

Rivera v 3M Co.

2020 NY Slip Op 30143(U)

January 17, 2020

Supreme Court, New York County

Docket Number: 190360/2017

Judge: Manuel J. Mendez

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

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION

SUSAN L. RIVERA, Individually and As Personal Representative of The Estate of FIDEL RIVERA,

Plaintiffs,

- against -

3M COMPANY, f/k/a Minnesota Mining and Manufacturing Co., et al.

Defendants.

INDEX NO. 190360/2017

MOTION DATE 01/08/2020

MOTION SEQ. NO. 009

MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion by Meriden Molded Plastics Inc. for summary judgment:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____ cross motion _____

Replying Affidavits _____

PAPERS NUMBERED

1 - 3

4 - 5

6 - 7

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendant MERIDEN MOLDED PLASTIC INC.'s (hereinafter referred to as "MMP") motion pursuant to CPLR §3212 for summary judgment, dismissing the complaint and all cross-claims asserted against it, is denied.

Plaintiff, Fidel Rivera (hereinafter "decedent"), was diagnosed with malignant pleural mesothelioma on October 11, 2017 and died from the disease on January 2, 2019 (Opp. Exhs. 1 and 4). Plaintiffs allege the decedent was exposed to asbestos in a variety of ways, his exposure - as relevant to this motion - is from the asbestos in thermosetting plastics used as molded plastic component parts that were manufactured by MMP and placed in various other manufacturers' arc chutes and products from about 1968 through 1978.

Decedent was deposed over the course of seven days, December 12, 13, 14, 15, 18, 19 and 20, 2017, and his videotaped de bene esse deposition was conducted on March 9, 2018 (Mot. Exh. C). Decedent testified that from 1956 through 1959, he was an apprentice and in 1959 became a union electrician. As an apprentice and union electrician (International Brotherhood of Electrical Workers - Local 3) he was employed by various contractors at multiple locations in New York City (Mot. Exh. C, pgs. 60, 70-77, 82-85, 103-104, 128-131, 204, 256 and 306-310 and Opp Exh. 3, pgs. 19-20, 193-) Decedent stated that starting in 1975 he was employed by General Electric in Schenectady, New York (hereinafter "GE") and remained with the company until he retired in about 1997 (Mot. Exh. C, pgs. 211-213, 239, 395, 402-403 and 435-436). Decedent testified that he was exposed to asbestos containing products for about two or three years after being employed by GE (from 1975 through approximately 1978), when he worked for the company as an electrician and an elevator mechanic (Mot. Exh. C, pgs. 212-218).

Decedent testified that during the period before he started working with GE (1956 through 1975) he regularly used various electrical products that contained asbestos components including asbestos arc chutes. Decedent specifically recalled that there were asbestos containing arc chutes in disconnect switches, contactors, switchgear, and control boxes. He identified six manufacturers, ITE, GE, Westinghouse, Square-D, Allen-Bradley and Cutler Hammer, as having

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

asbestos containing components, including arc chutes, in their electrical products (Mot. Exh. C, pgs. 78-80, 86, 89, 94-97, 100-102, 114-116, 158-168, 173-175, 185-188, 198-202, 696-750, 784 and 788-792, and Opp. Exh. 3, pg. 67). Decedent recalled that when he installed a new GE arc chute on the disconnect switch, it was gray, "U" shaped, and grainy. Decedent stated that the new arc chute was the same on a Westinghouse disconnect switch (Mot. Exh. C, pgs. 728-730 and 733).

Decedent testified that during the first approximately three years he worked at GE in Schnectedy he continued to work with arc chutes on contactors associated with the twelve to fourteen Otis elevators on the campus, and in the load centers (Mot. Exh. C, pgs. 215-218).

Decedent testified that his experience as an electrician led him to believe the arc chutes had asbestos in them. He stated that arc chutes were made of asbestos. Decedent testified that he was exposed to asbestos from having to handle and manipulate the arc chutes, to detach them from electrical equipment and remove them. He explained that arc chutes deteriorated over time as they were exposed to heat from electric arcs which acted like lightning bolts. He described preventive maintenance as disconnecting the power, wiping off all the debris, dust and dirt, unscrewing the arc chute to see if it was still in working condition and if not replacing it. Decedent stated that if the arc chute was damaged you would be able to see discoloration, pitting and erosion of the sides. He stated that even though asbestos has excellent heat qualities, the sudden increase in temperature could cause it to crack. Decedent testified that he also had to clean the arc chutes by rubbing them with a rag prior to reinstalling them (Mot. Exh. C, pgs. 94-97, 100-101, 364-367, 372, 728-732 and Opp. Exh. 3 at pgs. 68 and 84-85).

This action was commenced on November 16, 2017. The pleadings were subsequently amended, and MMP was added as a party in the Fifth Amended Complaint dated July 5, 2018 (see NYSCEF Doc. No. 1 and Mot. Exh. D). On July 30, 2018, MMP filed its Standard Answer to Plaintiffs' Counsel's Standard Complaint No. 1 (Mot. Exh. E).

MMP seeks an Order granting it summary judgment pursuant to CPLR §3212, dismissing the plaintiffs' complaint and all cross-claims asserted against it.

MMP argues that it is entitled to summary judgment because the decedent's deposition testimony does not specifically identify MMP, and is too vague to establish he was exposed to asbestos from products manufactured, distributed, sold or installed by the company. MMP claims that none of the discovery taken in this action revealed a factual basis for liability because there was no name placed on the company's molded plastic products and the decedent stated he did not see any identifying name. MMP further argues that the plaintiffs have not produced any other evidence of the decedent's exposure to implicate the company.

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 NYS 2d 184 [1st Dept. 1997]).

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]). The defendant 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 MMP meets its preliminary burden that the plaintiffs are required to raise any issues of fact (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, supra).

MMP has failed to make a prima facie case. MMP does not provide any evidence, other than the pleadings and decedent's deposition testimony. The five page affirmation in support only cites to decedent's deposition testimony with no other corporate records, testimony from a corporate representative or other related proof to support MMP's claims.

A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Ricci v. A.O. Smith Water Products*, 143 A.D. 3d 516, 38 N.Y.S. 3d 797 [1st Dept. 2016] and *Koulermos v. A.O. Smith Water Products*, 137 A.D. 3d 575, 27 N.Y.S. 3d 157 [1st Dept., 2016]). Regarding asbestos, a defendant must make a prima facie showing that its product did not contribute to the causation of plaintiff's illness (*Comeau v. W.R. Grace & Co. - Conn. (Matter of New York City Asbestos Litigation)*, 216 A.D. 2d 79, 628 N.Y.S. 2d 72 [1st Dept., 1995] citing to *Reid v. Georgia - Pacific Corp.*, 212 A.D. 2d 462, 622 N.Y.S. 2d 946 [1st Dept., 1995], *Di Salvo v. A.O. Smith Water Products (In re New York City Asbestos Litigation)*, 123 A.D. 3d 498, 1 N.Y.S. 3d 20 [1st Dept., 2014] and *O'Connor v. Aerco Intl., Inc.*, 152 A.D. 3d 841, 57 N.Y.S. 2d 766 [3rd Dept., 2017]).

MMP must first unequivocally establish that the decedent had no level of exposure to its product, which was a component of arc chutes he worked with from the six identified manufacturers during the relevant time period, before plaintiffs need to raise an issue of fact. MMP also has to establish that the decedent's exposure to its product was not sufficient to contribute to the development of his mesothelioma (*Berensmann v. 3M Company (Matter of New York City Asbestos Litigation)*, 122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1st Dept., 2014]).

MMP fails to make a prima facie case and there is no need to address plaintiffs arguments in opposition to this motion. MMP's reliance on the evidence provided by the plaintiffs' in opposition to this motion for summary judgment amounts to "pointing to gaps" and also fails to make a prima facie case.

