Matter of New York City Asbestos Litig.
2017 NY Slip Op 30224(U)
February 2, 2017
Supreme Court, New York County
Docket Number: 190093/2016
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 Index 190093/2016

IN RE NEW YORK CITY ASBESTOS LITIGATION

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LESLIE FOGEL and CATHERINE FOGEL

Sequence 002 and 004

Plaintiffs

-against-

AMERICAN INTERNATIONAL INDUSTRIES FOR CLUBMAN, et al

Defendants

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This appeal of the Special Master's decision dated December 5, 2016 presents an issue of apparent first impression: whether a plaintiff is entitled to be placed in an *in extremis* cluster or must be transferred to a FIFO cluster where plaintiff alleges exposure to asbestos from ovens in Queens, but has not sued a defendant or identified an entity connected to that product. It is uncontested that all defendants in this asbestos action are talc manufacturers, suppliers or miners and that plaintiff's exposure to talc occurred in places outside of New York City (mainly Long Island and New Jersey). Other than talc exposures, plaintiff claims that he was exposed to asbestos between the ages of eight to ten years old when he crawled inside a cooled oven on a number of occasions at his father's job at Tech-Ohm Resistor Corporation ("Tech-Ohm"), in Queens. Plaintiff testified that because he was small, he was the only one who could fit inside the interior of the oven to collect the resistors that were previously baked inside. The Special Master found that plaintiff was entitled to inclusion in the October 2016 *in extremis* cluster because "plaintiff's visits to Tech-Ohm constitute sufficient contact with NYC." Plaintiff passed away after these motions were filed.

The motions are granted and the decision is reversed, under the specific and unusual facts of this case.

Defendants Unilever United States, Inc. d/b/a/ Brut (sequence 002) and Whittaker Clark & Daniels (sequence 004) joined by defendant American International Industries, make the following arguments in support of the motions:

- Although plaintiff identified a product (an oven), he did not identify a brand of oven, nor did he identify an oven manufacturer or supplier, or sue a defendant who has responsibility for the oven.
- Plaintiff has not demonstrated that the oven contained asbestos, although he believed that to be the case based on "common knowledge" and because the material in the oven resembled asbestos screen material that he used in his chemistry class.
- Plaintiff's testimony is "manufactured" in order to obtain *in extremis* status and is a "sham" and a "farce"-plaintiff testified that he rarely crawled inside the oven at his father's workplace and visited Tech-Ohm approximately five to ten times.
- Plaintiff's expert medical causation report concluded that plaintiff's mesothelioma was the result of "the only exposures to asbestos . . . cosmetic talcs."

In opposition, plaintiff argues that the issue of inclusion in the *in extremis* docket is determined by a connection to New York City and to not to a particular defendant. Plaintiff also asserts that if he loses *in extremis* status, defendants should be precluded from claiming that plaintiff was exposed to asbestos from ovens. Plaintiff also suggests that his expert's report focuses solely on talc as a result of the short deadlines in asbestos cases, where evidence is not yet fully developed. Plaintiff also maintains that the investigation into plaintiff's oven exposure is ongoing and that a medical causation report can always be supplemented.

In response, defendants argue that plaintiff's investigation has not yielded identification of an oven defendant. Moreover, defendants assert that plaintiff's own expert concluded that plaintiff's illness was the result of talc exposure, thereby excluding any argument that plaintiff developed mesothelioma from any exposure to the Tech-Ohm oven. Additionally, defendants point out that if plaintiff's expert did not consider all the exposures, then the report is unreliable. Defendants also assert that they should not be precluded from establishing that plaintiff's illness was the result of asbestos exposure from ovens if their investigation proves more fruitful than plaintiff's investigation.

Discussion

In my January 5, 2017 decision in *Trumbull v Adience, Inc. et al*, Index Number 190084/16, I upheld the Special Master's decision to include a case in an *in extremis* cluster over defendants' objection. In that decision I noted that *in extremis* status is essentially a trial preference for terminally ill plaintiffs. I noted that the determination is not based on grounds of improper venue, forum non conveniens or lack of personal jurisdiction. Rather, I explained that the determination focuses on a New York City nexus requirement that was created to discourage forum shopping and ensure the fair resolution of the many asbestos cases that are filed here, bearing in mind the Court's scarce resources (*see e.g. Logan v A.P. Moller-Maersk, Inc.*, Index Number 190203/12 [Judge Heitler 2013]). I further held that *in extremis* status "does not revolve around the strengths and weakness of plaintiff's testimony so long as parts of his testimony clearly anchor his alleged exposures to . . . New York City." Moreover, I observed that the fact that a plaintiff may have been more intensely exposed outside of New York City is of no import because the very nature of asbestos exposures involve multiple actors and a stronger connection to one state or location over another.

The facts here differ from those alleged in *Trumbull*. Even after 10 months of investigation, plaintiff has not sued or identified any entity alleged to have responsibility for the oven, nor did plaintiff testify that the oven at issue was labeled as having asbestos content. The lack of a defendant connected to plaintiff's New York City exposure or the lack of identification of any such entity is fatal under the facts presented here. Once a defendant has been sued or once an entity connected to a product has been identified, it can be ascertained whether that entity made an asbestos-containing product during the relevant time period, thereby anchoring the action to a New York City asbestos exposure (*see e.g., Berensmann v 3M Co.*, 2013 NY Slip Op 33137 (U) [Sup Ct, New York County 2013] *aff'd,* 122 AD3d 520 [1st Dept 2014] [issues of fact existed for trial where plaintiff disbelieved that the product he encountered contained asbestos but where defendant admittedly made asbestos-containing products during the relevant period]). Even the failure to identify the brand of product is not fatal where a defendant, who has made an asbestos-containing product, has been identified (*see e.,g., Matter of New York City Asbestos Litig.* (2017 NY Slip Op 00572 [1st Dept 2017] [issues of fact exist for trial even though decedent did not identify the manufacturer of the pumps that he encountered where defendant made asbestos-containing pumps during the relevant period]). Plaintiff's testimony did not clearly anchor his alleged asbestos exposure to New York City. I decline to issue any preclusion order because plaintiff has not identified any legal basis to do so.

It is hereby

ORDERED that defendants' motions are granted to the extent that the Special Master's decision dated December 5, 2016 is reversed under the specific and unusual facts of this case; and it is further

ORDERED that the case should be removed from the *in extremis* cluster and shall be placed in the next FIFO cluster.

This constitutes the Decision and Order of the Court.

Dated: February 2, 2017

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

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