

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

2019 NY Slip Op 31496(U)

May 30, 2019

Supreme Court, New York County

Docket Number: 190022/2014

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK

COUNTY PRESENT: MANUEL J. MENDEZ PART 13

Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION

IRA RITZ and AUDREY RITZ,

Plaintiff(s),

- against -

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

Defendants.

INDEX NO. 190022 /2014

MOTION DATE 05-29-2019

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion for summary judgment by defendant CROWN BOILER CO.:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1- 2</u>
Answering Affidavits — Exhibits _____	<u>3-4</u>
Replying Affidavits _____	

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Crown Boiler Company’s (hereinafter “Crown”) motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs’ Complaint and all cross-claims against it, is denied.

Plaintiff Ira Ritz, diagnosed with lung cancer on November 5, 2013, alleges that he was exposed to asbestos while employed as a union electrician with IBEW Local 3 from 1962 to 1978 and as a self-employed owner of Elmwood Electric from 1978 to 1995. As relevant to this motion plaintiff identified Crown boiler as one of the products he encountered during his employment and stated in his deposition testimony (which took place on August 12, 13 and 14, 2014) that he was exposed to asbestos from defendant’s boiler at various unspecified worksites throughout the City of New York, Nassau and Suffolk Counties.

When questioned by the defendants at the deposition plaintiff was unable to state the shape, color, size, dimensions, or any other physical characteristics of the Crown boilers he encountered, nor could he state the precise location where he encountered these boilers, stating only that he encountered them in buildings from two to twenty stories tall. Furthermore, he stated that he had no reason to believe he was exposed to asbestos because of the Crown boiler themselves.

When questioned by his attorney at the deposition Mr. Ritz testified that he was exposed to asbestos when he wired Crown boilers and when he worked around others who insulated Crown boilers with asbestos. He stated that he removed asbestos insulation on the outside and sides of the boilers he worked

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

on to do the wiring. He stated he encountered pipe covering. He also stated that he was present when pipe coverers applied insulation material to the boiler.

Mr. Ritz stated that he “removed the insulation from the boilers with pliers, screwdrivers, a saw and sometimes a chisel” to wire them. He “had to remove this insulation in order to mount the power conduit”. He “learned this insulation contained asbestos from newspaper articles that said asbestos was the only product used to make insulation”. He further stated that and when pipe coverers insulated the boilers “this created visible dust which he inhaled”. “Pipe coverers would take asbestos out of paper bags, mix them with water and then trowel them on to the boilers. This occurred many times in his presence.” Mr. Ritz stated, “he believes he was exposed to asbestos from removing and applying insulation on Crown boilers, he saw the dust and he breathed the dust.”

Crown now moves for summary judgment pursuant to CPLR §3212 to dismiss Plaintiff’s Complaint and all cross-claims against it. Crown contends that the Plaintiff failed to provide sufficient evidence that he was exposed to asbestos from its product. Crown points to Mr. Ritz’ inability to state precisely where he encountered its boiler or to provide an accurate description of its boiler. Crown also states that Mr. Ritz initially stated he did not believe he was exposed to asbestos from a Crown boiler. Furthermore, Crown points to the affidavit of Mr. Paul Sohler, its corporate representative and person most knowledgeable, who states that: “to the best of [his] knowledge, at no time did Crown Boiler make a boiler with a junction box that could have fit wiring instructions inside. There would not have been wiring instructions inside the junction box on a Crown Boiler.” Mr. Sohler further states that: “to the best of [his] knowledge Crown Boiler never manufactured or supplied asbestos-containing insulation for use on the outside of its boilers. To the best of [his] knowledge boilers manufactured by Crown Boiler do not require insulation to be applied outside the steel shell. To the best of [his] knowledge, no such insulation was ever applied on Crown Boilers’ boilers by Crown Boiler, and no such external insulation was ever specified.”

Plaintiff opposes the motion contending that Crown failed to make prima facie showing that its boiler could not have caused Mr. Ritz’ disease, and in any event, contend that issues of fact remain as to whether Mr. Ritz was exposed to asbestos from Crown’s boiler.

To prevail on a motion for summary judgment, the proponent must make its 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]). 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 NE2d 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]).

Crown fails to make a prima facie showing that Mr. Ritz was not exposed to asbestos from its boiler. Mr. Ritz provided conflicting deposition testimony. In one part of his deposition testimony he could not state where specifically he encountered Crown boilers, could not give a precise description of Crown boilers and even stated that he had no reason to believe he was exposed to asbestos from a Crown boiler. In another part of the same deposition he stated he worked on Crown boilers, he removed insulation from the boilers and was around when pipe coverers applied insulation. He stated that this created dust that he breathed in. Finally, he stated that he believes he was exposed to asbestos from Crown’s boilers.

Pointing to perceived deficiencies in plaintiff’s proof is not sufficient for Crown Boiler to meet its initial burden, as summary judgment movants, to make out a prima facie case entitling it to judgment as a matter of law (*Alvarez v. 21st Century Renovations Ltd.*, 66 A.D.3d 524, 887 N.Y.S.2d 64 [1st Dept. 2009]; *DeMilia v. DeMico Brothers, Inc.*, 294 A.D.2d 64, 741 N.Y.S.2d 873 [1st Dept. 2002]). Conflicting deposition testimony of the plaintiff raises issues of fact that are inappropriate for summary judgment (*Hernandez v. 21 Realty Co.*, 113 A.D.3d 503, 978 N.Y.S.2d 841 [1st Dept. 2014]; *Silva v. Worby, Groner, Edelman, LLP*, 54 A.D.3d 634, 864 N.Y.S.2d 23 [1st Dept. 2008]; *Aslam v. Weiss*, 308 A.D.2d 426, 764 N.Y.S.2d 210 [2nd Dept. 2003]).

Even if Crown was able to make its prima facie showing through the affidavit of Mr. Sohler, its person most knowledgeable, Plaintiff raises issues of fact to be resolved at trial. (see affidavits annexed to the moving papers as exhibits D). “The deposition testimony of a litigant is sufficient to raise an issue of fact to preclude the grant of summary judgment dismissing the complaint. The assessment of the value of a witnesses’ testimony constitutes an issue for resolution by the trier of fact...” (*Dollas v. Grace & Co.*, 225 A.D.2d 319, 639 N.Y.S.2d 323 [1st Dept. 1996]). The Plaintiff has demonstrated “facts and conditions from which Crown’s liability may be reasonably inferred” (*Reid, supra*) to warrant the denial of Crown’s motion for summary judgment.

Accordingly, it is ORDERED, that Defendant Crown Boiler Company's motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiff's Complaint and all cross-claims against it, is denied.

ENTER:

Dated: May 30, 2019

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

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