

Andreoli v A.O. Smith Water Prods. Co.

2019 NY Slip Op 33588(U)

December 5, 2019

Supreme Court, New York County

Docket Number: 190299/2017

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION

EUGENE ANDREOLI and JACALYN ANDREOLI, INDEX NO. 190299/2017
Plaintiffs, MOTION DATE 12/04/2019
- against - MOTION SEQ. NO. 009
A.O. SMITH WATER PRODUCTS CO., et al., MOTION CAL. NO.
Defendants.

The following papers, numbered 1 to 7 were read on this motion for summary judgment by Burnham, LLC:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [] Yes [X] No

Upon a reading of the foregoing cited papers, it is Ordered that Burnham LLC's (hereinafter "Burnham") motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' complaint and all cross-claims against it, is denied.

Eugene Andreoli was diagnosed with lung cancer on October 11, 2017 (Opp. Exh. 1). His alleged exposure to asbestos - as relevant to this motion - was from working with Burnham's asbestos containing boilers as a senior maintainer for the Sewanaka School System, at New Hyde Park Memorial High School and Floral Park Memorial High School from 2001 through 2003.

Mr. Andreoli was deposed over the course of seven days, December 11, 12, 13,14 and 15, 2017, January 3 and 5, 2018 (Mot. Exh. D and Opp. Exh. 1). He testified that his job as senior maintainer required that he upkeep and maintain the school. He stated that he worked at New Hyde Park Memorial High School from about 1995 or 1996 through 2001 and at Floral Park Memorial High School from 2001 through 2003. Mr. Andreoli testified that he believed he was exposed to asbestos from his work repairing and cleaning Floral Park Memorial High School's two asbestos containing Burnham boilers once every four or five months. He stated that he had to open up the Burnham boilers and physically get inside of them to make repairs (Mot. Exh. D, pgs. 72-73 and 75).

Mr. Andreoli stated that he performed various repairs on the Burnham boilers including: cleaning them out, replacing numerous kinds of leaking pipes, welding cracks, removal and replacement of boiler tubes. He testified that cleaning out the boilers meant going through the access doors and removing soot and asbestos dust from inside the boiler. Mr. Andreoli stated that he had to grind or torch the end of old boiler tubes which would disrupt the asbestos dust from the asbestos lining inside the Burnham boiler, and the asbestos dust would surround him. He testified that he also would hit the old boiler tubes with a sledgehammer to get them out after he cut them or ground down the welds, cut them with torches and smashed them out, which resulted in a lot of airborne asbestos dust everywhere that he breathed in (Mot. Exh. D, pgs. 1042-1045).

Plaintiffs commenced this action on October 9, 2017 (NYSCEF Docket No. 1). The summons and complaint were subsequently amended on November 17, 2017 and January 17, 2018 to add additional defendants (Mot. Exh. A). Burnham filed its Acknowledgment of Receipt on November 20, 2017 (Mot. Exh. C).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Burnham now seeks an Order granting summary judgment pursuant to CPLR §3212, dismissing the plaintiffs' complaint and all cross-claims asserted against it. Burnham argues that it is entitled to summary judgment on causation because Mr. Andreoli's deposition testimony does not establish he was exposed to asbestos from its boilers or related products. Burnham further argues that Mr. Andreoli's testimony is too vague to establish causation from exposure to asbestos, and that it would be pure speculation and conjecture to determine there was any asbestos containing components associated with the Burnham boilers he allegedly worked on during the relevant time period.

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]). It is only after the burden of proof is met that the burden switches to the non-moving party 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 by giving the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]).

A defendant seeking summary judgment in an asbestos case 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]). Burnham must "unequivocally establish that its product could not have contributed to the causation of plaintiff's injury" for the court to grant summary judgment (Matter of N.Y.C. Asbestos Litig., 122 AD3d 520, 997 NYS2d 381 [1st Dept. 2014]). It is not until after Burnham meets its preliminary burden that the plaintiffs are required to raise any issues of fact (Amatulli v Delhi Constr. Corp., 77 NY2d 525, supra).

Burnham claims that decedent's deposition testimony failed to provide sufficient product identification and that there was asbestos exposure from its boilers, and any asbestos containing related products, or specific causation.

Burnham relies on the October 31, 2019 affidavit of its corporate representative and consultant, Roger Pepper. He was employed with the company from 1991 until his retirement in 2015. Mr. Pepper was Burnham's Quality Control Manager from 1995 through 2015, prior to that he held the positions of Quality Control Supervisor and Quality Control Inspector (Mot. Exh. E). He states that as Burnham's corporate representative he "reviewed books and records of Burnham maintained in the ordinary course of business, reviewed Burnham historical documents, reviewed transcripts of testimony given by Burnham employees and previous Burnham corporate designees, and spoke to past and present Burnham employees" (Mot. Exh. E, para. 3).

Mr. Pepper, after a review of Mr. Andreoli's deposition testimony, states that "the only commercial boiler manufactured by Burnham with internal steel tubes is a commercial steel firetube boiler" (Mot. Exh. E, para. 5). Mr. Pepper then states that Mr. Andreoli testified as to welding internal tubes on Burnham boilers, but "Burnham only manufactured two models of commercial steel boilers that had welded tubes." Mr. Pepper claims that of the two models of commercial steel boilers only one was sold in New York and it was first manufactured in 1990 (Mot. Exh. E, para 6). Mr. Pepper states that the only Burnham boilers with a liner inside the vessel were jacketed boilers, and the company's commercial steel boilers did not contain asbestos, they had fiberglass or wool glass insulation.

Mr. Pepper failed to identify the names of any of the individuals he spoke to, and any of Burnham's corporate records he searched or reviewed. Burnham failed to provide any brochures or other supporting documentation to establish that the company only manufactured commercial steel boilers with internal tubes that were welded, or that the

company first started manufacturing commercial steel boilers in 1990, approximately one year before Mr. Pepper was employed with the company. Burnham failed to provide any substantiating documentation to support Mr. Pepper's Affidavit and has not made a prima facie case to obtain summary judgment (See *In re New York City Asbestos Litigation (DiSalvo)*, 123 AD 3d 498, 1 NYS 3d 20 [1st Dept. 2014], *Shanahan v. AERCO International, Inc.*, 172 AD 3d 534, 101 NYS 3d 28 [1st Dept. 2019], *Residential Credit Solutions, Inc. v. Gould*, 171 AD 3d 38, 101 NYS 3d 2 [1st Dept. 2019], and *Barraillier v. City of New York*, 12 AD 3d 168, 784 NYS 2d 55 [1st Dept., 2004]).

Alternatively, in addition to Mr. Andreoli's deposition testimony, plaintiffs provide trial testimony of Burnham's corporate representative, Roderick Strohl, in an unrelated action (Opp. Exh. 5). Mr. Strohl states that Burnham manufactured a "commercial steel product" made with fabricated steel. He testified that there may have been an asbestos gasketing application but was not certain. Mr. Strohl stated that fabricated steel boilers were welded, had plates and were available in larger sizes. Burnham's fabricated steel boilers were distinct from sectional boilers that were usually associated with cast iron. Mr. Strohl stated that there was also a cast iron tube boiler (Opp. Exh. 5, pgs. 78-87). He testified that he was unable to find information pertaining to steel fire tube boilers and could not state whether they were manufactured prior to the 1960's (Opp. Exh. 5, pgs. 95-97). Plaintiffs also provide Burnham's promotional materials and brochures that reference steel fire tube boilers manufactured in the 1960's, and the "Big 50 Twin Series Boiler," a cast-iron square sectional tube type boiler, designed for use that included schools (Opp. Exhs. 7, 8 and 9). Plaintiffs argue that this evidence at the very least creates credibility issues warranting denial of summary judgment.

Plaintiffs need "only show facts and conditions from which defendant's liability may be reasonably inferred" (*Reid v Ga.-Pacific Corp.*, 212 AD2d 462, 622 NYS2d 946 [1st Dept. 1995]). Summary judgment must be denied when the plaintiff has "presented sufficient evidence, not all of which is hearsay, to warrant a trial" (*Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.)*, 7 AD3d 285, 776 NYS2d 253 [1st Dept. 2004]).

Burnham provides no expert testimony to establish a prima facie case for summary judgment on causation. Burnham's arguments that plaintiffs lack evidence, and that decedent's testimony is conclusory and speculative, fails to make a prima facie case to obtain summary judgment. Furthermore plaintiffs, as the non-moving party, are entitled to the benefit of all favorable inferences, regardless of Burnham's allegation that they are unable to provide sufficient proof of decedent's exposure.

Burnham attempts to correct Mr. Pepper's affidavit on reply by providing a supplemental affidavit dated November 26, 2019. Mr. Pepper does not state when Burnham first started manufacturing tubed boilers. He otherwise contradicts his earlier affidavit stating "Burnham has not manufactured tubed boilers from its inception" (Reply, Pepper Aff., para. 5). He states that "Burnham has never manufactured cast iron tubed boilers" (Reply, Pepper Aff., para. 6). Mr. Pepper's November 26, 2019 affidavit suffers from the same defects as his initial affidavit submitted in support of the motion.

The opposition papers have provided sufficient proof to create an inference that plaintiff was exposed to asbestos from Burnham's fire tube boiler and asbestos containing component products, specifically the liner (*Reid v Ga.- Pacific Corp.*, 212 A.D. 2d 462, *supra* and *Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.)*, 7 A.D. 3d 285, *supra*). Mr. Andreoli's deposition testimony identifying his work with Burnham's boilers at the school (Mot. Exh. D, pgs. 72-73, 75 and 1042-1045), combined with plaintiffs' other evidence, creates "facts and conditions from which [defendant's] liability may be reasonably inferred" (*Reid v Ga.- Pacific Corp.*, 212 A.D. 2d 462, *supra*), and raises issues of fact. Summary judgment must be denied when the plaintiff has "presented sufficient evidence, not all of which is hearsay, to warrant a trial" (*Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.)*, 7 AD3d 285, *supra*).

Plaintiffs have shown "facts and conditions from which Burnham's liability for Mr. Andreoli's lung cancer may be reasonably inferred" (Reid, supra), creating credibility issues and issues of fact, warranting denial of summary judgment.

Accordingly, it is ORDERED, that Burnham LLC's motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' complaint and all cross-claims against it, is denied.

ENTER: MANUEL J. MENDEZ
J.S.C.

Dated: December 5, 2019



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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