Matter of New York City Asbestos Litig.
2015 NY Slip Op 31276(U)
July 21, 2015
Supreme Court
Docket Number: 190278/2013
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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JACK P. SCAINETTI

Plaintiffs,

-against-

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

Defendant(s).

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PETER H. MOULTON, J.:

Plaintiff Jack P. Scainetti ("plaintiff") was diagnosed with mesothelioma on July 17, 2013. His disease, he claims, is connected to his exposure to asbestos-containing products manufactured, distributed, sold, or installed by various defendants, including defendant BW/IP ("defendant" or "BW/IP"). Specifically, plaintiff alleges that Byron Jackson pumps manufactured by defendant exposed him to asbestos during his work at powerhouses where Byron Jackson pumps were present from 1948 to 1971. Defendant moves for summary judgment and seeks dismissal of all claims against it based on its claim that plaintiff has failed to identify a BW/IP product as the source of his alleged asbestos exposure.

Arguments

Defendant submits that plaintiff has failed to present a factual basis for his claims against BW/IP. Defendant contends that plaintiff has not identified a BW/IP product as the source of his alleged asbestos exposure. Defendant argues that plaintiff did not identify any BW/IP products,

including Byron Jackson pumps, as the source of his alleged exposure, over the course of three (3) days of deposition testimony. Accordingly, defendant states that plaintiff has failed to demonstrate any evidence that links his injuries to any asbestos fibers from products manufactured, sold, distributed or installed by BW/IP.

In opposition, plaintiff argues that when he was deposed, he testified that he was exposed to asbestos from the work others did on pumps in his presence at powerhouses along the East River, including the Astoria, Ravenswood, Kent Avenue and Waterside powerhouses (Scainetti Deposition, Ex. 3, Plaintiff's Opposition, at 167, 197-202, 245-252). Plaintiff further states that he testified about his own work with "[v]alves and pumps" (*id.* at 250). More specifically, he states that he was "involved with building the incinerator" at a powerhouse, and that such work involved the handling of pumps and valves (*id.* at 250). Additionally, plaintiff states that he testified that he would handle asbestos at the various powerhouses, and that other tradesmen used asbestos on pumps and valves in the same manner that he did (*id.* at 251). Though plaintiff himself did not identify a BW/IP product at his deposition, Anthony Vivona, a worker for Con Edison at the Waterside powerhouse beginning in September 1963, identified Byron Jackson pumps as being in use at the site at that time (Vivona Deposition, Ex. 4, Plaintiff's Opposition, at 171-173, 284, 553-561). Plaintiff argues that this product identification overlaps with his work at the Waterside powerhouse, and others, from 1948-1971. Finally, plaintiff argues that Byron Jackson admits that it sold pumps with asbestos components, and contracted with insulation contractors to insulate its pumps with asbestos (*see* Byron Jackson Interrog. Resp., at 4, Ex. 5; *see also* Frank Costanzo Deposition, Ex. 6, Plaintiff's Opposition, at 235-237). Indeed, BW/IP corporate representative Frank Costanzo testified under oath that BW/IP would contract with insulation contractors to insulate customers' pumps with

asbestos up until the 1980s (*id.*). In light of this, plaintiff submits that sufficient evidence has been proffered to raise triable issues of fact as to whether his asbestos exposure stemmed from his work around BW/IP products, and specifically Byron Jackson pumps.

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]). Therefore, summary judgment in defendant's favor is denied when defendant fails "to unequivocally establish that its product could not have contributed to the causation of plaintiff's injury" (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept. 1995]; *Matter of New York City Asbestos Litig.* (*Berensmann*), 122 AD3d 520 [1st Dept. 2014]). 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]). By contrast, in *Root v Eastern Refractories, Co.* (13 AD3d 1187 [1st Dept. 2004]), an affidavit from a corporate employee who worked for the defendant since 1948, which stated that the company did not supply

any asbestos-containing products to Syracuse University during the relevant time, is sufficient to meet the burden of proof.

The First Department has stated that where a defendant manufactures both an asbestos-free and asbestos-containing product, it must eliminate the possibility of a plaintiff's exposure to the asbestos-containing product to show the absence of material issues of fact (*see Matter of New York City Asbestos Litig. (Berensmann)*, 122 AD3d 520 [1st Dept. 2014]["Although the record shows that defendant began to manufacture and ship asbestos-free joint compound around the time that plaintiff purchased defendant's product, issues of fact exist as to whether asbestos-free joint compound was available in Manhattan where plaintiff made his purchase of the subject product"]; *see also Berkowitz v. A.C. & S, Inc.*, 288 AD2d 148 [1st Dept. 2001][issue of fact raised by defendants' admission that products sometimes used asbestos]).

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 conjecture or speculation (*see Roimesher v Colgate Scaffolding & Equip. Corp.*, 77 AD3d 425, 426 [1st Dept. 2010]). Nor can a plaintiff rely upon the affirmation of counsel to fill in a crucial gap regarding how the plaintiff was exposed (*see Matter of Asbestos Litigation* (*Comeau*), 216 AD2d 79 [1st Dept. 1995] [counsel stated that the deceased plaintiff metal lather must "necessarily [have] scraped . . . W.R. Grace asbestos containing fireproofing . . . in order to perform his job"]). To defeat summary judgment, a plaintiff's evidence must create a reasonable inference that plaintiff was exposed to a specific defendant's product (*see Comeau v. W.R. Grace & Co.-Conn*), 216 AD2d 79 [1st Dept. 1995]).

Where a defendant asserts that there is a lack of proper identification of its product from a

plaintiff's testimony, that plaintiff – through the testimony or affidavit of another– can submit product identification testimony sufficient to raise triable issues of fact regarding a defendant's liability (*see Tronlone v. Lac d'Amiante Du Quebec*, 297 AD2d 528 [1st Dept. 2002][even though decedent did not identify defendant's product, issues of fact raised where decedent's coworker testified that decedent was exposed to asbestos fibers in the course of his employment and that plaintiff mixed, worked with, and was exposed to asbestos fibers used in defendant's product]).

In addition, issues of credibility are for the jury (*Cochrane v Owens-Corning Fiberglass Corp.*, 219 AD2d 557, 559-60). 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]). This is particularly true in asbestos cases, like that in *Dollas*, where the testimony presented is often proffered by witnesses attempting to recall remote events that are years and perhaps even decades removed from the present. Furthermore, it is 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, supra*; *Matter of New York City Asbestos Litg.* (*Brooklyn Nav. Shipyard Cases*), 188 AD2d 214, 225 [1st. Dept], *affd* 82 NY2d 821 [1993]).

BW/IP has failed to establish a prima facie case. No affidavit, conclusory or otherwise, was proffered in support of its motion. Nor did BW/IP cite to any deposition testimony of its own witnesses that would support a prima facie case. BW/IP's memorandum of law does not dispute

the presence, at a minimum, of Byron Jackson asbestos-insulated pumps at the Waterside powerhouse beginning in September 1963. Moreover, BW/IP does not rule out the possibility that such asbestos-insulated pumps may have been installed at and subsequently remained on the Waterside powerhouse site during plaintiff's window of potential exposure from 1948 to 1971. Indeed, the testimony of Frank Costanzo confirms that BW/IP sold Byron Jackson pumps with asbestos components, and contracted with insulation contractors to insulate its pumps with asbestos until the 1980s. Moreover, when the court pointedly asked BW/IP's counsel at oral argument whether he would concede that Byron Jackson asbestos-insulated pumps would have likely remained at the Waterside powerhouse after 1963, counsel stated as follows: "I think that's probably accurate" (*see* Transcript of May 19, 2015 oral argument at p. 4, line 13). BW/IP also could not point to any records submitted to the court to rebuke plaintiff's testimony highlighted for that court at oral argument that "during all those years working for Detrick, I must have gone into just about all of those major powerhouses along the East River" (*id.* at p. 9, line 12-14). As such, the unrebuked presence of Byron Jackson asbestos-insulated pumps at powerhouses along the East River, and specifically at the Waterside powerhouse, during the years of plaintiff's years of work at powerhouses sufficiently illustrates defendant's inability to meet its burden here.

Even if BW/IP had met its burden, issues of fact exist for trial. Plaintiff's testimony includes specific allegations that he handled asbestos at the various powerhouses he worked at, and that other tradesmen used asbestos on pumps and valves in the same manner that he did. Plaintiff's testimony also illustrates that his work along the East River coincided with Vivona's presence at the Waterside powerhouse in late 1963 (Scaineti having worked at powerhouses along the East River, including the Waterside powerhouse, from 1948-1971). BW/IP attempts to minimize this temporal overlap

by asserting that "[t]he only ostensible connection between Mr. Vivona and plaintiff in this matter is Waterside Powerhouse... the Waterside 'connection' is tenuous at best since plaintiff in this case did not name Waterside as his work site" (*see* Defendant's Reply Affirmation at paragraph 7). Defendant also attempts to minimize Vivona's testimony by stating that "[i]t is undisputed that Mr. Vivona did not testify to any work performed by plaintiff or alleged exposure relating to plaintiff in the instant matter at Waterside or any other location." What defendant ignores in all of his criticism of Vivona's testimony is the critical fact that Vivona was able to specifically identify the presence of defendant's product at the Waterside powerhouse, and that his testimony mentioned the presence of that product at the Waterside powerhouse during the relevant time of plaintiff's alleged exposure. Defendant's inability to refute plaintiff's characterization of its pumps as asbestos-containing further supports plaintiff's contention that issues of fact exist for a jury to resolve. Defendant may take exception with plaintiff and Vivona's recollection, however, as the non-moving party on a motion for summary judgment, plaintiff is entitled to have his, and all other, deposition testimony viewed in a light most favorable to him (*see Vega*, 18 NY3d at 503). Ultimately, the credibility of the witnesses proffered in opposition to this motion will be evaluated by a jury (*see Dollas*, 225 AD2d at 321). As such, defendant's opposition to, and attempts to minimize plaintiff and Vivona's testimony presents an issue of fact for the jury to address.

Defendant's reliance on *Perdicaro v. A.O. Smith Water Products*, 52 AD3d 300, 301 [1st Dept. 2008] to negate the issues of fact that are present here is misplaced. In *Perdicaro*, the court found that the plaintiff worker's evidence failed to raise a factual issue of fact where no factual support was offered to reasonably suggest that the insulation that he observed defendants' subcontractors install on pumps at various powerhouses was asbestos-based. Indeed, the plaintiff

in *Perdicaro* "lacked sufficient training in insulating work," and the evidence in the case indicated that the insulation work that was done at the powerhouses he worked at "often contained fire/heat resistant components other than asbestos." As such, the court held that it would be "purely speculation" to assume that the insulating materials used at the powerhouses that plaintiff worked at were indeed asbestos-based. Notably, based on testimony similar to that in the instant case, it was not plaintiff's proximity to the defendant's product that was questioned by the First Department, but rather whether that product contained asbestos. Here, defendant has provided specific testimony indicating that Byron Jackson pumps contained asbestos insulation during the range of years that plaintiff worked at powerhouses with pumps and valves. Moreover, Vivona's testimony indicates that at the very least, the Waterside powerhouse, that he and plaintiff worked at, contained Byron Jackson pumps in late 1963 during the relevant period of plaintiff's alleged exposure. As such, the instant case contains specific allegations upon which a reasonable inference can be drawn that the Byron Jackson pumps present at the powerhouses plaintiff worked at contained asbestos. Those allegations are unmitigated by any evidence from defendant indicating that the Byron Jackson pumps present at the powerhouses plaintiff worked at did not use asbestos. Consequently, *Perdicaro* is not implicated by the instant case.

It is hereby

ORDERED that defendant's motion is denied.

This constitutes the Decision and Order of the Court.

Dated: July 21, 2015

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