

Capilets v Aerco Intl.
2018 NY Slip Op 31142(U)
May 30, 2018
Supreme Court, New York County
Docket Number: 190060/2016
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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CHRISTINE CAPILETS, as Executor of the
Estate of LOUIS J. PANETTA,

Plaintiff

Index No. 190060/2016

- against -

DECISION AND ORDER

AERCO INTERNATIONAL, et al.,

Defendants
-----X

LUCY BILLINGS, J.S.C.:

Plaintiff sues to recover damages for the decedent Louis Panetta's exposure to asbestos from 1972 to 2002 from work using Harris Corporation's printing presses. Defendant Harris Corporation moves for summary judgment dismissing the complaint and all cross-claims against Harris Corporation, C.P.L.R. § 3212(b), based on the absence of evidence that any Harris Corporation product contributed to the decedent's exposure.

I. HARRIS CORPORATION'S BURDEN

To establish entitlement to summary judgment, Harris Corporation must demonstrate unequivocally that its product did not contribute 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). Harris Corporation 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).

To support the motion, Harris Corporation relies first on Panetta's deposition testimony that the brake pads or linings and the cylinder blankets in Harris Corporation's motorized sheet-fed presses and web presses that Panetta worked directly with or next to caused his exposure to asbestos. At least for purposes of this motion, Harris Corporation does not dispute that Panetta operated and otherwise was exposed to its printing presses. Instead, it juxtaposes this testimony with George Karosas' affidavit that Harris Corporation's presses did not use mechanical brakes requiring brake pads or linings and used rubber blankets that did not contain asbestos.

Karosas attests that he "worked for Harris Corp. and through . . . committee activities and consulting work [has] been actively involved with the printing industry for thirty three years," Aff. of Gary Casimir Ex. F ¶ 2, and that he "worked for Harris for six years and . . . acquired extensive personal knowledge of the engineering, design, and manufacture of Harris products." Id. ¶ 3. Karosas also reviewed Harris Corporation's product manuals and observed the operation of Harris Corporation's printing presses.

Karosas' affidavit supporting Harris Corporation's motion fails to establish the period when Karosas was employed by Harris Corporation in relation to the period when Panetta worked with and next to Harris Corporation's equipment and when he was

exposed to asbestos. Unless Karosas' employment by Harris Corporation overlapped with Panetta's work with Harris Corporation's equipment and his exposure to asbestos, Karosas' observations regarding Harris Corporation's products do not establish his personal knowledge of the printing presses that Panetta worked with or near. In fact, in a "Supplemental Affidavit" subsequent to plaintiff's opposition, Karosas admits that he did not work for Harris Corporation until 1997, leaving him without personal knowledge of the 25 preceding years when Panetta worked with or next to Harris Corporation's printing presses.

Karosas does not explain how, simply by being "actively involved with the printing industry" during 1984-1997 he acquired knowledge of all Harris Corporation's printing presses in use during 1972-1997. Casimir Aff. Ex. F ¶ 2. Therefore Karosas' personal knowledge fails to support his conclusion that Harris Corporation's products during 1972-1997 did not require the components containing asbestos that plaintiff claims caused Panetta's exposure to asbestos. Matter of New York City Asbestos Litig., 27 N.Y.3d 765, 804-805 (2016); Oldham v. City of New York, 155 A.D.3d 477, 477 (1st Dep't 2017); DeCanio v. Principal Bldg. Servs. Inc., 115 A.D.3d 579, 580 (1st Dep't 2013); Rodriguez v. Board of Educ. of the City of N.Y., 107 A.D.3d 651, 652 (1st Dep't 2013). Absent this foundation, Karosas' affidavit does not satisfy Harris Corporation's initial burden upon its summary judgment motion. Matter of New York City Asbestos

Litig., 123 A.D.3d at 499; Gogos v. Modell's Sporting Goods, Inc., 87 A.D.3d 248, 254 (1st Dep't 2011).

Nor does Harris Corporation offer any other admissible evidence conclusively demonstrating that Harris Corporation's printing presses in use during 1972-1997 did not include components containing asbestos. See Spiconardi v. Macy's E., Inc., 83 A.D.3d 472, 473 (1st Dep't 2011); Lewis v. Baker, 1 A.D.3d 217, 217 (1st Dep't 2003). Karosas bases his conclusions regarding this period on his review of unspecified Harris Corporation manuals for its presses, but does not present the manuals. His recitation of their contents is hearsay and "not an acceptable substitute" for the documents themselves. People v. Joseph, 86 N.Y.2d 565, 570 (1995). See BP A.C. Corp. v. One Beacon Ins. Group, 8 N.Y.3d 708, 716 (2007); Shanmugam v. SCI Eng'g, P.C., 122 A.D.3d 437, 438 (1st Dep't 2014); Williams v. Esor Realty Co., 117 A.D.3d 480, 480-81 (1st Dep't 2014); Ainetchi v. 500 W. End LLC, 51 A.D.3d 513, 515 (1st Dep't 2008).

Finally, Karosas attests that Panetta could not have been exposed to any asbestos dust generated by Harris Corporation's printing presses, because they needed to be free from dust that caused imperfections in the printing. Panetta emphasized, however, that, to prevent this very result, it was necessary to keep the printing operations clean; that part of his job was to clean up any dust generated, in particular by wiping and removing dust from the cylinder blankets; and that this part of his job principally caused his exposure to asbestos.

II. HARRIS CORPORATION'S BELATED ATTEMPT TO MEET ITS BURDEN

In Karosas' Supplemental Affidavit subsequent to plaintiff's opposition, Karosas reiterates, based on features described in manuals that he still fails to present, that Harris Corporation's printing presses did not use mechanical brakes requiring asbestos pads or lining and used rubber blankets without asbestos. Subsequent to this affidavit, in reply, Harris Corporation does present manuals for its presses to show that it did not manufacture the presses Panetta described in his testimony as the presses that he worked with and next to and that exposed him to asbestos. These manuals, Exhibits G-L to the Reply Affirmation of Harris Corporation's attorney, see 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), are admissible as ancient documents because they are 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).

Accepting Karosas' attestations based on these manuals, however, Karosas admits that he reviewed the manuals that Harris Corporation's attorneys provided to him, which do not necessarily represent manuals from Harris Corporation's complete archives covering all its printing presses in use from 1972 to 2002 or even to 1997. This selective collection of manuals may explain why Karosas' attestations merely contradict Panetta's repeated

testimony of his observations. First, the boxes mechanics brought when replacing the presses' brake pads or linings bore the inscription, "Harris asbestos brakes." Casimir Aff. Ex. C, at 388-89, 423, 445. Second, Panetta also identified the cylinder blankets as manufactured by Harris Corporation by its label on the back of the blankets and as containing asbestos by the blankets' color, strength, and resistance to loosening. This testimony, based on his 30 years operating and working next to printing presses, demonstrates his use of Harris Corporation's asbestos products. Tronlone v. Lac d'Amiante Du Quebec, 99 N.Y.2d 647 (2003); Matter of New York City Asbestos Litig., 7 A.D.3d 285, 285 (1st Dep't 2004); Taylor v. A.C. & S., Inc., 306 A.D.2d 202, 202 (1st Dep't 2003); Taylor v. A.C. & S., Inc., 304 A.D.2d 403, 404 (1st Dep't 2003). While Panetta did testify regarding presses that Harris Corporation did not manufacture, he also testified that he used Harris Corporation presses extensively.

III. NO EXPERT OPINION IS INVOLVED OR NEEDED.

Harris Corporation urges that expert opinion is necessary to rebut Karosas' conclusions. Nothing to which Karosas attests requires any more expertise than personal experience with Harris Corporation's printing presses: whether they used mechanical brakes; used cylinder blankets composed of asbestos or only of rubber; and, through the use of these components, created dust. LaSalle Bank N.A. v. Nomura Asset Capital Corp., 72 A.D.3d 409, 411 (1st Dep't 2010); Hendricks v. Baksh, 46 A.D.3d 259, 260 (1st

Dep't 2007); Breen v. Laric Entertainment Corp., 2 A.D.3d 298, 300 (1st Dep't 2003); Toribio v. J.D. Posillico, Inc., 297 A.D.2d 216, 217 (1st Dep't 2002). See People v. Ignatyev, 147 A.D.3d 489, 490 (1st Dep't 2017); Boye v. Rubin & Bailin, LLP, 152 A.D.3d 1, 9 (1st Dep't 2017); Good Hill Master Fund L.P. v. Deutsche Bank AG, 146 A.D.3d 632, 637 (1st Dep't 2017).

Panetta's testimony demonstrates that he was entirely competent to attest to these facts. At best, Karosas' experience in the printing industry and the documentary support for his affidavits in comparison to Panetta's experience and first-hand observations bear on the probative value of Panetta's testimony, not the admissibility for purposes of defeating summary judgment. Matter of Moona C. (Charlotte K.), 107 A.D.3d 466, 467 (1st Dep't 2013); Board of Mgrs. of 195 Hudson St Condominium v. 195 Hudson St. Assoc., LLC, 63 A.D.3d 523, 524 (1st Dep't 2009); Moon Ok Kwon v. Martin, 19 A.D.3d 664, 664 (1st Dep't 2005).

IV. CONCLUSION

Since defendant Harris Corporation failed to meet its initial burden to establish that its product could not have contributed to Panetta's injury from asbestos and, even in reply, fails to eliminate factual issues regarding his exposure to its asbestos products, the court denies its motion for summary judgment. C.P.L.R. § 3212(b); Matter of New York City Asbestos

Litig., 123 A.D.3d at 499; Esteva v. City of New York, 30 A.D.3d 212, 213 (1st Dep't 2006).

DATED: May 30, 2018



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