

Gajda v A.O. Smith Water Prods. Co.
2018 NY Slip Op 32673(U)
October 18, 2018
Supreme Court, New York County
Docket Number: 190343/2016
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
*Justice*PART 13IN RE: NEW YORK CITY ASBESTOS LITIGATIONROBERT F. GAJDA and PATRICE GAJDA,
Plaintiff(s),INDEX NO. 190343/2016MOTION DATE 10/10/2018

- against -

MOTION SEQ. NO. 002

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

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to 5 were read on Cleaver-Brooks, Inc.'s motion for summary judgment:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED1- 2

Answering Affidavits — Exhibits _____

3-4

Replying Affidavits _____

5Cross-Motion: ☐ Yes ☒ No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Cleaver-Brooks, Inc.'s ("Cleaver-Brooks") motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' complaint and all cross-claims against it is granted. The Complaint and all cross-claims against Defendant Cleaver-Brooks are dismissed.

Plaintiff, Robert Gajda, diagnosed with lung cancer on October 25, 2016 (Opposition Papers Exh. A), alleges that his disease is due to asbestos exposure (Moving Papers Exh. A). During his examination before trial he testified that he was exposed to asbestos in a variety of ways when he was a boiler technician for the United States Navy from 1973-1981, a helper and fireman for Kingsboro Psychiatric Hospital from 1982-1983, and from 1984-1985 (Gajda Dep. at 57-79, 84-87, 89-91, 99-101, 109-114, 119-126, 136). Plaintiffs commenced this action on November 10, 2016 to recover for injuries resulting from Mr. Gajda's asbestos exposure.

Defendant Cleaver-Brooks now moves for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' Complaint and all cross-claims against it. Cleaver-Brooks contends that Mr. Gajda's deposition shows he was not exposed to asbestos from its boiler. Plaintiffs oppose the motion contending that Cleaver-Brooks failed to make a prima facie showing that its boiler could not have caused Mr. Gajda's lung cancer and, in any event, contend that issues of fact remain as to whether Mr. Gajda's exposure to asbestos from Cleaver-Brooks' boiler caused his lung cancer.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]); Martin v Briggs, 235 AD2d 192, 663 NYS2d 184 [1st Dept. 1997]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (Kornfeld v NRX Tech., Inc., 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Summary judgment is a drastic remedy that should only be granted if there are no triable issues of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13, 965 NE3d 240 [2012]). A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Torres v Indus. Container*, 305 AD2d 136, 760 NYS2d 128 [1st Dept. 2003]; see also *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 27 NYS3d 157 [1st Dept. 2016]). Regarding asbestos, a defendant must "make a prima facie showing that its product could not have contributed to the causation of Plaintiff's injury" (*Comeau v W. R. Grace & Co.- Conn. (In re N.Y.C. Asbestos Litig.)*, 216 AD2d 79, 628 NYS2d 72 [1st Dept. 1995]). The defendant must "unequivocally establish that its product could not have contributed to the causation of plaintiff's injury" for the court to grant summary judgment (*Matter of N.Y.C. Asbestos Litig.*, 122 AD3d 520, 997 NYS2d 381 [1st Dept. 2014]).

"Plaintiff is not required to show the precise causes of his damages, but only show facts and conditions from which defendant's liability may be reasonably inferred" (*Reid v Ga.- Pacific Corp.*, 212 AD2d 462, 622 NYS2d 946 [1st Dept. 1995]). Summary judgment must be denied when the plaintiff has "presented sufficient evidence, not all of which is hearsay, to warrant a trial" (*Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.)*, 7 AD3d 285, 776 NYS2d 253 [1st Dept. 2004]).

Cleaver-Brooks contends that summary judgment is warranted because Mr. Gadja's deposition shows he was not exposed to asbestos from its boiler.

Mr. Gajda testified that when he worked as a fireman at the Kingsboro Psychiatric Hospital from 1982-1983, an old boiler (the "number one boiler") was demolished and replaced with a Cleaver-Brooks boiler (Gajda Dep. at 131:11-19). He testified that, as a fireman, he "took readings ..., made sure the boiler operated within its parameters and ... ma[d]e sure it ran" (Id. at 130:14-131:19). He testified that the demolition of the "number one boiler" and the re-insulation of the building's piping system exposed him to asbestos (Id. at 291:16-292:11). Specifically, he testified:

Q. What aspect of your work as a fireman at Kingsboro Psychiatric Hospital do you feel caused you to come into contact with an asbestos-containing product or material or type of equipment?

A. During the time I was a fireman, they came and they did the demolition on the number one boiler, which I believe I mentioned earlier. It was down from a casualty. They cut into the steam lines, the waterlines. There was no abatement or containment set up around this boiler when they did this demolition, and then they replaced the boiler with a Cleaver Brooks packaged unit, which they slid in through the side of the building.

Q. Do you know the make or model of the old number one boiler that was being removed?

A. I don't recall, no.

Q. Did you play any part in the process of demolishing the existing or old number one boiler?

A. No, I did not.

Q. Did you play any part in the installation of the new boiler?

A. In the installation, no.

Q. Do you feel that you were - in any way came into contact with asbestos during the installation of the new boiler?

A. Possibly, yes.

Q. How so?

A. Because they tied the new boiler's systems into the old system and then they came and re-insulated.

Q. And what did you see these workers doing?

A. Can you be more specific?

Q. Sure. During the installation process of the new boiler what, if anything, did you see these workers doing in your presence with respect to the use of asbestos-containing products or materials?

A. Well, they had to re-insulate the main steam lines coming from the boiler to our main steam headers, re-insulate the feed waterlines. They had to actually rebuild the stack line coming from the exhaust side of the boiler going to the main stack, breeching. The breeching itself extended the length of the boiler room and the boiler's tied into it and then it went to a common stack.

Q. What type of insulation material do you recall seeing these workers use?

A. White block.

Q. Would you know the make or manufacturer of any of this block insulation material that you observed these workers using during the installation of the new boiler at Kingsboro Psychiatric Hospital?

A. Don't recall.

Q. Apart from their use of this white block insulation material during the installation of the new boiler, is there any other aspect of their work installing the new boiler in the boiler room at Kingsboro Psychiatric Hospital that you feel caused you to come into contact with an asbestos-containing product or material or piece of equipment?

A. Well, there was white dust everywhere and, as I said, there was no containment set up at all, either during the demolition or the insulation, so what was floating in the air, I couldn't say for sure.

Q. Do you know the source of this white dust?

A. I assumed it was coming down from the work they were doing.

Q. Is there any other aspect of their work installing the new or replacement boiler in the boiler room at Kingsboro Psychiatric Hospital that you feel caused you to come into contact with an asbestos-containing product, material or piece of equipment?

A. Other than what I just stated, no.

(Id. at 131:6-134:12)

On cross-examination, Mr. Gajda testified:

Q. Now, your exposure to asbestos would've been from the existing piping that was already there, not from the boiler itself; am I correct?

A. Yes.

(Id. 291:16-22) (Objection omitted).

On counsel's direct examination, Mr. Gajda testified to no exposure from the Cleaver-Brooks' boiler (Id. 405:6-408:15). Again, Mr. Gajda's testimony limits his exposure to the dust created during the re-insulation of the building's piping system (Id). On re-cross examination, Mr. Gajda's deposition shows he was not exposed to asbestos from Cleaver-Brooks' boiler (Id. at 447-449).

Mr. Gajda's deposition shows that he was not exposed to asbestos from Cleaver-Brooks' boiler. The mere presence of Cleaver-Brooks' boiler is insufficient to establish that Mr. Gajda was actually exposed to asbestos from Cleaver-Brooks' boiler (see *Cawein v Flintkote Co.*, 203 AD2d 105, 106 [1st Dept. 1994]). Plaintiffs must show that Mr. Gajda was actually exposed to asbestos from Cleaver-Brooks' boiler. Because Plaintiffs have not made that showing, Cleaver-Brooks has established its prima facie burden that its boiler "could not have contributed to the causation of Plaintiff's injury" (Comeau, *supra*).

Plaintiffs do not raise a genuine issue of fact to overcome Cleaver-Brooks' prima facie showing. Plaintiffs submit NY Department of Labor records showing that a Cleaver-Brooks boiler was present during the period Mr. Gajda was employed at Kingsboro Psychiatric Hospital (see Opposition Papers Exh. C). The presence of Cleaver-Brooks' boiler is not in dispute, and thus this does not raise an issue of fact to be resolved at trial.

Plaintiffs contend that Mr. Gajda's deposition has discrepancies that raise issues of fact to be resolved at trial. Plaintiffs further contend that any discrepancies go to the weight of Plaintiffs' testimony, not to its admissibility, and are improper for summary judgment. This argument, however, is unavailing. Mr. Gajda's deposition has no discrepancies. As stated above, Mr. Gajda consistently testified that he was exposed to asbestos during the demolition of the old boiler and the re-insulation of the building's piping system during the installation of Cleaver-Brooks' boiler, not from the boiler itself.

Plaintiffs' reliance on *James Baxley v. Anchor Packing Co., et al.*, Index No. 190419/2009 fails to raise a triable issue of fact (Opposition Papers Exh. D). In *Baxley*, the plaintiff testified he was exposed to asbestos from working on defendant's boiler (Id. at 4). He also testified that he repaired and maintained defendant's boiler and that he disturbed and installed insulation on the boiler (Id. at 5). Here, the facts are distinguishable. Mr. Gajda's deposition shows he did not work on the boiler during the installation. Rather, his work was limited to taking readings, making sure the boiler operated within its parameters, and making sure it ran (Gajda Dep. at 130:14-131:19). He did not testify that he maintained, disturbed, or installed insulation on the boiler; furthermore, the block insulation used was placed on the building's piping system, not in Cleaver-Brooks' boiler.

Thus, Plaintiffs do not show "facts and conditions from which [Cleaver-Brooks'] liability may be reasonably inferred" (Reid, supra). Summary judgment is thus warranted.

ACCORDINGLY, it is ORDERED that Defendant Cleaver-Brooks, Inc.'s ("Cleaver-Brooks") motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' complaint and all cross-claims against it is granted, and it is further,

ORDERED that all claims and cross-claims against Defendant Cleaver-Brooks, Inc. are severed and dismissed, and it is further,

ORDERED that the Defendant Cleaver-Brooks, Inc. serve a copy of this Order with Notice of Entry on the Trial Support Clerk located in the General Clerk's Office (Room 119) and on the County Clerk, by e-filing protocol, and it is further,

ORDERED that the Clerk enter judgment accordingly.

ENTER:

Dated: October 18, 2018



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE