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| <b>Leavitt v A.O. Smith Water Prods.</b>                                                                                                                                                                                       |
| 2019 NY Slip Op 31916(U)                                                                                                                                                                                                       |
| July 1, 2019                                                                                                                                                                                                                   |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 190240/2017                                                                                                                                                                                                     |
| Judge: Manuel J. Mendez                                                                                                                                                                                                        |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK  
COUNTYPRESENT: MANUEL J. MENDEZ  
*Justice*PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

RUSSEL LEAVITT and JOYCE LEAVITT,

INDEX NO. 190240/2017

Plaintiff(s),

MOTION DATE 6/26/2019

- against -

MOTION SEQ. NO. 005A.O. SMITH WATER PRODUCTS, *et al.*

MOTION CAL. NO. \_\_\_\_\_

Defendants.

The following papers, numbered 1 to 6 were read on CertainTeed Corporation's motion for summary judgment:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED1-3

Answering Affidavits — Exhibits \_\_\_\_\_

4-5

Replying Affidavits \_\_\_\_\_

6Cross-Motion: Yes ☒ No ☐

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

This action was commenced by service of a Summons and Complaint filed on August 31, 2018 and an Amended Summons and Complaint filed on September 18, 2018. The deposition of plaintiff Robert Goodheart was conducted on April 16, 2018 and April 17, 2018 (Aff in Supp., Exhibit B). During his deposition, plaintiff testified that from 1969 until 1973 he worked as a securities analyst for Argus Research. Argus Research created and sold stock research to investors. He was responsible for the electric products industry and as such he would visit manufacturers' plants (Aff in Supp., Exh. B at 65:8-24). He then did similar work for James H. Oliphant from 1974 to 1975 (*id.* at 79:24-25; 80:1-9), H.C. Wainwright starting in about 1976, (*id.* at 81:20-25; 83:1-4) and Smith Barney from approximately 1976 to 1983 (*id.* at 83:24-25; 84:17-25; 85:1-5).

Among the sites where plaintiff claimed to be exposed to asbestos was the General Electric facility in Schenectady, NY (*id.* at 87:1-14). From 1969 until the mid-1980s, he visited General Electric at least two or three times (*id.* at 96:1-12). Plaintiff stated that he made visits to General Electric in order to better understand their business (*id.* at 97: 17-19). He did group tours of the General Electric facility and described it as being "gigantic" (*id.* at 97:20-23). These visits would last a few hours each (*id.* at 98:10-15) and he stated that he saw boilers there among other equipment. Plaintiff claimed that these boilers were coated with a white, plaster-like substance and he witnessed men removing the insulation from them (*id.* at 99:20-25). He could not, however, identify the brand name, trade name, or manufacturer of any of these boilers (*id.* at 102:20-22).

Plaintiff presents the affidavit of Ken Balch (Aff. in Supp., Exh. C) from an unrelated case. In his affidavit, Mr. Balch stated that in the 1970s, he worked around boilers in Building 273 of the GE Schenectady facility and he identified Kohler, among others, as a manufacturer of a boiler (or boilers) in that building. The plaintiff in the instant case has testified that he was exposed to asbestos from boilers being serviced which were present in the "main building" at GE Schenectady. There is no direct evidence, however, that the "main building" where plaintiff claims to have encountered boilers was the "Building 273" referenced in Ken Balch's affidavit.

Plaintiff also presents Jessie Pitman's deposition testimony from an unrelated case. During his deposition, Mr. Pitman identified Kohler as the manufacturer of a furnace that was present in Building 332 at GE Schenectady from 1983 to 1985 (Aff. in Supp., Exh. D at 58:17-25; 59:1-6). Mr. Pitman stated that there was only one Kohler furnace in Building 332 (id. at 183:10-13). He also gave a physical description of GE Schenectady Building 273 in his deposition (see *generally* Aff. in Opp., Exh. 3). Again, however, there is no direct evidence that either of these buildings (i.e., Building 332 or Building 273) referenced in Pitman's deposition are the "main building" which plaintiff describes as containing the boilers in question.

As such, the record reflects that plaintiff has not personally identified Kohler as the manufacturer of a boiler from which he claims to have been exposed to asbestos. Instead, the plaintiffs present Ken Balch's affidavit (Aff. in Supp., Exh. C) and Jessie Pitman's deposition transcript (Aff. in Supp., Exh. D) in an effort to establish that Building 273 of GE Schenectady was the "main building" in which the instant plaintiff alleges exposure to asbestos from a Kohler product.

Kohler now moves for summary judgment, arguing that its products have not been sufficiently identified. Plaintiffs oppose the motion, claiming that, from the evidence presented, it may be inferred that the "main building" in which the plaintiff alleges he was exposed to asbestos from a boiler is the Building 273 described by Mr. Balch and Mr. Pitman.

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]).

Kohler claims summary judgment should be granted because there is no proper evidence that plaintiff came into contact with asbestos from a Kohler product. Defendant further argues that proof of the simple presence of a Kohler product somewhere is not enough to defeat a motion for summary judgment.

Plaintiffs argue that defendant has failed to meet its prima facie burden for summary judgment. Plaintiffs further claim that Kohler's motion should be denied because Mr. Leavitt's testimony, in conjunction with the statements of Mr. Balch and Mr. Pitman, yields a reasonable inference that Kohler boilers were a source of Mr. Leavitt's alleged asbestos-exposure.

This case does not present issues of material fact suitable for determination by a jury. Rather, plaintiff attempts to rely on inferences as a substitute for the fact that the record does not reflect that the plaintiff ever identified a Kohler product in a specific building. As can be seen from the map included in Kohler's reply, the GE Schenectady facility was laid-out much like a college campus (Aff. in Reply at 5). Plaintiffs attempt to use Mr. Balch's affidavit and Mr. Pitman's deposition to create an inference that compensates for Mr. Leavitt never having been able to identify the specific building on this GE "campus" where he encountered a Kohler boiler.

Defendant has met its prima facie burden by presenting evidence eliminating all material issues of fact (see *Klein v City of New York, supra*) and plaintiffs have failed to rebut this with admissible evidence raising triable issues of fact (see *Amatulli v Delhi Const. Corp., supra*). Defendant shows that plaintiff was unable to identify a Kohler product in any specific location as a source of his asbestos exposure. Plaintiffs then fail to refute this with proper evidence to the contrary. In fact, taken together, Mr. Balch's affidavit and Mr. Pitman's deposition do not even establish that a Kohler boiler was present in the same building on the GE Schenectady campus. Moreover, Mr. Balch's affidavit and Mr. Pitman's deposition fail to establish that a Kohler boiler was a specific source of Mr. Leavitt's alleged exposure to asbestos. Therefore, summary judgment is granted.

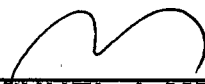
Accordingly, it is ORDERED that defendant Kohler Co.'s motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiffs' complaint and all cross-claims against it, is granted, and it is further

ORDERED that the complaint and all cross-claims against defendant Kohler Co. are severed and dismissed, and it is further

**ORDERED that the clerk of court enter judgment accordingly.**

**ENTER:**

**Dated: July 1, 2019**

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

**Check one:** ☐ **FINAL DISPOSITION**    ☒ **NON-FINAL DISPOSITION**

**Check if appropriate:**    ☐ **DO NOT POST**    ☐ **REFERENCE**