

<b>Marullo v Amchem Prods., Inc.</b>
2019 NY Slip Op 32243(U)
July 26, 2019
Supreme Court, New York County
Docket Number: 190426/2014
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 JOHN MARULLO JR. and KATHLEEN MARULLO Plaintiff(s), - against - AMCHEM PRODUCTS, INC., et al. Defendants. INDEX NO. 190426/2014 MOTION DATE 7/17/2019 MOTION SEQ. NO. 001 MOTION CAL. NO.

FOR THE FOLLOWING REASON(S):

The following papers, numbered 1 to 6 were read on J-M Manufacturing Company, 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, J-M Manufacturing Company, Inc.'s (hereinafter, "J-MM") motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiffs' complaint and all cross-claims against it, is granted to the extent of dismissing the punitive damages claim. The remainder of the relief sought in J-MM's motion is denied.

This action was commenced on October 27, 2014 by the filing a Summons and Complaint (Aff. in Supp., Exh. A). Mr. Marullo was deposed over two days in May 2016 (See Aff. in Supp., Exh. E). At his deposition he stated that from 1954-1994 he was a member of the Laborers' International Union of North America, Local 17 (See id. at 47, 60-61). During his career as a laborer, he worked for several companies (see generally id.). He worked for one such company, Hal-Mar, from 1982-1994 (see id. at 144-145). While employed at Hal-Mar, Mr. Marullo installed asbestos cement pipe (hereinafter, "ACP") at various locations in New York for use in sewage and drainage systems (see id.). Mr. Marullo testified that the manufacturer of some of the ACP was "Johns-Manville" and/or "JM" (see id. at 64-66, 146, 453, 185; see generally id. at 197 205, 300-354). When performing installations, Mr. Marullo cut the ACP with a circular gas-powered saw (see id. at 299, 301, 310, 325-326, 335, 346, 430-432). The ACP was 4, 6, or 8 inches in diameter (see id. at 340-341). Mr. Marullo was unaware from where the ACP was purchased and claimed he did not see a warning on the ACP (see id. at 300-301, 305, 315, 328 and 342). He did, however, testify to having seen "JM" written directly on the pipe (see id. at 302). Notably, Mr. Marullo also claimed to have been exposed to asbestos from "JM" pipe while working for Hal-Mar on the "287 Taconic job" from at least 1985-1986 (see id. at 199:10-201:17).

J-MM is a manufacturer of PVC pipe, and from 1983-1988 it also supplied ACP (See Aff in Supp, Exhs. F, I, J and K). Importantly, J-MM came into existence on December 1982 and did not begin operations until January 1983 (See Aff in

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Supp, Exhs. F, I, J, and K). J-MM bought Johns-Manville's PVC division in connection with Johns-Manville's bankruptcy (See Aff in Supp, Exhs. F, I, J, and K). J-M A/C, a separate and distinct company, with separate and distinct ownership, also formed in 1982 (See Aff in Supp, Exhibits F, J, and K). J-M A/C bought the ACP division from the Johns-Manville bankruptcy estate (See Aff in Supp, Exhibits F, J, and K). Subsequently, J-MM entered into an agreement with J-M A/C to supply the ACP manufactured by J-M A/C (See Aff in Supp, Exhibits F, J, and K). When J-MM purchased the PVC pipe division from Johns-Manville, it did not assume any of Johns-Manville ACP liabilities by order of the Federal Bankruptcy Court overseeing and approving the sale (See Aff in Supp, Exhs. J and K). Per the terms of the sale, J-MM was expressly barred from using the terms "Johns-Manville" or "JM" on any ACP products it supplied (See Exhibits J and K).

ACP has been an approved product in the United States since 1934 (See Aff in Supp, Exh. H). It was tested by the National Bureau of Standards (U.S. Department of Commerce) for 20 years (1937-1957) and determined to be entirely resistant to all major forms of corrosion, making it the best option for highly acidic, alkaline or saline soils, or other chemically aggressive underground environments (See id). It has been approved by the U.S. Public Health Service since 1949 and approved by OSHA since 1971, the first year of OSHA's existence (See id). In the 1970s, safe work practices for dust control in the handling of ACP were developed jointly by industry, labor and government, which mandated the use of hand tools in field installation (See id). Because these measures have been found to be effective, ACP remains an approved product for water and sewage in New York pursuant to New York's Division of Housing and Community Renewal Building Construction Code ("NYBCC") (See id). ACP was specified for use by the NYBCC during the relevant time-period in this case (See Aff. in Supp., Exhibits R, S, and T). Moreover, instructions for safe ACP installation were disseminated by J-MM itself and codified in plumbing codes, industry practice manuals, as well as in both Federal and State law (See Aff in Supp, Exhs. F, G, H, M, N, O, R, S, and T).

During the time-period that J-MM supplied ACP (1983-1988), OSHA had been in existence in the United States for over 10 years (See Aff in Supp, Exhibits F, G, H, and O). OSHA prohibited the use of unventilated power-tools on ACP during the installation process. It further placed an affirmative obligation on employers to refrain from unsafe work practices, such as cutting ACP, or any asbestos-containing product, with an unventilated power saw (See Aff in Supp, Exhs. G, H, and O).

The AWWA (a non-profit organization whose mission is to promulgate regulations and standards to ensure delivery of clean potable water internationally), the ACPPA (an organization of ACP producers), and other organizations, provided warnings to end-users regarding legal, proper, and safe work practices with ACP, beginning in 1978 and 1977, respectively (See Aff in Supp, Exhibits "F", "G", "H").

Although asbestos hazards and the importance of proper ACP use were apparently known to the industry by 1983, J-MM employed many additional methods of warning its customers and end-users about safe ACP work practices

(discussed further, *infra*). Along with these warnings, J-MM supplied three basic types of ACP: water, sewer, and storm drain (See *id.*). The ACP J-MM supplied was a specialty product used by contractors involved in public works projects, which were subject to Federal and State regulations (See Aff in Supp, Exhs. F, G, and H).

Defendant now moves for summary judgment, essentially arguing that plaintiffs have not sufficiently established that Mr. Marullo was exposed to asbestos from J-MM products. Plaintiffs oppose the motion, claiming that it has been established that Mr. Marullo was exposed to asbestos from J-MM products.

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 John Marullo's testimony does not create a reasonable inference that he worked with ACP supplied by J-MM, as the ACP he describes is consistent with a product supplied by a separate company, the Johns-Manville Corporation (hereinafter, "Johns-Mansville"). Defendant claims that Mr. Marullo's employers were sophisticated intermediaries charged with constructive knowledge of the hazards associated with cutting ACP with a power-saw. Defendant further argues that Mr. Marullo's employer is the liable party because of the dangerous acts it instructed Mr. Marullo to engage in, which was likely for the sole reason of increasing profits by increasing the speed at which the pipe was installed. Lastly, defendant contends

that the use of a power-saw on ACP was an illegal and reckless (unforeseeable) use of the product.

Plaintiffs oppose the motion, claiming that Mr. Marullo testified to being exposed to asbestos from J-MM pipe. Plaintiffs contend that Mr. Marullo never saw a warning on the J-MM pipe at issue and further contend that J-MM cannot avoid liability for Mr. Marullo's employer's failure to warn of asbestos hazards or its failure to follow OSHA regulations.

Defendant asserts that plaintiff's testimony fails to create a reasonable inference that he worked with ACP supplied by J-MM and it is, in fact, evident that Mr. Marullo's testimony never refers to the pipe at issue by the name "JMM." Rather, Mr. Marullo refers to this pipe as "JM" pipe (see *generally* Aff. in Supp., Exh. E).

Plaintiff has identified "JM" pipes as a source of his exposure to asbestos during the relevant time-period when J-MM was supplying the ACP pipe at issue (1983-1988) (see Aff. in Supp., Exhs. F, I, J and K). For the purposes of defeating defendant's motion for summary judgment, Mr. Marullo need not have been perfectly precise in identifying the name printed on the pipe in question (see *Reid v Ga. - Pacific Corp.*, 212 AD2d 462, 622 NYS2d 946 [1st Dept 1995]). "JM" and "J-MM" are clearly very similar names and all that needs to be established is that "facts and conditions" were present such that Mr. Marullo could have been exposed to asbestos from J-MM products under the circumstances alleged (see *id.*). Plaintiffs adequately establish this through testimony which states that Mr. Marullo was exposed to asbestos from "JM" pipe at a time when J-MM could, in fact, have been the supplier of the pipe in question (see Aff. in Supp., Exh. E at 199:10-201:17).

Whether Mr. Marullo's testimony regarding his encounter with pipes he referred to as "JM" pipes is cogent and specific enough to substantiate his claim that he was exposed to asbestos from products which J-MM supplied is a factual question properly left to a jury. It is not 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]).

Defendant has failed to meet its burden of presenting evidence which "unequivocally establish[es] that its products could not have contributed to the causation of plaintiff's injury" (see *Matter of N.Y.C. Asbestos Litig.*, *supra*). On the other hand, Mr. Marullo's testimony sufficiently shows "facts and conditions from which defendant's liability may be reasonably inferred" (see *Reid v Ga. - Pacific Corp.*, *supra*). Summary judgment is denied other than as concerns the issue of punitive damages.

Punitive damages are not available in the typical negligence case. Punitive damages are not even “available in the ordinary fraud and deceit case ... but are permitted only when a defendant's wrongdoing is not simply intentional but evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations” (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD 3d 457, 458, 924 NYS 2d 376, 377 [1<sup>st</sup> Dept 2011]; citing to *Walker v Sheldon* 10 NY 2d 401, 405, 179 NE 2d 497, 223 NYS 2d 488 [1961]; *Ross v Louise Wise Servs., Inc.*, 8 NY 3d 478, 489, 868 NE 2d 189, 836 NYS 2d 509 [2007]). The record for this case simply fails to raise any questions of fact concerning whether defendant's alleged wrongdoing was intentional or, worse yet, marked by a “high degree of moral turpitude” (see *id.*).

Rather, it is alleged that J-MM utilized several methods to warn its customers and end-users about safe ACP work practices. First, J-MM placed a warning sticker on every piece of ACP it supplied, which stated in English and Spanish: “Caution: Do not use power saws to cut this pipe. Breathing dust created by improper work practices may cause serious bodily harm. When cutting, machining, or tapping, refer to the recommended work practice guide furnished to your employer” (Exh. 1 annexed to Aff. in Supp., Exh. F). Further, J-MM's salespeople and field installation crew were trained and instructed to educate customers regarding proper ACP work practices. J-MM's salespeople held “tail gate” meetings for the customers in the field, demonstrating how to use ACP and provided additional oral warnings not to cut ACP with power saws (See Aff. in Supp., Exh. F).

In addition to these field demonstrations, it is further alleged that J-MM's salespeople would hand out copies of the “J-M Pipe Installation Guide,” which contained another explicit warning against cutting ACP with a power-saw (Exh. B at 56, annexed to Aff in Supp., Exh. F). Finally, J-MM made available MSDS (Material Safety Data Sheets), which again cautioned against cutting ACP with a power-saw, and further advised that overexposure to asbestos from improper work practices (e.g. using power saws) could cause pulmonary disease (see Exh. C at 3, annexed to Aff in Supp., Exh. F). Given all these efforts J-MM made to warn about the safe use of ACP, summary judgment is granted on the issue of punitive damages.

Accordingly, it is Ordered that J-M Manufacturing Company, Inc.'s motion seeking summary judgment is granted only to the extent of dismissing John Marullo and Kathleen Marullo's claims for punitive damages against it, and it is further,

ORDERED that J-M Manufacturing Company, Inc.'s motion for summary judgment on the issue of punitive damages is granted and it is further,

ORDERED that the remainder of the relief sought in J-M Manufacturing Company, Inc.'s motion is denied, and it is further,

Ordered that plaintiffs' claims for punitive damages against defendant J-M Manufacturing are severed and dismissed, and it is further,

ORDERED that the clerk of court enter judgment accordingly.

MANUEL J. MENDEZ  
J.S.C.

ENTER:



MANUEL J. MENDEZ  
J.S.C.

Dated: July 26, 2019

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