

Moutal v AO Smith Water Prods. Co.
2020 NY Slip Op 30226(U)
January 31, 2020
Supreme Court, New York County
Docket Number: 190086/2019
Judge: Manuel J. Mendez
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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

PAUL MOUTAL and MARYANE BURNS,

Plaintiffs,

-against-

INDEX NO. 190086/2019
MOTION DATE 01/22/2020
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

AO SMITH WATER PRODUCTS CO., et al.,
Defendants.

The following papers, numbered 1 to 7 were read on CompuDyne, LLC f/k/a CompuDyne Corporation, Individually, and as Successor to York Shipley Inc.'s motion pursuant to CPLR §3212 for summary judgment:

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

CROSS-MOTION YES NO

Upon a reading of the foregoing cited papers, it is Ordered that defendant, CompuDyne, LLC f/k/a CompuDyne Corporation, Individually, and as Successor to York Shipley Inc.'s (hereinafter "defendant") motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiffs' complaint and all cross-claims against it, is denied.

Paul Moutal was diagnosed with lung cancer on January 9, 2019 (Opp. Exh. 1). His alleged exposure to asbestos - as relevant to this motion - was from demolishing defendant's asbestos containing "York" boilers during his off the books part-time work, for his Uncle Louis Lastra's side business starting when he was fourteen years old in 1971 through about 1978 and for Burton Construction from 1971 through 1975.

Mr. Moutal was deposed over the course of three days, July 30, 31, and August 1, 2019 (Mot. Exh. C and Opp. Exh. 2). He testified that he started working as a demolition laborer with his Uncle Louis Lastra in 1971. His Uncle Louis was a union carpenter with forty years of experience who took on jobs as a general contractor, as a side business. He testified that his Uncle Louis renovated duplex, triplex and "fourplex" houses mostly in Queens and Brooklyn but also in Staten Island. Mr. Moutal stated that another uncle, Angelo Lastra, also periodically came to the job site. He testified that he worked with his Uncle Louis on between thirty-six and fifty jobs. He stated he would demolish and help remove the boiler systems from the mechanical rooms of the buildings and sometimes he just removed the boiler itself (Mot. Exh. C, pgs. 50, 66-75, 210- 212, 304, 307 and 321-323).

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

Mr. Moutal identified "York" boilers as one the brands he demolished while working for his Uncle Louis. He specially remembered seeing the word "York" on the boilers. He stated that the boilers were too heavy to cart out and had to be broken and taken apart. Mr. Moutal described the process of demolishing boilers as taking the asbestos wrapping or insulation and gaskets off, then taking apart the boilers with hammers and wrecking bars. He stated he would take the burner off and then take the boiler apart, smashing the metal jacket off and disconnecting the exhaust pipe, or if the boiler was sectional he would smash open the sections. He recalled that sometimes he would split boilers open using a wooden wedge, or he would just smash them with a sledgehammer. Mr. Moutal stated he believed he was exposed to asbestos when he smashed "York" boilers apart, which created dust that he breathed in. Mr. Moutal testified that the boilers he demolished exposed him to asbestos from gaskets - including rope gaskets - and external insulation. He described the external insulation on jacketed boilers as a fibrous discolored material (Mot. Exh. C, pgs. 72, 79-81, 338, 342, 346-351 and 354-356).

Mr. Moutal stated that his Uncle Angelo worked in a post office in Queens, and as side work "recycled" metal pumps, valves and pipes that were part of the heating system after their removal at his Uncle Louis' job sites. Mr. Moutal testified that his Uncle Angelo would have him clean up the metal valves, pipes and pumps, using a wire brush or a hammer, put them in a pile, and load them into his [Uncle Angelo's] station wagon so that they could be sold for scrap (Mot. Exh. C, pgs. 83-85, 219-222, and 437-440).

Mr. Moutal testified that a neighbor, Calisto Burton, owned Burton Construction and employed him part-time to work on residential single family homes located in Mahopac and throughout Putnam County, New York. He testified that he worked with Burton Construction on more than a dozen projects that were both new construction and renovations. Mr. Moutal stated that on renovations he was the "demo guy." Mr. Moutal recalled that demolition included: performing gut work on kitchen renovations involving sheetrock and insulation; finishing basements, which involved mechanical room work; stripping walls of building materials and stripping roofing materials. He stated he didn't recall doing a lot of boiler replacements with Burton Construction. He testified that the removal of boilers for Burton Construction overlapped with the boiler removal work he was also doing with his Uncle Louis during the relevant time period of 1971 through 1975. He stated that the removal of boilers took place over both employment periods. He could not specifically remember locations from where he removed boilers during his employment (Mot. Exh. C, pgs. 87-89, 93, 322-324, 334-335, 506, 699-703).

Plaintiffs commenced this action on April 4, 2019 (Mot. Exh. A). Defendant filed its Verified Answer on May 16, 2019 (Mot. Exh. B).

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

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]).

Defendant argues that Mr. Moutal's removal of its "York" boilers to salvage scrap metal for his Uncle Angelo is not a foreseeable use of their product, therefore, they owe no duty, and cannot be held liable for damages resulting from his alleged asbestos related lung cancer.

Plaintiffs in opposition argue that Mr. Moutal was not a scrap metal worker, instead he was a laborer responsible for demolishing "York" boilers for their removal from the property, which was within the expectation of replacement at the end of their practical service life, and the scope of foreseeable use. They claim that Mr. Moutal's work was primarily demolition for purposes of disposal, so that the boilers could be carted out of buildings, and he did not sell the demolished "York" boilers as scrap metal. Plaintiffs further argue that it is foreseeable that, at some point, the "York" boilers would have to be disassembled and because of their weight or size, be carted away from the original site of installation.

Salvage workers do not have a products liability claim for asbestos related exposure because the manner in which they demolish products to obtain metal for resale, is beyond the scope of foreseeable use (see *Hockler v William Powell Co.*, 129 AD3d 463, 11 NYS 3d 45 [1st Dept 2015]).

The inability to bring a product's liability claim is narrowly applied to salvage workers. Renovations and their related demolition activities are common enough that it cannot be said they are unlikely to occur, or that it is an unforeseeable use of a defendant's boiler products (See *In re New York City Asbestos Litigation (Harrison v. A.O. Smith Corporation*, 2016 WL 540710 (Sup. Ct., NYC, 2016) citing to *Di Ponzio v. Riordan*, 89 NY 2d 578 at, 679 NE 2d 616, 657 NYS 2d 377 [1997] and *Prosser and Keeton*, op. cit., §31, at 170l). A distinction is made between unintended use of a product through demolition, and lack of foreseeable use because of salvage (See *Hockler*, supra at pg. 464).

Mr. Moutal was employed, by his Uncle Louis Lastra and his neighbor, Calisto Burton, when he worked for Burton Construction, as a demolition worker, not a salvage worker. His job was primarily to dismantle the boilers for replacement. To the extent that after dismantling the boilers he cleaned certain portions so that his Uncle Angelo Lastra could sell those pieces as scrap metal (which was incidental to his main job), this presents an issue of fact for a jury to determine if during his entire period of employment, or just during that incidental period, he was acting as a salvage worker.

"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 N.Y. 3d 499, 965 N.E. 2d 240, 942 N.Y.S. 2d 13 [2012]). There remain issues of fact as to

whether Mr. Moutal's exposure to the asbestos that caused his lung cancer was from defendants' "York" boilers when he worked as a laborer performing demolition work. To the extent Mr. Moutal provided conflicting testimony related to his work performed for his Uncle Louis Lastra and Burton Construction it also presents a credibility issue to be determined by the trier of fact (See *Luebke v. MBI Group*, 122 AD 3d 514, 997 NYS 3d 379 [1st Dept. 2014] citing to *Vazieiyan v. Blancato*, 267 AD 2d 152, 700 NYS 2d 22 [1st Dept., 1999]).

"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]). Plaintiffs have presented sufficient evidence - including Mr. Moutal's testimony - that when construed in a light most favorable to them as the non-moving party, warrants denial of summary judgment.

Accordingly, it is ORDERED that that defendant, CompuDyne, LLC f/k/a CompuDyne Corporation, Individually, and as Successor to York Shipley Inc.'s motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiffs' complaint and all cross-claims against it, is denied.

ENTER:

Dated: January 31, 2020

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

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