

Daly v Amchem Prods., Inc.

2021 NY Slip Op 30241(U)

January 26, 2021

Supreme Court, New York County

Docket Number: 190297/19

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

at 314-315). Plaintiff further testified that the insulators changed brakes that created asbestos dust which plaintiff would inhale (*id.*).

“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]). 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 [1st Dept. 2014]).

Here, upon motion for summary judgment, Cleaver alleges that plaintiff has failed to establish a scientific basis for finding causation attributable to Cleaver’s product. Defendant notes that plaintiff testified that he could not quantify the amount of time that he spent working in the vicinity of other performing insulation work on a Cleaver boiler (Mot, Exh E at 362-363). Defendant submits the affidavit of Cleaver’s corporate representative, John Tornetta, who affirmed that Cleaver’s commercial records indicate that Cleaver shipped one boiler to Indian Point (Mot, Exh G at 2, ¶5). Mr. Tornetta noted that the boiler included non-asbestos containing insulation, which did not call for the use of any external insulation (*id.* ¶¶ 5-6). In fact Mr. Tornetta testified that the use of insulation would have been unnecessary and possibly detrimental to the operation of the boiler (*id.* ¶6). Thus, defendant avers that there is no evidence that its product could have caused plaintiff’s injuries.

Cleaver has demonstrated that it delivered only one boiler to Indian Point prior to 1974, and that the boiler did not contain asbestos. If plaintiff worked near a Cleaver boiler, said boiler would not have had asbestos insulation at the time of the alleged exposure. Plaintiff's timeline for his exposure to Cleaver's asbestos products is not feasible. Defendant has established that Cleaver did not supply Indian Point with an asbestos-containing boiler during plaintiff's employment at Indian Point and, thus, could not have contributed to the causation of plaintiff's injury. As such, defendant has made a prima facie showing of entitlement to judgment as a matter of law and the burden shifts to plaintiffs to raise an issue of fact.

In opposition, plaintiffs allege that defendant has failed to make a prima facie showing of entitlement to summary judgment because Cleaver's motion, "in questioning Mr. Daly's testimony, is simply pointing to gaps or creating questions of fact that show summary judgment must be denied (Aff in Op at 9, ¶22). Plaintiffs cite to Second Department case law, which has found that a defendant cannot sustain their burden merely by pointing out gaps in the plaintiffs' proof (*Iannucci v. Kucker & Bruh, LLP*, 161 A.D.3d 959, 960 [2d Dept 2018] citing *Quantum Corporate Funding, Ltd. v Ellis*, 126 A.D.3d 866, 871 [2d Dept 2015]).

The Court finds that the case at bar is distinct from the case law in which plaintiffs rely. Such case law concerns gaps in a plaintiff's proof in legal malpractice actions. In regards to gaps in testimony in asbestos matters, this Court ruled in a recent Decision/Order in *O'Sullivan v Borg-Warner* Index No. 190180/2012, January 4, 2021, that there is no gap in testimony where a plaintiff was questioned about a brand and identified said brand as the maker of the product, which plaintiff alleged caused exposure to asbestos. Here, plaintiff was in fact questioned about Cleaver's alleged asbestos containing products. At his deposition, plaintiff identified Cleaver as the brand that manufactured the boiler during the alleged exposure. Plaintiff testified to being

exposed to asbestos insulation from the Cleaver boiler, a boiler which defendant has demonstrated, did not contain asbestos insulation during the time that plaintiff testified to working in its vicinity. Thus, plaintiff's attempt to raise a feigned issue of fact as to whether defendant is "simply pointing to gaps" (Aff in Op at 9, ¶22) in plaintiffs' evidence fails. Here, defendant does not point to gaps in plaintiffs' testimony. Rather, defendant has established that its product, which plaintiff's testimony clearly identified and alleged exposed him to asbestos, did not contain asbestos such that its product, as identified by plaintiff, could not have caused plaintiff's injuries relating to asbestos exposure.

The Court finds that there is no gap in the testimony of Plaintiff. Plaintiff was asked to identify who made any of the boilers that he saw being insulated with asbestos (Aff in Op, Exh 3 at 68-71) Plaintiff identified Cleaver as the brand of boiler, however defendant has demonstrated that at the alleged time of exposure it sent only one boiler to Indian Point, and that said boiler was not made to be insulated with asbestos. Thus, plaintiffs' opposition fails to raise a genuine triable issue of fact and defendant's motion is granted as it has made a prima facie showing of lack of causation and is entitled to summary judgment to dismiss plaintiffs' Complaint.

Accordingly, it is

ORDERED that defendant's motion for summary judgment, pursuant to CPLR 3212, for a finding in favor of Cleaver on the grounds that said defendant has made a prima facie case demonstrating lack of causation and to dismiss plaintiffs' Complaint and all cross-claims against Cleaver is granted; and it is further

ORDERED that the Complaint is dismissed in its entirety as against defendant Cleaver with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants;
and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers
filed with the court bear the amended caption; and it is further

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

This Constitutes the Decision/Order of the Court.



ADAM SILVERA, J.S.C.

1/26/2021
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE