

Matter of New York City Asbestos Litig.
2010 NY Slip Op 33123(U)
October 27, 2010
Supreme Court, New York County
Docket Number: 190281/09
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHERRY KLEIN HEITLER
Justice

PART 30

Robert Horn
Plaintiff,

INDEX NO. 190281/09

MOTION DATE _____

- v -
A-W Chesterton et al
Defendant.

MOTION SEQ. NO. 17

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

~~Cross-Motion:~~ Yes No

*This motion is
decided as per the
memo decided on 10.27.10.*

FILED
NOV 05 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10.27.10

Sherry Klein Heitler
SHERRY KLEIN HEITLER J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----- X
In Re: New York City Asbestos Litigation
----- X
ROBERT HORN

NYCAL
Index No. 190281/09
Motion Seq. 001

Plaintiff,
- against -

DECISION AND ORDER

A.W. CHESTERTON, et al.,
Defendants.

FILED
NOV 05 2010
NEW YORK
COUNTY CLERK'S OFFICE

SHERRY KLEIN HEITLER, J:

In this asbestos personal injury action, the defendant, Treadwell Corp. ("Treadwell"), moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all cross-claims against it. For the reasons set forth below, the motion is granted in part and denied in part.

BACKGROUND

This is an action commenced by Robert Horn ("Mr. Horn") to recover damages for personal injuries allegedly caused by exposure to asbestos-containing products used by Treadwell, a mechanical contractor. Between 1954 and 1974, Mr. Horn was a sheet metal worker in Local 38 in Dutchess County, New York. Mr. Horn contends he was exposed to asbestos in the early 1970's as a bystander while working at the Bowline powerhouse ("Bowline") in Haverstraw, New York. Specifically, Mr. Horn claims Treadwell employees installing block insulation caused the release of asbestos fibers to which he was exposed. Between 1973 and 1974, Mr. Horn was briefly employed by Treadwell as a welder. In 2009, Mr. Horn was diagnosed with mesothelioma and commenced the instant action. He was deposed over the course of four days between September 2, 2009 and

October 27, 2009. His videotaped trial testimony was given on October 20, 2009 and October 21, 2009.

Defendant moves for summary judgment on the ground that the claim is barred by the Workers' Compensation Law. In opposition, plaintiff contends, among other things, that: (1) the Workers' Compensation Law is inapplicable because Mr. Horn was exposed prior to his employment with Treadwell; and (2) since defendant fails to raise any issue in its moving papers regarding plaintiff's alleged exposure prior to his employment by Treadwell, it should not be permitted to do so for the first time in reply. In reply, defendant argues that plaintiff's alleged exposure by reason of Treadwell's actions is purely speculative and does not raise triable issues of fact.

DISCUSSION

In order to obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *See Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR § 3212[b]. The failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]. Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. *See Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986].

Workers Compensation is the sole exclusive remedy available against an employer when an employee is injured during the course of employment. *See Workers' Compensation Law* §§ 10, 11. The universe of injuries covered by the Workers' Compensation Law is extremely broad and

includes not only physical injuries, but also diseases, including asbestos-related diseases. *See Acevedo v Consolidated Edison of New York Inc.*, 189 AD2d 497, 500 [1st Dept 1995]; *see also Blair v Bendix Corp.*, 85 NY2d 834 [1995]. To the extent plaintiff was exposed to asbestos during the course of his employment with Treadwell, his sole remedy is found in New York's Workers' Compensation Law and in that regard the motion for summary judgment is granted.

However, the Workers' Compensation Law only covers injuries that arise out of one's course of employment. The critical issue, therefore, is whether plaintiff's exposure occurred other than while he was an employee of Treadwell, thereby permitting plaintiff to bring his claim against Treadwell as a standard personal injury action. In this case, plaintiff contends that Mr. Horn was exposed by reason of Treadwell's actions prior to the time he was employed by Treadwell. As such, the Workers' Compensation Law does not apply.

More importantly, plaintiff argues that Treadwell failed to raise any issue regarding plaintiff's exposure prior to his employment by Treadwell in its initial moving papers, instead arguing on that issue for the first time in its reply papers. On a motion for summary judgment, the moving party is required to establish its entitlement to summary judgment as a matter of law in its moving papers, *see Ayotte, supra*, 81 NY2d at 1063, and courts may not consider arguments raised for the first time in reply, *see Hawthorne v City of New York*, 44 AD3d 544 [1st Dept 2007]; *see also Scansarole v Madison Sq. Garden, L.P.*, 33 AD3d 517 [1st Dept 2006].

The only issue discussed by defendant in its moving papers is whether plaintiff's claim is barred by the Workers' Compensation Law. While defendant made the conclusory statement that plaintiff failed to offer any proof that he was exposed to asbestos-containing products installed by Treadwell, summary judgment may not be granted on conclusory statements alone. This prevents

parties from strategically reserving substantive arguments in support of their conclusory statements for reply. *See Scherrer v Time Equities, Inc.*, 218 AD2d 166, 120 [1st Dept 1995]. Here, not until defendant submitted its reply brief did defendant address Mr. Horn's alleged exposure at the Bowline facility. As defendant has failed to establish, *prima facie*, its entitlement to summary judgment with respect to plaintiff's allegations prior to his employment by Treadwell, the motion must be denied. *See Zuckerman, supra*.

In any event, plaintiff has presented sufficient evidence from which defendant's liability may reasonably be inferred to defeat this summary judgment motion. In a personal injury action arising from a plaintiff's alleged exposure to asbestos or an asbestos-containing material, the plaintiff is required to demonstrate that he was actually exposed to asbestos fibers released from a particular defendant's product. *See Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept 1994]. The plaintiff is only required "to show facts and conditions from which defendants' liability may reasonably be inferred." *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995]. Mere boilerplate and conclusory allegations will not suffice. *Cawein, supra*, 203 AD2d at 105.

Here, plaintiff claims that while installing sheet metal on boilers at the Bowline facility during the 1971-1972 time period, Treadwell employees were simultaneously installing asbestos-containing insulation blocks on the same boilers. *See* Deposition of Robert Horn, dated September 2, 2009, Defendants Exhibit A ("Horn Deposition"), pp. 214, 238. In support, plaintiff offers an invoice which confirms that Kaylo block insulation was purchased and shipped to Treadwell at the Bowline facility in early 1972. *See* Invoice from Robert A. Keasbey Co., dated April 23, 1972, Plaintiff's Exhibit A. Kaylo block insulation is an asbestos-containing insulation material which matches the description of the asbestos-containing insulation material Mr. Horn testified he was

exposed to in the early 1970's, to wit, white insulation blocks measuring approximately three feet long by two feet wide. See Kaylo Block Insulation Product Brochure, dated July 1956, Plaintiff's Exhibit B. Although plaintiff did not precisely recall who installed the insulation on the boilers at the Bowline facility, plaintiff does recall that he worked in the vicinity of Treadwell employees and as such testified that he was exposed to asbestos from the white block insulation material.

Taken together, the invoice, product brochure, and plaintiff's testimony support an inference that Treadwell installed asbestos-containing Kaylo block insulation at the Bowline facility in plaintiff's immediate vicinity. See Reid, supra. The inability of plaintiff to precisely identify defendant as the contractor responsible for installing the insulation does not require a finding in defendant's favor because the evidence that Treadwell purchased and used the asbestos-containing insulation at the Bowline facility during the relevant time period, together with plaintiff's testimony, is sufficient to defeat defendant's motion. See Berkowitz v A.C. & S., Inc., 288 AD2d 148 [1st Dept 2001].

Therefore, it is hereby

ORDERED that defendant's motion for summary judgment is granted as to any alleged exposure which may have occurred during plaintiff's course of employment with Treadwell and otherwise is denied as to all other time periods at issue, and it is further

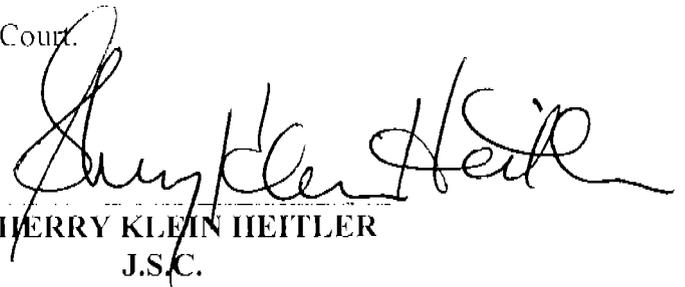
ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

DATED:

October 27, 2010

FILED



SHERRY KLEIN HEITLER
J.S.C.

NOV 05 2010

NEW YORK 5
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