

Maridakis v Amchem Prods., Inc.

2019 NY Slip Op 30503(U)

March 1, 2019

Supreme Court, New York County

Docket Number: 190225/2015

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
GEORGE MARIDAKIS and KATHERINA MARIDAKIS INDEX NO. 190225/2015

Plaintiff(s), MOTION DATE 2/20/2019

- against - MOTION SEQ. NO. 001

AMCHEM PRODUCTS, INC., et al., MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to 7 were read on CertainTeed Corporation's motion for summary judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	<u>1-3</u>
Answering Affidavits – Exhibits _____	<u>4-5</u>
Replying Affidavits _____	<u>6-7</u>
Cross-Motion: Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	

FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Upon a reading of the foregoing cited papers, it is Ordered that Defendant, CertainTeed Corporation's (hereinafter, "CertainTeed") motion for summary judgment pursuant to CPLR §3212, dismissing Plaintiff's entire complaint against it, is denied. Defendant CertainTeed's motion, in the alternative, for partial summary judgment limiting the determination of any issues of fact at trial concerning Mr. Maridakis's alleged exposure to CertainTeed siding is also denied.

Plaintiff, George Maridakis, a contractor, was diagnosed with asbestosis on January 29, 2015 and lung cancer on February 4, 2015. Mr. Maridakis alleges that he was exposed to asbestos dust as he worked with and around products manufactured by CertainTeed. In his deposition, Mr. Maridakis specifically details his alleged exposure to asbestos due to encountering both CertainTeed roofing shingles and siding materials throughout the course of his career (see Exh. 2 of Plaintiff's Aff. in Opp.). George and Katherina Maridakis began this action on July 23, 2015 to recover for Mr. Maridakis'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]). 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]).

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 NE2d 240 [2012]). 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]).

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]). Conflicting testimonial evidence 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 AD 3d 439, 922 N.Y.S. 2d 70 [2011], *Almonte v 638 West 160 LLC*, 139 A.D. 3d 439, 29 NYS 3d 178 [1st Dept., 2016] and *Doumbia v Moonlight Towing, Inc.*, 160 AD 3d 554, 71 NYS 3d 884 [1st Dept., 2018] citing to *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY 2d 338, 313 NE 2d 776, 357 NYS 2d 478 [1974]).

In support of its motion for summary judgment dismissing all of Plaintiffs claims against it, CertainTeed argues that William Eberle's affidavit conclusively establishes that it never manufactured or sold any asbestos-containing vinyl siding during the relevant time; therefore, Plaintiff could never have been exposed to asbestos from this vinyl siding (*Eberle Aff.* ¶ 7).

CertainTeed also utilizes this argument in moving for partial summary judgment to eliminate issues of fact concerning Mr. Maridakis exposure to CertainTeed siding at any subsequent trial. Specifically, CertainTeed argues that the siding materials at issue were made of PVC and contained absolutely no asbestos (*id.*).

The problem with this argument is that although Mr. Eberle's deposition may be admissible under the CMR (as a statement from someone with personal knowledge of whether a product contained asbestos), it alone is not conclusive evidence that CertainTeed vinyl siding contained no asbestos. Rather, this deposition merely raises an issue of credibility for the jury to decide; namely, whether Mr. Eberle's sworn statement that the siding at issue was devoid of asbestos should be believed. However, it is not the court's place to make credibility determinations or findings of fact on a motion for summary judgment, but rather to identify such facts or point to the lack thereof (*Vega v Restani, supra*).

CertainTeed also argues that Mr. Maridakis's claim that he was exposed to asbestos from CertainTeed roofing shingles is without sufficient evidentiary support to withstand this motion for summary judgement. This is because CertainTeed notes that under cross-examination, there is an instance where Mr. Maridakis appears to not recollect working with CertainTeed roofing shingles:

Q: I'm going to just move on to the time that you worked with Mandy in Quality. I believe that was from 1977 to 1980, correct?

A: Yes, about that.

Q: You had mentioned during that time you had worked with CertainTeed shingles. Do you recall that?

A: CertainTeed shingles?

Q: Yes. Do you recall if you worked with them?

A: No, I don't remember. I mentioned that?

Q: I'm just asking you.

A: No, I don't recall it, no.

Q: Just so the record is clear, did you ever work with any CertainTeed roofing shingles?

A: I'm not sure. I'm not sure if I used CertainTeed shingles, roofing shingles.

Q: Just so the record is clear, do you believe that you would have been exposed to any CertainTeed roofing shingles during the time that you worked with Mandy in Quality?

A: I'm not sure about that.

Q: Sir, I think those are all the questions I have. Thank you for your time.

(Exh. D of Defendant's Aff. in Support at 343: 21-344:20)

Notwithstanding the above, when questioned by his own attorney, Mr. Maridakis states that he did, in fact, work with the CertainTeed roofing shingles at issue:

Q: What kind of materials did you remove?

A: Again, I don't know what I removed. I know what I installed, but I don't know what I removed.

Q: What did you install?

A: I used different companies. I used CertainTeed. I used GAF. I used DAP again, Bird.

Q: What are you describing when you name these companies, what product?

A: For the shingles I use the G.-A.-F. I use Owens Corning, I use CertainTeed. I used to use – the roof cement was DAP. If I had to use roof cement, I used DAP.

(Exh. 2 of Plaintiff's Aff. in Opp. at 145-146)

Q: What materials did you install when you were doing roofing?

A: Like I told you before, I use GAF, I use G-A-F, I use CertainTeed, I use Owens Corning, Tamko, sometimes Tamko.

[...]

Q: What types of products were these?

A: Shingles, roof shingles.

(Id. at 161)

The above testimony gives rise to a credibility determination; namely, how much credence a jury would ultimately give to Plaintiff's testimony concerning whether he worked with CertainTeed roofing shingles. It is not the court's place on summary judgment to resolve conflicting testimony or resolve specifically, as in this case, why Mr. Maridakis stated at one point during his testimony that he was unsure about whether he had worked with CertainTeed roofing shingles. Rather, the conflicting testimony above raises credibility issues which are a basis to deny summary judgment (*Messina v New York City Transit Authority*, 84 AD 3d 439, 922 N.Y.S. 2d 70 [2011], *Almonte v 638 West 160 LLC*, 139 A.D. 3d 439, 29 NYS 3d 178 [1st Dept., 2016] and *Doumbia v Moonlight Towing, Inc.*, 160 AD 3d 554, 71 NYS 3d 884 [1st Dept., 2018] citing to *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY 2d 338, 313 NE 2d 776, 357 NYS 2d 478 [1974]).

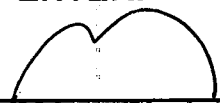
Accordingly, it is ORDERED that Defendant CertainTeed Corporation's motion for summary judgment pursuant to CPLR §3212, dismissing Plaintiffs' complaint in its entirety is denied and it is further,

ORDERED that Defendant CertainTeed Corporation's motion, in the alternative, for partial summary judgment limiting the determination of any issues of fact at trial concerning the Plaintiff Mr. Maridakis's alleged exposure to CertainTeed siding is also denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: March 1, 2019



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE