

Fennhahn v Brenntag N. Am., Inc.
2019 NY Slip Op 32240(U)
July 26, 2019
Supreme Court, New York County
Docket Number: 190099/2016
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 MARGOT FENNHahn as Personal Representative of the Estate of STEFAN JOSEPH GLADYSZEWSKI and MARGOT FENNHahn, Individually

INDEX NO. 190099/2016 MOTION DATE 7/17/2019 MOTION SEQ. NO. 006 MOTION CAL. NO.

Plaintiff(s), - against - BRENNTAG NORTH AMERICA, INC., et al. Defendants.

The following papers, numbered 1 to 7 were read on Whittaker, Clark & Daniels, Inc.'s motion for summary judgment:

Table with 2 columns: Description of papers and 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 Whittaker, Clark & Daniels, Inc.'s (hereinafter, "WCD") motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiffs' complaint and all cross-claims against it, is granted solely to the extent of dismissing all claims and cross-claims regarding the supply of talc by WCD to Colgate-Palmolive (hereinafter, "Colgate").

This action was commenced on April 8, 2016 by the filing of a Summons and Complaint (Aff. in Supp., Exh. A). Plaintiffs allege that plaintiff-decedent, Stefan Gladyszewski, developed omentum mesothelioma as a result of using talcum powder (see generally Aff. in Supp., Exh. A). More specifically, plaintiffs allege that Mr. Gladyszewski used Colgate's Cashmere Bouquet from 1958-68 (see Aff in Supp, Exh. C, at 15; Aff in Supp, Exh. D, at 44:3-24; 59:22-25; 64:22-25). Notably, the record does not show that WCD was a supplier of cosmetic talc to Colgate at any point during the relevant time-period.

Plaintiffs further claim that Mr. Gladyszewski was exposed to asbestos from Kaiser Gypsum joint compound, which allegedly contained asbestos-talc supplied or distributed by WCD. Mr. Gladyszewski stated that this asbestos exposure occurred while he was working on a remodeling project that he had started sometime in 1972 and finished by August 12, 1973 (see Aff in Opp., Exh. 1 at 90:19-91:4; Aff in Opp., Exh. 2 at 361:3-16, 364:24-365:15). As part of the project, he described applying Kaiser Gypsum premixed joint compound with a putty knife when "trying to fill a nail hole or cover a seam or, you know, get the tape wet and put the tape up there" on the drywall (Aff in Opp., Exh. 1 at 92:3-13; Aff in Opp., Exh. 2 at 372:13-373:11; Aff in Opp., Exh. 3 at 99:23 101:11). After

FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

applying the joint compound, he "had to sand it" using sandpaper (Aff in Opp., Exh. 1 at 92:14-18; Aff. in Opp., Exh. 2 at 376:1-7; Aff in Opp., Exh. 3 at 101:12-17, 102:18-25). The process of sanding the seams created dust and Mr. Gladyszewski believes it was the sanding of the Kaiser Gypsum joint compound that exposed him to asbestos (Aff. in Opp., Exh. 2 at 377:21 378:6; Aff in Opp., Exh. 3 at 18:4-20:15, 103:1-104:2).

Defendant now moves for summary judgment, essentially arguing that it did not supply talc for use in any of the products from which Mr. Gladyszewski alleges asbestos exposure. Plaintiffs oppose the motion, claiming that WCD did, in fact, supply talc powder used as an ingredient in the Kaiser Gypsum products from which the plaintiff alleges asbestos exposure. Nonetheless, plaintiffs, at this point, concede that WCD is not liable for supplying the talc used in the cosmetic talc products originally at issue.

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 it did not supply the talc used in the cosmetic products originally at issue. Defendant further argues that the record shows that WCD was not an approved source from which Kaiser Gypsum would have obtained the talc in question. Relatedly, defendant points

out that there is no direct evidence of a connection between WCD and Kaiser Gypsum.

Plaintiffs oppose the motion, claiming that WCD supplied talc as one of the ingredients used to make Kaiser Gypsum joint compound and that sanding and sweeping joint compound have long been known to result in heavy asbestos exposure. Plaintiffs, however, concede that WCD is not liable for supplying the talc used in the cosmetic products which were originally at issue in this case.

In the final analysis, plaintiffs have shown that WCD supplied talc for use in the Kaiser Gypsum products from which plaintiff alleges exposure to asbestos. Plaintiffs' allegation that Kaiser Gypsum used ingredients such as "Nytal 200," supplied by WCD to the metropolitan area as "Number 13," to manufacture the products in question is supported by the record. There is evidence showing that WCD distributed its "Number 13" brand name talc to Kaiser Gypsum for use in the products at issue. The record shows that R.T. Vanderbilt Co.'s (hereinafter, "Vanderbilt") "Nytal 200" is defendant WCD's "Number 13," that Vanderbilt took over International Talc Co. (hereinafter, "International Talc"), and that Kaiser Gypsum used Nytal 200 from International Talc and Vanderbilt in its joint compound.

Plaintiffs' cited evidence establishes that WCD (e.g., through mislabeling or a product distribution scheme) somehow ended up distributing or manufacturing the talc used to produce the Kaiser Gypsum products in question (see *generally* Aff. in Opp., Exh. 6; Aff. in Opp., Exh. 10). The additional documentation provided concerning the list of "approved sources" for Kaiser Gypsum talc also shows that WCD supplied the talc used to manufacture the products at issue (Aff. in Opp., Exh. 7; Aff. in Opp., Exh. 8). Moreover, Mr. George Dippold's testimony at least raises an issue of fact as to whether WCD distributed International Talc (i.e., "Asbestine") which was an approved source of talc used in Kaiser Gypsum joint compound (see Aff. in Opp., Exh. 6 at 14-16; Aff. in Opp., Exh. 7; Aff. in Opp., Exh. 8).

It is not, however, the function of the court deciding a summary judgment motion to determine 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]).

Upon a review of the record in the light most favorable to the non-moving party, summary judgment is denied with respect to the dismissal of the action against WCD for supplying talc to Kaiser Gypsum for the manufacture of its joint compound (see *SSBS Realty Corp. v Public Service Mut. Ins. Co.*, *supra*; *Martin v Briggs*, *supra*). Defendant has, however, established prima facie entitlement to summary judgment, through admissible evidence, eliminating all material issues

of fact that defendant WCD did not supply talc to defendant Colgate-Palmolive (see *Klein v City of New York, supra*) and plaintiffs have failed to rebut this showing (see *Amatulli v Delhi Constr. Corp., supra*).

Accordingly, it is ORDERED that defendant Whittaker, Clark & Daniels, Inc.'s motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiffs' complaint and all cross-claims against it, is granted to the extent of dismissing all claims and cross-claims regarding the supply of talc by WCD to Colgate-Palmolive, and it is further,

ORDERED that the claims and all cross-claims against defendant Whittaker, Clark & Daniels, Inc. for the supply of talc to Colgate-Palmolive are severed and dismissed, and it is further,

ORDERED that the remainder of the motion is denied, and it is further,

ORDERED that the clerk of court enter judgment accordingly.

ENTER:

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

Dated: July 26, 2019



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE