Vavner v American Optical Corp
2019 NY Slip Op 31914(U)
July 1, 2019
Supreme Court, New York County
Docket Number: 190132/2017
Judge: Manuel J. Mendez

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION
STEVEN J. YAVNER and PHYLLIS H. YAVNER,

Plaintiff(s),

- against -

AMERICAN OPTICAL CORP, *et al.*

Defendants.

INDEX NO. 190132/2017
MOTION DATE 6/26/2019
MOTION SEQ. NO. 003
MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on CertainTeed Corporation's motion for summary judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6-7

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendant, Fulton Boiler Works, Inc.'s (hereinafter, "Fulton") motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiffs' complaint and all cross-claims against it, is denied.

This action was commenced by service of a Summons and Complaint on April 20, 2017. This case involves Stanley Yavner's (plaintiff-decedent) claim that he developed mesothelioma from being exposed to asbestos from various products and environments over the course of his life (*see* Aff. in Supp., Exh. C, at ¶ 17A). Plaintiff alleged exposure to asbestos-containing products while working at Jay Silverman Laundry ("the shop"), a store owned and operated by his grandfather in Winthrop, Massachusetts (*see id.* at ¶ 17A).

The shop occupied three different locations within a single strip of stores on Crest Avenue in Winthrop, Massachusetts (*see* Aff. in Supp., Exh. E at 214:19–215:4; Silverman Deposition, Exh. F at 14:22–15:6). The first location of the shop was 31 Crest Avenue (*see* Aff. in Supp., Exh. F, Silverman Dep. at 14:11-15). The shop moved from 31 Crest Avenue to a second location in the strip mall located in between the first and the third locations, before it eventually moved for a final time to 41 Crest Avenue. Plaintiff and his uncle David Silverman testified that the store moved from the first location to the second location sometime around 1950 (*see* Aff. in Supp., Exh. F at 16:11-15, Exh. G, at 108:22-24). However, defense counsel, at his deposition, suggested she was in possession of a document from the Winthrop, Massachusetts Department of Buildings that proved the shop was moved to the second location sometime in 1953.

The decedent started working at his grandfather's shop at age 11 (about 1946 or 1947) (*see* Aff. in Supp., Exh. D at 26:16–27:7, 302:23–303:9). Mr. Silverman testified that a new Fulton boiler was installed when the shop moved to

the second location (*id.* at 22:15-22). The shop eventually moved from the second location to the third and final location at 41 Crest Avenue and the business changed the name to "Silver Clean" (*id.* at 15:4-8, 19:14-16). The decedent never worked at the 41 Crest Avenue location (*see* Aff. in Supp., Exh. G, at 112:14-17).

Notably, defendant presents evidence that the first Fulton boiler, commercially available for sale, was sold on February 9, 1951 (NYSCEF Doc. No. 121 at ¶¶ 5, 6). Defendant also presents evidence that Fulton was not incorporated as a business entity until 1950 (NYSCEF DOC. No. 122).

Fulton now moves for summary judgment, claiming it could not have manufactured the boilers at the first or second locations of the family's business because it was not in existence and producing boilers at the operative time. Plaintiffs oppose the motion, essentially, arguing that the jury could infer, from a complete reading of Mr. Yavner's and Mr. Silverman's testimony, that plaintiff was exposed to asbestos from a Fulton boiler manufactured in the 1950s.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept 1998]); *Martin v Briggs*, 235 AD2d 192, 663 NYS2d 184 [1st Dept 1997]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

Summary judgment is a drastic remedy that should only be granted if there are no triable issues of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13, 965 NE3d 240 [2012]). A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Torres v Indus. Container*, 305 AD2d 136, 760 NYS2d 128 [1st Dept 2003]; *see also Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 27 NYS3d 157 [1st Dept 2016]). Regarding asbestos, a defendant must "make a prima facie showing that its product could not have contributed to the causation of Plaintiff's injury" (*Comeau v W. R. Grace & Co.-Conn. (In re N.Y.C. Asbestos Litig.)*, 216 AD2d 79, 628 NYS2d 72 [1st Dept 1995]).

Defendant argues that plaintiff's claims against Fulton fail because plaintiff has not managed to raise a triable issue of fact concerning when the Fulton boilers at issue were installed (i.e., plaintiff has not shown that any of the boilers in question were installed after 1951).

Plaintiffs argue that a jury could reasonably infer that plaintiff was exposed to asbestos from a Fulton boiler in the 1950s from a complete reading of Mr.

Yavner's testimony. Plaintiffs further claim that defendant has failed to meet its prima facie burden to show that it could not have contributed to plaintiff's injuries.

This case contains conflicting testimonial evidence that must be resolved by a jury. In Mr. Yavner's De Bene Esse transcript, he states that the shop at which he worked did not move to its second location until sometime between 1949-1951 (Aff. in Opp., Exh. 8 at 108:18-24). However, defense counsel states that it located records from the Winthrop, Massachusetts Department of Buildings, showing that the shop in question was still in its first location (31 Crest Avenue) in 1953 (*id.* at 108:25-109:13). Therefore, such records would, on their face, indicate that the shop did not move to its second location until 1953 (*see id.* at 108:25-109:13), which is a date after Fulton was incorporated and manufacturing boilers.

Moreover, Mr. Silverman testified that he was born in 1925 (Aff. in Opp., Exh. 7 at 8:18-19) and stated that he began working at the shop's second location when he was approximately 25 years old (*id.* at 25:9-11), which would mean he started working at the shop's second location around 1950. He further testified that the boiler was installed at the shop's second location after he had already started working there (*see id.* at 22:12-22), which would mean it was installed sometime after 1950.

Defendant has presented proper evidence to show that it was not incorporated until 1950 (NYSCEF DOC. No. 122) and that it did not sell its first boiler until 1951 (NYSCEF Doc. No. 124). Nonetheless, defense counsel's claim that it found records showing that the shop would not have moved to its second location until after 1953 (Aff. in Opp., Exh. 8 at 108:25-109:13) coupled with Mr. Silverman's testimony that a new Fulton boiler was installed after the shop moved to the second location in the 1950s raises an important fact-question as to the manufacturer of the boiler at the second shop. In other words, Mr. Silverman may actually have installed the boiler at the second shop post-1953, thereby rendering the possibility that he installed a Fulton boiler (*see* NYSCEF Doc. No. 124).

Mr. Yavner further testified that he was present while others were changing the insulation on the boiler at his grandfather's shop (Aff. in Supp., Exh. D at 33:9-11). He identified the brand of insulation being removed as Fulton and the replacement insulation being installed as Fulton brand, as well (*id.* at 33:12-19). It is unclear, however, at which shop location Mr. Yavner claims to have witnessed others using these Fulton products. This creates an issue of fact for a jury to decide.

It is not the function of the court deciding a summary judgment motion to determine credibility issues or make findings of fact, but rather to identify material issues of fact (or point to the lack thereof) (*Vega v Restani Const. Corp.*, 18 NY 3d 499, 965 NE 2d 240, 942 NYS 2d 13 [2012]). Conflicting testimonial evidence raises credibility issues that cannot be resolved on papers and is a basis to deny summary judgment (*Messina v New York City Transit Authority*, 84 AD 3d 439, 922 NYS 2d 70 [2011], *Almonte v 638 West 160 LLC*, 139 AD 3d 439, 29

NYS 3d 178 [1st Dept 2016] and *Doumbia v Moonlight Towing, Inc.*, 160 AD 3d 554, 71 NYS 3d 884 [1st Dept 2018] citing to *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY 2d 338, 313 NE 2d 776, 357 NYS 2d 478 [1974]). Summary judgment is not appropriate at this juncture.

Accordingly, it is ORDERED that defendant Fulton Boiler Works, Inc.'s motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiffs' complaint and all cross-claims against it, is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: July 1, 2019

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION x NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE