

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

2019 NY Slip Op 30758(U)

March 21, 2019

Supreme Court, New York County

Docket Number: 190187/2017

Judge: Manuel J. Mendez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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		INDEX NO.	190187/2017
MICHAEL FLORIO			
	Plaintiff(s),	MOTION DATE	3/13/2019
	- against -	MOTION SEQ. NO.	001
	A.O. SMITH WATER PRODUCTS CO., et al.	MOTION CAL. NO.	
	Defendants.		

The following papers, numbered 1 to 6 were read on Columbia Boiler of Pottstown's motion for summary judgment:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	1-3
Answering Affidavits – Exhibits _____	4-5
Replying Affidavits _____	6

Cross-Motion: **Yes** **X No**

FOR THE FOLLOWING REASON(S):

Upon a reading of the foregoing cited papers, it is Ordered that defendant, Columbia Boiler of Pottstown's (hereinafter, "Columbia") motion for summary judgment pursuant to CPLR §3212, dismissing Plaintiffs' complaint and all cross-claims against it, is granted.

Plaintiff, Michael Florio was diagnosed with Lung Cancer on April 21, 2017. Plaintiff's attorney commenced this action in New York County Supreme Court on June 23, 2017. On October 18, 2017, plaintiff's attorney filed a Supplemental Summons and Amended Verified Complaint against additional defendants. Mr. Florio was deposed from February 13 through February 16 of 2018 detailing his alleged exposure to asbestos from working with Columbia Boilers. Mr. Florio testified to being exposed to asbestos from working on Columbia Boilers from about 1955 to 1993. Mr. Florio now brings this action to recover for his personal 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*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

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]). 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 argues that plaintiff's testimony against Columbia Boiler is hearsay which cannot be relied upon under any exceptions to the hearsay rules such as to allow this case to proceed to trial. More specifically, defendant argues that plaintiff's deposition fails to adequately and properly (i.e., by relying on more than simple hearsay testimony) identify Columbia boilers as a specific source of plaintiff's alleged exposure to asbestos.

In opposition to the motion for summary judgment, plaintiff argues that Mr. Florio sufficiently described what he believed to be a Columbia boiler such that this description should suffice, together with the alleged hearsay-identification of the boiler, to allow this case to proceed to trial. Plaintiff also argues that when the evidence is viewed in the light most favorable to the non-moving party, Mr. Florio's testimony should be viewed as conflicting, thereby effectively rebutting defendant's prima facie showing of entitlement to summary judgment.

Throughout his deposition, Mr. Florio offers multiple instances of hearsay evidence as to how he was aware that the boiler from which he alleges exposure to asbestos was specifically a Columbia boiler:

Q: Now, I think I forgot to ask you, with the Columbia boiler how did you know it was a Columbia boiler?

A: I didn't know it until one of the fellows says you know what kind of boiler this is? I says I don't know, it looked -- I thought it was an O. Smith [sic] boiler or it was a Dunkirk, I don't know. The guy, the fellow was

telling me, you know this is an old Columbia boiler, I think the boiler must have been 50 years old. I think they put the boiler in before they put the building up.

(Aff. in Opp., Exh. 2 at 390:21-391:8, *emphasis added*)

Q: Do you recall seeing the name Columbia anywhere on the boiler?

A: No, I didn't, ma'am. We went by what the serviceman said.

Q: Did he say how he knew it was a Columbia boiler?

A: Say that again.

Q: How did the serviceman know it was a Columbia boiler?

MR. FINLEY: Objection.

Q: If you know. Do you know?

A: I don't know how he knew, he just told me.

Q: Was there a nameplate anywhere on the boiler?

A: If there was it probably was covered with asbestos.

(Id. at 394:17-395:9, *emphasis added*)

Mr. Florio's testimony regarding Columbia boilers also otherwise fails to show that he had any intimate knowledge of exactly which brand of boiler he was working with. Mr. Florio's testimony only offers details about the general size and estimated age of the boiler (see *generally id.* at 383-386). Plaintiff has, thus, made no sufficient showing of "facts and conditions from which defendant's liability may be reasonably inferred" and he has failed to satisfy the *Reid* standard (*Reid v Ga. – Pacific Corp., supra*).

Mr. Florio's testimony contains only hearsay information as to how he was aware of the specific brand of boiler upon which he believed to be working. Hearsay statements are defined as "out-of-court statements offered for the truth of the matters they assert ... and 'may be received in evidence only if they fall within one of the recognized exceptions to the hearsay rule, and then only if the proponent demonstrates that the evidence is reliable'" (*Nucci ex rel. Nucci v Proper*, 95 NY2d 597, 602, 721 NYS 2d 593 [2001]; citing *People v Brensic*, 70 NY2d 9, 14, 517 NYS 2d 120 [1987]).

There has been no showing that the above hearsay testimony concerning a third-party telling Mr. Florio that he was working on a Columbia boiler is especially reliable or falls within some recognized exception to the hearsay rules. There has also been no showing that Mr. Florio's deposition features conflicting testimony such as to survive summary judgment (see *generally* Aff. in Opp., Exh. 2 at 381-396). Thus, plaintiff has failed to present "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*).

Plaintiff has not met his burden in opposing defendant's prima facie showing of entitlement to summary judgment. Therefore, summary judgment is granted.

Accordingly, it is ORDERED that defendant Columbia Boiler of Pottstown's motion for summary judgment pursuant to CPLR §3212, dismissing plaintiff's complaint and all cross-claims against it, is granted, and it is further

ORDERED that the complaint and all cross-claims against defendant Columbia Boiler of Pottstown are severed and dismissed, and it is further

ORDERED that the clerk of court enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: March 21, 2019



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE