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

CHARLES VINCENT and HOLLY VINCENT,

Plaintiffs,

-against-

A.O. SMITH WATER PRODUCTS CO., et al.,

Defendants.

INDEX NO.	**190460/2018**
MOTION DATE	**03/05/2020**
MOTION SEQ. NO.	**003**
MOTION CAL. NO.	

The following papers, numbered 1 to 11 were read on this motion by Baltimore Aircoil Company, Inc. pursuant to CPLR §3212 for summary judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1- 5
Answering Affidavits — Exhibits	6 - 8
Replying Affidavits	9 - 11

CROSS-MOTION ☐ YES X NO

Upon a reading of the foregoing cited papers, it is Ordered that Baltimore Aircoil Company, Inc.'s (hereinafter "BAC") motion for summary judgment pursuant to CPLR §3212 to dismiss the plaintiffs' complaint and all cross-claims against it based on lack of product identification is denied.

Plaintiff, Charles Vincent was diagnosed with mesothelioma on October 31, 2018 (NYSCEF Doc. 2). Mr. Vincent was deposed over a course of five days on March 6, 7, 8, 27, and 28, 2019, and his de bene esse deposition was conducted on October 2, 2019 (Mot. Exhs. D, E, F, G, H and I). It is alleged that the decedent was exposed to asbestos in a variety of ways. His alleged exposure - as relevant to this motion - was from his work in the air conditioning business as a helper and mechanic working asbestos containing parts on BAC's cooling towers from about 1958 through 1960 and 1964 through 1988.

Mr. Vincent testified that he was a hired by William A. Schwartz, an air conditioning contractor, when he was in seventh or eighth grade. He stated that he worked in the office until he was sixteen years old when he started working as a helper. He started working on BAC cooling towers during the summers when he was a junior and senior in high school. Mr. Vincent stated that he graduated from high school in 1960 (Mot. Exh. D, pgs. 42, 46-50, 52, 79 and 80-81, Mot. Exh. E, pg. 236). He testified that starting in 1964 he worked for Schwartz as a mechanic, and became a supervisor working in the field less frequently starting in the mid-1980's. He stopped working for Schwartz in 1988 (Mot. Exh. D, pgs. 117-118 and 143-144, and Mot. Exh. G., pgs. 426 and 430).

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

Mr. Vincent specifically recalled working on BAC cooling towers at the Squibb Building located at 50 West 47th Street, the World Trade Center on the south and west side of the building, and a residence at Rockefeller University. He could not recall specific dates but claimed the cooling towers were run all year because different offices needed cooling, and servicing would be several times a year. He stated that the work at the World Trade Center and Rockefeller University occurred sometime in the mid-1980s, after he became a supervisor. Mr. Vincent stated that he personally serviced the towers even though he was a supervisor (Mot. Exh. E, pgs. 235-237, 241-243 and 247-254).

Mr. Vincent described the BAC cooling towers as having a fan on top of the tower with louvers on either side for the intake and discharge of air. He stated that most BAC cooling towers were rectangular. There was a rod attached to each louver blade and as the tower aged the original louvers deteriorated, resulting in the need to replace the louver and drill a new attachment bracket for the rod that drove the louver open or closed. Mr. Vincent stated that the louvers were bolted onto the cooling tower. He described the asbestos containing gaskets as off white in color, the size of the louver, and there was one gasket for each louver at each of the two sides of the cooling tower. He stated that the gasket was placed between the louvers and the body of the cooling tower and had pre-drilled holes for the bolts to fit through. He stated that there was a pan located at the base of the tower that collected water. (Mot. Exh. E, pgs. 239-245 and Mot. Exh. I, pgs. 59-63).

Mr. Vincent stated that he was exposed to asbestos from working on cooling towers which was a regular and frequent part of the work at Schwarz. He stated that he was exposed to asbestos from cleaning and scraping the asbestos containing louvers and asbestos containing gaskets that were used with the louvers, that this cleaning and scraping created visible dust he breathed in. He stated that he had to clean and scrape the louvers to remove the asbestos gaskets every winter. Mr. Vincent testified that the gasket either adhered to the side of the tower or the louver frame and would tear or rip. He would have to clean it up, scrape it off and arrange to put new gasketing on. He stated that the pans he cleaned may have also collected asbestos debris if the air flow and water flow carried it away. Mr. Vincent also testified he was exposed to asbestos in the fill (Mot. Exh. E, pgs. 235-237 and 241-243, and Exh. I, pgs. 17-19, 59-60 and 63-65).

Plaintiffs commenced this action on December 12, 2018 (Mot. Exh. A). BAC's Verified Answer to Plaintiff's Verified Complaint and Answer to Cross-Claims is dated January 3, 2019 (Mot. Exh. B).

BAC now moves for summary judgment pursuant to CPLR §3212 dismissing the plaintiffs' claims and all cross-claims asserted against it, based on lack of product identification.

BAC argues that it has made its prima facie case by establishing that Mr. Vincent was not exposed to asbestos in the company's cooling tower products. BAC claims that the louvers never contained asbestos, and the company's cooling towers did not use any gaskets for the louvers.

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]).

BAC argues that plaintiffs will be unable to present evidence from which liability may be inferred or raise any issues of fact on summary judgment.

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).

BAC must unequivocally establish that Mr. Vincent's exposure to its cooling tower products did not contribute to the development of his mesothelioma. BAC's argument as to plaintiffs' lack of evidence does not make a prima facie case.

BAC relies on the February 11, 2020 affidavit of its corporate representative David Hutton, a Professional Registered Engineer (Mechanical), employed by BAC from 1967 through 2005. Mr. Hutton states that he has held various positions of increasing responsibility while working at BAC, specifically, "engineering design and management, field performance testing and trouble-shooting, product management, and marketing management for evaporative heat transfer and thermal storage equipment for HVAC, industrial, process and power generation applications."

Mr. Hutton defines a cooling tower as a device to remove unwanted heat from a system of evaporation of a portion of a circulating water stream. He states that Mr. Vincent encountered BAC cooling towers as part of HVAC applications used to transfer heat from an air conditioning chiller by using circulating water. Mr. Hutton

states that BAC cooling tower louvers never contained asbestos and were in fact made of either galvanized steel or fiberglass reinforced polyester (FRP). In support of his claim that there is no asbestos in the louvers, Mr. Hutton relies on two documents identified as "product literature" to prove that there was no asbestos in the BAC cooling tower louvers. The first document is a product bulletin from April 1976, and he refers to page 12, which states "...Louvers shall be corrugated, hot-dip galvanized steel, finished with Zinc Chromatized Aluminum" (Hutton Aff. Exh. A). Mr. Hutton also states that "The literature for the earlier UT, TU, TUA models manufactured by Baltimore Aircoil in the 1950's and 1960's, while not specifying louvers, specifically stated that the cooling tower in toto was made of 'hot-dip galvanized steel construction throughout.' See, for example, pg. 27 of Exhibit B hereto, a 1960 product bulletin" (Hutton Aff. Exh. B).

Mr. Hutton also states that there were no gaskets placed between the louvers and framing in any BAC cooling towers, because of the engineering and design. He relies on Exhibit A which shows where the louvers are located as demonstrating there were no gaskets (Hutton Aff. Exh. A).

Mr. Hutton was not employed during the entire period relevant to Mr. Vincent's alleged exposure. He also does not state the periods he held the "various positions of increasing responsibility" that are identified in his affidavit as the source of his knowledge of BAC cooling towers. He only incorporates the two documents, product bulletins from 1973 and 1960, and neither document mentions the "fiberglass reinforced polyester (FRP)" he stated was a component of the BAC cooling tower louvers (Hutton Aff. Exh. A and B). Mr. Hutton's affidavit is "conclusory and without specific factual basis, and thus does not meet the prima facie burden of a proponent of a motion for summary judgment" (Matter of N.Y.C. Asbestos Litig. (DiSalvo v. A.O. Smith Water Products), 123 AD3d 498, 1 NYS3d 20 [1st Dept. 2014]).

"In asbestos-related litigation, the plaintiff on a summary judgment motion must demonstrate that there was actual exposure to asbestos from the defendant's product" (Cawein v Flintkote Co., 203 AD2d 105, 610 NYS2d 487 [1st Dept 1994]). The Plaintiff 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]). A plaintiff's inability to recall exact details of the exposure is not fatal to the claim and should not automatically result in the granting of summary judgment (Lloyd v W.R. Grace & Co., 215 AD2d 177, 626 NYS2d 147 [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 in opposition rely on Mr. Vincent's deposition testimony and provide BAC's responses to Interrogatories that state in response to Interrogatory Number 3 that the company's records reflect sales of asbestos containing fill used in cooling towers only from 1973 through 1979 (Opp. Exh. E, pg. 6). They also provide Mr. Hutton's deposition testimony wherein he affirmed that generally BAC cooling towers manufactured from 1972 through 1978 had an asbestos containing product called MNA that was used in the fill component (Opp. Exh. F, pgs. 104-106).

"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]). Conflicting testimony raises credibility issues that cannot be resolved on papers and is a basis to deny summary judgment (Messina v. New York City Transit Authority, 84 A.D. 3d 439, 922 N.Y.S. 2d 70 [2011] and Almonte v. 638 West 160 LLC, 139 A.D. 3d 439, 29 N.Y.S. 3d 178 [1st Dept., 2016]).

There remain issues of fact as to whether Mr. Vincent was exposed to asbestos from components of BAC's cooling towers including, the louvers, the collection tray and the fill, during part, or all, of the period relevant to his exposure and whether this was a cause of his mesothelioma. Mr. Vincent stated that most of his exposure to asbestos in BAC cooling towers was from the louvers and gaskets related to the louvers, but he also identified other sources of exposure, including the "fill," that raise an issue of fact. The conflicting evidence and testimony raise credibility issues of fact that cannot be resolved on a motion for summary judgment.

To the extent Mr. Vincent provided internally conflicting testimony as to his exposure to asbestos in various component parts of BAC's cooling products, it also presents a credibility issue to be determined by the trier of fact (See Luebke v. MBI Group, 122 A.D. 3d 514, 997 N.Y.S. 3d 379 [1st Dept. 2014] citing to Vazieiyan v. Blancato, 267 A.D. 2d 152, 700 N.Y.S. 2d 22 [1st Dept., 1999]).

BAC for the first time on reply attempts to include an additional affidavit from Mr. Hutton, to establish that his statements are correct (Hutton Aff. on Reply). 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]). Mr. Hutton's statements provided for the first time with defendant's reply papers, deprive the plaintiffs of the opportunity to respond and are improperly before this Court. Additionally, Mr. Hutton references unidentified "relevant Company job files" that he allegedly reviewed to confirm that the BAC cooling tower models used at the job sites identified by Mr. Vincent did not have asbestos containing MNA in the fill." His conclusory affidavit submitted on reply does not identify the source of "relevant Company job files" and is unsupported by any evidence, rendering it insufficient to warrant summary judgment (Matter of N.Y.C. Asbestos Litig. (DiSalvo v. A.O. Smith Water Products), 123 AD3d 498, supra).

Plaintiffs are not required to show the precise causes of damages resulting from decedent's exposure to defendant's products "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 plaintiffs have "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]).

Mr. Vincent's deposition testimony, when combined with the deposition testimony of Mr. Hutton and BAC's interrogatory responses create "facts and conditions from which [BAC's] liability may be reasonably inferred" (Reid v Ga.-Pacific Corp., 212 AD 2d 462, supra), at the very least there are credibility issues, and construing the evidence in favor of the plaintiffs as the non-moving parties warrants denial of summary judgment.

ACCORDINGLY, it is ORDERED that Baltimore Aircoil Company, Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss the plaintiffs' complaint and all cross-claims against it is denied.

ENTER:

Dated: June 1, 2020

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

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