

Martin v Troy Belting & Supply Co.
2018 NY Slip Op 34193(U)
December 13, 2018
Supreme Court, Albany County
Docket Number: Index No. 906831-16
Judge: Richard T. Aulisi
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STATE OF NEW YORK

SUPREME COURT

COUNTY OF ALBANY

CHRISTINE M. MARTIN, Individually and as Executrix
of the Estate of MICHAEL T. MARTIN, Deceased,

Plaintiffs,

**DECISION
AND ORDER**

-VS-

TROY BELTING & SUPPLY COMPANY, et al.,

Index # 906831-16

RJI # 01-17-123911

Defendants.

Michael T. Martin commenced the within action to recover damages for personal injuries allegedly incurred from his exposure to various asbestos containing products. He commenced this action on November 10, 2016, by filing a summons and complaint in the Albany County Clerk's Office. Issue was subsequently joined and discovery has been conducted pursuant to an expedited schedule. This matter is currently scheduled for trial commencing January 16, 2019. Michael T. Martin died on December 24, 2016, and Christine M. Martin was substituted as Executrix of the Estate of Michael T. Martin.

The defendant, Troy Belting & Supply Company (defendant), has made a motion for summary judgment dismissing the plaintiffs' complaint and all cross claims asserted against it, pursuant to CPLR 3212. The defendant seeks summary judgment on the theory that the plaintiffs have been unable to specifically identify, or prove, exposure to any asbestos containing material manufactured, sold, or distributed by it.

The plaintiff, Christine M. Martin, alleges that her decedent, Michael T. Martin, developed an asbestos related lung cancer as a result of his exposure to asbestos containing materials and products while working as an electrician at the Albany Steam Powerhouse, from 1970 until 2003. In particular, and for the purpose of the within motion, the plaintiffs allege that Michael T. Martin was exposed to asbestos containing gasket material while assisting mechanics

who were repairing equipment at the powerhouse. Specifically, it is alleged that Mr. Martin was present when mechanics would replace gaskets and packing materials in the various pumps and valves at the powerhouse. Additionally, the plaintiffs claim that the gaskets and packing materials were made of asbestos and that the dust from these products contributed to his exposure to asbestos. The plaintiffs allege that the defendant was the supplier of asbestos containing materials to the powerhouse.

The defendant asserts that during discovery, the injured plaintiff failed to demonstrate that Troy Belting was a distributor or supplier of any asbestos containing materials. The defendant claims that plaintiffs' proof in this action simply establishes that the defendant delivered unknown contents to Mr. Martin's work site, the Albany Steam Station, between 1975 and 1978. The defendant also asserts that there is no proof that Mr. Martin ever worked with or around any product delivered by it to his work station.

A proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]). In the context of an asbestos case, the defendant bears the initial burden of demonstrating that its respective products "could not have contributed to the causation" of the plaintiff's injuries (Matter of New York City Asbestos Litig., 116 AD3d 545, 545 [2014]; see Matter of New York City Asbestos Litig., 216 AD2d 79, 80 [1995]). "Moreover, a defendant cannot satisfy this burden by merely pointing to gaps in a plaintiff's prove" (Overocker v Madigan, 113 AD3d 924,925[3rd Dept. 2014]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). "Stated another way, a defendant cannot prevail on a motion for summary judgment merely by correctly arguing that the record before a court on the motion would be one which, if presented at trial, 'would fail to [satisfy a plaintiff's] burden of proof and

the court would be required to direct a verdict for defendant[]” (O’Connor v AERCO Intern., Inc., 152 AD3d 841, 842-843, [3d Dept 2017] quoting Yun Tung Chow v Reckitt & Colman, Inc., 17 NY3d 29, 35 [2011, Smith, J., concurring]). To that end, “plaintiffs’ burden to establish a material issue of fact as to ‘the facts and conditions from which [defendants’] liability may reasonably be inferred’ is only triggered in the event that a moving defendant made the aforementioned prima facie showing” (Id. quoting Matter of New York City Asbestos Litig., 216 AD2d at 80).

The Court also notes that since this is a summary judgment motion, it must view the evidence in a light most favorable to the non-moving party, drawing all reasonable inferences in favor of the non-moving party (see Salerno v Garlock, Inc., 212 AD2d 463, 464 [1st Dept 1995]; Greco v Boyce, 262 AD2d 734 [3d Dept 1999]).

In response to the defendant’s summary judgment motion, plaintiffs rely on the testimony of a former co-worker of Mr. Martin, one Lawrence DiLallo. Mr. DiLallo, a mechanic, worked with Mr. Martin between the 1970’s and 1980’s at the Albany Steam Plant. The plaintiffs seek to use Mr. DiLallo’s testimony from this action, as well as Mr. DiLallo’s testimony from his own asbestos case, against the defendant, Troy Belting. The plaintiffs insist that Mr. DiLallo’s testimony is sufficient to raise a material issue of fact. Mr. DiLallo was questioned about “suppliers” coming to the Albany Steam Station, where he worked. He recalled Troy Belting as the supplier.¹ He went on to testify that he believed Troy Belting was supplying the gasket material, because they went through a lot of it.² He also testified that Troy Belting was the only supplier to the Steam Station that he recalled.³

This Court finds that the moving defendant has failed to meet its initial burden of proof and, even if it had sustained its burden, the submissions by plaintiff in opposition to the motion clearly raise a material issue of fact.

In light of the foregoing, the Court finds that there is a material issue of fact which

¹ DiLallo Dep. Page 122

² DiLallo Dep. Page 123

³ DiLallo Dep. Page 213

necessitates the denial of the defendant's summary judgment motion.

The defendant Troy Belting & Supply Company's motion for summary judgment is denied, without costs.

This writing shall constitute the Decision and Order of this Court.

Signed this 13th day of December, 2018, at Johnstown, New York.



HON. RICHARD T. AULISI
Justice of the Supreme Court

ENTER

