

Sireci v A.O. Smith Water Prods.

2019 NY Slip Op 32466(U)

August 20, 2019

Supreme Court, New York County

Docket Number: 190365/2018

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

VIRGINIA ANNE SIRECI, Individually and as Administratrix of the Estate of PHILIP A. SIRECI, deceased,

Plaintiff(s),

INDEX NO. 190365/2018

- against -

MOTION DATE 7/31/2019

A.O. SMITH WATER PRODUCTS, et al.

MOTION SEQ. NO. 001

Defendants.

MOTION CAL. NO.

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

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes 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, Ransom & Randolph Company's (hereinafter, "R&R") motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiffs' complaint and all cross-claims against it, is denied.

Plaintiffs commenced this action by filing a Summons and Complaint on September 13, 2018. Philip Sireci worked for the I.D. Watch Case Company ("I.D. Watch") in Jamaica, New York for "at least a year" between 1975 and 1976 (Aff in Opp., Exh. A at 60-61, 82). The I.D. Watch Case Company was a "manufacturing setting" where metal watch casings were designed and fabricated (Aff in Opp., Exh. A 63-66, 246). Mr. Sireci's primary job was machining metal parts, using a lathe or table saw (Id. at 65-68). Plaintiff testified that at times he was sent up to another floor where welding of metal watch cases was being done (Id. at 66-67, 72-73). The welders worked on boards to do their welding (Id. at 74). If the welders wanted their welding boards cut down a little bit, they gave the board to Mr. Sireci or another man to have it cut down (Id. at 66-68, 70-71).

Mr. Sireci further testified that several activities with asbestos boards allegedly exposed him to asbestos-laden dust: (1) cutting the asbestos boards with circular saws; (2) cleaning up the equipment and workspaces daily around where this work was done with brooms and dust pans; and (3) dumping the contaminated refuse from garbage cans into dumpsters (Aff in Opp., Exh. A at 66-67, 75-80, 218-20, 223-24, 228, 240, 248, 344, 357-61). Mr. Sireci testified that he observed that some of these asbestos boards were R&R products (Aff in Opp., Exh. A at 78, 83, 249-253). He stated that he knew they were R&R boards because he saw the name printed somewhere on the boards (Aff in Opp. Exh. A at 250; see also Aff in Opp., Exh. A at 251-252). Plaintiffs bring this action to recover for Mr. Sireci's personal injuries due to asbestos-exposure.

FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Defendant now moves for summary judgment, essentially, arguing that plaintiffs have failed to rebut defendant's prima facie showing of entitlement to summary judgment. Plaintiffs oppose the motion, contending that summary judgment is inappropriate at this juncture as all the defendant has managed to do is, at best, present conflicting evidence for the jury to decide.

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 argues that summary judgment is warranted because R&R did not manufacture or supply the boards at issue. Defendant further argues that plaintiff's testimony is discredited by the defendant's records showing they did not manufacture the products at issue and, therefore, such testimony should be excluded. In the same vein, defendant argues that there is no competent, admissible evidence that any board allegedly manufactured or supplied by R&R was asbestos containing.

Plaintiffs oppose the motion, arguing that Mr. Sireci testified that R&R asbestos boards at the I.D. Watch Case Company were a source of his asbestos exposure. Plaintiffs further argue that the testimony they have submitted is sufficient to raise issues of fact and that the evidence defendant has provided, at best, constitutes conflicting evidence. Lastly, plaintiffs contend that R&R's

remaining arguments are unsupported simple extensions of its product identification arguments or are otherwise baseless.

In the final analysis, defendant has failed to eliminate all material issues of fact such as to warrant summary judgment (see *Klein v City of New York, supra*). R&R has presented catalogues, product photographs/descriptions, and price lists showing that it did not manufacture or supply asbestos board (see generally Aff in Supp, Exhs. E-1 and E-2). R&R has also produced certain newspaper articles documenting its company history of manufacturing dental and ceramic products (Aff in Supp., Exh. F). But this evidence is not dispositive as there is still conflicting evidence in this case which cannot be resolved on a motion for summary judgment. This is because Mr. Sireci testifies to having been exposed to asbestos from R&R products (see Aff in Opp., Exh. A at 78, 83, 249-253).

A jury must, therefore, weigh the credibility of plaintiff's testimony against R&R's evidence and determine whether it definitively establishes that R&R never manufactured the asbestos boards in question. It is not the function of the Court deciding a summary judgment motion to make credibility determinations or 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 N.Y.S. 2d 70 [2011], *Almonte v 638 West 160 LLC*, 139 A.D. 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]).


It must also be noted that although Mr. Sireci's testimony may not perfectly identify the physical characteristics of the asbestos board in question (i.e., R&R asbestos board), this does not prevent plaintiffs from establishing that Mr. Sireci was exposed to asbestos from R&R products. This is because "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]). In other words, for the purposes of defeating defendant's motion for summary judgment, all that must be established is that "facts and conditions" were present such that Mr. Sireci could have been exposed to asbestos from R&R products under the circumstances alleged (see *id.*). Defendant's motion for summary judgment is denied.

Accordingly, it is ORDERED that defendant Ransom & Randolph Company's motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiffs' complaint and all cross-claims against it, is denied

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: August 20, 2019



MANUEL J. MENDEZ
J.S.C.

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