

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

2019 NY Slip Op 30792(U)

March 22, 2019

Supreme Court, New York County

Docket Number: 190026/2015

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 JAMES HUTCHINGS and JACQUELINE HUTCHINGS,

INDEX NO. 190026/2015 MOTION DATE 3/6/2019 MOTION SEQ. NO. 004 MOTION CAL. NO.

Plaintiff(s),

- against -

A.O. SMITH WATER PRODUCTS CO., et al.

Defendants.

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

Table with 2 columns: PAPER NUMBERED, 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, CertainTeed Corporation's, (hereinafter, "CertainTeed") motion for summary judgment pursuant to CPLR §3212, dismissing plaintiffs' complaint and all cross-claims against it, is denied.

Plaintiff James Hutchings was diagnosed with asbestosis on April 29, 2014. Plaintiffs commenced this action in New York County Supreme Court on February 3, 2015. On March 28, 2016 plaintiffs filed a Supplemental Summons and Amended Verified Complaint against additional defendants. Mr. Hutchings was deposed on May 23 and May 24, 2017. In his deposition, he specifically alleged exposure to asbestos starting in 1960 from interior lining duct-work containing CertainTeed black rolled insulation material of various thickness ranging from 0.5 to 1 inch (see Aff. in Opp., Exh. 2 at 129). He testified that he used this lining throughout his career, which ended in 1998 (see Aff. in Opp., Exh. 2 at 291).

Mr. Hutchings stated that the lining material roll was approximately four (4) feet by one hundred (100) feet for the one-inch insulation and approximately four (4) feet by more than one hundred (100) feet for the half-inch insulation, but he wasn't completely sure of this (see Aff. in Opp., Exh. 2 at 295). Mr. Hutchings recalled that the product came wrapped in a paper bag which said "CertainTeed" on the side of it (see Aff. in Opp., Exh. 2 at 297-298). He further testified that he used a box cutter to cut the insulation material before affixing it to the interior of the ducts (Aff. in Opp., Exh. 2 at 300-302). Mr. Hutchings testified that this process created dust which he inhaled (see Aff. in Opp. at 308). Finally, he testified that he later learned that this insulation contained asbestos (see Aff. in Opp., Exh. 2 at 306-307). Plaintiffs James Hutchings and Jacqueline Hutchings now bring this action to recover for Mr. Hutchings' personal injuries due to asbestos-exposure.

FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

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 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 its product brochures and the Affidavit of Michael J. Noone establish that the CertainTeed products in question did not contain asbestos. Accordingly, CertainTeed argues that it has met its burden of showing that its products could not have contributed to the causation of plaintiff's injury because CertainTeed duct liner (from which Mr. Hutchings specifically alleges exposure to asbestos) never contained asbestos. Defendant also argues that plaintiffs cannot meet their burden of showing a triable issue of fact because the evidence it has presented definitively demonstrates that the CertainTeed products at issue contained no asbestos.

In response, plaintiffs argue that Dr. Noone's affidavit and the evidence which CertainTeed presents fail to definitively establish the true composition of

the products in question such as to warrant summary judgment. Thus, plaintiffs argue that this case presents a question of how much credence should be given to the defendant's evidence concerning the composition of the CertainTeed products at issue (thus, warranting a denial of summary judgment).

The Affidavit of Michael J. Noone, Ph.D contains sworn statements as to the composition of a variety of CertainTeed products including the CertainTeed Duct Liner from which plaintiff specifically alleges exposure to asbestos (Noone Aff. at 2-3). However, Dr. Noone's sworn testimony to the effect that these products "never contained any asbestos" does not provide conclusive evidence that these products were devoid of asbestos such as to warrant summary judgment. This is because such sworn testimony fails to eliminate "all material issues of fact" and, thus, does not satisfy the movant-defendant's burden to establish prima facie entitlement to summary judgment (see *Klein v City of New York, supra*). The product brochures provided by defendant also contain claims about the composition of CertainTeed products which are not backed by any empirical data (see Noone Aff., Exhs. 1-15). Therefore, these brochures merely contain unverified representations about the products in question and similarly fail to eliminate "all material issues of fact" as required to satisfy the defendant's burden to establish a prima facie case for summary judgment (see *id.*).

As such, this case has, at this point, become a matter of weighing the credibility of the defendant's various forms of sworn, but not empirically-backed, attestations (i.e., those of Dr. Noone's and those presented by the CertainTeed product brochures) against the sworn testimony of Mr. Hutchings.


However, it is not the function of the Court deciding a summary judgment motion to weigh credibility issues or make 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 NYS 2d 70 [2011], *Almonte v 638 West 160 LLC*, 139 AD 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]).

Defendant has failed to meet its burden of presenting evidence which "unequivocally establish[es] that its product could not have contributed to the causation of plaintiff's injury" (see *Matter of N.Y.C. Asbestos Litig., supra*). On the other hand, plaintiff-Mr. Hutchings' testimony satisfies the burden of the *Reid* standard because it sufficiently shows "facts and conditions from which defendant's liability may be reasonably inferred" (see *Reid v Ga. - Pacific Corp., supra*). Mr. Hutchings' testimony also presents enough contrary evidence to that of the defendant's to warrant a trial (see *Amatulli v Delhi Constr. Corp.*). Therefore, summary judgment is denied.

Accordingly, it is ORDERED that defendant CertainTeed Corporation's motion for summary judgment pursuant to CPLR §3212, dismissing plaintiffs' complaint and all cross-claims against it, is denied.

ENTER:

Dated: March 22, 2019

  
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MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST     REFERENCE