

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

2019 NY Slip Op 31112(U)

April 15, 2019

Supreme Court, New York County

Docket Number: 190373/2016

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

AZALIA CHALCO, Executrix of the Estate of WILSON CHALCO, and AZALIA CHALCO, Individually, Plaintiffs,

- against -

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

INDEX NO. 190373/2016
MOTION DATE 04/10/2019
MOTION SEQ. NO. 006
MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on Burnham, LLC's motion for summary judgment:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for 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 Burnham, LLC's (hereinafter "Burnham") motion for summary judgment pursuant to CPLR §3212 to dismiss the plaintiffs' complaint and all cross-claims against it is granted.

Wilson Chalco (hereinafter referred to as "decedent") was diagnosed with mesothelioma on August 31, 2016. He died from his illness, at age 68, on April 18, 2017 (Opp., Exhs. 1 and 2). It is alleged that the decedent was exposed to asbestos in a variety of ways. His exposure to asbestos - as relevant to this motion - was from being in the vicinity of maintenance and cleaning workers working on Burnham boilers, when he was employed as a maintenance man by the New York City Housing Authority (hereinafter "NYCHA") at the Gowanus Houses, from about 1989 through 2006 (Mot. Exh. A and Opp., Exhs. 3 and 4, Chart A).

Decedent was deposed over a course of two days on February 1 and 2, 2017 (Mot. Decedent's EBT Exhs. A and B, Opp. Decedent's EBT excerpts, Exh. 3). He stated that NYCHA's Gowanus Houses had almost twenty (20) buildings and he worked as a maintenance man in a majority of them (Mot. Exh. A, Decedent's EBT, pgs. 31-32). Decedent described his maintenance man duties as working with the garbage compactor, cleaning each floor of the buildings he worked on, and cleaning away the leaves in the summer and the snow in the winter. Decedent testified that he was exposed to asbestos while working with the garbage compactor at the Gowanus Houses. He testified, "The chimney, the boiler was right next to where I was working. I saw workers cleaning that and there was a lot of dust." (Mot. Exh. A, Decedent's EBT pg. 34, lines 12-22). He specifically stated that he did not do any of the work on boilers, pumps or valves, himself, but that he had to enter the site because he had to take the garbage out to the compactor (Mot. Exh. A, Decedent's EBT, pgs.35, lines 1-21). Decedent testified that every building had a compactor and one boiler, that were located in the basement (Mot. Exh. B, Decedent's EBT pgs. 61 lines 9-16 and 75 lines 12-16). It was estimated that the garbage compactor was about twenty feet away from the boilers, more or less (Mot. Exh. B, Decedent's EBT, pgs. 61 lines 17-25, and 62 lines 1-2). Decedent stated that all the boilers were oil burning, but did not know what they were made of (Mot. Exh. B, Decedent's EBT pg. 63 lines 7-10).

Decedent identified Burnham as the manufacturer of the boilers because he saw a sign that said the name (Mot., Exh. A, Decedent's EBT pg. 35, lines 22-25). When asked what he saw the other men doing with the boilers, decedent testified, "Cleaning the pumps, the valves and a powder was coming out of it. A black powder." (The interpreter explained that the word "powder" had previously been translated to mean "dust") (Mot., Exh. A,

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

Decedent's EBT, pg. 37, lines 8-12). When clarification was sought about the boilers, the decedent testified, "Well, the boilers, because when they were doing the cleaning, there was some dust coming out of it" (Mot. A, Decedent's EBT, pg. 37, lines 17-21). He further testified that, "once in a while" he saw workers cleaning the boilers and "black smoke came out of it," (Mot. Exh. B, Decedent's EBT, pgs. 83 lines 14-25). Decedent testified that he could not say where the dust was coming from. When questioned, "So, it's fair to say that you can't tell us what specific piece of equipment the dust was coming from?" Decedent answered "Well, when I was cleaning, the dust will appear" (Mot. Exh. B, Decedent's EBT pg. 90, lines 24-25, and pg. 91 lines 1-7).

Plaintiffs commenced this action on December 8, 2016 (NYSCEF Docket No. 1). The Summons and Complaint were subsequently amended on January 30, 2017. Burnham's Acknowledgment is dated February 3, 2017 (NYSCEF Dockets 20 and 24).

Defendant Burham now moves for summary judgment pursuant to CPLR §3212 dismissing the plaintiffs' claims 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 Burnham relies on the affirmation of its attorney, the decedent's deposition transcripts, and excerpts from the deposition of its corporate representative Roger Pepper (Mot. Pope 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 (*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 argue that Burham's motion should be denied because it relies on the hearsay affirmation of an attorney. However, the attorney's affirmation in support of Burnham's motion is being used as a vehicle to submit evidence in admissible form - specifically, deposition testimony - and is sufficient to sustain this motion.

A defendant seeking summary judgment in an asbestos case 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]).

Burnham argues that it is entitled to summary judgment on causation because the deposition testimony establishes the decedent was not exposed to asbestos from its boiler products. Burham further argues that the decedent's testimony is too vague to establish specific causation from exposure to asbestos, and that it would be pure speculation and conjecture to determine there was any asbestos containing components associated with the boilers in the Gowanus Houses during the relevant time period.

Burnham relies on the deposition testimony of Roger Pepper, a corporate representative to establish that any boilers the decedent was allegedly exposed to would not have had asbestos on the outside (Mot. Exh. C, Pepper EBT). Mr. Pepper testified that Burnham produced "jacketed boilers" that used asbestos "aircell board" insulation starting in the 1930's through after World War II. He stated that the late 1940's into the early 1950's was a transition period when Burnham started using fiberglass to replace the air cell insulation. He testified that unjacketed boilers were covered in asbestos cement (Mot. Exh. C, Pepper EBT, pgs. 1991-1993).

Burnham claims that the decedent provided no testimony: (1) as to what part or components of the boilers had asbestos, and whether there was asbestos insulation on the outside of the boilers; (2) that there was manipulation or disturbance of asbestos materials associated with the boilers (ie gaskets or packing material), or identification of which materials were used; (3) as to what part of the boiler generated the dust during cleaning, or stated a basis for decedent's conclusion that the "black dust" contained asbestos; (4) of how frequently decedent was in the vicinity of the boilers; and (5) of the length of time decedent was exposed to the alleged asbestos dust.

Plaintiffs oppose the motion contending that Burnham failed to make a prima facie showing that its boilers could not have caused the decedent's mesothelioma and, that issues of fact remain as to whether decedent's exposure to asbestos from Burnham's boilers caused his mesothelioma.

"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 rely on Burnham's responses to interrogatories and a notice to admit in unrelated actions, arguing that Burnham admitted that it used asbestos components including "rope, cement, millboard, furnace cement, tape gasket, handhole gaskets and manhole gaskets", in residential products from about the 1920's through 1986 and partially 1990 (Opp. Exhs. 5 and 6). Plaintiffs claim that the decedent sufficiently testified to being exposed to asbestos from component parts in Burnham boilers. Plaintiffs cite to Burnham's directions for a water tube sectional boiler and a catalog - requiring either asbestos sealing or asbestos insulation - as proof that the work being performed on the boilers would have generated asbestos dust consistent with the decedent's testimony (Opp. Exhs. 7 and 8). Plaintiffs argue that this evidence at the very least creates credibility issues warranting denial of summary judgment.

The mere presence of Burnham boilers is insufficient to establish that the decedent was actually exposed to asbestos from Burnham's boilers (see Cawein v. Flintkote Co., 203 AD2d 105, 106 [1st Dept. 1994]). Plaintiffs must show that the decedent was actually exposed to asbestos from the Burnham boilers. Plaintiffs have not made that showing, and Burnham has established its prima facie burden that its boiler "could not have contributed to the causation of Plaintiff's injury."

Plaintiffs refer to the reports of their expert witnesses, Dr. Mark Ellis Ginsburg, M.D. and David Y. Zhang, M.D., Ph.D., M.P.H., as demonstrating that plaintiff's mesothelioma was caused by exposure to asbestos from Burnham boilers. Dr. Ginsburg concludes that the decedent's mesothelioma as caused by cumulative exposure to asbestos, including from manipulation or disturbance of asbestos containing insulation, gaskets and packing. Dr. Zhang concludes that

the decedent's cumulative exposure to each company's asbestos containing products caused his mesothelioma (Opp. Exh. 1). It is plaintiff's contention that the decedent's cumulative exposure to asbestos includes Burnham's boilers. Plaintiffs cite to the decedent's testimony specifically identifying Burnham as the manufacturer of the boilers and the reference to dust from the cleaning work performed while he was working at the garbage compactor (Opp. Exh. 3, Decedent's EBT, pgs. 34-35, 37 and 77), in combination with the other evidence they submitted, as being sufficient to raise an issue of fact on causation.

Plaintiffs' expert's Dr. Ginsburg, reference to asbestos gaskets, is unsupported by the decedent's testimony. Decedent identified other manufacturers of valves and pumps, and did not state how his exposure to dust from those items, is related to Burnham's boilers (Mot. Exh. A, Decedent's EBT, pgs. 35 lines 8-14, 37 lines 8-14, 38 lines 1-11, and Mot. Exh. B, Decedent's EBT, pgs. 76 lines 10-25, 77 lines 2-20, 78 lines 10-15, 86 lines 8-12, 88 lines 8-15, 99 lines 11-14 and 101 lines 22-25). Dr. Zhang did not specifically identify Burnham's boilers (Opp. Exh. 1). Burnham's Notice to Admit at item 28, has an admission that between 1972 and 1990, there were specifications for Burnham asbestos containing insulation as a component part, only for commercial steel boilers, but a denial as to cast iron residential and steel residential boilers (Opp. Exh. 5).

Decedent's testimony repeatedly identifies the black dust as coming from the valves and the pumps when they were cleaned. He referred to the valves and pumps as related to the boiler, but the primary source of the black dust (Mot. Exh. A, Decedent's EBT, pgs. 35 lines 8-14, 37 lines 8-14, 38 lines 1-11, and Mot. Exh. B, Decedent's EBT, pgs. 76 lines 10-25, 77 lines 2-20, 78 lines 10-15, 86 lines 8-12, 88 lines 8-15, 99 lines 11-14 and 101 lines 22-25). Decedent specifically identified the manufacturers of the pumps as, "Bell Goulden (phonetic)," "Groot (phonetic) and "Goulding set and roll (phonetic)." He identified the valve manufacturers as Crane and Fairbank (Mot. Exh. A, Decedent's EBT, pgs. 36-37). Decedent's testimony as to valves and pumps is not sufficiently connected to boilers to raise issues of fact or credibility issues on Burnham's motion for summary judgment.

Plaintiffs have not raised genuine issues of fact to overcome Burnham's prima facie showing. Their argument that any discrepancies in decedent's deposition testimony raises issues of fact to be resolved at trial, is unavailing. Plaintiffs have not shown "facts and conditions from which Burnham's liability for decedent's mesothelioma may be reasonably inferred" (Reid, supra), warranting the granting of summary judgment to Burnham.

ACCORDINGLY, it is ORDERED that Burnham, LLC's motion for summary judgment pursuant to CPLR §3212 to dismiss the plaintiffs' complaint and all cross-claims against it is granted, and it is further,

ORDERED that all claims and cross-claims against Burnham, LLC are severed and dismissed, and it is further,

ORDERED that all claims and cross-claims asserted against the remaining defendants, continue to be in effect, and it is further,

ORDERED that defendant Burnham, LLC serve a copy of this Order with Notice of Entry on the Trial Support Clerk located in the General Clerk's Office (Room 119) and on the County Clerk, by e-filing protocol, and it is further,

ORDERED that the Clerk enter judgment accordingly.

ENTER:

Dated: April 15, 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