Prestigiacomo v Amchem Prods., Inc.
2019 NY Slip Op 31044(U)
April 11, 2019
Supreme Court, New York County
Docket Number: 190386/2017
Judge: Manuel J. Mendez

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
ATANASIO PRESTIGIACOMO and PAULINE PRESTIGIACOMO

INDEX NO. 190386/2017

Plaintiff(s),

- against -

AMCHEM PRODUCTS, INC., *et al.*,

Defendants.

MOTION DATE 4/10/2019

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on Paccar, Inc.'s motion for summary judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1- 3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6-7

Cross-Motion: Yes X No

FOR THE FOLLOWING REASON(S):

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

Plaintiffs commenced this action on December 20, 2017. Atanasio Prestigiacomo was diagnosed with lung cancer on November 15, 2017. He was deposed on February 8, 2018, February 9, 2018, and February 12, 2018. Mr. Prestigiacomo alleges having been exposed to asbestos when he, among other things, repaired trucks for a living for various employers and came into contact with asbestos-containing brakes, clutches, and gaskets.

Plaintiffs now bring this action to recover for Mr. Prestigiacomo's personal injuries due to asbestos-exposure. Defendant PACCAR moves for summary judgment, essentially, arguing that the evidence presented fails to identify Kenworth as a specific source of plaintiff's exposure to asbestos.

Early on in his testimony, Mr. Prestigiacomo identifies "Kenwork [sic]" as one of the fleet vehicles upon which he worked:

> A: They had about 40 truck. They had about 70 rig all the time, payloader, truck, cars and everything.
> Q: So, you worked on fleet vehicles 14 that were owned by Twin County?
> A: Yes.
> Q: And what was their fleet 17 comprised of, what different types of vehicles?
> A: It was Oshkosh, you know, Autocar, you know, Kenwork [sic], GM, that's the way it was. Mack, I think

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

there was a couple of Mack, you know.

(Aff. in Opp., Exh. 1 at 158:10-22)

Plaintiff also mentions "Kenwar [sic]" as a brand of vehicle he serviced later in his testimony (Aff. in Supp., Exh. D at 370:6).

However, when cross-examined and asked directly whether he remembers encountering "Kenworth" products, Mr. Prestigiacomo answers in the negative:

> Q: When you testified last week, you mentioned a brand called Kenworth; do you recall that?
> A: What?
> Q: Do you recall testifying about Kenworth, a company called Kenworth?
> A: Kenworth?
> MR. ROMANELLI: You mentioned it last -
> A: I don't remember.
> Q: Is there a product that you associate with the name Kenworth?
> A: I don't remember Kenworth, you know, Kenworth.
> Q: Sir, you don't know whether or not you worked with products manufactured by Kenworth?
> A: What is it, you know, what kind of product? I don't know, I don't remember Kenworth.
> Q: When you worked at Twin City County Transmit Mix from around 1969 to 1970, --
> A. Yes.
> Q: -- you worked with a number of different types of products including trucks and tractors, right?
> A: Yes.
> Q: Were any of those products manufactured by a company called Kenworth?
> A: I don't remember, you know, I really -- I don't remember.

(Aff. in Supp., Exh. D at 438:14-439:21)

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]).

Defendant makes three basic arguments in support of its motion for summary judgment. First, it argues that Mr. Prestigiacomo did not properly implicate Kenworth (a brand owned by defendant PACCAR) as a source of his exposure to asbestos. Second, it argues that plaintiff's testimony should be suppressed for purposes of ruling on this motion because PACCAR was effectively deprived of the opportunity to cross-examine him. Third, defendant claims that plaintiff's testimony should be suppressed for purposes of determining this motion because his testimony was purely speculative.

Plaintiffs oppose the motion, claiming that the defendant has not met its prima facie burden of establishing that its products could not have contributed to Mr. Prestigiacomo's injury. Plaintiffs also claim that PACCAR can be held responsible for replacement asbestos-containing brakes, clutches, and gaskets. Furthermore, plaintiffs argue that Mr. Prestigiacomo's misstatement of the "Kenworth" name should not become grounds for granting summary judgment. Plaintiffs argue that there are material issues of fact remaining such as to warrant denial of summary judgment.

This case presents unique circumstances which distinguish it from the cases cited in the arguments of the defendant. Specifically, this case involves a situation in which plaintiff, Mr. Prestigiacomo, was given a proper opportunity to correct his potential misstatements and clarify whether he had meant to say "Kenworth" in his testimony instead of "Kenwar [sic]" or "Kenwork [sic]." The *Reid* case is not on point because it involved a mere mispronunciation of a name (*see Reid v Georgia-Pacific Corp.*, 212 AD2d 462, NYS2d 946 [1st Dept 1995]. *Nigro* and *Tronlone* are also not on point because they involved a mere misspelling issue in relation to the defendant's name or product and not an inability to recall the defendant's name (*see Nigro v A.C. and S., Inc.* [Jan. 12, 2009 Sup Ct NY, Co. [Heitler, J.] and *Tronlone v Lac d'Amainte du Québec, Ltée*, 297 AD2d 528, NYS2d 79 [1st Dept 2002]).

The ultimate record in this case simply fails to show any instance in which Mr. Prestigiacomo properly identifies "Kenworth" products or vehicles as a specific source of his exposure to asbestos. Therefore, no material issues of fact remain as to whether PACCAR is liable for his exposure to asbestos.

PACCAR has established prima facie entitlement to summary judgment and plaintiffs have failed to rebut this prima facie showing. PACCAR's motion for summary judgment is granted.

Accordingly, it is ORDERED that defendant Paccar, Inc.'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 Paccar, Inc. 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: April 11, 2019

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION x NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE