

Matter of New York City Asbestos Litig.
2015 NY Slip Op 31478(U)
August 6, 2015
Supreme Court, New York County
Docket Number:
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

Index 190156/2014

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IN RE NEW YORK CITY ASBESTOS LITIGATION

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JOSEPH GALASSO and RUTH GALASSO

Plaintiffs,

-against-

ALUMINUM COMPANY OF AMERICA (ALCOA),. et al.,

Defendant(s).

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PETER H. MOULTON, J.:

Plaintiff Joseph A. Galasso (“plaintiff”) was diagnosed with mesothelioma in March of 2014. His disease, he claims, is connected to his exposure to asbestos-containing dust during his employment as a carpenter from approximately 1952 until 1995. More specifically, Galasso claims that he was exposed to asbestos from work he did installing and cleaning up debris from BF Goodrich (“defendant” or “Goodrich”) floor tiles. Goodrich is alleged to have manufactured, sold, and distributed asbestos-containing floor tiles used at various sites plaintiff worked at throughout the course of his career. It is undisputed that up until 1963, Goodrich sold both asbestos-containing and non-asbestos vinyl tiles. Goodrich moves, pursuant to CPLR § 3212, for summary judgment dismissing plaintiff’s complaint and all claims and cross-claims against it.

Arguments

Goodrich contends that plaintiff has not shown that he specifically came into contact with

asbestos-containing floor tiles that Goodrich manufactured and sold. Indeed, Goodrich alleges that “[p]laintiff has failed to provide any admissible testimony that he was ever exposed to asbestos from a tile manufactured by Goodrich” (*see* Goodrich Memorandum of Law at pg.6). Goodrich argues that at plaintiff’s deposition, he equivocally testified that he merely “thought” that its floor tiles had been removed at the Nassau County Jail, one of the sites where he worked (*id.*)¹ When pressed for further details, plaintiff could not recall the year or decade in which he had supposedly viewed the tiles at the jail (*see* Galasso Deposition, Ex. B, Plaintiff’s Opposition, at pp 385-386). Additionally, defendant cites plaintiff’s testimony regarding the tile manufacturers that stood out during the course of his career as being “Kentile and Amtico” as further evidence of his minimal or non-exposure to Goodrich tiles (Goodrich Memorandum of Law at pg. 2-4). Goodrich does not, however, dispute that it manufactured and sold vinyl asbestos-containing floor tiles during the relevant years of plaintiff’s alleged exposure.

Defendant also argues that plaintiff’s visual perception of “dust” particles that he came into contact with is insufficient to show that those particles were asbestos-containing (*id.* at pg. 6). Defendant makes this claim while again not disputing that it manufactured and sold vinyl asbestos-containing floor tiles. Instead, defendant emphasizes that plaintiff cannot prove that the particles he came into contact with contained asbestos given that Goodrich made both asbestos and non-asbestos floor tiles (*see* Affidavit of Joan M. Taffi, ¶ 4). As such, defendant submits that plaintiff’s belief that the tiles he came into contact with contained asbestos and were manufactured by Goodrich is

¹The actual testimony that defendant relies on when stating that plaintiff “thought” that the floor tiles he had seen were Goodrich tiles is pg. 389 of plaintiff’s deposition transcript, where plaintiff testified as follows: “Well, a lot of floors were used in those days could have been Kentile or Goodrich or things like that.” Plaintiff does not state the word “thought” that defendant ascribes to him.

nothing more than inadmissible conjecture that fails to establish a genuine issue of material fact.

In opposition to defendant's motion, plaintiff submits that when he was deposed, he testified that his asbestos exposure stemmed from installing and subsequently cleaning up Goodrich floor tile. Indeed, plaintiff described his work installing Goodrich floor tile as a dusty process that caused his exposure:

Q: Do you recall ever working at Pall Corp. in Sea Cliff?

A: Yes.

A: They manufacture filters and stuff.

Q: And your job log indicates that you worked there on more than —

A: Sure.

Q: — one occasion.

A: Over the years also.

Q: Is that correct sir?

A: Yes.

Q: Do you remember the work you were doing there on any of those occasions?

A: That was basically the same thing, that was alteration, it'd be floors, walls, ceilings, fire doors.

Q: Do you recall what area of Pall Corp. you worked at?

A: No. It's sort of a factory building type.

Q: Do you remember your employer at that location?

A: Could have been Lamparter or Phillips, I'm not sure. Or probably both at times, different times.²

Q: Do you believe you were exposed to asbestos from any of this work?

A: Yeah.

Q: How do you believe you were exposed?

²Social Security records confirm that Galasso worked at Lamparter from 1960-1977 and Phillips from 1955-1956.

A: By the dust created by installing, installation and cleaning.
Q: You testified that you did floor work there, what kind of floor work did you do?
A: That was floor tile.
Q: Did you install floor tile?
A: I think so.
Q: Do you believe that floor tile contained asbestos?
A: Yes.
Q: Who manufactured the floor tile at that location?
A: It was either Kentile or B.F. Goodrich, I'm not sure.

A: Well, it had the same effect.
Q: What do you mean by that, sir?
A: That you would create dust if you're removing the tile on the floor tile.
Q: And you're saying removal and I said replace, let's just go through that a second. Throughout the course of your career in the 50s, 60s, 70s and 80s, did you have occasion to replace floor tile?
A: Yes.
Q: How often would you say you had to do that?
A: Well, every job was different.
Q: Okay.
A: Maybe every 20 years they change a floor.
Q: When they had to replace it completely?

A: Right.
Q: What about times where things were damaged where you had to just make repairs, did you have to do that?
A: There was some of that but not that much.
Q: Did you have to perform that work?
A: Certainly.
Q: And tell me about that work, how would that be done?
A: Same way — well, in that case probably use a Bernz-o-matic to loosen the tile and take it out.
Q: You talked about a Bernz-o-matic yesterday.
A: Right.
Q: How would a Bernz-o-matic be used on the tile to loosen it up and take it out?

A: To heat the floors, to unbind the glue.
Q: And did you have to use any kind of tools to break up the floor?

A: Yes. Use a scraper.
Q: And what would you use the scraper on?
A: On the floors to scrape up the residue, whatever is left there.
Q: And you would have to remove the tiles before you removed—
A: Right.
Q: —before you do that work on the residue; is that right?
A: Right.
Q: And the tiles, did they come up in one piece or were they broken?
A: No, usually they break on you.
Q: And when they break on you, what would happen?
A: Well, it would create dust.
Q: The dust was associated with the tile?
A: Yes.

Q: And did you breathe in that dust?
A: Yes.
Q: And do you believe you were exposed to asbestos additionally from tile work which you had to replace and remove throughout the course of your career?
A: Yes.

(see Galasso Deposition, Ex. B, Plaintiff's Opposition, at pp 606-608, 1459-1462 objections omitted).

Based on this testimony, plaintiff asserts that he identified working with Goodrich floor tiles, mentioned that such work specifically involved installation and repairs that generated dust, and that the tiles he worked with contained asbestos. Plaintiff asserts that his exposure to such floor tiles occurred throughout the course of his career as a carpenter, including during his work for Phillips and Lamparter from 1955-1956 and 1960-1977, respectively. That period coincides with Goodrich's

purported involvement within, and exit from, the floor tile business. Plaintiff further argues that defendant's corporate representative, Paul Bratenus ("Bratenus"), confirmed at his deposition that asbestos was an ingredient in both the asphalt and vinyl tile that Goodrich manufactured, and that such tile was manufactured by Goodrich from 1946 until the end of 1963 (*see* Bratenus Deposition, Ex. D, Plaintiff's Opposition at pp 5-14). Plaintiff also states that Bratenus confirmed that Goodrich floor tile was sold primarily "east of the Mississippi," and that plaintiff's entire forty-plus year work as a carpenter was spent in New York and its surrounding areas (*id.*). Finally, plaintiff argues that Bratenus does not dispute that Goodrich asbestos-containing floor tile may have been re-sold on the market and in residual use after Goodrich ceased manufacturing such tile in 1963. In light of this, plaintiff argues that sufficient evidence has been proffered to raise triable issues of fact as to whether his asbestos exposure stemmed from his work with Goodrich floor tiles.

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]).

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]).

Because assessment of credibility is a jury function, summary judgment must be denied even where plaintiff’s testimony is equivocal. In *Berensmann v 3M Co* (122 AD3d 520 [1st Dept 2014]), the First Department affirmed the trial court’s denial of defendant’s motion for summary judgment where the plaintiff identified the moving defendant’s product by testifying that “It might’ve been” a brand that he used, then testified “No I can’t remember” then testified “it’s likely that I did, but

that's the best I could do" and ultimately, that he did not even believe the product contained asbestos (*Berensmann*, 2013 NY Slip Op 33137 (U) [Sup Ct, New York County 2013]). 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" (*Berensmann v 3M Co* (122 AD3d 520, 521 [1st Dept 2014] [citing *Reid*, 212 AD2d at 463, *supra*]).

Moreover, a defendant's contention that a plaintiff's description of the asbestos-containing product differs from the true description of that product merely raises issues of credibility for the jury (*see Penn v Amchem Products*, 85 AD3d 475 [1st Dept 2011]).

Goodrich has failed to establish a prima facie case. In support of its motion, Goodrich concedes that it made asbestos-containing floor tile until late 1963. The affidavit of Joan M. Taffi, a Goodrich Corporation employee, does not contain any specificity beyond the general claim that "[p]rior to 1964, B.F. Goodrich Company produced and sold asbestos floor tile, as well as vinyl floor tile that contained no asbestos" (*see* Affidavit of Joan M. Taffi, ¶ 4). Absent from the affidavit are any numerical figures with respect to the quantity of asbestos and non-asbestos floor tiles that Goodrich manufactured prior to 1964. The Taffi affidavit does, however, refer to various corporate records from Goodrich, including Bratenus' deposition testimony. Those records, which also include sample specifications for non-asbestos Goodrich tiles as well as confirmation that Goodrich exited the floor tile business in 1963, do little to advance Goodrich's arguments. Indeed, as previously mentioned, Bratenus' deposition testimony confirms that asbestos was an ingredient in both the asphalt and vinyl tile that Goodrich manufactured, and that such tile was manufactured from 1946

until the end of 1963 (*see* Bratenus Deposition, Ex. D, Plaintiff's Opposition at pp 5-14). Bratenus' testimony also shows that Goodrich manufactured and sold three types of flooring: vinyl asbestos and non-asbestos tile, asphalt tile and rubber tile (*id.*). Admittedly, Goodrich states that both its vinyl and asphalt tile contained asbestos (*id.*). In fact, only its rubber tile was asbestos free. As such, two out of the three tile types that defendant manufactured contained asbestos.³ Defendant's concession with respect to the existence of asbestos-containing floor tiles during from 1946 until the end of 1963 is particularly relevant given that it coincides with plaintiff's alleged use of Goodrich products during his work for Phillips and Lamparter from 1955-1956 and 1960-1977, respectively. Plaintiff further asserts that his work as a carpenter commenced in 1952, and that he may have been exposed to asbestos-containing floor tiles from as early as that time.

Beyond that, Goodrich fails to address its continuing operations after it exited the floor tile business in late 1963. The Taffi affidavit proffered in support of Goodrich's motion does not mention what happened to Goodrich's tile inventory after it ceased production. It is possible that while Goodrich did not manufacture tile after 1963, it may have sold its residual stock of tiles after that period of time. Moreover, Goodrich's customers – including hardware stores and wholesalers – may have continued to sell Goodrich floor tile after 1963. As such, defendant has “failed to proffer any evidence that its asbestos products were not being used residually in the marketplace by various companies...after it ceased manufacturing and selling such products” (*see Taylor v. A.C. & S., Inc.*, 306 AD2d 202, 202-03 [1st Dept. 2003])[Appellate Division reversed grant of summary judgment in defendant's favor based on defendant's argument that it had discontinued production of its

³Additionally, beyond referencing his specific exposure to Goodrich floor tiles, plaintiff also identified that he may have seen Goodrich spackling and pipe covering during his work at the Port Authority and Kings County Hospital in 1955 and 1961, respectively (*see Galasso Deposition, Ex. B, Plaintiff's Opposition*, at pp 245, 251, 253, 255-56).

asbestos-containing products due to defendant's failure to account for whether or not its products could have residually been used in the marketplace in the 1980s and 1990s after it ceased production in 1977]; *see also Berensmann*, 122 AD3d at 521 [1st Dept. 2014][court held that although record showed that defendant began to manufacture and ship asbestos-free product around the time when plaintiff purchased defendant's product, issues of fact remained as to whether asbestos-free product was available in Manhattan where plaintiff purchased product]).

Even if defendant had met its initial burden here, plaintiff's deposition testimony raises issues of fact with respect to whether his asbestos exposure stemmed from Goodrich floor tiles. Plaintiff states that during his employment as a carpenter he personally worked with and around floor tiles, installing and repairing them at various job sites. He further recalled that during his work, sizeable amounts of dust were generated. Plaintiff states that he regularly breathed in that dust. To the best of his recollection, plaintiff stated that he believed that the primary manufacturers of the tile that he used during the relevant years of his employment were Kentile and Goodrich. Defendant does not dispute plaintiff's testimony regarding his possible exposure to Goodrich asbestos-containing tiles prior to the time when Goodrich stopped manufacturing such tiles in 1963. Defendant also does not dispute that Goodrich floor tile was sold primarily "east of the Mississippi," and that plaintiff's entire forty-plus year work as a carpenter was spent in New York and its surrounding areas. In fact, defendant concedes that Goodrich manufactured asbestos-containing floor tile from 1946 until the end 1963, a period of time that overlaps with plaintiff's work during that relevant period of time beginning in 1952. Moreover, defendant does not dispute that Goodrich asbestos tiles could have remained on the market through sales and re-sales after it ceased manufacturing such tiles in 1963.

Goodrich's argument that plaintiff's deposition testimony is weak in light of the fact that plaintiff identifies other manufacturers of floor tile that he used and at times is non-committal (i.e.

“Well, a lot of the floors...used in those days could have been Kentile or Goodrich or things like that”) is unpersuasive. The lengths to which Goodrich disagrees with plaintiff’s characterizations merely raises credibility issues for the jury (*see Berensmann v 3M Co*, 122 AD3d 520, *supra*; *Penn v Amchem Products*, 85 AD3d 475, *supra*). Goodrich may take exception with plaintiff’s recollection, however, as the non-moving party on a motion for summary judgment, plaintiff is entitled to have his deposition testimony viewed in a light most favorable to him (*see Vega*, 18 NY3d at 503). Ultimately, his credibility will be evaluated by a jury (*see Dollas*, 225 AD2d at 321).

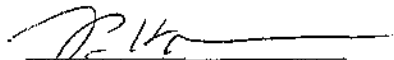
Thus plaintiff’s testimony tenders sufficient facts from which defendant’s liability could be reasonably inferred.

It is hereby

ORDERED that defendant’s motion is denied.

This constitutes the Decision and Order of the Court.

Dated: August 6, 2015


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