

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

2019 NY Slip Op 31970(U)

July 10, 2019

Supreme Court, New York County

Docket Number: 190246/2016

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

SONIA SERRANO, as Personal Representative for the Estate of SALOMON SERRANO, and SONIA SERRANO, Individually,

INDEX NO. 190246/2016

MOTION DATE 07/10/2019

MOTION SEQ. NO. 003

MOTION CAL. NO.

- against - Plaintiffs,

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

The following papers, numbered 1 to 6 were read on this motion for summary judgment by Superior Boiler Works, Inc.:

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 Defendant Superior Boiler Works, Inc.'s (hereinafter "SBW") motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all amendments as well as any cross-claims asserted against it, is denied.

Solomon Serrano (hereinafter referred to as "decedent") was diagnosed with pleural mesothelioma on July 26, 2016 (Opp. Exh. 1). He died from his illness, on November 8, 2017 (NYSCEF Doc. No. 223). It is alleged that he was exposed to SBW's asbestos containing boilers and related products - as relevant to this motion - from his work as a "helper" to Tony Cuevas, a general contractor in Bronx, New York from 1962 through 1965; and as a Boiler Technician when he was working for Royal Boiler in Manhattan, Brooklyn, Queens and the other boroughs of the City of New York, from 1965 through 1966 (Mot. Exh. A and Opp. Exh. 1).

Decedent was deposed over the course of seven days on October 31, and November 1, 2,3 4,10 and 11, 2016 (Mot. Exh. A and Opp. Exh. 1).

Decedent testified that while he was a sophomore in high school in 1962 he got a job working with Tony Cuevas. He stated that he worked for Tony Cuevas off the books from 1962 through his graduation from high school in 1965, in apartment buildings throughout the South Bronx. He testified that after he graduated high school in 1965, he went to work for Royal Boiler as a Boiler Technician for a little over a year (Mot. Exh. D, pgs. 90-92, 95 and 157-158). He testified that at Royal Boiler he worked mostly in Manhattan but also Brooklyn, Queens and the boroughs. He worked on boilers in apartment buildings in Manhattan, and in the other boroughs he worked on single family residential homes and in commercial locations (Mot. Exh. D, pgs. 161-162, and Opp. Exh. 2, pgs. 863-883).

Decedent testified that he worked with SBW boilers and related products about five times while employed by Tony Cuevas. He stated that SBW appeared on a nameplate attached somewhere on the face of the boilers (Mot. Exh. D, pgs. 866-867 and 869). He stated that the SBW boilers he saw while working with Tony Cuevas were for heating systems. He described the SBW boilers as cylindrical with front and back access doors, the firing mechanism had a burner in the front of it, there were steel flue passages with tubing in the center part where the combustion goes through, and they used either gas or oil as a fuel source. Decedent recalled that the SBW boilers he worked with were jacketed (Mot. Exh. D, pgs. 873-875).

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

He testified that while he was working for Tony Cuevas he was exposed to asbestos dust from the top of the boilers. He was also exposed to asbestos dust while he was checking out the controls in the flue passages that connected to the unit itself. Decedent stated that he knew the dust was asbestos because he was familiar with it, when touched it felt like cotton, and he was breathing it in and exhaling it (Mot. Exh. D., pgs. 872-873 and 876). Decedent stated that he was also exposed to asbestos when working for Tony Cuevas when one of SBW's boilers was emitting fumes from the asbestos rope on the back door. He testified that he had to remove and replace the asbestos rope and that he was exposed to asbestos by opening the boiler door. Decedent described the process of replacing the asbestos rope as requiring the use of a chisel to remove baked asbestos cement, and scraping where the rope rests against the boiler. He stated that he mixed the asbestos cement powder and put the new rope in with a rubber mallet to make it snug. After that he sealed the door with the asbestos cement and cleaned up the mess. Decedent testified that the entire process generated an immense amount of asbestos dust that he breathed in (Mot. Exh. D, pgs. 878-880).

Decedent testified that he was exposed to asbestos associated with SBW boilers while working for Royal Boiler in apartment buildings in Manhattan on more than six different occasions and maybe closer to ten (Mot. Exh. D, pgs. 883 and 899). He remembered that the boilers were cylindrical, placed on a skid, blue in color with metal jackets and they were the biggest he had seen. He stated he was exposed to asbestos working on SBW boilers in residential apartment buildings in Manhattan when he replaced the tubing. Decedent described the process of replacing tubing on SBW boilers as requiring the front and back door be opened, then assessing the tubing that needed replacement, cutting it with a blow torch, pulling it out and then replacing it using a big drill that when inserted into the edge of the tube expands the edge of the pipe to the back plate of the boiler, sealing it. He testified that he was exposed to asbestos from SBW boilers in Manhattan apartment buildings when he removed asbestos cement and rope to get to the front and back doors of the boilers to assess and replace the tubes, from taping it up, the mixing of asbestos cement, and from the dust coming up from sweeping as part of the clean up process. He stated that he breathed in the dust (Mot. Exh. D, pgs. 894-896, 909 and 1477).

Decedent testified that he was exposed to asbestos from SBW boilers during his commercial work for Royal Boiler from the same activities as his exposure from residential work. He stated that he was also exposed to asbestos on SBW boilers by using a brush to clean the tubes to increase their efficiency. Decedent described SBW's boilers during his commercial work as having metal jackets, being blue in color, cylindrical in shape, long, and large enough for a person about six feet tall to stand inside of them (Mot. Exh. D, pgs. 906-910).

The Summons and Complaint were amended on August 29, 2016 (See Mot. Exh. A). Plaintiff, Sonia Serrano, is the decedent's wife, and on December 13, 2017 the Summons and Complaint were modified to reflect her status as personal representative of the decedent's estate (Mot. Exh. A). The Supplemental Summons and Third Amended Complaint dated January 23, 2018 includes a cause of action addressing Section 11 of the Worker's Compensation Law (Mot. Exh. A). SBW's Verified Answer to Plaintiffs' Complaint and Cross-Claims was served on October 18, 2016 (Mot. Exh. B).

SBW now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all amendments as well as any cross-claims asserted 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 NYS 2d 184 [1st Dept. 1997]).

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]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party by giving the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]).

SBW argues that it did not ship any of the boilers it manufactured to any location in the Bronx, Manhattan, Queens or Brooklyn between 1954 and 1967 and that none of the boilers decedent encountered could possibly be manufactured by the company.

In support of its argument SBW provides the affidavit of Robert H. Helfrich, its corporate representative. Mr. Helfrich was initially employed by SBW as the data processing manager from 1973 through 1994, he was then general manager of the company until he resigned in 1999. Mr. Helfrich developed all of SBW's computer applications from their inception and created the data bases used by the programs. He developed a separate data base for application in asbestos litigation, and a data base summarizing the sale of every SBW boiler from 1954 through 1988. Mr. Helfrich states that SBW does not manufacture boilers with any asbestos exposed exterior. He claims that between the years 1954 and 1988 no external insulation was ever specified by SBW for their boilers. He further states that SBW boilers do not require insulation applied to the outside shell. He stated that a review of his own database, tracking every SBW boiler sold between 1954 and 1988, resulted in Mr. Helfrich finding no record of shipment of SBW boilers to Brooklyn, Queens, Bronx or New York City prior to, or during, the timeframe stated by the decedent (Mot. Exh. E).

Plaintiffs in opposition provide four deposition transcripts of SBW's corporate representative Robert Helfrich taken in unrelated actions on January 14, 2009 (Opp. Exh. 4), October 29, 2013 (Opp. Exh. 5), May 19, 1997 (Opp. Exh. 6), and July 16, 2004 (Opp. Exh. 7). Plaintiffs argue that Mr. Helfrich's deposition testimony contradicts the statements made in his affidavit and shows that SBW did not possess a substantial amount of information on its boiler and related products, sales records, or purchase records for the period relevant to the decedent's exposure, and prior to 1973 SBW had no document retention policy.

Mr. Helfrich testified that there was no list compiled of component parts. He stated that SBW was incorporated in 1960 and the former owner of the company was Clyde Anderson. Mr. Helfrich testified that SBW boilers were painted blue and were blue in color. He stated that SBW boilers had asbestos components that included rope, gaskets, cements and millboard that were eventually made asbestos-free in the late 1980's. The change to asbestos-free products did not change the way the boiler operated (Opp. Exh. 4, pgs. 30-33, 48, 89, 179, 182-184).

Mr. Helfrich stated that he processed purchasing records that showed some of the materials used on SBW boilers contained asbestos from the 1960's through the 1970's. He first developed a database for SBW's purchase orders starting in the late 1980's. Mr. Helfrich conceded that he would not know whether it was possible to place asbestos insulation on the outside of SBW's boilers, or if an end user would have placed asbestos insulation on the outside of an SBW boiler. Mr. Helfrich testified that SBW would not have specifically prohibited end users from placing asbestos insulation on the outside of its boilers and he had no specific knowledge, prior to his employment in 1973, only general information provided by an SBW's former owner, Clyde Anderson, who was with the company from the 1950's. He testified that SBW had records for boilers that were sold to distributors but there were no records if the distributor re-sold the boiler some place else. He further testified that prior to joining the company in 1973, he did not think SBW had a record retention policy (Opp. Exh. 5, pgs. 46-47, 52-53 and 57-59).

Mr. Helfrich testified that SBW's retention policy for records varied for different documents, with purchasing records and accounts payable kept for seven years and then discarded. He testified that there was no policy for inventory records of the types of products SBW manufactured until he arrived at the company (1973). Mr. Helfrich stated that there were no SBW purchasing order records of asbestos containing products or

materials prior to 1972. He stated that records of SBW boiler sales were retained and information provided to the "National Board" were never purged. He then testified that some records do not go that far back, and he would have to assume the records were all maintained, but did not actually know that (Opp. Exh. 6, pgs. 26-32).

Mr. Helfrich explained that the "National Board of Boiler Inspectors" assigns a unique and unalterable number to each boiler unit, registering it and keeping the unit on file. He specifically identified the asbestos containing products in an SBW boiler as "asbestos handhole gaskets," "asbestos manway gaskets," asbestos rope in sealing the doors, and a packing material that for a short period of time used asbestos (Opp. Exh. 7, pgs. 15-17).

Mr. Helfrich's conflicting testimony at the very least raises credibility issues warranting denial of summary judgment (Messina v. New York City Transit Authority, 84 A.D. 3d 439, 922 N.Y.S. 2d 76 [2011]).

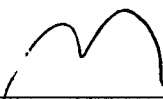
In New York City Asbestos Litigation the "plaintiff is not required to show the precise causes of his damages, but only show facts and conditions from which defendant's liability may be reasonably inferred" (Reid v Ga.-Pacific Corp., 212 AD2d 462, 622 NYS2d 946 [1st Dept. 1995]). Summary judgment must 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]).

Plaintiffs have raised issues of fact to be resolved at trial. Mr. Helfrich's conflicting testimony demonstrates that at least some of SBW's records he allegedly relied on for the database could have been incomplete. Decedent's deposition testimony correctly identified the shape and blue color of the SBW boilers. Mr. Helfrich testified that SBW did manufacture boilers that contained separate asbestos containing parts, including ropes. The decedent identified asbestos ropes as part of his asbestos exposure from SBW boilers. There remain issues of fact as to whether the decedent was exposed to asbestos from his work with SBW boilers. Plaintiffs have demonstrated "facts and conditions from which [SBW's] liability may be reasonably inferred" (Reid, supra) and treating the evidence presented in a light most favorable to the plaintiffs, warrants the denial of SBW's motion for summary judgment.

Plaintiffs correctly argue that the email and spreadsheet were created by SBW's lawyers rendering them hearsay, and combined with SBW's failure to respond to Product Identification Interrogatories further warrants denial of summary judgment.

ACCORDINGLY, it is ORDERED that Defendant Superior Boiler Works, Inc.'s (hereinafter "SBW") motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all amendments as well as any cross-claims asserted against it, is denied.

ENTER:



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Dated: July 10, 2019

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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