimesher v Colgate Scaffolding & Equip. Corp.*, 77 AD3d 425, 426 [1st Dept 2010]). It is also well-settled that in personal injury litigation, 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,* 212 AD2d 462, *supra*).

In addition, issues of credibility are for the jury (*Cochrane v Owens-Corning Fiberglass Corp.*, 219 AD2d 557, 559-60 [1st Dept 1995]). Because credibility is a jury function, summary judgment must be denied even where a plaintiff's testimony is equivocal (*see Berensmann*, 122 AD3d 520, 521, *supra*, *citing Reid*, 212 AD2d at 463, *supra*). Where "[t]he deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaint . . . [t]he assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier fact, and any apparent discrepancy between the testimony and the evidence of the record goes only to the weight and not the admissibility of the testimony" (*Dollas v Grace & Co.*, 225 AD2d 319, 321 [1st Dept 1996] [internal citations omitted]). Thus, it was reversible error in Dollas for the supreme court to reject, "as being unworthy of belief" the testimony of a plaintiff in a separate action which was offered in opposition to defendant's summary judgment motion (*id.*). A defendant's contention that a plaintiff's description of the asbestos-containing product differs from the true description of that product also merely raises issues of credibility for the jury (*see Penn v Amchem Products*, 85 AD3d 475 [1st Dept 2011]).

Here, Flowserve has failed to meet its initial burden. Flowserve proffers no evidentiary proofs demonstrating that its valves were not at the sites that plaintiff worked at, did not contain asbestos, and did not otherwise require the use of asbestos "as a matter of design, mechanics or economic necessity." Rather, Flowserve points to plaintiff's equivocal testimony with respect to whether he was exposed to "Edward valves," "Vogt valves," or "Edward-Vogt valves." Such evidence "pointing to gaps in an opponent's evidence is insufficient to demonstrate a movant's entitlement to summary judgment" (*see Koulermos, supra*). By not proffering affirmative

evidence that its products could not have contributed to plaintiff's injury, Flowserve has failed to meet its burden (*Reid*, 212 AD2d at 463, *supra*; *Berensmann* 122 AD3d at 521, *supra*; *Matter of New York City Asbestos (DiSalvo)*, 123 AD3d 498, *supra*).

Even if Flowserve had met its burden, issues of fact exist for trial. A reasonable inference may be drawn from plaintiff's testimony concerning his encounters with "Edward valves," "Vogt valves," and "Edward-Vogt valves" that plaintiff separately encountered "Edward valves" and "Vogt valves." Indeed, aside from the passage plaintiff highlights in support of the proposition that he separately encountered "Edward valves" and "Vogt valves" (Tr., Vol. 2, at 190: 17-22 ["Edward, yeah. There was Pacific – brand Pacific, Watt, Peerless – no, not Peerless. Honeywell, and there was Fishers, and there was – Fisher, Pacific, Vogt, Vogt – valves"], several other passages from his deposition support that suggestion. For instance, when asked whether he had named all the valve manufacturers he encountered, plaintiff stated as follows: "Well, there's Crane, Pacific, Watt, Honeywell, Fisher, Jenkins. **Did I say Vogt? Vogt. Edward Vogt**" (Tr., Vol. 2, at 209: 7-10 [emphasis added]). Later, during a similar line of questioning, he reiterated "Well, there was Crane, Pacific, Fisher, Jenkins, **Vogt, Edward Vogt**, Grinnell" (Tr., Vol. 2, at 226: 19-21 [emphasis added]). By separately identifying "Vogt" and "Edward Vogt" valves, an inference can be drawn that plaintiff was referring to at least two separate valve manufacturers rather than just to "Edward-Vogt" valves, as defendant argues.

Such an inference is strengthened by the fact that Flowserve does not dispute that "Edward valves" and "Vogt valves" were both made with or outfitted with asbestos-containing parts during periods of time contemporaneous with plaintiff's work history. Additionally, even if one were to cast plaintiff's testimony with respect to his encounters with "Edward valves," "Vogt valves," or

"Edward-Vogt valves" as equivocal, summary judgment still should not be granted in Flowserve's favor (*see Berensmann* 122 AD3d at 521, *supra*). Rather, it is for the jury to decide whether plaintiff was describing "Edward valves," "Vogt valves," or "Edward-Vogt valves" when he testified with respect to his encounters with those products. Moreover, the fact that plaintiff's description of the asbestos-containing valves he encountered may differ from the true description of those valves merely raises issues of credibility for the jury (*see Penn v Amchem Products*, 85 AD3d 475, *supra*).

In order for this court to discount plaintiff's separate invocation of his encounters with "Edward valves," "Vogt valves," and "Edward-Vogt valves," and conclude that he must have been referring solely to "Edward-Vogt valves" that did not come into existence until 1998, it must do what the court in *Dollas* (225 AD2d at 321, *supra*) found was reversible error – weigh the quality of the testimony and disregard portions of it "as being unworthy of belief." It is for the jury, not the court, to weigh plaintiff's credibility and resolve inconsistencies in his testimony (*see Berensmann* 122 AD3d 520, *supra*; *Penn v Amchem Products*, 85 AD3d 475, *supra*). Additionally, a reasonable inference with respect to plaintiff's exposure to Flowserve valves can be drawn from plaintiff's testimony that he saw the names "Edward" and "Vogt" imprinted onto the valves he encountered (Tr., Vol. 2, at 190:8-22; Tr., Vol. 3, at 425:22-426:18). Presumably, plaintiff could not have perceived such a memory if such valves did not exist. Whether or not plaintiff's memory is credible is an issue of fact for a jury to reconcile.

As it is undisputed that defendant never manufactured Rockwell pumps, plaintiff's claims relating to Rockwell pumps are dismissed (*see Berensmann* 122 AD3d at 521, *supra* ["it is undisputed that defendant never manufactured wallboards containing asbestos, and thus, the claims

relating to defendant's wallboards are dismissed"]). It is hereby,

ORDERED that defendant's motion is denied in its entirety, except as to plaintiff's claims relating to Rockwell pumps, which are dismissed.

This constitutes the Decision and Order of the Court.

Dated: August 22, 2016