

**Rivera v 3M Co.**

2020 NY Slip Op 30203(U)

January 27, 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 Justice PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

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

Plaintiffs,

INDEX NO. 190360/2017

- against -

MOTION DATE 01/08/2020

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

MOTION SEQ. NO. 013

Defendants.

MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion by Ericksson, Inc. for summary judgment:

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

PAPERS NUMBERED

1 - 4

Answering Affidavits — Exhibits cross motion

5 - 6

Replying Affidavits

7 - 8

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendant ERICKSSON, INC.'s (as successor-in-interest to Anaconda Wire & Cable Company) 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 electric wire and cables manufactured by Ericksson, Inc.'s (hereinafter "defendant") predecessor Anaconda Wire & Cable Company (hereinafter referred to individually as "Anaconda") from about 1968 through 1975.

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. Exhs. A and B). Decedent testified that from 1956 through 1959, he was an apprentice and in 1959 became a union electrician. He stated that he left the union to work for General Electric in 1975. 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. A, pgs. 60, 70-77, 82-85, 103-104, 128-131, 204, 212-213, 256 and 306-310 and Mot. Exh. B, pgs. 19-20 and 193-195).

Decedent testified that during the period he worked as an electrician he worked with electrical wires and cables. He stated that when performing residential work he had to run wires to electrical devices from an external source and make the devices operable (ie circuit breaker) to bring power into the building. Decedent testified that he would have to "pull the wire" into the building through electrical conduits to obtain the needed length to make a connection, then using a knife or pliers he would "skin the end of the wire, remove the insulation," and hook it up. He stated that the insulation on the wires was asbestos, rubber or plastic (Mot. Exh. B, pgs. 32, 36-40 and Mot. Exh. A, pgs. 153, 158-159, 185-186 192, 198-199, 208-209 and 312).

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

Decedent testified that some of the insulation on the wires he worked with had National Electrical Code (hereinafer "NEC") designations that identified them as containing asbestos. He specifically remembered two designations: "AVA" and "AF." Decedent recalled that "AF" stands for asbestos fixture. He testified that when he skinned asbestos wire it created dust that he breathed in. Decedent stated that "AVA" stood for varnished cambric insulation on the outside and when it was skinned it had almost "liquidy stuff" that was called "varnish," there was also an insulation material "like a cloth." He stated that he was able to tell it was asbestos wire even without the designation because it was usually braided on the outside and sometimes the "AVA" varnished cambric cable had a "particular look" specifically a glossy black coating over it. Decedent recalled that "AVA" wire was larger cable and used as a "feeder" to bring the main power into the building. Decedent named "Anaconda" as one of the manufacturers of "AVA" varnished cambric insulated cable that he used (Mot. Exh. B, pgs. 40-44 and 180 and Mot. Exh. A, pgs. 332-333).

He stated that typically the name of the manufacturer of a particular wire or cable was stamped on the side of the reel, and the NEC designation that would indicate it contained asbestos was stamped on the wire or cable. He recalled seeing the name "Anaconda" on the side of the reel of cable. Decedent identified multiple locations where he used AVA cable throughout his career, including underground wiring at the Arizona pavilion at the World's Fair. Decedent explained that "AF" stands for "asbestos fixture wire" and was typically used for fluorescent light fixtures. He stated that he typically had to strip the "AF" wires so that they could be twisted together. Stripping the wires exposed the decedent to asbestos dust. Decedent identified NEC designations TW, TH, THW, THHN, RW, RH and RHW as rubber and thermoplastic wires and cable that did not contain asbestos (Mot. Exh. B, pgs. 39, 44, 47-49 and 180, and Mot. Exh. A, pgs. 119-121, 153-154, 197-199, 208-209, 305, 309-313, 318-323, and 472).

Plaintiffs argue that the motion papers are defective because defendant failed to attach a copy of the pleadings to the motion papers as required pursuant to CPLR §3212(b). This defect in the motion papers will be overlooked as the pleadings were filed electronically (Studio A Showroom, LLC v. Yoon, 99 AD 3d 632, 952 NYS 2d 879 [1<sup>st</sup> Dept. 2012]).

This action was commenced on November 16, 2017. The pleadings were subsequently amended multiple times to add new defendants, to add a cause of action for wrongful death, and to substitute the decedent's estate as a plaintiff (see NYSCEF Doc. Nos. 1, 5, 8, 26, 65, 90, 216 and 246). On December 12, 2017 defendant filed its Acknowledgment of Service of plaintiff's Verified Complaint which repeats and realleges New York Litigation Standard Complaint No. 1 (NYSCEF Doc. No. 35).

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

Defendant argues that it is entitled to summary judgment because the decedent's deposition testimony does not establish he was exposed to asbestos from its wires and cable products, and plaintiffs cannot establish causation.

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 [1<sup>st</sup> Dept. 1998]).

Defendant claims that decedent's deposition testimony fails to establish specific causation or that there was asbestos exposure from Anaconda's asbestos containing varnished cambric "AVA," or "AF" wires and cables.

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

Defendant relies on the September 21, 2019 affidavit of its corporate representative, Randy Snider. Mr. Snider states that as a corporate representative he "has personal knowledge of the facts" and has "reviewed documents /testimony and [is] fully competent to testify to the matters stated therein" (Mot. Exh. C, para. 1). He states that he was employed with the company from 1985 until his retirement in 2015. Mr. Snider states he worked for the defendant in various capacities but does not specifically identify any of them (Mot. Exh. C, para. 3). He states that the decedent testified as to exposure to Anaconda wire with the NEC designation "AF," but that Anaconda never manufactured any wire with that NEC designation. Mr. Snider refers to the decedent's testimony that he used varnished cambric Anaconda cable with the NEC designation "AVA" and wire gauge printed on the outer jacket. Mr. Snider states that Anaconda never printed NEC designations or anything else on the outer jacket of any of its asbestos containing wire and cable. He further states that Anaconda last manufactured asbestos containing varnished cambric "AVA" cable in 1951, five years before the decedent began working as an electrician (Mot. Exh. C, paras. 8,9 and 10).

Mr. Snider's affidavit is conclusory. He did not state the basis for his "personal knowledge of the facts." Mr. Snider states he was hired by Ericsson - not Anaconda - ten years after the period relevant to the decedent's alleged exposure - from 1956 through 1975. Mr. Snider failed to specifically identify the names of any of the individuals he spoke to, or any of defendant's or Anaconda's corporate records or deposition testimony he searched or reviewed. He failed to provide any brochures or other supporting documentation to establish that the company did not manufacture NEC rated "AF" cable or wires, did not apply the NEC designation "AVA" on the outer jacket, or that Anaconda stopped manufacturing "AVA" varnished cambric cable in 1951. Defendant failed to attach to the initial motion papers any substantiating documentation to support Mr. Snider'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 [1<sup>st</sup> Dept. 2014], Shanahan v. AERCO International, Inc., 172 AD 3d 534, 101 NYS 3d 28 [1<sup>st</sup> Dept. 2019], Residential Credit Solutions, Inc. V. Gould, 171 AD 3d 38, 101 NYS 3d 2 [1<sup>st</sup> Dept. 2019], and Barrailier v. City of New York, 12 AD 3d 168, 784 NYS 2d 55 [1<sup>st</sup> Dept., 2004]).

Alternatively, defendant provides as part of the reply papers the January 19, 2009 testimony of corporate representative Eric W. Kothe, Technical Director of Operations of "Anaconda Ericsson." Defendant claims that Mr. Snider relied on Mr. Kothe's deposition because all of the potential company representatives from the relevant time period, specifically the early 1950's are deceased (Reply Aff., pg. 3, para. 7). Mr. Kothe testified that Anaconda made asbestos containing "varnished cambric cable" until "the early 1950's," and is almost certain they closed that operation in about or before 1955 (Reply, Exh. J, pg. 22). This testimony contradicts Mr. Snider's conclusory statement that Anaconda stopped manufacturing "AVA" varnished cambric cable in 1951. This also brings the period Anaconda stopped manufacturing asbestos containing AVA varnished cambric

cable closer to the period relevant to decedent's exposure. Defendant has also not provided proof that after Anaconda stopped manufacturing the AVA varnished cables, they were no longer sold to contractors during the period relevant to the decedent's alleged exposure, 1956 through 1975.

Defendant provides as part of the reply papers a 1951 Anaconda catalog to show that Mr. Snider relied on catalogs for the statements made in his affidavit (Reply Exh. K). The catalog at Section 23, page 16, bates stamped EB001158, specifically refers to "Asbestos and Asbestos-Varnished-Cambric" where it states in relevant part:

"Asbestos-Varnished-Cambric insulation is manufactured by applying a wall of felted asbestos, saturating and drying, then a wall of varnished cambric (V-C) tapes after which a second wall of felted asbestos is applied saturated and dried. A covering is then applied." (Reply Exh. K, Section 23, pg. 16, bates stamped EB001158).

The 1951 catalog also states, "Several types of standardized designs are available: "...Type AVA - Cables" are "manufactured with asbestos-V-C insulation and asbestos braid" for use in dry locations. They are rated at 5000 volts maximum and a temperature of 110C." (Reply Exh. K, Section 23, pg. 16, bates stamped EB001158). The catalog does not prove that Anaconda stopped manufacturing asbestos containing "AVA" varnished cambric cables in 1951.

Plaintiffs in opposition provide the Underwriters' Laboratories, Inc., May of 1960 Electrical Construction Materials List. The list under the subsection "ASBESTOS VARNISHED CLOTH" identifies Anaconda as the manufacturer of asbestos containing AVA wires up to 5000 volts with the "name and type designation on tag or reel" (Opp. Exh. 5). This raises an issue of fact as to whether the defendant was still manufacturing asbestos containing AVA electrical wiring during the relevant time period of decedent's alleged exposure and whether Anaconda printed its name on the reel.

"It is not the function of the Court deciding a summary judgment motion to make credibility determinations or 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]). Summary judgment is a drastic remedy that should not be granted where there is conflicting testimony (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 NY 2d 57, 268 NYS 2d 18, 215 NE 2d 341 [1966], Dollas v. W.R.Grace & Co., 325 AD 2d 319, 639 NYS 2d 323 [1<sup>st</sup> Dept. 1996] and Ansah v. A.W.I. Sec. & Investigation, Inc., 129 AD 3d 538, 12 NYS 3d 35 [1<sup>st</sup> Dept., 2015]).

The conflicting testimony provided by defendant's corporate representatives creates credibility issues, of whether Anaconda manufactured asbestos containing "AVA" varnished cambric cables or wires and "AF" cables or wires, at least in part, during the period relevant to the decedent's alleged exposure, or if those wires were sold during the relevant time period of 1956 through 1975. This conflicting testimony Scientific Consultants ("MVA") creates issues of fact on general causation for the jury to decide, that cannot be resolved on this motion for summary judgment. Decedent's testimony and other evidence to the extent that it contradicts the defendants corporate representatives also creates a credibility issue for the jury to decide, warranting denial of summary judgment.

Defendant provides the unsworn and unaffirmed September 6, 2019 expert report of Mr. William B. Egeland, M.S., P.G. a geologist and senior consultant at MAS in support of its arguments on causation (Mot. Exh. I). Defendant argues that Mr. Egeland relies on four studies prepared at MAS (Mot. Exhs. E, F, G and H), which prove that even to the extent the decedent worked with Anaconda's asbestos containing wire and cable products during the relevant time period, his exposure would not have caused his mesothelioma, warranting summary judgment on specific causation.

Mr. Egeland's report is in the form of a letter addressed to the defense attorney (Mot. Exh. I), does not affirm the statements in the report to be "true under the penalties

of perjury” and is not subscribed before a notary public or other authorized official. It is hearsay and inadmissible as evidence on this motion for summary judgment (See Grasso v. Angerami, 79 NY 2d 813, 588 NE 2d 76, 79 NYS 2d 813 [1991], Frees v. Frank & Walter Eberhart L.P. No. 1, 71 AD 3d 491, 896 NYS 2d 71 [1st Dept. 2010], Offman v. Singh, 27 AD 3d 284, 813 NYS 2d 56 [1st Dept. 2006], CPLR §2106, Shinn v. Catanzaro, 1 AD 3d 195, 767 NYS 2d 88 [1st Dept. 2003], and Arce v. 1704 Seddon Realty Corp., 89 AD 3d 602, 935 NYS 2d 1 [1st Dept. 2011] citing to Mazzola v. City of New York, 32 AD 3d 906, 821 NYS 2d 247 [2nd Dept., 2006]).

Defendant provides no excuse for the failure to provide Mr. Egeland’s expert affidavit in proper form, and instead inappropriately attempts to “incorporate” a corrected affidavit and report as part of the reply papers. This does not cure the defect (see Accardo v. Metro-North Railroad, 103 AD 3d 589, 959 NYS 2d 696 [1st Dept., 2013]). The other MAS studies relied on by Mr. Egeland are also hearsay and do not make a prima facie case. Defendant has failed to make a prima facie case on causation.

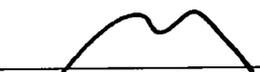
Defendant provides a copy of the unaffirmed and unsworn January 24, 2019 letter report of plaintiff’s expert, Dr. Steven Markowitz that was addressed to plaintiffs’ attorney (Mot. Exh. D).

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]).

Defendant fails to make a prima facie case on causation and there is no need to address plaintiffs arguments in opposition to this motion. Defendant’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. Furthermore plaintiffs, as the non-moving party, are entitled to the benefit of all favorable inferences, regardless of defendant’s allegation that they are unable to provide sufficient proof of decedent’s exposure.

Accordingly, it is ORDERED that defendant ERICKSSON, INC.’s (as successor-in-interest to Anaconda Wire & Cable Company) motion pursuant to CPLR §3212 for summary judgment, dismissing the complaint and all cross-claims asserted against it, is denied.

ENTER:

  
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MANUEL J. MENDEZ,  
J.S.C.

Dated: January 27, 2020

MANUEL J. MENDEZ  
J.S.C.

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