

Fahey v ABB Inc.

2018 NY Slip Op 31034(U)

May 18, 2018

Supreme Court, New York County

Docket Number: 190231/2015

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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ANNE MARIE FAHEY, Individually and as
Administrator of the Estate of THOMAS
J. FAHEY,

Index No. 190231/2015

Plaintiff

- against -

DECISION AND ORDER

ABB INC., et al.,

Defendants
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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for the deceased Thomas Fahey's exposure to asbestos beginning in 1980, from transite boards, fire stop bags, fire stop putties, and cloth insulation covering cables at his work sites where Western Electric Company employees also worked and where the company supplied these materials. Plaintiff claims that Fahey worked alongside Western Electric employees who worked with these materials and that he, too, worked with these materials. Defendant Alcatel Lucent USA, Inc., concedes that it is Western Electric's successor-in-interest for purposes of Alcatel Lucent's current motion for summary judgment dismissing the complaint and all cross-claims against Alcatel Lucent, C.P.L.R. § 3212(b), based on the absence of evidence that any product supplied by Western Electric contributed to the decedent's exposure.

II. ALCATEL LUCENT'S PRIMA FACIE DEFENSE

To demonstrate entitlement to summary judgment, Alcatel Lucent must show unequivocally that no products supplied by its predecessor contributed to the decedent's injury. Matter of New York City Asbestos Litig., 146 A.D.3d 700, 700 (1st Dep't 2017); Matter of New York City Asbestos Litig., 123 A.D.3d 498, 499 (1st Dep't 2014); Matter of New York City Asbestos Litig., 122 A.D.3d 520, 521 (1st Dep't 2014). Alcatel Lucent may not meet its burden by merely pointing to deficiencies in plaintiff's evidence. Ricci v. A.O. Smith Water Prods. Co., 143 A.D.3d 516, 516 (1st Dep't 2016); Koulermos v. A.O. Smith Water Prods., 137 A.D.3d 575, 576 (1st Dep't 2016). Alcatel Lucent meets its initial burden, however, by presenting the deposition testimony by Fahey that he did not know the manufacturer or supplier of the transite boards, fire stop bags, fire stop putties, or cloth insulation covering the cables that he observed at his work sites, nor know whether any of these materials contained asbestos. Matter of New York City Asbestos Litig., 216 A.D.2d 79, 80 (1st Dep't 1995); Diel v. Flintkote, 204 A.D.2d 53, 54 (1st Dep't 1994); Schiraldi v. U.S. Min. Prods., 194 A.D.2d 482, 483 (1st Dep't 1993).

III. PLAINTIFF'S REBUTTAL

The documentary evidence that plaintiff presents in opposition includes a specification from Bell Operating Company and correspondence from AT&T Bell Laboratories employees, but none of the documents themselves nor any other admissible

evidence shows any connection between those entities and Western Electric or Alcatel Lucent. Gogos v. Modell's Sporting Goods, Inc., 87 A.D.3d 248, 253-54 (1st Dep't 2011). Other documents that plaintiff presents also lack a foundation for their admissibility. A memorandum dated January 9, 1974, by failing to identify the author's employer, and a document entitled "Occupational Safety and Health," Aff. of James Kramer Ex. 5, at 1, by failing to identify either the author or the author's employer, also lack any connection to defendant.

Nevertheless, plaintiff does present at least one admissible document demonstrating the presence of asbestos at sites where Fahey worked. Zuckerman v. City of New York, 49 N.Y.2d 557, 563 (1980); Aur v. Manhattan Greenpoint Ltd., 132 A.D.3d 595, 595 (1st Dep't 2015); Sela v. Hammerson Fifth Ave., 277 A.D.2d 7, 7 (1st Dep't 2000). A Western Electric handbook dated January 21, 1965, instructs that green bags filled with asbestos be used as temporary closings for holes through which cables run. The handbook is admissible as an ancient document because it is more than 30 years old and not claimed to be fraudulent or invalid. Essig v. 5670 58 St. Holding Corp., 50 A.D.3d 948, 949 (2d Dep't 2008); Szalkowski v. Asbestospray Corp., 259 A.D.2d 867, 868 (3d Dep't 1999). Although Alcatel Lucent points out that the handbook predates Fahey's exposure to asbestos by 15 years, Fahey testified that he observed greenish or bluish bags provided by Western Electric. Considered with this testimony, the document shows that he may have been exposed to the bags filled with

asbestos that Western Electric supplied. Correspondence dated May 24, 1973, from Western Electric, reporting on the amount of asbestos dust generated from cutting cable hole covers containing asbestos in Western Electric's central offices is also admissible but, absent evidence that Fahey worked at Western Electric's central offices, does not show his exposure to asbestos from these covers.

IV. ALCATEL LUCENT'S REPLY

In reply, Alcatel Lucent presents correspondence dated September 20, 1974, from American Telephone and Telegraph Company (AT&T) referring to a Western Electric directive that steel plates were to replace wall and floor cable hole covers containing asbestos and that no further cutting of the current covers containing asbestos was to be undertaken. Alcatel Lucent, however, may not rely on evidence presented for the first time in reply when it is not responsive to plaintiff's opposition. Enjoy Realty Corp. v. Van Wagner Communications, LLC, 22 N.Y.3d 413, 422 (2013); Amtrust-NP SFR Venture, LLC v. Vazquez, 140 A.D.3d 541, 541-42 (1st Dep't 2016); Scafe v. Schindler El. Corp., 111 A.D.3d 556, 556 (1st Dep't 2013); Keneally v. 400 Fifth Realty LLC, 110 A.D.3d 624, 624 (1st Dep't 2013). See Young v. New York City Health & Hosps. Corp., 147 A.D.3d 509, 510 (1st Dep't 2017); 71 Clinton St. Apts. LLC v. 71 Clinton Inc., 114 A.D.3d 583, 584 (1st Dep't 2014).

In any event, since neither the correspondence nor the directive itself constitutes evidence of compliance with the

directive, and the directive in fact admits that current covers contained asbestos, the evidence does not establish Alcatel Lucent's nonliability for Fahey's exposure to asbestos. Matter of New York City Asbestos Litig., 122 A.D.3d at 521. To the contrary, Fahey testified that he observed no steel or other metal plates in place of the transite board covers containing asbestos in any telecommunications facility and observed Western Electric employees still cutting the transite board covers during the 1980s.

V. CONCLUSION

This document, plus plaintiff's evidence, raise factual issues regarding Fahey's exposure to asbestos both from the cable hole covers and from the fire stop bags supplied by Western Electric to his work sites, for which Alcatel Lucent now is liable. Tronlone v. Lac d'Amiante Du Quebec, 99 N.Y.2d 647, 647 (2003); Knee v. A.W. Chesterton Co., 52 A.D.3d 355, 356 (1st Dep't 2008); Petteys v. Georgia Pac. Corp., 214 A.D.2d 363, 363 (1st Dep't 1995). See Matter of New York County Asbestos Litig., 52 A.D.3d 300, 301 (1st Dep't 2008). Therefore the court denies the motion by defendant Alcatel Lucent USA, Inc., for summary judgment. C.P.L.R. § 3212(b).

DATED: May 18, 2018



LUCY BILLINGS, J.S.C.

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