

Johnson v Aerco Intl., Inc.

2021 NY Slip Op 30191(U)

January 21, 2021

Supreme Court, New York County

Docket Number: 190229/2018

Judge: Adam Silvera

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ADAM SILVERA PART IAS MOTION 13

Justice

-----X

SHEILA JOHNSON, Individually, and as Executrix for the
Estate of DONALD JOHNSON, deceased.

INDEX NO. 190229/2018

MOTION DATE 08/27/2020

Plaintiff(s),

MOTION SEQ. NO. 015

- v -

**DECISION + ORDER ON
MOTION**

AERCO INTERNATIONAL, INC., *et al.*,

Defendant(s).

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 0015) 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 490, 495, 506, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 542, 543

were read on this motion to/for JUDGMENT - SUMMARY.

Before the Court is defendant McCord Corporation’s (“McCord”) motion for summary judgment, pursuant to CPLR 3212, to dismiss plaintiff’s Complaint and all cross-claims, based on plaintiff’s alleged failure to put forth legally sufficient evidence to establish an issue of material fact as to whether any product manufactured, sold or distributed by McCord caused or contributed to plaintiff Donald Johnson’s (“Decedent”) mesothelioma. Plaintiff opposes the motion.

McCord’s motion contends that plaintiff has failed to establish that a McCord product was a substantial factor in causing Decedent’s alleged injuries. The case at issue arises from Decedent’s July 17, 2018, diagnosis of mesothelioma, which plaintiff alleges was caused by his exposure to asbestos dust while enlisted in the United States Navy from 1961 to 1969 (Aff in Op Exh A). During this time, Decedent was stationed at the Boston Naval Shipyard (“BNS”) for approximately 26 months, where he served as a heavy equipment operator (*id.* at 39-41; Exh B at 28-29, ¶9).

Decedent passed away from mesothelioma on August 22, 2018, before being deposited. Plaintiff, however, produced three fact witnesses for discovery depositions regarding product identification: Gary Schleich, John Banahan, and Wilbur Billington (Aff in Op, Exh B). Mr. Billington worked alongside Decedent at BNS from 1966 until September 1967 (*id.* at 28, ¶6; 29, ¶9). Mr. Billington testified that he and Decedent removed and replaced McCord and Victor engine gaskets at BNS and that the men were exposed to coworkers who scraped and replaced engine gaskets during overhauls which created visible asbestos dust (*id.* at 154, ¶22, 155, ¶¶11-22, 24; 156, ¶¶3, 16; 203; ¶7-12). Here, upon motion for summary judgment, McCord alleges that it did not cause Decedent's injuries, and that plaintiff relies on speculative deposition testimony. McCord claims that it can establish the absence of any evidence of Decedent's exposure to a McCord product.

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). A defendant seeking summary judgment in a products liability case involving asbestos must make a prima facie case that its product could not have contributed to the causation of the plaintiff's injury (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462 [1st Dept 1995]). An opinion on causation in a toxic tort should set forth: (1) a plaintiff's exposure to a toxin; (2) that the toxin is capable of causing the particular illness, or “general causation”; and (3) that plaintiff was exposed to sufficient levels of the toxin to cause the illness, or “specific causation” (*Parker v Mobil Oil Corp.*, 7 NY3d 434 [2006]).

“It is not enough for a plaintiff in a toxic tort action for damages to show that a certain agent sometimes causes the kind of harm that he or she is complaining of; at a minimum, there

must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of that agent that are known to cause the kind of harm that the plaintiff claims to have suffered” (*Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 784 [2014] quoting *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1107 [8th Cir.1996]).

Here, defendant argues that the absence of evidence of plaintiff’s exposure to defendant’s products establishes defendant’s facial non-liability, and shifts to plaintiff the burden of demonstrating, by admissible evidence, the existence of a factual issue requiring a trial of the action, or of tendering an acceptable excuse for plaintiff’s failure to do so. Defendant argues that to meet this burden, plaintiff must first establish that he or she was exposed to the defendant’s product, which requires identification of the specific defendant-manufacturer of the offending product (*Johnson v. Celotex Corp.*, 899 F.2d 1281 [2d Cir. 1989] cert denied, 498 U.S. 920 [1990]; *Cawein v. Flintkote Co.*, 203 A.D.2d 105, 106 [1st Dept 1994]). According to defendant, plaintiff must further establish that the specific exposure to the particular defendant’s product was a substantial factor in the alleged resulting injuries (*Diel v. Flintkote Co.*, 204 A.D.2d 53 [1st Dept 1994]) ([finding manufacturer is not liable for plaintiff’s injury when evidence creating a reasonable inference that plaintiff was exposed to defendant’s products is absent]).

Defendant argues that plaintiff cannot defeat the present motion with unsupported, speculative, or conclusory allegations and that mere speculation that a particular product was present at a worksite or that a particular product contained asbestos-containing materials is insufficient to create a triable issue of fact (*Perdicaro v. A.O. Smith Water Products*, 52 A.D.3d 300, 860 N.Y.S.2d 506 [1st Dept. 2008]). Defendant avers that plaintiff’s witnesses Mr. Schleich and Mr. Banahan make no mention of McCord in their testimony. Further, defendant argues that Mr. Billington’s general recollection that McCord products were present at the BNS does not

identify that Decedent worked with McCord products. Defendant avers that Mr. Billington provides no testimony that Decedent was exposed to, breathed, inhaled, or even came into contact with any dust produced from work with a McCord gasket.

Defendant notes that Mr. Billington identified McCord as a brand replacement gasket, or as one of the new gaskets being installed and could not identify the brand of the gasket being removed. Defendant argues that any interpretation of Mr. Billington's testimony that finds Decedent was exposed to respirable fibers from a McCord gasket is "pure speculation and conjecture" (Mot at 8). Thus, defendant argues that plaintiff cannot put forth any evidence, other than the speculative and conclusory assertions of Mr. Billington's testimony, establishing that Decedent was exposed to asbestos fibers released from a product manufactured, sold, distributed or installed by McCord.

In opposition, plaintiff argues that it is well settled law that, in a personal injury litigation, the plaintiff is not required to show the precise cause of his damages, but only facts and conditions from which defendant's liability can be reasonably inferred (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462 [1st Dept 1995]). Further, plaintiff argues that defendant has failed to meet its burden to show that its product could not have contributed to the causation of plaintiff's asbestos-related injuries. Notably, a defendant cannot satisfy this burden by merely pointing to gaps in a plaintiff's proof (*Fischer v. Am. Biltrite, Inc.*, 184 A.D.3d 446, 126 N.Y.S.3d 16 [2020]).

Here, the Court notes that defendant's motion relies solely on gaps in plaintiff's proof in attempt to meet its burden. Defendant has made conclusory allegations that none of plaintiff's witnesses sufficiently allege that Decedent was exposed to asbestos from McCord's products. Defendant has provided no evidence that its gaskets, which plaintiff's witness testified were

present at BNS, were not manufactured with asbestos. Defendant has provided no evidence that their product did not create visible asbestos dust, which could have been inhaled in by Decedent. Plaintiff has provided testimony from Mr. Billington who stated that he remembered: McCord gaskets at BNS during Mr. Johnson's services, that approximately five gaskets were removed once per month, totaling around 60 removals per year, that asbestos dust was present during gasket removal procedures, and that Decedent was required to walk right by the airborne asbestos dust from these gaskets on his way to the water fountain (Exhibit B at 154, ¶¶22 -157, ¶¶2; 203, ¶¶7-12).

Defendant contests causation, but provides no expert reports on the matter in support of its motion. McCord "bears the initial burden to establish that exposure to the asbestos from [its products] could not have contributed to [mesothelioma] or that [Plaintiff] was not exposed to levels of asbestos sufficient to contribute to the development of his disease" (*Pogacnik v A.O. Smith Water Prods. Co.*, 60 Misc. 3d 1208[A], 2018 NY Slip Op 51026[U], *2 [Sup Ct, NY County 2018]). Defendant has merely pointed to gaps in plaintiff's proof and has failed to provide evidence to prove that plaintiff was not exposed to asbestos. Thus, defendant has failed to meet its burden for summary judgment and defendant's motion to dismiss plaintiff's Complaint and all cross-claims is denied.

Accordingly, it is

ORDERED that defendant's motion for summary judgment, pursuant to CPLR 3212, for a finding in favor of McCord on the grounds that plaintiff has failed to put forth legally sufficient evidence to establish an issue of material fact as to whether any product manufactured, sold or distributed by McCord caused or contributed to Decedent's mesothelioma and to dismiss plaintiff's Complaint and all cross-claims against McCord is denied; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon all parties with notice of entry.

This Constitutes the Decision/Order of the Court



1/21/2020
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE