Bardone v A.O. Smith Water Prods. Co.
2015 NY Slip Op 31170(U)
July 8, 2015
Supreme Court, New York County
Docket Number: 190134/14
Judge: Peter H. Moulton
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50

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BRUCE J. BARDONE and KATHERINE BARDONE

Index No. 190134/14
Motion Seq. 005

Plaintiffs,

DECISION & ORDER

- against -

A.O. SMITH WATER PRODUCTS CO., et al.,

Defendants.

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PETER H. MOULTON, J.:

Plaintiff Bruce J. Bardone ("plaintiff") worked personally, and in the presence of others, as an electrician at various job sites throughout New York City from the early 1960s through the 1970s. While working at those job sites, plaintiff alleges that he was exposed to asbestos-containing floor tiles manufactured, sold, and distributed by Defendant Goodyear Tire & Rubber Company ("Goodyear" or "Defendant"). On March 25, 2014, plaintiff was diagnosed with lung cancer that he attributes, in part, to his alleged asbestos-exposure to Goodyear floor tiles.

Defendant moves, pursuant to CPLR § 3212, for summary judgment dismissing the complaint as well as all cross-claims asserted against it in this action on the grounds that there is no evidence that plaintiff was actually exposed to asbestos fibers released from a product manufactured, sold, distributed, and/or installed by Goodyear. Specifically, Goodyear alleges that the only direct exposure plaintiff had to its floor tiles stemmed from his work drilling holes on tiles manufactured

by Goodyear and other manufacturers. Additionally, defendant states that when asked to identify the manufacturer of the floor tiles at his job sites, plaintiff stated that he could not identify the manufacturer of a specific set of floor tiles unless he was reading the box or packaging in which a particular floor tile had been packaged and sold. Defendant further points out that when asked why he believed that some of the floor tiles he had encountered at some of the sites he worked at were manufactured by Goodyear, plaintiff said it was because he saw boxes bearing the name "Goodyear" along with the word "asbestos." Goodyear claims that it never made such boxes bearing the word "asbestos." It also claims that plaintiff's descriptions of the physical properties of the floor tiles he encountered (hard and inflexible), do not comport with the fact that Goodyear manufactured several floor tiles that were flexible and often sold in rolls. Finally, Goodyear claims that plaintiff's physical description of the tiles he encountered correlates closest to Goodyear's "Deluxe On Grade" floor tiles, which it claims were, and have always been, asbestos-free.

In opposition, plaintiff asserts that defendant has failed to meet its burden. Plaintiff further argues that his testimony raises triable issues of fact with respect to Goodyear tiles contributing to his asbestos exposure. In support of that claim, plaintiff notes that he positively identified seeing and being in direct contact with Goodyear tiles originating from boxes containing the word "asbestos." He further argues that Goodyear does not dispute that its tiles were at the various job sites plaintiff described. As noted in plaintiff's opposition papers, Goodyear has submitted no affirmative documentation in support of its claim that its boxes never bore the word "asbestos." Plaintiff further argues that Goodyear has submitted no documentation proving that all the tiles that it manufactured and sold in the 1970s were asbestos-free. The affidavit of Joseph Kemmerling, plaintiff argues, is insufficient to establish a prima facie case, as Kemmerling did not join Goodyear

until 1968 and submitted no documentation in support of his opinions. Plaintiff also argues that Kemmerling's testimony is sharply contradicted by the deposition testimony of Goodyear corporate representative Russell Holmes. Finally, plaintiff asserts that all Goodyear tiles, even those not intentionally manufactured with asbestos, were contaminated with tremolite asbestos fiber. As such, plaintiff states that Goodyear cannot sustain its burden and make a prima facie showing. Even if managed to do so, plaintiff submits that issues of fact exist for a jury to decide.

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]).

Here, defendant has failed to meet its initial burden. The affidavit of Joseph Kemmerling proffered in support of the motion points to no document, brochure or other source of information categorically refuting plaintiff's claims with respect to the descriptions of the tiles he encountered. Additionally, Kemmerling admits to only reviewing "certain portions" of plaintiff's deposition testimony prior to disseminating his own findings. And while Kemmerling avers that "asbestos was not an ingredient in Goodyear vinyl flooring" from 1969 to 1979, he does not dispute that asbestos-containing Goodyear tile existed prior to that time, a period in which plaintiff claims to have worked with such tiles. Additionally, the deposition testimony of Russell Holmes, the aforementioned former Goodyear employee, appears to state that HDH tile, a particular Goodyear tile known to have contained asbestos, was manufactured until at least 1975, also within the relevant time frame of plaintiff's work history. As such, Goodyear appears to concede, at a minimum, that tiles manufactured by it contained asbestos during at least part of plaintiff's relevant work history. That finding is undisturbed by defendant's additional submission of the affidavit of Edmund Lutz, a former Goodyear marketing and sales representative for the first time in its Reply Memorandum.[1] Lutz's affidavit stated that "Goodyear floor tile was never manufactured or sold in packages that bore

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[1]The original Edmund Lutz affidavit submitted in Defendant's Reply Memorandum was an incomplete document. At oral argument, the court allowed defendant to substitute it with a complete version.

the word 'asbestos.'" While that statement is at odds with plaintiff's account, defendant cannot rule out the possibility, for instance, that the word "asbestos" was placed on the boxes at plaintiff's various job sites after the boxes had already been marketed or sold. The undisputed presence of defendant's tiles at plaintiff's various job sites sufficiently shows that defendant cannot meet its burden of establishing a prima facie case.

Moreover, even if defendant had met its burden, issues of fact exist for trial. As is relevant to the instant motion, at his deposition plaintiff testified that he was exposed to asbestos-containing dust from Goodyear brand tiles that were being cut and installed at numerous job sites throughout the 1960s and 1970s. Specifically he testified that while working as an electrician, he was exposed to asbestos from electrical panels, boilers, HVAC equipment, sheetrock, and motors (*see* Bruce J. Bardone Deposition Transcript, Ex. 2, Plaintiff's Affirmation in Opposition, p. 34, 44-45). At some of those sites, he recalled being exposed to asbestos dust from floor tiles that were being cut and installed by laborers in his presence (*id.* at p. 595-598; p. 31-36, p.79-80, and p. 1321-1324). Plaintiff further recalled being exposed to asbestos from Goodyear floor tiles that he drilled into in order to install electrical components (*id.* at p. 604-606). He was able to identify the tile that he drilled into as Goodyear tile based on his observation of empty boxes of Goodyear brand tile in the vicinity of his work space (*id.* at p. 596-598). Plaintiff further expressed familiarity with the characteristics of Goodyear floor tiles (*id.* at p. 596-597).

The court notes Goodyear's exception to many of plaintiff's descriptions and characterizations. For instance, Goodyear takes exception to plaintiff characterizing the tiles that he encountered as hard and inflexible when it describes its floor tiles as being flexible and often sold in rolls. Additionally, Goodyear repeatedly claims that its floor tile boxes never contained the word

"asbestos." The weight to afford plaintiff's testimony when compared to that of Goodyear, is not for this court to determine. Any discrepancy here between plaintiff's testimony and that of defendant's witnesses and records at trial is for a jury to decide. Also, as the non-moving party on a motion for summary judgment, 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).

It is worth noting here that defendant's reliance on *Cawein v. Flintkote Company,* 203 AD2d 105, 105-06 [1st Dept. 1994] as to the issue of product identification is misplaced as the *Cawein* case does not comport with the more pervasively cited First Department precedent set in cases such as *Reid* and the *Brooklyn Nav. Shipyard Cases*, as noted in this decision. *Cawein* is also factually distinguishable from the instant case. *Cawein* involved a floor tile laborer who worked from 1959 to 1985 in floor tile factories. Though Cawein could not identify defendant Flintkote's product as the source of his asbestos exposure, a co-worker submitted an affidavit stating that he had seen an unopened bag of Flintkote's product at Cawein's factory without reference to a specific date or range of dates. Flintkote also was able to assert that it had never supplied asbestos to the plant Cawein worked at. Here, unlike in *Cawein*, plaintiff was able to assert the specific range of dates during which he would have been exposed to defendant's tiles. Additionally, defendant does not dispute the presence of its tiles at the job sites that plaintiff worked at. Most notably, here plaintiff has not only submitted testimony with respect to unopened tile boxes, but affirmatively describes his recollection with respect to the contents of those boxes. Those facts were not present in *Cawein*. As such, the holding in *Cawein* bears no relevance to the court's decision here.

Based on the forgoing, the court finds that sufficient evidence has been proffered to defeat

defendant's motion. It is hereby

ORDERED that defendant's motion is denied in its entirety.

This Constitutes the Decision and Order of the Court.

DATED: 7/8/15

PETER H. MOULTON, J.S.C.