

Raimo v A.O. Smith Water Prods. Co.

2019 NY Slip Op 30369(U)

February 15, 2019

Supreme Court, New York County

Docket Number: 190356/2017

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 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

This Document Applies To:

RICHARD RAIMO and ROSEANN RAIMO,

INDEX NO. 190356/2017

Plaintiffs,

MOTION DATE 01/23/2019

- against -

MOTION SEQ. NO. 001

A.O. SMITH WATER PRODUCTS CO. and MILTON ROY COMPANY, et al.,

MOTION CAL. NO.

Defendants.

The following papers, numbered 1 to 7 were read on this motion for summary judgment by Milton Roy Company:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [] Yes [X] No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant, Milton Roy Company's motion for summary judgment pursuant to CPLR §3212 dismissing plaintiffs' claims and all cross-claims asserted against it, is denied.

Plaintiff Richard Raimo, alleges that as result of asbestos exposure he was diagnosed with colon cancer in 2017 (Opp. Romanelli Aff., Exh.1, Answer to Interrogatory #7). He was about 66 years old at the time of his diagnosis. Mr. Raimo was deposed over a course of three days on February 20, 22 and 23, 2018 (Mot. Eliasberg Fuchs Aff., Exhs. E, G and H, Opp. Romanelli Aff. Exh. 3). It is alleged that Mr. Raimo was exposed to asbestos while working as an assistant, "A mechanic field operator," and mostly as a high voltage trouble shooter," at Con Edison in locations throughout New York City from March of 1973 through the mid-1980s (Mot. Eliasberg Fuchs Aff., Exh. E, pgs. 74-75). His alleged exposure - as relevant to this motion - was from defendant Milton Roy Company's pumps, asbestos packing materials, and gaskets.

Mr. Raimo testified that over the course of his fifteen to sixteen years of employment with Con Edison, he worked at various locations all over the City of New York for various periods of time, but he could no longer remember the specific time periods or how long he worked at the various locations (Mot. Eliasberg Fuchs Aff., Exh. E, pgs. 74-75 and 77). Mr. Raimo testified that he worked at the Hell Gate location in the Bronx and multiple locations in Manhattan, including: (1) the Chinatown Generating Station also known as the Leonard Street Substation (Mot. Eliasberg Fuchs Aff., Exh. G, pgs. 338-339); (2) the Waterside Generating Station; 14th Street Generating Station; (3) the 110th Street Substation; (4) the Rector Street Substation; (5) the World Trade Center Substation; (6) East 63rd Street substation; (7) the Park Avenue Substation; and (8) the West End Avenue either Generating or Substation (Mot. Eliasberg Fuchs Aff., Exh. E, pgs. 78-80). Mr. Raimo did not identify defendant's pumps from his work at the Hellsgate Generating Station (Mot. Eliasberg Fuchs Aff., Exh. E, pgs. 130 and 134). Mr. Raimo also did not remember any work on pumps or valves when he was at the Rector Street Substation or at the Park Avenue Substation (Mot. Eliasberg Fuchs Aff., Exh. E, pgs. 172, 175 and 215).

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

Mr. Raimo claims that although it was not part of his job, he would provide other Con Edison employees, usually mechanics, with assistance when the equipment was too heavy to lift. He testified that the equipment he assisted with included pumps. He identified defendant's pumps as one of six or seven different brands that were being worked on at the various stations or substations, and were located throughout the buildings in the rooms he was working in. Mr. Raimo testified that he was exposed to asbestos by touching it when he lifted the pumps to put them in place until they were bolted in during the replacement of defective pumps, and from breathing in second hand airborne asbestos dust from the work of others that were replacing packing and changing gaskets that he assumed were also manufactured by the defendant. He provided assistance "more than a handful" of times and identified defendant's pumps because of the name, saying "I always thought it was a person." (Mot. Eliasberg Fuchs Aff., Exh. E, pgs. 93-99 and 102-103, 114, 119, 123, 143, 149-151, 179, 182-183-186, 194, 196, 201-204). Mr. Raimo testified that he believed he was exposed to asbestos about fifty (50) percent of the time he worked at the generating stations and substations, because of the nature of the work being performed (Mot. Eliasberg Fuchs Aff., Exh. G, pg. 326).

Mr. Raimo testified that he was exposed to asbestos from packing associated with pumps at the 110th Street Substation and the West End Avenue Generating Substation, and identified the defendant as "Milton Joe" or "something Milton" or "Milton Joe or something" (Mot. Eliasberg Fuchs Aff., Exh. E, pg. 160, 197). Mr. Raimo testified that he could not describe the color of defendant's pumps, he guessed that they "Maybe red," and that it was possible some other manufacturer's pumps, were red in color. He could not state the size of defendant's pumps. He testified that defendant's pumps were made of metal and whatever packing and gaskets came with it, he guessed that the metal could have been iron or cast iron but testified "I don't know what they were made of" (Mot. Eliasberg Fuchs Aff., Exh. G, pgs. 340, 342, 349). He claims he identified defendant's pumps because throughout his career they would either have been on hand as back up or work was being performed on them (Mot. Eliasberg Fuchs Aff., Exh. G, pgs. 344-357). Mr. Raimo further testified that he remembered defendant's products because of the name on the packaging (Mot. Eliasberg Fuchs Aff., Exh. G, pgs. 340-343).

Plaintiffs commenced this action on November 15, 2017, and subsequently amended the complaint twice (See Mot. Eliasberg Fuchs Aff., Exhs. A, C and F). Defendant has appeared in this action and joined issue (Mot. Eliasberg Fuchs Aff., Exhs. B, D and I).

Milton Roy Company's (hereinafter referred to as "defendant") motion seeks an Order granting summary judgment pursuant to CPLR §3212 dismissing plaintiffs' claims and all cross-claims asserted against it.

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]). It is only after the burden of proof is met that the burden switches to the nonmoving party 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 by giving the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]).

In support of its motion for summary judgment defendant relies on the affidavit of James Carling, current Market Development Manager for Industries and Municipal Markets (Mot. Eliasberg Fuchs Aff., Exh. M). Mr. Carling states that

he has been employed by the defendant from 1980. He relies solely on a review of defendant's archives of sales/engineering documents, dating back to the mid-1950's. Mr. Carling states that, contrary to Mr. Raimo's testimony, defendant's records show no shipment of the Milton Roy Company's pumps to any of the various Con Ed facilities plaintiff is alleged to have worked at from March of 1973 through the mid-1980's. He claims that Mr. Raimo's description of the pumps as "possibly red in color" and made from cast iron were incorrect. Mr. Carling concludes that plaintiff was not exposed to asbestos from any pump manufactured by the defendant at the Con Ed facilities during the relevant period (Mot. Eliasberg Fuchs Aff., Exh. M).

Mr. Carling's affidavit relies solely on review of defendant's records for the period Mr. Raimo alleges he was exposed, but fails to mention whether Milton Roy Company pumps or related gaskets and packing materials were sold to Con Edison prior to the period of plaintiff's exposure. Mr. Carling's affidavit is "conclusory and without specific factual basis, and did not establish the prima facie burden of a proponent of a motion for summary judgment" (Matter of N.Y.C. Asbestos Litig., 123 AD3d 498, 1 NYS3d 20 [1st Dept. 2014]).

Defendant argues that plaintiff's deposition testimony, the affidavit of James Carling, and its responses to plaintiffs' interrogatories establish that: (i) Mr. Raimo is unable to specifically identify any of defendant's products or related materials; (ii) plaintiff is unable to specifically state the relevant time period and at which locations he was exposed to defendant's products (iii) that the company never supplied pumps to Con Edison during the alleged relevant period of 1973 through 1985; and (iv) that plaintiffs failed to provide sufficient expert evidence that Mr. Raimo's exposure to asbestos was casually related to the use of defendant's products.

"In asbestos-related litigation, the plaintiff on a summary judgment motion must demonstrate that there was actual exposure to asbestos from the defendant's product" (Cawein v Flintkote Co., 203 AD2d 105, 610 NYS2d 487 [1st Dept 1994]). The Plaintiff 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]). A Plaintiff's inability to recall exact details of the exposure is not fatal to the claim and should not automatically result in the granting of summary judgment (Lloyd v W.R. Grace & Co., 215 AD2d 177, 626 NYS2d 147 [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]).

Plaintiffs, as the non-moving party, are entitled to the benefit of all favorable inferences, regardless of Mr. Raimo's ability to provide a detailed description of defendant's pumps, packing material or gaskets. Plaintiff alleges that defendant's products were at multiple locations he worked at for Con Edison, at least in part, because he saw the name on boxes. Defendant has failed to provide proof that Con Edison never purchased any of its products or that its products did not contain any asbestos. To the extent the products were purchased prior to the alleged period of exposure and stored or otherwise used later, there remains issues of fact.

"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 N.Y. 3d 499, 965 N.E. 2d 240, 942 N.Y.S. 2d 13 [2012]). Summary judgment is a drastic remedy that should not be granted where conflicting affidavits about the work performed by plaintiff cannot be resolved (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y. S. 2d 18, 215 N.E. 2d 341 [1966] and Ansah v. A.W.I. Sec. & Investigation, Inc., 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1st Dept., 2015]). Conflicting testimony raises credibility issues, that

cannot be resolved on papers and is a basis to deny summary judgment (*Messina v. New York City Transit Authority*, 84 A.D. 3d 439, 922 N.Y.S. 2d 70 [2011], *Almonte v. 638 West 160 LLC*, 139 A.D. 3d 439, 29 N.Y.S. 3d 178 [1st Dept., 2016] and *Doumbia v. Moonlight Towing, Inc.*, 160 A.D. 3d 554, 71 N.Y.S. 3d 884 [1st Dept., 2018] citing to *S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y. 2d 338, 313 N.E. 2d 776, 357 N.Y.S. 2d 478 [1974]).


Plaintiffs have also raised triable issues of fact as to whether defendant’s liability may be reasonably inferred from Mr. Raimo’s second hand exposure to asbestos gaskets and packing manufactured for use with pumps, and his assistance in holding their pumps in place while other Con Edison workers bolted them in. Mr. Raimo repeatedly identified Milton Roy pumps as located throughout those Generating Stations and Substations he worked in. He stated that he could not provide definitive information because of the time that had elapsed. Mr. Raimo’s failure to provide specific dimensions, color or materials, does not mean defendant’s pumps were not present or that he had no exposure to defendant’s products.

Defendant failed to provide any expert report or other evidence on the issue of causation. Defendant’s argument that the report of plaintiffs’ expert Dr. Sanford M. Ratner, M.D., FACP, FCCP, fails to establish causation, is unavailing (*Opp. Romanelli Aff.*, Exh.3). Defendant did not make a prima facie case on causation, there is no need to address the sufficiency of the evidence submitted in opposition to the motion.

Accordingly, it is ORDERED that Defendant Milton Roy Company’s motion for summary judgment pursuant to CPLR §3212 dismissing plaintiffs’ claims and all cross-claims asserted against it, is denied.

ENTER:

Dated: February 15, 2019

MANUEL J. MENDEZ
J.S.C.


MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
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