Alternatively, plaintiffs provides excerpts from MMP's corporate representative H. Robert Grossman's deposition testimony taken on November 18, 2016 (Opp. Exh. 5). Mr. Grossman testified that MMP would manufacture custom molded plastic using either a cold molding or hot molding process and explained the manufacturing technique for both processes. Mr. Grossman stated that MMP started the cold mold business in 1950 and the entire business closed between 1985 and 1986. He testified that MMP never put its logo or name on any of the arc chutes it manufactured for its customers. Mr. Grossman specifically identified MMP's customers as Allis-Chalmers, Cutler-Hammer, GE, ITE, and Square-D, he could not recall any others offhand. He stated that each of the compounds the company manufactured had asbestos from when the company started in 1950 through the late 1970's or around the 1980's (Opp. Exh. 5, pgs. 14-17, 22-25, 30, and 34-35).

Plaintiffs provide MMP's responses to interrogatories wherein it states that the company began removing asbestos from its melamine and phenolic materials in either 1977 or 1978. MMP stated that it "understands that its custom molded materials were used as arc chutes and that they were installed into larger units by their customers to make larger electrical switches and controllers." GE had intellectual property rights to its molds, which were returned after MMP manufactured the product. MMP states that its customers included ITE, Imperial Company, Gould Brown Boveri, General Electric and Federal Pacific and that almost all of the molded components were sold to companies located in the northeastern United States. (Opp. Exh. 6, pgs. 11-13, Interrogatory 15 and Responses to Interrogatory 15). Interrogatory responses from ABB Inc., state it purchased the assets from ITE and was aware that asbestos containing arc chutes provided by Meriden were used in electrical products until the late 1980's (Opp. Exh. 7, pgs. 18-21).

Plaintiffs are not required to show the precise causes of damages as a result of the decedent's exposure to MMP's product, only "facts and conditions from which defendant's liability may be reasonably inferred." The opposition papers have provided sufficient proof - defendant's interrogatories, the decedent's deposition testimony, MMP's corporate representative's deposition testimony together with other evidence - to create "facts and conditions from which [MMP's] liability may be reasonably inferred" (Reid v Ga.- Pacific Corp., 212 A.D. 2d 462, 622 N.Y.S. 2d 946 [1st Dept.1995] and Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.), 7 A.D. 3d 285, 776 N.Y.S. 2d 253 [1st Dept. 2004]).

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 raised issues of fact. They have shown "facts and conditions from which defendant's liability for the decedent's mesothelioma may be reasonably inferred" (Reid, supra), warranting denial of summary judgment.

MMP attempts to include, for the first time in its reply papers, the August 30, 1983 deposition testimony of corporate representative Jay Grossman (Reply Exh. A). MMP claims that decedent's inability to specifically identify any of the products he worked with during the relevant period of 1956 through 1978 shows that there is no evidence of exposure to asbestos from the company's products, warranting summary judgment. Defendant is presenting new evidence and arguments for the first time in reply papers to support its prima facie case.

New arguments raised for the first time in reply papers deprive the opposing party of an opportunity to respond, and are not properly made before the Court (Ambac Assur. Corp. v. DLJ Mtge. Capital Inc., 92 A.D. 3d 451, 939 N.Y.S. 2d 333 [1st Dept.,2012], In re New York City Asbestos Litigation (Konstantin), 121 A.D. 3d 230, 990 N.Y.S. 2d 174 [1st Dept., 2014] and Chavez v. Bancker Const. Corp., Inc., 272 A.D. 2d 429, 708 N.Y.S. 2d 325 [2nd Dept., 2000]).

The additional deposition testimony and related arguments made for the first time in MMP's reply papers, deprive the plaintiffs of the opportunity to respond to the assertions being made and are improperly before this Court. However, plaintiffs provided other evidence in their opposition papers that raise an issue of fact, which warrants denial of summary judgment.

Accordingly, it is ORDERED that defendant MERIDEN MOLDED PLASTIC INC.'s motion pursuant to CPLR §3212 for summary judgment, dismissing the complaint and all cross-claims asserted against it, is denied.

ENTER:



MANUEL J. MENDEZ,
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Dated: January 17, 2020

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE