

Proctor v Alcoa, Inc.
2014 NY Slip Op 30885(U)
March 31, 2014
Sup Ct, New York County
Docket Number: 190040/13
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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JAMES AUGUSTUS PROCTOR and
JOY C. PROCTOR,

Index No. 190040/13
Motion Seq. 006

Plaintiffs,

-against-

DECISION & ORDER

ALCOA, INC., *et al*,

Defendants.

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SHERRY KLEIN HEITLER, J:

In this asbestos personal injury action, defendant Momentive Specialty Chemicals, Inc., sued herein as Borden Chemical Inc. (“Momentive”), moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that there is no evidence to show that plaintiff James Augustus Proctor was exposed to asbestos from a Borden product.

Mr. Proctor was diagnosed with mesothelioma in January of 2013. He commenced this action on February 7, 2013¹ and was deposed for five days in March and April of 2013.² Relevant to this motion, Mr. Proctor testified that from approximately 1964 through the early 1970s he was a sheet metal worker responsible for the installation of HVAC duct work. With respect to the defendant, plaintiffs alleges that Mr. Proctor was exposed to asbestos from the application of Duro-Dyne, an asbestos-containing duct sealer manufactured by Borden.³

¹ His case is included in this court’s October 2013 *In-Extremis* Trial Group.
² Portions of Mr. Proctor’s deposition transcripts are submitted as plaintiff’s exhibit 1 (“Deposition”).
³ See Duro-Dyne’s 2004 NYCAL Interrogatory Responses, plaintiff’s exhibit 2, attachment 1, p. 34.

Summary judgment is a drastic remedy that should be awarded only if the defendant produces evidence which *prima facie* resolves all material issues of fact in its favor and which demonstrates its entitlement to judgment as a matter of law. *See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Under the circumstances of this case the defendant's motion must be denied. In this regard, the moving papers merely consist of an attorney's affirmation which states in a conclusory manner that Mr. Proctor never testified that he was exposed to asbestos from a Borden product. However, this court's review of Mr. Proctor's deposition transcript reveals that he did in fact testify that he was exposed to a Borden product (Duro-Dyne) which indisputably contained asbestos (Deposition pp. 159, 425, 427):

Q. You mentioned that you had to replace -- you were replacing duct work. Correct?

A. Right.

Q. You mentioned DuraDyne?

A. Right.

Q. Do you believe that the process -- that process exposed you to asbestos?

A. Right.

Q. From what product?

A. From the DuraDyne product, pipe joint fitting. We would get it on our hands, on our clothes.

* * * *

Q. Is there any way for you to tell me how much Duro Dyne sealer you used at the department store?

A. It's a large amount. I mean, I could say 50 cans, 100 cans, but it was a lot.

* * * *

Q. Do you believe that the Duro Dyne sealer exposed you to asbestos?

A. Yes.

Q. How so?

- A. When we put it on the duct work, it would fall on our hands, the dust from brushing it on, it would be floating in the air. Generally, that was it.

Such testimony is sufficient to raise an issue of fact with respect to the defendant's liability.

See Josephson v Crane Club, Inc., 264 AD2d 359, 360 (1st Dept 1999) (quoting *Butler v Helmsley Spear Inc.*, 198 AD2d 131, 132) (the deposition testimony of a plaintiff submitted in opposition to a summary judgment motion "constitutes evidence in admissible form by someone with personal knowledge of the facts . . ."); *see also Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995) (to successfully oppose a summary judgment motion in an asbestos personal injury case the plaintiff need only show facts and conditions from which the defendant's liability may be reasonably inferred).

For the first time in reply the defendant submits an affidavit from industrial hygienist Dr. Dennis Paustenbach who essentially opines that Duro-Dyne could not have contributed to Mr. Proctor's injuries.⁴ However, it would be improper for this court to consider Dr. Paustenbach's affidavit for the purpose of establishing the defendant's entitlement to summary judgment, *see Batista v Santiago*, 25 AD3d 326, 326 (1st Dept 2006), especially where, as here, plaintiff has had "neither the obligation nor opportunity to respond . . ." *Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 (1st Dept 1993).

Plaintiff opposes the motion as premature on the ground that the defendant has not provided basic discovery in this matter. The defendant responds that plaintiff improperly served

⁴ Specifically, Dr. Paustenbach states that "any exposure that Mr. Proctor may have had to chrysotile asbestos from a Borden Chemical Product (if any occurred at all) would not have been part of the subset of inhaled fibers that caused his mesothelioma." He continues that "any such exposure would have been negligible (if any occurred at all) and indistinguishable from general background exposures to chrysotile asbestos that are not known to be sufficient to induce mesothelioma. There would be no risk associated with the exposures from Borden Chemical products." Paustenbach Affidavit ¶¶ 39-40.

its discovery requests on the defendant's prior counsel. To the extent these issues have not been resolved the parties are directed to immediately contact the Special Master.

Accordingly, it is hereby

ORDERED that Borden Chemical, Inc.'s motion for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: 3.31.14



SHERRY KLEIN HEITLER
J.S.C.