

Murphy-Clagett v A.O. Smith Water Prods.
2017 NY Slip Op 32311(U)
October 23, 2017
Supreme Court, New York County
Docket Number: 190311/2015
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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IN RE: NEW YORK CITY
ASBESTOS LITIGATION
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This Document Relates to:

MARY MURPHY-CLAGETT, as Temporary
Administrator for the Estate of
PIETRO MACALUSO,

Index No. 190311/2015

Plaintiff

- against -

DECISION AND ORDER

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

Defendants
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LUCY BILLINGS, J.S.C.:

For the reasons more fully explained on the record October 23, 2017, the court denies defendant A.O. Smith Water Products Company's motion for summary judgment dismissing all claims against A.O. Smith Water Products. C.P.L.R. § 3212(b). First, it has failed to establish that the decedent Pietro Macaluso was not exposed to asbestos by breathing dust from the insulation and rope gaskets on boilers manufactured by A.O. Smith Water Products while he worked for Bruno Frustaci in Kings County during 1972-82. Berensmann v. 3M Co., 122 A.D.3d 520, 521 (1st Dep't 2014). When engaged in work for Frustaci, Macaluso identified approximately 50 boilers that were covered by asbestos insulation, with gaskets that contained asbestos; that were manufactured by A.O. Smith Water Products; and that he removed from residences.

To establish that its boilers did not contain asbestos, A.O. Smith Water Products relies on the affidavit by its employee Bradley Plank, which the court may not consider. He demonstrates no personal knowledge of his employer's boilers more than a decade before his employment. Insofar as he relies on documents, his attestation to their contents is hearsay and "not an acceptable substitute" for the documents themselves, People v. Joseph, 86 N.Y.2d 565, 570 (1995), accompanied by their authentication and a foundation for their admissibility on personal knowledge. BP A.C. Corp. v. One Beacon Ins. Group, 8 N.Y.3d 708, 716 (2007); Williams v. Esor Realty Co., 117 A.D.3d 480, 480-81 (1st Dep't 2014); Cole v. Homes for the Homeless Inst., Inc., 93 A.D.3d 593, 594 (1st Dep't 2012); Mastroddi v. WDG Dutchess Assoc. Ltd. Partnership, 52 A.D.3d 341, 342 (1st Dep't 2008). See Shanmugam v. SCI Eng'g, P.C., 122 A.D.3d 437, 438 (1st Dep't 2014); Lapin v. Atlantic Realty Apts. Co., LLC, 48 A.D.3d 337, 338 (1st Dep't 2008)); Biondo v. World Comp Communications, 306 A.D.2d 212, 213 (1st Dep't 2003).

Moreover, in Plank's prior testimony presented by plaintiff, Plank admitted (1) that A.O. Smith Water Products has discontinued products and destroyed the documents relating to those products pursuant to a document retention policy and (2) that he did not know whether A.O. Smith Water Products' older products used asbestos. These admissions are particularly significant given Macaluso's exposure during 1972-82. In fact, A.O. Smith Water Products' verified responses to interrogatories

admit that residential boilers manufactured by A.O. Smith Water Products, like the boilers that Macaluso removed, used asbestos to insulate their components until approximately 1980. A.O. Smith Water Products presents no evidence, on the other hand, that A.O. Smith Water Products' boilers used insulation that did not contain asbestos during or before 1972-80.

Second, A.O. Smith Water Products has failed to establish that Macaluso's removal of its boilers by separating them into sections with a crowbar and sledgehammer to dismantle and then carry them out of the residences was not a reasonably foreseeable use of the boilers. Unlike the salvaging of valves as scrap metal in Hockler v. William Powell Co., 129 A.D.3d 463, 465 (1st Dep't 2015), it was foreseeable to A.O. Smith Water Products that its boilers would be removed from residences at the end of the boilers' useful life to install new boilers in the old boilers' place for continued heating. Although Plank attests, without personal knowledge of A.O. Smith Water Products' boilers during 1972-82, that it was unnecessary to break the boilers down into pieces, Plank was not in the residences to observe the spaces through which it was necessary to remove the boilers, and Macaluso, who was there, testified that it was necessary to break apart the boilers.

Finally, A.O. Smith Water Products has failed to meet its burden, upon its motion for summary judgment, to establish that Macaluso would not have heeded a warning regarding the hazards of exposure to asbestos when working near A.O. Smith Water Products'

boilers. A.O. Smith Water Products relies on Reis v. Volvo Cars of N. Am., Inc., 73 A.D.3d 420, 423 (1st Dep't 2010), where the plaintiff, in opposing the defendants' motion for summary judgment dismissing the claim of failure to warn about the absence of a starter interlock on their motor vehicle, did not rebut their evidence from his deposition that he did not consider it necessary to read the vehicle manual because he understood how the vehicle operated. Thus the defendants presented affirmative evidence that, had they provided a warning about the risks without the device, the plaintiff would not have heeded such a warning.

Here, no party inquired of Macaluso at his deposition about whether, had he been provided a warning about the risks of the products he worked with, he would have heeded them. Thus A.O. Smith Water Products is without any prima facie evidence of Macaluso's failure to heed a warning essential to this defense to plaintiff's claim of A.O. Smith's failure to warn about the risks of exposure to asbestos while working with its boilers. See Voss v. Netherlands Ins. Co., 22 N.Y.3d 728, 734 (2014); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005). Therefore A.O. Smith Water Products has failed to meet its prima facie burden, upon its motion for summary judgment, to establish any of its three grounds for dismissal. C.P.L.R. § 3212(b).

DATED: October 23, 2017



LUCY BILLINGS, J.S.C.

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