Tavernite v Air & Liquid Sys. Corp.
2019 NY Slip Op 31549(U)
May 30, 2019
Supreme Court, New York County
Docket Number: 190159/2017
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
HELGA TAVERNITE and VINCENT TAVERNITE

Plaintiff(s),

- against -

AIR & LIQUID SYSTEMS CORPORATION, as Successor by Merger to Buffalo Pumps, Inc., et. al.,

Defendants.

INDEX NO. 190159/2017
MOTION DATE 5/22/2019
MOTION SEQ. NO. 005
MOTION CAL. NO.

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

The following papers, numbered 1 to 7 were read on Taco, 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

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

Plaintiffs commenced this action against Taco by filing a Third Amended Summons and Complaint on or about June 2, 2017 (Aff. in Supp., Exh. A). It is alleged that decedent Helga Tavernite developed mesothelioma as a result of exposure to asbestos-laden dust from, among other things, laundering her husband's contaminated work clothing. Mrs. Tavernite was unable to testify, but her husband Vincent Tavernite was deposed on her behalf over the course of seven days between June 12, 2017 and November 29, 2017 (*see* Aff. in Opp., Exh. A). Mrs. Tavernite's son, Vincent S. Tavernite, also testified on her behalf over the course of three days between March 12, 2018 and September 24, 2018 (*see* Aff. in Opp., Exh. B).

Helga Tavernite's husband, Vincent Tavernite, worked as a handyman and maintenance mechanic (Aff. in Opp., Exh. A at 111, 115). From 1955 through the 1980s, Mr. Tavernite did side work on air conditioning and heating systems while working at Bernstein Real Estate (*id.* at 110, 508-09). This work occurred in residential settings throughout Queens, Brooklyn, and New Jersey (*id.* at 509). Mr. Tavernite testified that he removed and replaced many Taco pumps for more than 25 years as part of his side business and that this work generated asbestos-laden dust (*id.* at 508-18, 749, 751). He further testified that scraping asbestos flange gaskets from Taco pumps generated dust (*id.* at 513-16). Mr. Tavernite also stated that he removed and replaced Taco pumps in his personal residences (Aff. in Opp., Exh. A at 504-05, 518-31, 745-46). This work allegedly exposed him to asbestos and left asbestos residue on his clothing (Aff. in Opp., Exh. A at 521, 526-27, 748).

More specifically, Mr. Tavernite testified that he installed a Taco pump at his personal residence at 60th Drive in Queens, NY and that he replaced this Taco pump 2-3 times with new Taco pumps (*see* Aff. in Supp., Exh. E at 745:7-12, 746:6-8, 747:14-23, 748:22-749:4). He further alleged that he was exposed to asbestos from installing and removing flange gaskets while performing these pump replacements (*id.* at 748:11-18, 751:6-17).

Moreover, Mr. Tavernite described these residential Taco pumps as approximately 10" in length, 6" in diameter, inline, and supported by the inlet and outlet piping (*see* Aff. in Supp., Exh. E at 511:6-512:21, 747:4-10). Mr. Tavernite also took a picture of the Taco pump at his Queens residence (Aff. in Supp., Exh. F). He later testified that the picture of this Taco pump was a fair and accurate representation of all the Taco pumps he either installed or removed during his lifetime (Aff. in Supp., Exh. E at 751:22-752:21).

The defendant presents the Affidavit of Richard F. Brindamour, Jr. who is a Product Manager for Taco (Aff. in Supp., Exh. G). Mr. Brindamour states, in his Affidavit, that the photo of the Taco pump (Aff. in Supp., Exh. G) which Mr. Tavernite presents is of a Taco "00" pump model (Aff. in Supp., Exh. G at ¶7). Mr. Brindamour claims that Taco's "00" pump series never had asbestos-containing component parts (Aff. in Supp., Exh. G at ¶9 and ¶11). More specifically, he attests that the flange gaskets associated with Taco's "00" pump series did not contain asbestos (*id.* at ¶12).

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 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]).

On a motion for summary judgment, "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]).

Defendant now moves for summary judgment, arguing that plaintiffs have failed to prove that Helga Tavernite was exposed to any asbestos-containing products manufactured, rebranded, sold, shipped, installed, or distributed by Taco. Plaintiffs oppose the motion, arguing that the basis of Mr. Brindamour's affidavit is faulty and that Mr. Tavernite did not intend to state that the photo of the pump at his Queens residence was an accurate depiction of all such Taco pumps he encountered throughout his career.

Importantly, defendant argues that plaintiffs' assertion that the picture of the Taco pump in Mr. Tavernite's home did not accurately depict the Taco pumps which he encountered throughout his career is a misrepresentation of the evidence. Defendant contends that plaintiffs seek to change the actual testimony on record to suit their current narrative.

Plaintiffs respond, arguing that Mr. Tavernite meant to say that the photo at issue was a fair and accurate representation of that "particular" pump but that he never said it was the exact model he encountered throughout his career. In other words, plaintiffs contend that Mr. Tavernite's testimony should not be interpreted to mean that the pump in the photo was the same Taco pump he encountered every time he repaired or replaced such a pump throughout his career (*see* Aff. in Opp., Exh. A at 752-53). Plaintiffs also maintain that Taco cannot meet its prima facie burden by relying on Mr. Brindamour's affidavit. This is because they claim that the affidavit was made without Mr. Brindamour having proper personal knowledge of the relevant facts.

The salient testimony at issue concerning Mr. Tavernite's description of the Taco pumps to which he was exposed is as follows:

> Q: I just want to turn your attention to this. Did you take this picture?
> A: Yes.
> Q: Where was this picture taken?
> A: In the basement of my home in Queens.
> Q: In Queens. And this is at the 60th Drive address?
> A: Right.
> Q: Can you tell me what this is a picture of?
> A: A Taco pump.
> Q: Is this picture a fair and accurate representation of the Taco pumps you've encountered during your lifetime?
> A: That particular, yes.

(Aff. in Supp., Exh. E at 751:22-752:21)

As such, this case has, at this point, become a matter of weighing the credibility of Mr. Brindamour's affidavit against the sworn testimony of Mr. Tavernite.

However, it is not the function of the Court deciding a summary judgment motion to weigh credibility issues or make findings of fact, but rather to identify material issues of fact (or point to the lack thereof) (*Vega v Restani Const. Corp.*, 18 NY 3d 499, 965 NE 2d 240, 942 NYS 2d 13 [2012]). Conflicting testimonial evidence 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 AD 3d 439, 922 NYS 2d 70 [2011], *Almonte v 638 West 160 LLC*, 139 AD 3d 439, 29 NYS 3d 178 [1st Dept 2016] and *Doumbia v Moonlight Towing, Inc.*, 160 AD 3d 554, 71 NYS 3d 884 [1st Dept 2018] citing to *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY 2d 338, 313 NE 2d 776, 357 NYS 2d 478 [1974]). Moreover, the conflict between Mr. Brindamour's affidavit, and Mr. Tavernite's testimony raises issues that are inappropriate for summary judgment (*Hernandez v 21 Realty Co.*, 113 AD3d 503, 978 NYS2d 841 citing to *Bradley v Soundview Healthcenter*, 4 AD3d 194, 772 NYS2d 56 [1st Dept 2004]).

Mr. Tavernite's testimony shows "facts and conditions from which defendant's liability may be reasonably inferred" (*see Reid v Ga. - Pacific Corp.*, *supra*). Mr. Tavernite's testimony also presents enough evidence contrary to that of the defendant's to warrant a trial (*see Amatulli v Delhi Constr. Corp.*, *supra*). Therefore, summary judgment is denied.

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

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

Dated: May 30, 2019

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE