

**Lewis v A.O. Smith Water Prods. Co.**

2019 NY Slip Op 30646(U)

March 18, 2019

Supreme Court, New York County

Docket Number: 190267/2016

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

STANLEY B. LEWIS AND VERONICA LEWIS,
- against - Plaintiffs,
A.O. SMITH WATER PRODUCTS CO., et al, Defendants.

INDEX NO. 190267/2016
MOTION DATE 03/13/2019
MOTION SEQ. NO. 005
MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on QCP, Inc., f/k/a Bakers Pride Oven Co., Inc.'s motion pursuant to CPLR §3212 for summary judgment:

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 QCP, Inc., f/k/a Bakers Pride Oven Co. Inc.'s (hereinafter "QCP, Inc.") motion pursuant to CPLR §3212 for summary judgment dismissing the complaint and all cross-claims asserted against it, is denied.

Plaintiff, Stanley B. Lewis, was diagnosed with plural mesothelioma on August 9, 2016 (Opp. Bursytyn Aff. Exh. 2). He was born in 1932 and is approximately 87 years old. Mr. Lewis alleges he was exposed to asbestos in a variety of ways. His exposure - as relevant to this motion - is from the removal and installation of piping, gas valves and scraping asbestos decks on Bakers Pride Pizza Ovens while employed as a plumber by Harris Plumbing and Heating (Mot. Rutkowski Aff., Exh. E and Opp. Bursytyn Aff. Exh. 1).

Mr. Lewis was deposed over the course of six days, September 19, 20, 22, 23, 26 and 30, 2016. He testified that he worked as both a commercial and residential plumber for Harris Plumbing & Heating throughout New York City, from about 1955 through 1965 (Mot. Rutkowski Aff., Exh. E, pg. 151-152). Mr. Lewis testified that eighty (80) percent of his commercial work in restaurants - which included pizzerias - was on old existing ovens and twenty (20) percent on new equipment. He specifically remembered working on pizza ovens with a "Bakers Pride" name plate. He testified that on existing ovens he had to clean out and scrape the asbestos oven plates - also known as decks or racks - where food was placed (Mot. Rutkowski Aff., Exh. E, pgs. 168-170, 435, 438 and 732-733). He described the Baker's Pride oven as large gas ovens with four pipe legs, with controls on the side, large doors, plating, and a sheet metal hood that was attached to a chimney to let out exhaust fumes. Mr. Lewis testified that he was also responsible for installing the gas valves (Mot. Rutkowski Aff., Exh. E, pgs. 432-435, 437- 440 and 661). Mr. Lewis testified that when he came to repair the gas lines, the deck was made of a hard material that emitted dust from a hole when he cleaned or scraped it, and that it would create an asbestos "dust storm" that he breathed in (Mot. Rutkowski Aff., Exh. E, pgs. 733-734).

Plaintiffs commenced this action on September 1, 2016. The complaint was subsequently amended on September 7, 2016 (Mot. Rutkowski Aff., Exh. A). QCP, Inc. served its Verified Answer to the Second Amended Verified Complaint on April 26, 2017 (Mot. Rutkowski Aff., Exh. D).

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

QCP, Inc. provided proof of compliance with paragraph XXI of the NYCAL Case Management Order (CMO) by annexing a copy of an e-mailed letter dated September 12, 2018, attempting to obtain No Opposition Summary Judgment ("USJM") (Mot. Rutkowski Aff., Exh. F).

QCP, Inc.'s motion seeks an Order granting summary judgment, pursuant to CPLR §3212, dismissing the plaintiffs' complaint 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 non-moving 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 [1<sup>st</sup> Dept. 1998]).

In support of its motion for summary judgment QCP, Inc. relies on the affirmation of its attorney, the pleadings, plaintiffs' responses to QCP, Inc.'s interrogatories, a chart of Mr. Lewis' work history, Mr. Lewis' deposition transcripts, and the e-filed letter seeking USJM (Mot. Rutkowski Aff., Exhs. A, B, C, D, E and F).

An attorney's affirmation, alone, is hearsay that may not be considered, and does not support, prima facie entitlement to summary judgment (Kase v. H.E.E. Co., 95 A.D. 3d 568, 944 N.Y.S. 2d 95 [1<sup>st</sup> Dept., 2012] citing to Zuckerman v. City of New York, 49 N.Y. 2d 557 404 N.E. 2d 718, 427 N.Y.S. 2d 595 [1980]). A motion for summary judgment can be decided on the merits when an attorney's affirmation is used for the submission of documentary evidence in admissible form and annexes proof from an individual with personal knowledge, such as plaintiff's deposition testimony (See Aur v. Manhattan Greenpoint Ltd., 132 A.D. 3d 595, 20 N.Y.S. 3d 6 [1<sup>st</sup> Dept., 2015] and Hoeffner v. Orrick, Herrington & Sutcliffe LLP, 61 A.D. 3d 614, 878 N.Y.S. 2d 717 [1<sup>st</sup> Dept. 2009]).

Plaintiffs incorrectly argue that QCP, Inc.'s motion should be dismissed because it relies on the hearsay affirmation of an attorney. The attorney's affirmation in support of QCP Inc.'s motion is being used as a vehicle to submit deposition transcripts and is sufficient to support this motion.

QCP, Inc. argues that it is entitled to summary judgment on causation because Mr. Lewis could not specifically identify its product, testified that as a plumber he was responsible for installing gas valves and he did not personally handle the plate inside the oven which was in place when he performed the work (Mot. Rutkowski Aff., Exh. E, pgs. 435-439). QCP, Inc. argues that plaintiffs September 2, 2016 response to the Fourth Amended Standard Set of Interrogatories does not allege any exposure to asbestos from any oven or restaurant and that a chart provided by plaintiff only shows residential work at Harrison Plumbing & Heating from 1955 through 1973 (Mot. Rutkowski Aff. Exhs. Exhs. B and C).

Plaintiffs have shown that they served Amended Responses to Defendant's Fourth Amended Standard Set of Interrogatories on September 14, 2016, and that QCP, Inc. failed to address the amendments. The amended response to question 17 specifically identifies Bakers Pride pizza ovens and the attached amended chart corrects the employment with Harris Plumbing & Heating, stating that the employment was from 1955-1965 and that Mr. Lewis worked at "Commercial, Residential and Industrial Sites" (Opp. Bursytn Aff. Exh. 3 and Mot. Rutkowski Aff., Exh. B).

QCP, Inc. argues that plaintiff is not expected to present any admissible evidence of exposure to asbestos. This argument does not establish their entitlement to summary judgment.

A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (Ricci v. A.O. Smith Water Products, 143 A.D. 3d 516, 38 N.Y.S. 3d 797 [1<sup>st</sup> Dept. 2016] and Koulermos v A.O. Smith Water Prods., 137 A.D. 3d 575, 27 N.Y.S. 3d 157 [1<sup>st</sup> 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 illness (Comeau v W. R. Grace & Co.- Conn. (Matter of New York City Asbestos Litig.), 216 AD2d 79, 628 NYS2d 72 [1st Dept. 1995] citing to Reid v. Georgia - Pacific Corp., 212 A.D.2d 462, 622 N.Y.S. 2d 946 [1<sup>st</sup> Dept., 1995], DiSalvo v. A.O. Smith Water Products (*In re New York City Asbestos Litigation*), 123 A.D. 3d 498, 1 N.Y.S. 3d 20 [1<sup>st</sup> Dept. 2014] and O'Connor v. Aerco Intl., Inc., 152 A.D. 3d 841, 57 N.Y.S. 3d 766 [3<sup>rd</sup> Dept., 2017]). Defendants must unequivocally establish that Mr. Lewis either was not exposed to asbestos from their products, or that the levels of asbestos he was exposed to were not sufficient to contribute to the development of mesothelioma (Berensmann v. 3M Company (*Matter of New York City Asbestos Litig.*), 122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1<sup>st</sup> Dept., 2014]).

QCP, Inc.'s argument that plaintiffs have no evidence and cannot raise an issue of fact that Mr. Lewis was exposed to asbestos from his work with Bakers Pride pizza ovens during the relevant period of about 1955 to 1965, is not a basis to obtain summary judgment.

Alternatively, plaintiffs as the non-moving parties are entitled to the benefit of all favorable inferences, regardless of Mr. Lewis' ability to provide a detailed description of his exposure.

"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 [1<sup>st</sup> 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 [1<sup>st</sup> 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 [1<sup>st</sup> Dept. 2004]).

Mr. Lewis' inability to provide specific identification of the restaurants or pizzerias where he worked or their addresses, or maintenance records, is not enough to warrant summary judgment. He sufficiently identified Bakers Pride pizza ovens and provides descriptions of the equipment.

Plaintiffs in opposition raise an issue of fact with the deposition testimony of Thomas E. Nixon, the former president of QCP, Inc., taken on June 21, 2004 and November 17, 2009 (Opp. Bursytyn Aff. Exhs. 4 and 5). Mr. Nixon testified that the Bakers Pride pizza ovens manufactured between the 1950's through the 1980's had an asbestos containing transite deck where the food was placed to cook. He testified that the transite was 35 percent chrysotile asbestos and 65 percent Portland cement (Opp. Bursytyn Aff. Exh. 4 pgs. 31-32 and Exh. 5, pgs. 24-25, 32 and 35). Mr. Nixon also testified that Bakers Pride pizza ovens also had decks made with flat sheet steel, and decks made with firebrick. He described firebrick as consisting of several one-foot by one foot square pieces of brick, whereas a transite deck tended to be a large sheet of cement (Opp. Bursytyn Aff. Exh. 5, pgs. 36-38).

**QCP, Inc. argues that Mr. Nixon provided testimony that larger pizza ovens had two or three transite decks and plaintiff only identified one deck, warranting summary judgment (Opp. Bursytyn Aff. Exh. 4 pgs. 33-34 and Mot. Rutkowski Aff. Exh. E, pg. 438). Mr. Nixon's own conflicting testimony and the conflict with Mr. Lewis' deposition testimony raises credibility issues that warrant denial of summary judgment.**

**"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 [1<sup>st</sup> 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 [1<sup>st</sup> Dept., 2016] and Doumbia v. Moonlight Towing, Inc., 160 A.D. 3d 554, 71 N.Y.S. 3d 884 [1<sup>st</sup> 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 raised triable issues of fact as to whether QCP, Inc.'s liability may be reasonably inferred from Mr. Lewis' work around the company's asbestos containing Bakers Pride pizza ovens.**

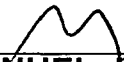
**Mr. Lewis testified that he cleaned, scraped and installed the asbestos decks in Bakers Pride pizza ovens, and he subsequently testified he only installed gas valves (Mot. Rutkowski Aff. Exh. E, pgs. 170, 436-439 and 733-734). This contradiction in Mr. Lewis' testimony raises credibility issues for a jury to determine.**

**There is no proof that either Mr. Lewis' or Mr. Nixon's contradictory testimony was solely for purposes of obtaining a favorable outcome in this action or in summary judgment and presents a credibility issue to be determined by the trier of fact (See Luebke v. MBI Group, 122 A.D. 3d 514, 997 N.Y.S. 3d 379 [1<sup>st</sup> Dept. 2014] citing to Vazieyan v. Blancato, 267 A.D. 2d 152, 700 N.Y.S. 2d 22 [1<sup>st</sup> Dept., 1999]). There remain issues of fact as to whether Mr. Lewis was exposed to asbestos by cleaning and scraping the asbestos containing transite decks in the Bakers Pride pizza ovens, and that this exposure resulted in his mesothelioma. The conflicting evidence and testimony raise issues of fact that cannot be resolved on a motion for summary judgment.**

**Accordingly, it is ORDERED that that defendant QCP, Inc., f/k/a Bakers Pride Oven Co. Inc.'s motion pursuant to CPLR §3212 for summary judgment dismissing the complaint and all cross-claims asserted against it, is denied.**

**ENTER:**

**Dated: March 18, 2019**

  
**MANUEL J. MENDEZ**  
**J.S.C.** **MANUEL J. MENDEZ**  
**J.S.C.**

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