Schwartz v Advance Auto Supply
2019 NY Slip Op 30090(U)
January 9, 2019
Supreme Court, New York County
Docket Number: 190316/2017
Judge: Manuel J. Mendez

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

ALBERT SCHWARTZ and REBECCA MARILYN SCHREIBER
Plaintiff,

- against -

ADVANCE AUTO SUPPLY, *et al.*,

Defendants.

INDEX NO. 190316/2017
MOTION DATE 12/19/2018
MOTION SEQ. NO. 010
MOTION CAL. NO.

The following papers, numbered 1 to 10 were read on Cleaver-Brooks, Inc.'s motion for summary judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-8
Replying Affidavits	9-10

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Sherwin-Williams Company (hereinafter, "Sherwin-Williams") motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' complaint and all cross-claims against it is denied.

Plaintiff, Albert Schwartz, diagnosed with mesothelioma, alleges that his disease is due to, *inter alia*, his exposure to asbestos-containing construction products purchased from Sherwin-Williams. Plaintiffs claim that Mr. Schwartz was exposed to asbestos while working with and around certain third party brands of ready-to-use joint compound, caulk, and window glazing which were allegedly purchased by his employer, Don Coleman (from "Coleman Painting" in Metuchen, New Jersey) at a Sherwin-Williams store (Defendant's Memorandum of Law in Support at 5). Plaintiffs now bring this action to recover for Albert Schwartz's injuries due to asbestos exposure.

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]).

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.*

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

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]).

In support of its motion, Defendant states that Sherwin-Williams is entitled to summary judgment because Plaintiffs lack competent, admissible evidence that Albert Schwartz worked with or around asbestos-containing products purchased from a Sherwin-Williams store. To this effect, Defendant argues that they did not have a store in Edison N.J. at the time Plaintiff was exposed to asbestos and that their store on Talmadge Road in Edison, N.J. was not opened until 1995; therefore, Mr. Schwartz could not have been exposed to asbestos containing products at a Sherwin-Williams store.

As also discussed further *infra*, Mr. Schwartz stated that the Sherwin-Williams store where the products were purchased was located on Talmadge, Road and Durham Road in Edison, N.J., close to the border with Metuchen N.J. (*see* Exh. A). However, Metuchen is actually an area contained within the boundaries of Edison, N.J. (*see* Exh. G).

As such, Mr. Schwartz's testimony clearly identifies Sherwin-Williams as one of the stores from which his employer purchased the asbestos-containing products at issue. Nonetheless, it appears Plaintiff may have some difficulty specifying the exact location of the Sherwin-Williams store from which the products were purchased. At his deposition, Mr. Schwartz testified as follows:

> Q: All right. Now, staying on the joint compound, did you personally have any responsibility for purchasing or obtaining any of the joint compound you worked with when you worked for Don Coleman?
> A: No.
> Q: Do you have any knowledge of where Don purchased or obtained the joint compound?
> A: Sure, I was with him a lot of times.
> Q: Where did he get it?
> A: Most of what we used was from Sherwin-Williams.
> Q: Any place other than Sherwin-Williams that you recall?
> A: Not that I recall.
> Q: Okay. And that Sherwin-Williams, where was that located?
> A: I believe it was Edison, New Jersey.
> Q: Do you recall what street it was on?
> A: No.
> Q: Was it - and you went to that Sherwin-Williams yourself, correct?
> A: Yes.
> Q: Did you go to one Sherwin-Williams or more than one Sherwin-Williams for joint compound?
> A: I think it just - most of what we did was local, and we would pick it up depending on where we were going, but I'm pretty sure that throughout the jobs that we've done, we have gone to other locations.
> Q: Other Sherwin-Williams locations, right?
> A: Well, maybe even other - like US Lumber or, you

know, other locations to buy product.
Q: Okay. Do you recall - did you ever go to a US Lumber locations and obtain joint compound?
A: I'm pretty certain we have.
Q: Okay. Where was the US Lumber located?
A: I don't recall.
Q: Was it in New Jersey?
A: Yes.
Q: In the Edison, New Jersey area?
A: Local, yeah.
Q: Okay. But I take it Sherwin-Williams was your primary source, correct?
A: That's correct.
Q: Okay. Do you know if Don had an account with Sherwin-Williams?
A: I'm pretty certain he did, yes.

(Exh. A at 301:14-303:19)

Again, in his videotaped deposition, Mr. Schwartz clearly identifies Sherwin-Williams as having been a supplier of the asbestos-containing products at issue:

Q: Where did you and Mr. Coleman Purchase the caulk, window glazing, and joint compound?
A: I would say 90 percent of it came from Sherwin-Williams on Tallmadge Road.
Q: What town was that in?
A: I believe it was Edison. It was right on the border of Metuchen and Edison, but I believe it was Edison.

(Exh. B at 33:15-22)

To survive the instant motion for summary judgment, Mr. Schwartz need not definitively identify the "precise location" of the Sherwin-Williams store from which the products at issue were allegedly purchased. He need 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]).

Thus, it is not evident from the record thus far that Plaintiffs lack sufficient evidence to make a prima facie case that Sherwin-Williams could be liable for having sold the asbestos containing products which lead to Mr. Schwartz's mesothelioma. Rather, it merely remains for a jury to decide whether the evidence presented is strong enough to establish that the products which caused Mr. Schwartz's mesothelioma were in fact purchased at a Sherwin-Williams store.

In light of the above testimony, Plaintiff's statements that the asbestos-containing products at issue were purchased from a Sherwin-Williams store are sufficient to meet the *Reid* standard as they show facts and conditions from which the Defendant's liability may be reasonably inferred (*Reid, supra*). 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.*), *supra*). Furthermore, it is not the function of the Court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material issues of fact (or point to the lack thereof) (*Vega v Restani Const. Corp.*, 18 NY 3d 499, 965 NE 2d 240, 942 NYS 2d 13 [2012]).

This case, therefore, presents testimonial evidence giving rise to credibility issues; namely whether Mr. Schwartz's description of where the asbestos-containing products at issue were purchased is credible enough to warrant attributing liability to Sherwin-Williams. The Plaintiff has met his burden in opposing Defendant's prima facie showing of entitlement to summary judgment. Therefore, summary judgment is denied.

Accordingly, it is ORDERED that Defendant Sherwin-Williams Company's motion for summary judgment pursuant to CPLR §3212, dismissing Plaintiffs' complaint and all cross-claims against it, is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: January 9, 2019

MANUEL J. MENDEZ
J.S.C.

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