

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

2019 NY Slip Op 31713(U)

June 17, 2019

Supreme Court, New York County

Docket Number: 190045/2018

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 SALVATORE ANTONUCCI, JR., as Administrator for the Estate of SALVATORE ANTONUCCI

INDEX NO. 190045/2018 MOTION DATE 6/12/2019 MOTION SEQ. NO. 001 MOTION CAL. NO.

Plaintiff(s),

- against -

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

Defendants.

The following papers, numbered 1 to 7 were read on Goodyear Tire & Rubber Company's motion for summary judgment:

Table with 2 columns: PAPER NUMBERED, PAPERS NUMBERED. Rows include 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 defendant, Goodyear Tire & Rubber Co.'s, (hereinafter, "Goodyear") motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiff's complaint and all cross-claims against it, is denied.

Plaintiff, Salvatore Antonucci was diagnosed with Lung Cancer on July 7, 2017. He passed away on June 10, 2018 (Aff. in Opp., Exh. 1). Mr. Antonucci was deposed on March 27-29 and April 2-3, 2018 (see generally Aff. in Opp., Exh. 2). Plaintiff alleges that he was first exposed to asbestos in the late 1960s when he started working on cars as a teenager. He joined the carpenters' union in 1971 and alleges exposure to asbestos from boilers, pumps, valves, and roofing material while working as a carpenter at various job sites throughout New York City (see generally, Aff. in Opp., Exh. 2). At many of these job sites, plaintiff further alleges that he was exposed to asbestos dust from floor tiles he personally cut and installed, which were manufactured, sold, and distributed by Goodyear (see id. at 40:12 - 40:10, 46:18 - 47:8, 60:14 - 61:6, 73:18 - 74:4, 645:19-648:5).

Plaintiff joined the Carpenter's Apprenticeship Program in 1971 (see id. at 39-40). Mr. Antonucci testified at his deposition, that from 1971-1979, as an apprentice and a journeyman carpenter, he was exposed to asbestos at many construction sites in New York City (See generally id.). He testified that Goodyear was one of only a few brands of floor tiles he encountered while working (See id. at 73:25 - 74:4). When cross examined by defense counsel, Mr. Antonucci stated that he worked with Goodyear tile throughout the 1970s. He described the tiles and their packaging. He specifically stated that he believed he was exposed to asbestos from working with Goodyear tiles because he was instructed to use VAT (vinyl asbestos tiles) (see id. at 179:1 - 186:4). Mr. Antonucci further testified that

FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

he knew Goodyear tiles contained asbestos because the blueprints he worked with specifically called for VAT (see *id.* at 184:7 - 185:8).

Defendant now moves for summary judgment, arguing that plaintiff's evidence is insufficient to warrant a trial. Plaintiff opposes the motion, claiming that defendant has not met its prima facie burden or eliminated all material issues of fact such as to warrant granting summary judgment.

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 moves for summary judgment, arguing that all non-homogenous floor tiles that Goodyear sold in the 1960s and 1970s were asbestos-free and the only tiles plaintiff-decedent claims to have worked with from 1970-1977 were the non-homogenous kind. Defendant also argues that plaintiff-decedent's belief that the Goodyear floor tiles he worked with were asbestos-containing is based on simple conjecture. Defendant further argues that (1) it never manufactured "vinyl asbestos tile;" (2) it did not manufacture 12" x 12" asbestos floor tiles; and (3) it, above all, did not manufacture asbestos-containing non-homogenous floor tiles in the 1960s or 1970s.

Plaintiff opposes the motion, arguing that defendant has submitted no evidence in support of its claim that plaintiff could not have worked with

Goodyear-asbestos containing tiles during the 1970s. Plaintiff contends that the Affidavit of Joseph Kemmerling lacks evidentiary value because he allegedly has no personal knowledge of the historical products manufactured by Goodyear and did not submit any documents in support of his opinion. Plaintiff further argues that there are other pieces of evidence and prior statements from Goodyear which contradict the assertions of the affidavits it now puts forth and rebut its claim that the floor tiles plaintiff encountered in the 1970s could not have contained asbestos.

In the final analysis, defendant does not come forward with definitive evidence to demonstrate that it could not have contributed to the causation of the plaintiff's injuries (see *Comeau v W. R. Grace & Co.- Conn., supra*). Rather, defendant impermissibly attempts to obtain summary judgment by pointing to gaps in plaintiff's proof (see *Torres v Indus. Container, supra*) and the remaining record contains conflicting evidence which a jury must weigh.

More specifically, defendant points to hearsay issues surrounding how plaintiff-decedent identified the Goodyear products at issue as containing asbestos. Defendant cannot obtain summary judgment simply by identifying gaps in plaintiff's evidence (see *Torres v Indus. Container*); in obtaining summary judgment, defendant must meet its prima facie burden of showing that its products could not have contributed to the plaintiff's injuries (see *Comeau v W. R. Grace & Co.- Conn., supra*).

Defendant fails to meet its burden here as all it does is introduce exhibits that do not prove anything definitively and leave the record containing conflicting testimonial evidence which cannot be resolved on papers alone. For instance, Goodyear presents the affidavit of Edmund Lutz to establish that it never manufactured "vinyl asbestos tile" (Aff. in Supp., Exh. C). However, the assertions in the affidavit are not definitive as they are not, for instance, supported by any external documentation (see Aff. in Supp., Exh. C). Goodyear also presents the affidavit of Joseph Kemmerling to establish that plaintiff-decedent could not have been exposed to asbestos containing tile from the time-period alleged (Aff. in Supp., Exh. F). However, the assertions in this affidavit are, likewise, not definitive as they are not backed by anything other than Mr. Kemmerling's word (see Aff. in Supp., Exh. F).

The evidence on record requires a fact-finder to weigh its credibility. Namely, the credibility of Joseph Kemmerling's and Edmund Lutz's affidavits must be weighed against plaintiff's testimony that he was exposed to asbestos-containing Goodyear products. 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]).

Defendant has failed to meet its burden of presenting evidence which "unequivocally establish[es] that its product could not have contributed to the causation of plaintiff's injury" (see *Matter of N.Y.C. Asbestos Litig., supra*). Plaintiff also presents enough contrary evidence to require a trial even if defendant had met its burden as it offers evidence that Goodyear made prior statements which conflict with the assertions in the affidavits they now present (see *Aff. in Opp., Exhs. 4-6*). Therefore, summary judgment is denied.

Accordingly, it is ORDERED that defendant Goodyear Tire & Rubber Co.'s motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiff's complaint and all cross-claims against it, is denied.

**MANUEL J. MENDEZ
J.S.C.**

ENTER:



**MANUEL J. MENDEZ
J.S.C.**

Dated: June 17, 2019

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