Bardone v AO Smith Water Prods. Co.
2015 NY Slip Op 30914(U)
May 14, 2015
Supreme Court, State of New York
Docket Number: 190134/2014
Judge: Peter H. Moulton
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SUPREME COURT OF THE STATE OF NEW YORK : Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK

----------X Index 190134/2014

IN RE NEW YORK CITY ASBESTOS LITIGATION

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BRUCE J. BARDONE and KATHERINE BARDONE

Plaintiffs,

-against-

AO SMITH WATER PRODUCTS CO.,. et al.,

Defendant(s).

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PETER H. MOULTON, J.:

Plaintiff Bruce J. Bardone ("plaintiff") was diagnosed with lung cancer in March of 2014. His disease, he claims, is connected to his asbestos exposure in the 1960s and 1970s while working as an apprentice electrician and journeyman at various work sites throughout New York City. At those sites, plaintiff claims he was exposed to asbestos dust from floor tiles that were regularly being cut, sawed, and installed in his presence. Defendant BF Goodrich ("defendant" or "Goodrich") is alleged to have manufactured, sold, and distributed asbestos-containing floor tiles used at the various job sites plaintiff worked at during the relevant time period. It is undisputed that up until 1963, Goodrich sold asbestos-containing vinyl tiles (*see* Taffi Aff. at ¶ 4). Goodrich moves, pursuant to CPLR § 3212, for summary judgment dismissing plaintiff's complaint and all claims and cross claims against it.

Arguments

Goodrich contends that plaintiff has not shown that he specifically came into contact with

asbestos-containing floor tiles that Goodrich manufactured and sold. Goodrich alleges that during his deposition, plaintiff could not recall any words or accompanying information associated with its tile packaging other than the name "Goodrich." As Goodrich manufactured and sold both asbestos and non-asbestos floor tile until late 1963, defendant asserts that it is equally likely that the floor tile plaintiff came into contact with did not contain asbestos.[1] Defendant also argues that plaintiff's testimony concerning his alleged exposure is largely inadmissible and compromised by his mistaken belief. For instance, defendant states that plaintiff's testimony concerning his work around Goodrich asbestos tiles in the early 1970s is unreliable given the fact that Goodrich stopped manufacturing such tiles in 1963. Therefore, defendant argues that plaintiff's testimony is insufficient to create genuine issue of material fact to defeat summary judgment.

Plaintiff opposes the motion, claiming that Goodrich has failed to meet its prima facie burden of proving that there is no genuine issue of fact as to whether plaintiff was exposed to asbestos-containing floor tile manufactured, sold, and distributed by Goodrich. Plaintiff points to his own deposition testimony, arguing that such testimony proffers abundant evidence showing that triable issues of fact exist as to whether plaintiff was exposed to asbestos-containing floor tile manufactured, sold, and distributed by Goodrich. At his deposition plaintiff testified that from 1962-1979, he worked as an apprentice and a journeyman electrician, and was exposed to asbestos at numerous construction sites (*see* Bardone Deposition Transcript, Ex.2, Plaintiff's Opposition, at pgs. 31-36, 79-80, 102, 105, 586-598). While he performed his work at those various sites, plaintiff

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[1] At oral argument on May 12, 2015, however, Goodrich conceded that it was not arguing that issues of fact remain as to plaintiff's alleged 1962 asbestos exposure from Goodrich tiles given that such tiles were indisputably on the market in 1962.

testified that other tradespeople were present, including tradesman who installed Goodrich floor tile (*id.*). He claimed that those tradesmen oftentimes used knives and saws to cut tiles to size, creating visible asbestos dust (*id.* at pgs. 1321-1324). Plaintiff further recalled that he was exposed to asbestos from Goodrich floor tile when he had to drill into the tiles to install electrical components (*id.* at pgs. 604-606). Indeed, plaintiff's deposition transcript contains the following passage:

> Q. You testified that you were present at numerous locations when floor tile was installed. Do you recall that?
>
> A. Yes.
>
> Q. You testified that you observed BF Goodrich and Goodyear floor tile being installed?
>
> A. That's correct.
>
> ...
>
> Q. Can you describe the way the tile was?
>
> A. They put a tar down and an adhesive of some sort and let it dry for at least a couple of hours and then they would start laying the tiles.
>
> Q. How did they lay the tiles?
>
> A. One by one. There were tile layers on their knees laying the tiles one by one.
>
> Q. What tools, if any, did the tile layers use?
>
> A. They used knives to cut it. They had small saws in certain circumstances. They were sawing them out if it was installed already. To bend it they had a BemzOmatic torch, they would heat it up and bend it. What else? That would be about it.
>
> Q. When the tile layers used the knives and

the saws to cut — what did they use the knife for?

A. To cut it.

Q. What did they use the saw for?

A. To cut it.

Q. When the tile layers used the knives and the saws to cut the BFGoodrich and Goodyear tile, were you present?

A. Yes.

Q. When they cut the BFGoodrich and Goodyear tiles with the knife and with the saw, what, if anything, did you observe?

A. Well, there was some residue from sawing especially.

Q. When you say residue, what do you mean?
A. You're sawing a material out of an occupied space so you're going to get -- the material is getting sawed out of what you're cutting.

Q. I understand that it's getting sawed, but I want to know what did you see when it was getting sawed?

A. The particles or sawdust. That's what they call sawdust.

Q. Did you breathe that dust?

A. Yes.

Q. Did breathing that dust cause you to be exposed to asbestos?

A. Yes.

(*id.* at 1321-1324; objections omitted).

Plaintiff argues that he was exposed to Goodrich tiles in 1962 and again in the 1970s. He specifically recalled working on Goodrich tile at single family homes, apartment buildings, and at John F. Kennedy International Airport ("JFK") (*id.* at 32-36). Contrary to defendant's contention that plaintiff simply recalled the name "Goodrich" on tile boxes, plaintiff argues that he testified that he knew that Goodrich tiles were asbestos-containing because of specific denotations on the boxes. Specifically, plaintiff testified as follows:

> Q. Do you know if the tiles specifically had to be asbestos, though?
>
> A. Yes.
>
> Q. How do you know that?
>
> A. Well, working on the job and knowing the specifications.
>
> Q. You knew the specifications for the flooring?
>
> A. You knew the specifications for everything.
>
> Q. Did you know the specifications for the flooring at the sewer plant?
>
> A. Yes.
>
> Q. And how did you know to do that?
>
> A. I just told you, by the specifications, working with the people that were there.
>
> Q. So, did you hear it from somebody that was working there?
>
> A. No. I read it on boxes, I believe. It was a known fact.
>
> Q. Can you describe the boxes?
>
> A. 12-by-12.

> Q. So, the boxes are 12-by-12?
>
> A. Yes, 12-by-12 square, like a cube.
>
> Q. You said the floor tiles were also 12-by-12?
>
> A. That's how they came delivered, the floor tiles in there. Any bigger, you couldn't lift it.
>
> Q. Do you remember the specific packaging of any of these boxes that you saw at the sewer plant?
>
> A. I believe B.F. Goodrich, Goodyear. I believe some of the names that you mentioned, but I'm not —you know, it was a thousand jobs and a thousand floors. So, you know, it's a lot of tiles.
>
> (*id.* at 596-598; objections omitted).

Plaintiff argues that throughout his deposition, he emphasized that the packaging of the boxes he observed was identical from site-to-site and had the name "Goodrich" prominently displayed. In fact, plaintiff states that he specifically recalled Goodrich boxes at a 12th Street Sewer plant, and that those boxes indicated that the tiles contained asbestos (*id.* at 596-598). Plaintiff further testified that he also saw identical Goodrich boxes at various other sites in New York City, including JFK (*id.* at 613-616). In sum, plaintiff argues that his testimony illustrates that the Goodrich tile he observed being laid throughout his career contained asbestos, thus precluding summary judgment.

Discussion

> CPLR § 3212 (b) provides, in relevant part:
>
> A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of

> any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

Thus, a defendant moving for summary judgment must first establish its *prima facie* entitlement to judgment as a matter of law by demonstrating the absence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Therefore, summary judgment in defendant's favor is denied when defendant fails "to unequivocally establish that its product could not have contributed to the causation of plaintiff's injury" (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept. 1995]; *Matter of New York City Asbestos Litig.* (*Berensmann*), 122 AD3d 520 [1st Dept. 2014]). An affidavit from a corporate representative which is "conclusory and without specific factual basis" does not meet the burden (*Matter of New York City Asbestos Litig.* (*DiSalvo*), 123 AD3d 498 [1st Dept. 2014]). By contrast, in *Root v Eastern Refractories, Co.* (13 AD3d 1187 [1st Dept. 2004]), an affidavit from a corporate employee who worked for the defendant since 1948, which stated that the company did not supply any asbestos-containing products to Syracuse University during the relevant time, is sufficient to meet the burden of proof.

It is only after the burden of proof is met that plaintiff must then show "facts and conditions from which the defendant's liability may be reasonably inferred" (*Reid*, 212 AD2d at 463, *supra*). The plaintiff cannot, however, rely on conjecture or speculation (*see Roimesher v Colgate Scaffolding & Equip. Corp.*, 77 AD3d 425, 426 [1st Dept. 2010]). Nor can a plaintiff rely upon the affirmation of counsel to fill in a crucial gap regarding how the plaintiff was exposed (*see Matter of Asbestos Litigation* (*Comeau*), 216 AD2d 79 [1st Dept. 1995] [counsel stated that the deceased plaintiff metal lather must "necessarily [have] scraped . . . W.R. Grace asbestos containing fireproofing . . . in order to perform his job"]). To defeat summary judgment, a plaintiff's evidence

must create a reasonable inference that plaintiff was exposed to a specific defendant's product (*see Comeau v. W.R. Grace & Co.-Conn*), 216 AD2d 79 [1st Dept. 1995]).

In addition, issues of credibility are for the jury (*Cochrane v Owens-Corning Fiberglass Corp.*, 219 AD2d 557, 559-60). Where "[t]he deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaint . . . [t]he assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier fact, and any apparent discrepancy between the testimony and the evidence of the record goes only to the weight and not the admissibility of the testimony" (*Dollas v. Grace & Co.*, 225 AD2d 319, 321 [1st Dept. 1996] [internal citations omitted]). This is particularly true in asbestos cases, like that in *Dollas*, where the testimony presented is often proffered by witnesses attempting to recall remote events that are years and perhaps even decades removed from the present. Furthermore, it is well-settled that in personal injury litigation, a plaintiff is not required to show the precise cause of his damages, but only facts and conditions from which a defendant's liability can be reasonably inferred (*Reid, supra*; *Matter of New York City Asbestos Litg.* (*Brooklyn Nav. Shipyard Cases*), 188 AD2d 214, 225 [1st. Dept], *affd* 82 NY2d 821 [1993]).

Goodrich has failed to establish a prima facie case. In support of its motion, Goodrich concedes that it made asbestos-containing floor tile until late 1963, but states that since it also made non-asbestos containing floor tile, it is equally likely that the tiles plaintiff was exposed to were non-asbestos containing. The conclusory affidavit of Joan M. Taffi, a Goodrich Corporation employee, does not contain any specificity with respect to the number of vinyl asbestos floor tiles that Goodrich manufactured prior to 1964. In fact, Goodrich's use of the affidavit to buttress its claims with respect to the use of non-asbestos tiles contradicts several documents in the record before the court. Indeed, the record here shows that Goodrich manufactured and sold three types of flooring: vinyl

asbestos tile, asphalt tile and rubber tile (*see* Bratenas Deposition, Ex. 3, Plaintiff's Opposition, at pgs.59-60). Admittedly, Goodrich states that both its vinyl asbestos tile and asphalt tile contained asbestos (*id.*; Goodrich Liability Interrogatories, Ex. 4, Plaintiff's Opposition, at pg. 12). In fact, only its rubber tile was asbestos free. Thus, contrary to defendant's claims, two out of the three tile types that it manufactured contained asbestos, which is sufficient to raise an issue of fact as to whether plaintiff was exposed to asbestos-containing tiles.

Additionally, Goodrich fails to address its continuing operations after it exited the floor tile business in late 1963. The Taffi affidavit proffered in support of Goodrich's motion does not mention what happened to Goodrich's tile inventory after it ceased production. It is possible that while Goodrich did not manufacture tile after 1963, it may have sold its residual stock of tiles after that period of time. Moreover, Goodrich's customers – including hardware stores and wholesalers – may have continued to sell Goodrich floor tile after 1963. As such, defendant has "failed to proffer any evidence that its asbestos products were not being used residually in the marketplace by various companies...after it ceased manufacturing and selling such products" (*see Taylor v. A.C. & S., Inc.*, 306 AD2d 202, 202-03 [1st Dept. 2003][Appellate Division reversed grant of summary judgment in defendant's favor based on defendant's argument that it had discontinued production of its asbestos-containing products due to defendant's failure to account for whether or not its products could have residually been used in the marketplace in the 1980s and 1990s after it ceased production in 1977]; *see also Matter of New York City Asbestos Litig. (Berensmann)*, 122 AD3d 520 [1st Dept. 2014][court held that although record showed that defendant began to manufacture and ship asbestos-free product around the time when plaintiff purchased defendant's product, issues of fact remained as to whether asbestos-free product was available in Manhattan where plaintiff purchased product]).

Goodrich's argument that plaintiff's deposition testimony helps establish its prima facie case rests on a contorted interpretation of the testimony. Specifically, Goodrich's Memorandum of Law states as follows:

> Other than the name "Goodrich," plaintiff could not recall any words or information contained on the tile packaging (*see* Goodrich Memorandum of Law, at pg. 5)

This statement is a mischaracterization of plaintiff's testimony. As illustrated by the passages from plaintiff's deposition referenced above, in addition to identifying the "Goodrich" name on tile boxes, plaintiff testified that he recalled seeing specifications and other markings that indicated that Goodrich boxes were asbestos-containing. Goodrich may take exception with the credibility of plaintiff's testimony on that point, however, plaintiff is entitled to have his deposition testimony viewed in a light most favorable to him (*see Vega*, 18 NY3d at 503). Ultimately, his credibility will be evaluated by a jury (*see Dollas*, 225 AD2d at 321). As such, defendant's attempts to minimize plaintiff's testimony are unpersuasive.

Even if defendant had met its initial burden here, plaintiff's deposition testimony raises issues of fact with respect to whether his asbestos exposure stemmed from Goodrich floor tiles. Plaintiff states that he personally worked with and around tradespeople who regularly cut, sawed, and installed floor tiles at various job sites. He also recalls seeing the Goodrich name on tile boxes, as well as markings indicating that such boxes contained asbestos tiles. Plaintiff also states that he repeatedly breathed dust created when he worked in the presence of floor tiles manufactured, sold, and distributed by Goodrich. Defendant does not challenge this testimony in any material capacity. For instance, defendant argues that plaintiff could not have used Goodrich asbestos tiles in the early 1970s – after its manufacturing of those tiles ceased – but fails to address whether the tiles remained on the market in residual use. Moreover, defendant notably does not challenge plaintiff's testimony

regarding his exposure to Goodrich tiles prior to the time when Goodrich stopped manufacturing such tiles in 1963. In fact, defendant conceded that plaintiff's 1962 exposure could have possibly stemmed from Goodrich asbestos tiles at oral argument. Thus plaintiff's testimony tenders sufficient facts from which defendant's liability could be reasonably inferred.

For the first time in reply, defendant attempts to diminish the significance of plaintiff's testimony by stating that it would be inadmissible at trial due to plaintiff's counsel's use of leading questions during the course of his deposition. At oral argument, defendant further added that plaintiff's testimony should be discounted due to its reliance on hearsay. The specific hearsay that defendant alleges pertains to plaintiff's identification of Goodrich boxes as being asbestos-containing based on his observations of boxes made by other manufacturers as well as his review of specifications for tile products during the relevant period of his exposure. Since the leading questions contention was raised for the first time in reply and the hearsay objection at oral argument, it would be inappropriate for the court to consider both. Nevertheless, even if the court were to entertain the arguments raised, both lack merit. Although several questions posed by plaintiff's counsel during plaintiff's deposition were objected to, many of those questions were not leading, as defense counsel claims. Additionally, to the extent that some were leading, most testimony elicited by plaintiff's counsel was not based on leading questions.

With respect to defendant's hearsay argument, defendant's counsel does not point to any specific testimony in plaintiff's deposition transcript that he considers to be hearsay. Moreover, he does not address whether he made any objections on hearsay grounds during the course of plaintiff's deposition. The failure to contemporaneously make such hearsay objections can result in their waiver (*see People v. Howell*, 44 AD3d 686 [2d Dept. 2007]). Even if the court were to deem plaintiff's unspecified testimony to be hearsay that falls outside a recognized exception, plaintiff has

presented sufficient evidence here, not all of which is hearsay (i.e. plaintiff's statements that he saw the words "asbestos" written on Goodrich boxes), to warrant the denial of defendant's motion (*see Matter of New York City Asbestos Litig. (Oken)*, 7 AD3d 285, 286 [1st Dept. 2004]).

It is hereby

ORDERED that defendant's motion is denied.

This constitutes the Decision and Order of the Court.

Dated: May 14, 2015

J.S.C.
HON. PETER H. MOULTON
J.S.C.