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| Matter of Cosgriff v Aerco Intl., Inc. |
| 2018 NY Slip Op 32712(U) |
| October 22, 2018 |
| Supreme Court, New York County |
| Docket Number: 190121/2017 |
| Judge: Manuel J. Mendez |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION
JOHN COSGRIFF and ROSEMARY COSGRIFF
Plaintiff(s),

INDEX NO. 190121/2017
MOTION DATE 10/17/2018
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

- against -

AERCO INTERNATIONAL, INC., et al.,
Defendants.

The following papers, numbered 1 to 6 were read on CBS Corporation's motion for summary judgment:

| | <u>PAPERS NUMBERED</u> |
|---|------------------------|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | <u>1- 2</u> |
| Answering Affidavits — Exhibits _____ | <u>3-4</u> |
| Replying Affidavits _____ | <u>5-6</u> |

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant CBS Corporation, f/k/a Viacom Inc., successor by merger to CBS Corporation, and f/k/a Westinghouse Electric Corporation's ("Westinghouse") 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 CBS Corporation are dismissed.

Plaintiff, John Cosgriff, diagnosed with lung cancer in 2017 (Moving Papers Exh. C, Answer 7A), alleges that his disease is due to asbestos exposure (Id. Exh. A). During his examination before trial Mr. Cosgriff testified that he was exposed to asbestos when he was a part-time bulldozer and payload operator at the Jamaica Pollution Plant and a crane operator at the JFK airport and other worksites in Brooklyn and Queens (Cosgriff Dep. at 134-149, 163-171, 205, 221-222). He testified that, as a crane operator, he was also exposed to asbestos when he worked at the World Trade Center and at the Astoria and Ravenswood powerhouses (Id. at 237-242, 243:9-244:9, 247:12-13). He testified that he worked at the Astoria powerhouse for six months in the 1960s or 1970s and for a "couple of months" at the Ravenswood powerhouse in the 1960s (Id). Plaintiffs commenced this action on April 12, 2017 to recover for injuries resulting from Mr. Cosgriff's asbestos exposure.

Westinghouse now moves for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' Complaint and all cross-claims against it. Westinghouse contends that summary judgment is warranted because Plaintiffs have not proffered sufficient evidence to show that Mr. Cosgriff was exposed to asbestos from its turbines. Plaintiffs oppose the motion contending that Westinghouse failed to make a prima facie showing that its turbines could not have caused Mr. Cosgriff's lung cancer and, in any event, contend that issues of fact remain as to whether Mr. Cosgriff's asbestos exposure from Westinghouse turbines 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

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

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]).

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]).

Westinghouse contends that, under *Schiraldi v. U.S. Mineral Products*, 194 AD2d 482, 599 NYS2d 572 [1st Dept. 1993], summary judgment is warranted because Plaintiffs' answers to interrogatories and Mr. Cosgriff's deposition shows that he was not exposed to asbestos from Westinghouse turbines. In *Schiraldi*, plaintiff's answers to interrogatories and his deposition did not identify defendant's product. The Appellate Division held that "the absence of such proof established appellant's facial non-liability and shifted to plaintiff the burden of demonstrating by admissible evidence the existence of a factual issue requiring a trial of the action" (*Schiraldi v. U.S. Mineral Products*, 194 AD2d 482, 599 NYS2d 572 [1st Dept. 1993]). Here, because Plaintiffs' interrogatory answers and Mr. Cosgriff's deposition do not identify Westinghouse as a turbine manufacturer whose product exposed Mr. Cosgriff to asbestos (*Moving Papers Exhs. C-D*), Westinghouse has established its prima facie burden that its turbine "could not have contributed to the causation of Plaintiff's injury" (*Comeau, supra*).

Plaintiffs fail to raise an issue of fact to be resolved at trial. Plaintiffs' reliance on its answers to interrogatories to raise an issue of fact is unavailing (*Moving Papers Exh. C*). Plaintiffs' interrogatory answers fail to identify Westinghouse turbines as a source of Plaintiffs' asbestos exposure (*Id.* at 10, Answer 17A and Exhibit A at 22). Nor does Mr. Cosgriff's deposition raise an issue of fact to be resolved at trial (*Opposition Papers Exh. B*). When asked about his asbestos exposure at the Astoria Powerhouse, Mr. Cosgriff testified as follows:

Q. Do you think you encountered asbestos while you worked at Astoria?

A. Yes, but not from the crane.

Q. Is it from the pipe insulation?

A. From the pipe, yes.

Q. Anything else?

A. That's all I encountered. I did walk into the building with pipe though. They had an opening there for me and I would carry the pipe because those booms would lay flat and you could carry the pipe into the building in certain instances.

(Id. at 246:4-15).

Mr. Cosgriff also testified that he worked at the Ravenswood powerhouse (Id. at 247:12-250:17). He testified that he was exposed to asbestos from burners and boilers, not Westinghouse turbines (Id. 248:15-18). Therefore, Mr. Cosgriff's deposition does not raise an issue of fact to be resolved at trial.

Plaintiffs contend that Westinghouse's answers to interrogatories in James Harvey v. A.O. Smith Water Prods., et al., Index No. 190061/2014 and James P. Glennon and Ruth Glennon v A.O. Smith Water Prods., et al., Index No. 190133/2016 raise issues of fact. These answers show that Westinghouse supplied turbines to the Astoria powerhouse (Opposition Papers Exh. C at 3 and 7). However, that Westinghouse turbines were present at the Astoria Powerhouse does not show Mr. Cosgriff was actually exposed to asbestos from these turbines. The mere presence of Westinghouse's turbines is insufficient to establish that Mr. Cosgriff was exposed to asbestos from Westinghouse's turbines (see Cawein v Flintkote Co., 203 AD2d 105, 106, 610 NYS2d 487 [1st Dept. 1994]). Without evidence of actual asbestos exposure, Plaintiffs cannot establish special causation.

Plaintiffs contend that "many other men" have testified that "all of the equipment" in the Astoria and Ravenswood powerhouses were insulated with asbestos-containing insulation in the 1960s and 1970s (Plaintiffs Aff. at 4, 11). In support, they submit the deposition transcripts of James Farnan Jr. and Peter Mucci (Opposition Papers Exhs. D-E). These depositions fail to raise an issue of fact in this matter. Plaintiffs must point to evidence in this record that Mr. Cosgriff was exposed to asbestos from Westinghouse's product. Because Plaintiffs have not made this showing, they have not shown "facts and conditions from which [Westinghouse's] liability may be reasonably inferred" (Reid, supra). Summary judgment is thus warranted.

ACCORDINGLY, it is ORDERED that Defendant CBS Corporation, f/k/a Viacom Inc., successor by merger to CBS Corporation, and f/k/a Westinghouse Electric Corporation's ("Westinghouse") 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 CBS Corporation, f/k/a Viacom Inc., successor by merger to CBS Corporation, and f/k/a Westinghouse Electric Corporation are severed and dismissed, and it is further,


ORDERED that the Defendant CBS Corporation, f/k/a Viacom Inc., successor by merger to CBS Corporation, and f/k/a Westinghouse Electric Corporation 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 22, 2018

MANUEL J. MENDEZ
J.S.C.


MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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