Salzano v Air & Liquid Sys. Corp.
2020 NY Slip Op 30101(U)
January 10, 2020
Supreme Court, New York County
Docket Number: 190446/2014
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

FRANK M. SALZANO as Executor of the Estate of FRANK G. SALZANO, and FRANCES SALZANO, individually,

Plaintiffs,

-against-

AIR & LIQUID SYSTEMS CORPORATION, as Successor-by-merger to BUFFALO PUMPS, INC., et al.,

Defendants.

INDEX NO.	190446/2014
MOTION DATE	01/07/2020
MOTION SEQ. NO.	001
MOTION CAL. NO.	

The following papers, numbered 1 to 6 were read on this motion for summary judgment by Honeywell International Inc., pursuant to CPLR § 3212:

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

CROSS-MOTION ☐ YES X NO

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Kaiser Gypsum Company, Inc.'s ("Kaiser Gypsum") motion for summary judgment pursuant to CPLR § 3212 to dismiss Plaintiffs' complaint, is denied.

Frank M. Salzano and Frances Salzano bring this action as executor of the Estate of Frank G. Salzano to recover for injuries sustained by decedent Frank G. Salzano (hereinafter "decedent").

Decedent was diagnosed with mesothelioma on June 5, 2013 and died three days later on June 8, 2013. Decedent worked as a superintendent at 1359 Broadway in New York, New York, and neighboring buildings from 1960 to approximately 1993. While employed as a superintendent, he regularly applied and sanded the asbestos-containing joint compound which created asbestos dust. The decedent would then clean up the dust created from sanding the asbestos-containing joint compound with a broom. Decedent's son, Thomas Salzano, alleges that the decedent was exposed to asbestos-containing joint compound manufactured by Kaiser Gypsum when he applied and sanded the joint compound on pipes to seal cracks, between boards of sheet rock to close seams, and subsequently cleaned

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

up with a broom the dust created from the sanding of the asbestos-containing joint compound at 1359 Broadway. Thomas Salzano witnessed the decedent at 1359 Broadway when he worked with him during the summers of 1972, '73, and '74.

Plaintiffs commenced this action on November 18, 2014 to recover for the injuries and death resulting from Mr. Salzano's exposure to asbestos.

Kaiser Gypsum now moves for summary judgment pursuant to CPLR § 3212 to dismiss Plaintiffs' complaint against it. Kaiser Gypsum contends that Plaintiffs have failed to provide sufficient evidence that decedent was exposed to asbestos dust from any asbestos-containing product supplied or distributed by Kaiser Gypsum. Plaintiffs oppose the motion contending that Kaiser Gypsum failed to make a prima facie showing that its products could not have caused Mr. Salzano's disease, and in any event, contend issues of fact remain as to whether Mr. Salzano was exposed to asbestos from Kaiser Gypsum products.

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 N.Y.2d 833, 652 N.Y.S.2d 723 [1996]). It is only after the burden of proof is met that the burden switches to the non-moving party to rebut the 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 N.Y.2d 525, 569 N.Y.S.2d 337 [1999]). 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 A.D.2d 772, 461 N.Y.S.2d 342 [1983], aff'd 62 N.Y.2d 686, 465 N.E.2d 30, 476 N.Y.S.2d 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 N.Y.3d 499, 942 N.Y.S.2d 13, 965, N.E.2d 240 [2012]). In determining the motion, the Court must construe the evidence in the light most favorable to the non-moving party by giving the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence. (SSBS Realty Corp. v. Public Service Mut. Ins. Co., 253 A.D.2d 583, 677 N.Y.S.2d 136 [1st Dept. 1998]).

In New York City Asbestos Litigation, the "plaintiff is not required to show the precise causes of his damages, but 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]).

In support of its motion, Kaiser Gypsum argues that Thomas Salzano's testimony against Kaiser Gypsum is hearsay which cannot be relied upon under any exceptions to the hearsay rules such as to allow this case to proceed. Kaiser

Gypsum ultimately argues that Thomas Salzano's deposition fails to adequately and properly identify Kaiser Gypsum pre-mixed joint compound as a specific source of Decedent's alleged exposure to asbestos.

In opposition to the motion for summary judgment, Plaintiffs argue that Thomas Salzano sufficiently described what he believed to be Kaiser Gypsum pre-mixed joint compound such that this description should suffice under the present sense impression exception to the hearsay rule, to allow this case to proceed to trial. Plaintiffs then argue that Kaiser Gypsum has waived its right to make this motion due to their failure to respond to Plaintiffs product identification interrogatories.

Throughout Thomas Salzano's deposition, he offers specific product identifications of Kaiser Gypsum pre-mixed joint compound. Thomas Salzano describes the joint compound as pre-mixed, a peanut butter, mud like consistency, white, and being stored in 3,4, or 5 gallon plastic buckets. (Affirmation in support, Exh. D at 69: 17-20; 516:20-517:2; 517:19-518:7). Thomas Salzano then goes on to state that he recalls the name Kaiser as a brand of compound when he was working with the compound because that is what his and his father's co-worker, Tom Napoli, told him. (Affirmation in support, Exh. D at 518:20-519:3).

Kaiser Gypsum argues that Thomas Salzano's product identification is inadmissible hearsay because he does not independently recall Kaiser Gypsum but remembers being told he was using Kaiser Gypsum product by Tom Napoli. Under the present sense impression exception to hearsay, present sense impressions are admissible if they are (1) spontaneous descriptions of events made substantially contemporaneously with the observations and (2) the descriptions are sufficiently corroborated by other evidence. (People v. Jones, 28 N.Y.3d 1037, 65 N.E.3d 699, 42 N.Y.S.3d 669 [Court of Appeals, 2016]; People v. Brown, 80 N.Y.2d 729, 610 N.E.2d 369, 594 N.Y.S.2d 696 [Court of Appeals, 1993]).

Thomas Salzano's product identification falls under the present sense impression exception to hearsay because Tom Napoli's statements were made contemporaneously, and Thomas Salzano's identification matches that of previous Kaiser Gypsum interrogatories from 2005. The first element for an admissible present sense impression is satisfied because Thomas Salzano recalls Tom Napoli stating that the joint compound being used, during the moment it was being used, was Kaiser Gypsum. Tom Napoli made these statements contemporaneously with his observation of the product being used, with no opportunity for reflection. The second element is satisfied because the prior Kaiser Gypsum interrogatories confirm that Kaiser Gypsum manufactured, sold, or distributed asbestos-containing pre-mixed joint compound during the years of 1972, '73, and '74. The interrogatories state that the pre-mixed joint compound is a white to off white colored paste, packaged in 4 or 5 gallon containers, and the product was a thick paste like material which dried to hard on a durable surface. (Affirmation in opposition, Exh. 1).

The Kaiser Gypsum product identification interrogatories from 2005, combined with Thomas Salzano's independent recollection and description of the product he was using at the time, provide the sufficient corroboration needed to satisfy the second element of the present sense impression exception.

Similarly, the Court in Vellucci v. Borg Warner Corp, denied a motion for summary judgment based on past interrogatory responses that showed a product manufacturer provided asbestos-containing products to be used during the time period in question (Vellucci v. Borg Warne Corp., 2013 N.Y. Slip Op. 31304 [2013]). Thus, circumstantial evidence exists to corroborate the declarant's statement. Since the declarant's statement is independently admissible under the present sense impression exception, issues of fact exist regarding product identification of the joint compound (Taft v. New York City Tr. Auth., 193 A.D.2d 503, 597 N.Y. S.2d 372 [1st Dept. 1993]; Steinhaus v. American Home Prods. Corp., 18 A.D.3d 312, 795 N.Y.S.2d 41 [1st Dept. 2005]).

Lastly, Plaintiffs argue that Kaiser Gypsum's motion for summary judgment cannot prevail because they have failed to respond to their product identification interrogatories. Pursuant to the CMO Section XXI, "no summary judgment motion shall be made unless discovery is complete on the issues that are the subject of the motion." According to CPLR § 3212(F), summary judgment may be denied or continued, if the summary judgment motion curtailed the discovery process and there is evidence the information is exclusively in the movant's possession. (Maysek & Moran v. S.G. Warburg & Co., Inc., 284 A.D.2d 203, 725 N.Y.S.2d 546 [1st Dept. 2001]; Miller-Francis v. Smith-Jackson, 113 A.D.3d 28, 976 N.Y.S.2d 34 [1st Dept. 2013]). Plaintiffs requested product information interrogatories from Kaiser Gypsum on October 19, 2015 and to this date, Kaiser Gypsum has not responded.

Kaiser Gypsum fails to make a prima facie showing of entitlement to judgment as a matter of law. Kaiser Gypsum's contention that Mr. Salzano was never exposed to asbestos-containing products manufactured, sold, or distributed by Kaiser Gypsum is unavailing. Even if Kaiser Gypsum was able to meet its prima facie burden, Plaintiffs raise issues of fact to be resolved at trial. Thomas Salzano's deposition testimony may be admissible under the present sense impression hearsay exception, and Kaiser Gypsum has failed to produce product identification interrogatories. Thomas Salzano identified Kaiser Gypsum's pre-mixed joint compound that was used by Mr. Salzano between 1972, '73, and '74. The pre-mixed joint compound described by Thomas Salzano directly correlates with previous Kaiser Gypsum product identification interrogatories of their pre-mixed joint compounds. Plaintiffs have demonstrated "facts and conditions from which [Kaiser Gypsum's] liability may be reasonably inferred" to warrant the denial of Kaiser Gypsum's motion for summary judgment (Reid v. Ga.- Pacific Corp., 212 AD2d 462, 622 NYS2d 946 [1st Dept. 1995]).

Accordingly, it is ORDERED that Defendant Kaiser Gypsum Company, Inc.'s motion for summary judgment pursuant to CPLR § 3212, is denied.

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

Dated: January 10, 2020

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION
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