

Matter of Mercatante v Amchem Prods., Inc.
2019 NY Slip Op 31043(U)
April 10, 2019
Supreme Court, New York County
Docket Number: 190018/2017
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

SARI MERCATANTE, as Personal Representative
of the Estate of FRANK L. MERCATANTE, and
SARI MERCATANTE, Individually,
Plaintiff,

- against -

AMCHEM PRODUCTS, INC., n/k/a RHONE
POULENC AG COMPANY, n/k/a BAYER
CROPSCIENCE, INC., et al.,
Defendants.

INDEX NO. 190018/2017
MOTION DATE 03/13/2019
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion for summary judgment by PACCAR, Inc.:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1- 4</u>
Answering Affidavits — Exhibits _____	<u>5 - 6</u>
Replying Affidavits _____	<u>7</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that defendant PACCAR, Inc.'s (hereinafter "PACCAR") motion pursuant to CPLR §3212, for summary judgment to dismiss plaintiff's claims and all cross-claims against it, is granted to the extent of dismissing plaintiff's seventh cause of action for spousal loss of consortium. The remainder of the relief sought in this motion, is denied.

Frank L. Mercatante (hereinafter referred to as "decedent") was diagnosed with malignant mesothelioma on December 19, 2016. He died from his illness, at age 64, on March 18, 2018. Decedent was deposed over a course of ten days on March 15, 16, 17, 20, 21, 22, 23, 24, 27, and 28, 2017 (Mot. Green Aff. Exh. F and B, Opp. Ratzki Aff. Exh. 1). It is alleged that the decedent was exposed to asbestos in a variety of ways. His exposure - as relevant to this motion - was from blowing asbestos dust from the brake drum area on Peterbilt and Kenworth trucks manufactured by companies that are owned by PACCAR.

Plaintiffs allege that the decedent was exposed to asbestos dust during his work when he was self employed and leasing an Exxon service station located at Rockaway Turnpike in New York from about 1975 through 1979 (Opp. Ratzki Aff., Exh. 1, pgs. 794-796, and 1277). Decedent initially testified at his deposition that he only did oil and gasket changes on Peterbuilt trucks, and that he replaced wiper blades, greased axles, or performed quick maintenance work on Kenworth trucks (Mot. Green Aff., Exh. F, pgs. 573- 576 and 580-581, Opp. Ratzki Aff., pg. 1278). Decedent later remembered that he worked with Peterbuilt and Kenworth 18 wheeler trucks and was exposed to asbestos from dust particles in the brake drum, coming from the asbestos brake linings, which he breathed in (Opp. Ratzki Aff., Exh. 1, pgs. 998-1000).

Decedent testified that he was exposed to asbestos dust from the brake drum area on Kenworth trucks when he used an air hose to blow it out, while rotating the tires from front to back (Opp. Ratzki Aff., Exh. 1 pgs. 1278-1280). Decedent claimed it was his habit to use the air hose (Opp. Ratzki Aff., Exh. 1, pg. 1280). Decedent stated he rotated the tires by removing them, using just the front part of the cab. He stated that he alone performed the whole process which would take about thirty minutes. He recalled for the most part the trucks used air brakes and that he did not perform any brake work on either a Peterbuilt or Kenworth truck. Decedent claimed that the tire rotations took place

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

about every six months and that he performed the same tire rotation service on both Peterbuilt and Kenworth trucks (Opp. Ratzki Aff., Exh. 1, pg. 1281-1283).

Plaintiffs commenced this action on January 19, 2017 (See NYSCEF Docket # 1). The PACCAR owned companies, Peterbuilt Motors Co. and Kenworth Truck Company, were added as defendants to plaintiffs' Fourth Amended Complaint dated March 15, 2017 (Mot. Green Aff., Exh. A). Plaintiffs' standard complaint asserts seven causes of action: (1) negligent failure to warn; (2) breach of warranty; (3) strict liability; (4) joint and several liability; (5) premises liability; (6) "dust mask" liability (asserted solely against two other defendants); and (7) spousal loss of consortium (Mot. Green Aff., Exh. B). On May 19, 2017 PACCAR answered the Fourth Amended Complaint (Mot. Green Aff., Exh. C).

PACCAR now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiff's complaint and all cross-claims 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]). 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]).

In support of its motion for summary judgment PACCAR relies on the affirmation of its attorney; the pleadings; copies of cases used as precedent; decedent's deposition transcripts; a certified copy of decedent's Social Security printout (to show his work history); a copy of the Note of Issue filed in this action; and plaintiff's expert witness reports (Mot. Green Aff., Exhs. A, B, C, D, E, G, H, I, J and K).

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 [1st 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 [1st Dept., 2015] and *Hoeffner v. Orrick, Herrington & Sutcliffe LLP*, 61 A.D. 3d 614, 878 N.Y.S. 2d 717 [1st Dept. 2009]).

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

PACCAR argues that plaintiffs are not expected to present any admissible evidence of causation, and that plaintiffs' expert reports do not establish either general or specific causation.

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 [1st Dept. 2016] and *Koulermos v A.O. Smith Water Prods.*, 137 A.D. 3d 575, 27 N.Y.S. 3d 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 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 [1st 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 [1st Dept. 2014] and O'Connor v. Aerco Intl., Inc., 152 A.D. 3d 841, 57 N.Y.S. 3d 766 [3rd Dept., 2017]). Defendants must unequivocally establish that the decedent 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 [1st Dept., 2014]).

PACCAR's argument that plaintiffs have no evidence, and cannot raise an issue of fact on either general or specific causation with their experts' reports, fails to state a prima facie basis to obtain summary judgment. Plaintiffs provided PACCAR, the expert reports of Dr. Sanford Ratner, M.D. and Dr. David Y. Zhang, M.D., Ph.D., M.P.H., a pathologist. Both reports conclude that the decedent's exposure to asbestos caused his mesothelioma (Mot. Green Aff., Exhs. H and I).

Dr. Zhang analyzes the decedent's history of asbestos exposure, clinical presentation, radiological findings and histological diagnoses. Dr. Zhang concludes that the decedent's malignant mesothelioma was a result of the cumulative exposure to each company's asbestos containing products (Mot. Green Aff., Exh. I). PACCAR does not provide any expert report in support of its conclusory claims that there is no causation and plaintiff's experts cannot establish decedent's causation, its argument amounts to "pointing to gaps in plaintiffs' proof" and fails to state a prima facie basis to obtain summary judgment.

PACCAR also does not establish entitlement to summary judgment by arguing that the plaintiffs' arguments are speculative and decedent's deposition testimony shows he was not exposed to asbestos dust from his work with Peterbilt and Kenworth trucks. Alternatively, plaintiffs as the non-moving parties are entitled to the benefit of all favorable inferences, regardless of the ability to provide a detailed description of exposure on causation.

"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 [1st 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 [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]).

Decedent's initial inability to provide specific identification of the work that would expose him to asbestos from dust coming from the brake drum after blowing it out with an air hose, is not enough to warrant summary judgment to PACCAR. Decedent sufficiently identified both Peterbilt and Kenworth trucks and provides descriptions of the manner in which he was exposed to asbestos, through the dust blown off the brake drum, that came from the brake lining when he rotated the tires.

Plaintiffs in opposition raise an issue of fact through PACCAR's interrogatory responses from an unrelated action, which stated in response to Interrogatory No. 6 that, "Kenworth/Peterbilt during the years 1970 - 1980 sold...some brake kits, brake assemblies, brake linings and gaskets which may

have contained asbestos.” The PACCAR corporate industrial hygienist, Dave Bissonette, states that in 1976 a presentation on asbestos health hazards was made to the company’s safety and health staff by Assistant Professor Peter A. Breyse, of the University of Washington School of Public Health and Community Medicine. It is also stated that additional information may have been provided to various safety and medical staff for manufacturing operations over the course of 1970 through 1980 (Opp. Ratzki Aff. Exh. 2, at 6 and 8-11).

Plaintiffs also raise an issue of fact through the use of the deposition testimony of Mr. Lawrence P. Bean, a corporate representative of PACCAR, taken on October 1, 2010 in an unrelated action in California (Opp. Ratzki Aff., Exh. 3). Mr. Bean testified that prior to 1983 Peterbuilt and Kenworth trucks predominantly used drum brakes which had brake shoe lining material that would wear down during normal use. Mr. Bean further testified that both the brake lining and the break shoe would wear down during the process of applying the brakes, which takes the form of brake dust that could get mixed in road grime and axle grease (Opp. Ratzki Aff., Exh. 3 pgs. 249-252). He agreed that both Peterbuilt and Kenworth were aware that there was ware between the brake shoe or the brake lining and the drum (Opp. Ratzki Aff., Exh. 3 pgs. 252-253).

Mr. Bean testified that prior to 1983 both Peterbuilt and Kenworth were aware that asbestos was used as part of the brake lining components in their trucks. He stated that in drum brake systems any materials created from wear (i.e. asbestos dust), “would be contained within that whole brake assembly,” not just the drum (Opp. Ratzki Aff., Exh. 3, pgs. 260-261, and 266). Mr. Bean testified that the manufacturers of the drum brake asbestos component parts advised the dealership employees during visits and training not to blow out dust when doing maintenance type procedures (Opp. Ratzki Aff., Exh. 3, pgs. 266-267).

The interrogatory responses and Mr. Bean’s deposition testimony corroborate the decedent’s testimony concerning his exposure to asbestos dust when rotating tires on Peterbuilt and Kenworth trucks. Mr. Bean’s testimony and the interrogatory responses together with the decedent’s deposition testimony raises issues of fact and credibility issues that warrant denial of summary judgment.

PACCAR claims that the decedent’s certified Social Security Administration records indicate that he only worked at the Exxon service station on Rockaway Turnpike in New York from the first quarter of 1975 through the first quarter of 1977, or a year and a half. PACCAR argues that the Social Security Administration records show that the decedent worked for a much shorter period than was testified to at his depositions, demonstrating substantially less potential exposure to asbestos and warranting 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 [1st 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 [1st Dept., 2016] and Doumbia v. Moonlight Towing, Inc., 160 A.D. 3d 554, 71 N.Y.S. 3d 884 [1st 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 PACCAR’s liability may be reasonably inferred from the decedent’s alleged work around the Peterbuilt

and Kenworth trucks, and whether this exposure to asbestos resulted in his mesothelioma. The conflicting evidence and testimony raise issues of fact that cannot be resolved on a motion for summary judgment. PACCAR has not established that summary judgment is warranted on the claims asserted on behalf of the estate for personal injury and wrongful death, and the cross-claims asserted against it.

PACCAR seeks to dismiss the seventh cause of action for spousal loss of consortium arguing that the decedent's alleged injuries from his work around Peterbuilt and Kenworth trucks occurred before he was married to his wife (See *Holmes v. Maimonides Medical Center*, 95 A.D. 3d 831, 943 N.Y.s. 2d 573 [2nd Dept. 2012] citing to *Anderson v. Eli Lilly & Co.*, 79 N.Y. 2d 797, 588 N.E. 2d 66, 580 N.Y.S. 2d 168 [1991]). The decedent testified that he married his wife, Sari Mercatante, on January 26, 1983, after the alleged period of exposure from 1975 through 1979 (Mot. Green Aff. Exh. F, pg. 84 and Opp. Ratzki Aff., Exh. 1, pgs. 794-796, and 1277). Plaintiffs did not provide evidence to raise an issue of fact or otherwise sustain the seventh cause of action.

ACCORDINGLY, it is ORDERED that defendant PACCAR, Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' claims and all cross-claims against it, is granted only to the extent of dismissing the seventh cause of action for spousal loss of consortium, and it is further,

ORDERED that plaintiffs' claims asserted in the seventh cause of action for spousal loss of consortium against PACCAR, Inc., are severed and dismissed, and it is further,

ORDERED that the remainder of the relief sought in this motion, is denied, and it is further,

ORDERED that all remaining claims and cross-claims asserted against PACCAR, Inc., remain in effect, and it is further,

ORDERED that the Clerk of the Court shall enter judgment accordingly.

ENTER:

Dated: April 10, 2019



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