

Matter of Fischer v American Biltrite, Inc.
2019 NY Slip Op 30696(U)
March 20, 2019
Supreme Court, New York County
Docket Number: 190271/2016
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
DONA FISCHER, as Executrix of the Estate of
BENJAMIN FISCHER, deceased

INDEX NO. 190271/2016
MOTION DATE 3/6/2019
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

Plaintiff(s),

- against -

AMERICAN BILTRITE, INC., *et al.*,

Defendants.

The following papers, numbered 1 to 6 were read on Burnham LLC'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</u>
Cross-Motion: Yes X No	

Upon a reading of the foregoing cited papers, it is Ordered that Defendant, Burnham LLC's motion for summary judgment pursuant to CPLR §3212, dismissing Plaintiffs' complaint and all cross-claims against it, is granted.

Plaintiff-decedent Benjamin Fischer and plaintiff Dona Fischer commenced this action by filing a Summons and Verified Complaint on September 7, 2016 (see Aff. in Support, Exh A). Plaintiff-decedent Mr. Fischer was diagnosed with mesothelioma on February 10, 2016 (Aff. in Opp., Exh. 3) and died from it on December 26, 2017 (Aff. in Opp., Exh. 4). Plaintiffs claim that decedent Mr. Fischer developed mesothelioma from occupational exposure to asbestos. Defendant Burnham joined issue via a Verified Answer on or about October 19, 2016 (see Aff. in Supp., Exh. B). Plaintiff-decedent served answers to standard interrogatories on or about September 27, 2016 (see Aff. in Supp., Exh. C). At his deposition on November 16-18, 2016 Mr. Fischer identified "Lord & Burnham" (hereinafter, "Burnham") as the manufacturer of two greenhouses which his family's florist business purchased-used, owned, and operated (see Aff. in Supp., Exh. D). Plaintiffs bring this action to recover for Mr. Fischer'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

FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

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. 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]).

In support of its motion, defendant Burnham argues: (1) that it is entitled to summary judgment because plaintiff has failed to provide any evidence that Mr. Fischer was exposed to any asbestos-containing material manufactured, distributed, sold, or installed by Burnham; and (2) that plaintiff must and has failed to provide unequivocal testimony that Burnham manufactured an asbestos-containing product to which plaintiff-decedent was exposed.

Early in his deposition, Mr. Fischer testified that he did not believe he was exposed to asbestos from any of the structural parts of the Burnham greenhouses themselves:

Q: Sir, you mentioned that the greenhouses were manufactured by Lord & Burnham; is that correct?

A: That is correct.

Q: What about the greenhouses themselves do you believe contained asbestos or exposed you to asbestos?

MR. BAIN: Objection to form.

A: They're steel. It looked like cast iron. I don't think there would be -- unless it was sprayed on them for some reason -- I don't really think there would be -- I guess it's not for me to say, I don't think. I never saw asbestos like the transite or whatever on the greenhouse. Greenhouse was the web structure and then glass panels. The only other thing the greenhouse did have on it was a little rail of wood in which on either side of it where it is, in fact, you would get new ones all the time, where you buy it, little rolls of tar of asphalt. It looked like liquorice. You would spread that out to set your new glass in because all the time the glass at a point gets loose and either slides down at a very inopportune time on either a bad day or bad weather, and/or they would crack. So you were constantly in that situation, and you had to put that new little strip in there, but I don't think there was any asbestos in that.

(Aff. in Supp., Exh. D at Vol. I, 147:20 to 148:18)

Then, Mr. Fischer stated in his deposition that he was exposed to chunks of insulation breaking off the greenhouse boiler:

Q: Besides the transite potting benches and the soap board, do you believe there is anything else that you encountered that contained asbestos while you were working at the greenhouse?

A: The boiler.

Q: And the boiler, which we discussed, right?

A: Yes.

Q: Did you ever have any responsibility for insulating that boiler?

A: No. I remember pieces, chunks breaking off it. I don't remember why. I remember the guy that used to supply the fuel line repairing it.

(*Id.* at Vol. I, 152:17 to 153:3)

Mr. Fischer's testimony, however, fails to establish that Burnham manufactured the boiler in question:

Q: With regard to this boiler, [at Morningside Greenhouses], sir, do you know the brand name, trade name or manufacturer name of the boiler?

A: No, I don't.

(Id. at Vol. I, 140:18-21)

Mr. Fischer also goes on to testify that he encountered asbestos dust from scraping asbestos-containing transite greenhouse benches:

Q: Did he purchase complete greenhouses to transport back to New Jersey?

DEFENSE COUNSEL: Objection to form.

A: Yeah. They would take -- they had to be dismantled and brought back as framework, and I don't believe they -- I don't know whether they brought back all the glass, because that would be kind of forbidding, and, you know, whatever. The glass used in the greenhouse construction was not thick glass. Very --thinner than windowpane glass. Other part of it was, there were benches which were very desirable, and they came with it. They were -- it turns out that they were corrugated much like the shaping of Owens-Corning's fiberglass, but it was thicker, and they were used as the benches to put the plants on, and they were made out of asbestos.

DEFENSE COUNSEL: Move to strike the portions that are non-responsive.

Q: And those are those corrugated material that you believe you mentioned on the first day of your testimony; is that correct?

A: Yes.

Q: Is that the same corrugated material that you would have to scrape?

A: Yes.

Q: How often in a year would you have to scrape that corrugated material?

MR. BAIN: Objection. Asked and answered.

A: Twice.

(Id. at Vol. III, 456:4 to 457:8)

A: if you could clean it where your plants were going to sit on those benches, we took them out, lined them up along the edge of the house and left them there until next spring. The good part of it was we put them on the whole north side of the greenhouse, and it also provided insulation from northern winds during winter. So, yes,

we took [the benches] in and out, and we scraped them clean of the soil that was on them with a wire brush.

Q: How large was this wire brush?

A: Three-inch wire. It's a brush that's three inches wide, looked like a floor scrub brush but not with a bristle. With a wire -- bigger than a wire brush that people generally use in -- I'm not sure what else they use it for, but I see them in a hardware store, you know, inch and a half inch wide. These were wide wire brushes.

Q: Do you recall what material the wire was made out of? Was it brass? Was it steel?

A: No, it wasn't brass. It was a steel brush. Brass would have been too soft and bendable.

Q: Did that wire brushing create dust?

Q: Did you ever have to cut or manipulate those benches in any other way other than what you just told me about now?

MR. BAIN: Objection to form. Asked and answered.

A: The benches, only on the end. They were strong but brittle, and we had to -- when we brought them in, we couldn't overlap them because they were heavy, so we would set them on cinderblocks as legs, and in order not to have holes in the benches for the plants to fall through, we would sort of shorten them up to a clean cut, and we would have to do that also once a year as they became disfigured. It would only happen at the ends, but we would have to cut them off clean.

Q: What kind of tool would you use for that job?

A: We'd have to use a masonry kind of saw. The material was too difficult to do it with. We used a crosscut kind of saw. I think my father -- I mean, I helped him, but I don't think my father had a power saw for that. I'm not sure.

Q: Was that sawing process a dusty process?

A: Yes.

Q: Could you see that dust?

A: Yes.

Q: Do you believe you breathed in that dust?

MR. BAIN: Objection to form.

A: Yes.

Q: And when that time came that you guys switched over to fiberglass benches, did you throw out those transite materials?

(Id. at Vol. III, 458:5 to 460:14)

Nevertheless, Mr. Fischer's testimony does not sufficiently establish that the transite benches from which he alleges asbestos exposure were manufactured by Burnham:

Q: Do you know the brand name, trade name, manufacturer name of the transite benches?

A. No, I don't.

(*Id.* at Vol. I, 146:23-25)

Mr. Fischer's overall testimony fails to establish that he was exposed to asbestos from a product manufactured, distributed, sold, or installed by Burnham.

There is no evidence on the record sufficient to meet the *Reid* standard, *supra*. This is because plaintiff has not shown facts and conditions from which the defendant's liability may be reasonably inferred (*Reid, supra*). Rather, plaintiff's testimony shows that he is unable to identify who manufactured either the boiler or the benches from which he alleges exposure to asbestos. Plaintiff, has, thus, failed to satisfy the *Reid* standard.

As such, the plaintiff has failed to meet his burden in opposing defendant's prima facie showing of entitlement to summary judgment. Therefore, Burnham's motion for summary judgment is granted.

Accordingly, it is ORDERED that defendant Burnham LLC's motion for summary judgment pursuant to CPLR §3212, dismissing plaintiffs' complaint and all cross-claims against it, is granted, and it is further

ORDERED that the complaint and all cross-claims against defendant Burnham LLC are severed and dismissed, and it is further

ORDERED that the clerk of court enter judgment accordingly.

Dated: March 20, 2019

ENTER:

MANUEL J. MENDEZ
J.S.C.



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE