

Goodheart v Amchem Prods., Inc.
2019 NY Slip Op 31111(U)
April 12, 2019
Supreme Court, New York County
Docket Number: 190353/2018
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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
Justice

PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

ROBERT GOODHEART AND MAUREEN GOODHEART,

INDEX NO. 190353/2018

Plaintiffs,

MOTION DATE 03/13/2019

- against -

MOTION SEQ. NO. 001

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

MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on Kohler, Co.'s motion pursuant to CPLR §3212 for summary judgment:

	<u>PAPERS NUMBERED</u>
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 Kohler Co.'s (hereinafter "Kohler") motion pursuant to CPLR §3212 for summary judgment dismissing the complaint and all cross-claims asserted against it, is denied.

Plaintiff, Robert Goodheart, was diagnosed with malignant epithelioid mesothelioma on August 13, 2018, he was 62 years old (Opp. Dreksler Aff. Exh. 1). Mr. Goodheart alleges he was exposed to asbestos in a variety of ways. His exposure - as relevant to this motion - is from his work as a chimney cleaner removing, installing and cleaning up asbestos cement from Kohler boilers in residences throughout Brooklyn, while employed by Jacobson Chimney Cleaning Company (hereinafter "Jacobson Chimney").

Mr. Goodheart was deposed over the course of two days, October 9 and 10, 2018 (Mot. Riemer Aff., Exh. B and Opp. Dreksler Aff. Exh. 2). He testified that he worked mostly part-time for Jacobson Chimney in multi-family and single family residences in Brooklyn beginning about 1975 through 1977 (Mot. Riemer Aff., Exh. B, pgs. 62-66, 70, and 119-120). He stated that Jacobson Chimney was run by Mr. Bjorn Jacobson out of his house in Flatbush (Mot. Reimer Aff., Exh. B, pg. 62). Mr. Goodheart stated that initially he received on the job training by Mr. Jacobson until he was ready, and then went on stops by himself (Mot. Reimer Aff., Exh. B, pgs. 65-66). Mr. Goodheart testified that he identified "boilers" and "burners" interchangeably because Mr. Jacobson called them "burners" (Mot. Reimer Aff., Exh. B, pg. 334). Mr. Goodheart described his duties when working with Mr. Jacobson as:

"So, what we would do, we would disconnect the flue from the burner, where it meets the oil burner, the flue pipe, so we'd have to take off the cement over the - - the cement around there, pull it, pull it all down, you know, break it up and that would create, like, a lot of, like a little cloud (cloud) going on there, dusty.

Then what we'd do is vacuum out the inside of the flue, clean it out, put everything back in, take - - mix the cement which actually created dust, it was like a fibrous cement. We'd do it, let it dry, pat it down. Same thing on the part of the burner, then we'd come around and often times

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

some of the burners had doors. Some of them would say had asbestos gaskets on them that would be kind of falling apart because they were old.

We'd open the doors, clean the insides, some had tubes, we'd have to punch little tubes, clean the brush, close the door up and then reapply an asbestos gasket cement, pat it down to make sure it was sealed.

Some of them had small fire doors where you would have to open the little fire door up and the same thing, make sure the gaskets, whatever was on and then vacuum out the pit, the pit. The same thing you'd take -- and the burner you kind of cleaned."
(Mot. Reimer Aff., Exh. B, pgs. 68-69, lines 1-12).

Mr. Goodheart explained that "punching the tubes" means using a brush to clean the tubes located inside the boilers (Mot. Reimer Aff., Exh. B, pg. 255). He testified that all the boilers he worked with had asbestos cement surrounding them, and covering the doors leading to the tubes he had to clean. He remembered that some of the boilers also had asbestos gaskets or rope-type material that had to be removed, but he was unable to specifically recall which manufacturer's boilers had them (Mot. Reimer Aff., Exh. B, pgs. 79 and 137). He stated the boilers had asbestos cement attached to the flue which connected to the chimney (Mot. Reimer Aff., Exh. B, pg. 311).

Mr. Goodheart identified Kohler as one of about eight brands of boilers he worked on (Mot. Reimer Aff., Exh. B, pg. 71). He was able to identify a Kohler boiler by the tag on it, which was attached on the front or side on a metal plate (Mot. Reimer Aff., Exh. B, pg. 156). Mr. Goodheart specifically remembered that Kohler had a flue pipe that was part of the chimney that would either have to be removed or pulled out so he could clean. He specifically recalled cleaning the flue pipe and a "little butterfly" vent, and removing and replacing the asbestos cement at the point of attachment of the flue pipe to the chimney (Mot. Reimer Aff., Exh. B, pgs. 158-159). Mr. Goodheart while testifying specifically about Kohler stated "sometimes some of the boilers had doors" but was redirected by Kohler's counsel to testify about flue pipes (Mot. Reimer Aff., Exh. B, pg. 159 lines 18-22). Mr. Goodheart testified that on Kohler boilers, aside from the flue pipe, "some of them (boilers) actually had the asbestos cement on the other side, the other end of it also" (Mot. Reimer Aff., Exh. B, pg. 159, lines 23-25).

Mr. Goodheart also testified that he did the same type of work on all boilers regardless of manufacturer (Mot. Reimer Aff., Exh. B, pg. 130, lines 2-5). He stated that basically on all boilers he worked with, in addition to the flue pipes, he "removed asbestos cement that surrounded them, re-applied it" and then on the units that had doors leading to the tubes, he had to clean and then re-apply the cement to make the seal (Mot. Reimer Aff., Exh. B, pg. 311, lines 2-14).

Plaintiffs commenced this action on August 31, 2018. The complaint was subsequently amended on September 7, 2016 (NYSCEF Docket No. 1). Plaintiffs subsequently Amended the Summons and Complaint on September 18, 2018. Kohler served its Acknowledgment of Receipt on November 28, 2018 (NYSCEF Docket No. 62).

Kohler's motion seeks an Order granting summary judgment, pursuant to CPLR §3212, dismissing the plaintiffs' complaint and all cross-claims asserted against it.

In support of its motion for summary judgment Kohler relies solely on the affirmation of its attorney, the pleadings (not annexed as an exhibit), plaintiffs' Answers to Interrogatories, Mr. Goodheart's deposition transcripts, and a prior decision of this Court (Mot. Reimer Aff., Exhs. A, B and C).

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' argument that Kohler's motion should be denied because it relies on the hearsay affirmation of an attorney is unavailing. The attorney's affirmation in support of Kohler's motion is being used as a vehicle to submit evidence in admissible form - including deposition testimony - and is sufficient to sustain this motion.

Kohler argues that it is entitled to summary judgment on causation because Mr. Goodheart only specifically identified exposure to asbestos cement at the connection between the pipe and the chimney, which is not part of the Kohler boiler (Mot. Reimer Aff., Exh. B, pgs. 158-160). Kohler claims that Mr. Goodheart's testimony regarding contact with asbestos is limited to a specific location that is near the boiler, but not part of it, warranting summary judgment 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]).

Plaintiffs in opposition provide a Kohler brochure for the "22" Oil Boiler model, that states there were twin access doors for cleaning the flues at the front (Opp.Dreksler Aff., Exh. 3). Plaintiffs also cite to Mr. Goodheart's deposition testimony where he states "sometimes some of the boilers had doors" but was redirected by Kohler's counsel to testify about the flue pipes. They claim Mr. Goodheart's testimony that aside from the flue pipe, "some of them (boilers) actually had the asbestos cement on the other side, the other end of it also" (Mot. Reimer Aff., Exh. B, pg. 159, lines 18-22, and 23-25), also demonstrates he was exposed to asbestos cement in other locations on the Kohler boilers. Plaintiffs cite to Mr. Goodheart's testimony where he includes all boilers he worked with and refers to asbestos cement on doors and other locations. Plaintiffs argue that Kohler's attempt to limit Mr. Goodheart's testimony does not establish a prima facie basis to obtain 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]).

To the extent that Mr. Goodheart provided contradictory testimony, there is no proof that it was to obtain a favorable outcome in this action or in summary judgment. Mr. Goodheart's conflicting testimony presents a credibility issue to be determined by the trier of fact (See *Luebke v. MBI Group*, 122 A.D. 3d 514, 997 N.Y.S. 3d 379 [1st Dept. 2014] citing to *Vazieiyan v. Blancato*, 267 A.D. 2d 152, 700 N.Y.S. 2d 22 [1st Dept., 1999]). There remain issues of fact as to whether he was exposed to asbestos cement attached to Kohler boilers and whether that is the cause of his mesothelioma. Mr. Goodheart's conflicting testimony raises issues of fact that cannot be resolved on a motion for summary judgment.

Additionally, plaintiffs as the non-moving parties are entitled to the benefit of all favorable inferences, regardless of Mr. Goodheart's ability to provide a specific description of his exposure.

Plaintiffs have raised issues of fact as to whether Mr. Goodheart was exposed to asbestos cement that was applied to the Kohler boilers during the relevant period of about 1975 through 1977. Mr. Goodheart's failure to provide detailed and specific identification of all the locations he found or disturbed asbestos cement on Kohler's boilers does not mean that he was not exposed as part of his work as a chimney cleaner. Kohler's reliance on *Gadja v. A.O. Smith Water Products, Co., et al.*, Index No. 190343/2016, is misplaced, and that case is distinguishable. The plaintiff in *Gadja*, did not actually disturb the asbestos insulation, and only took readings in the area around the boiler. Mr. Goodheart testified that as a chimney cleaner, he had to actually remove and re-install asbestos cement from all the boilers he worked with, this includes Kohler's boilers. Plaintiffs have raised triable issues of fact on causation. Kohler's liability may be reasonably inferred from Mr. Goodheart's testimony about his work as a chimney cleaner and exposure to asbestos cement applied to Kohler's boilers.

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

ENTER: MANUEL J. MENDEZ
J.S.C.



MANUEL J. MENDEZ
J.S.C.

Dated: April 12, 2019

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE