

**Leavitt v A.O. Smith Water Prods. Co.**

2019 NY Slip Op 33261(U)

November 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 COUNTY**

**PRESENT: MANUEL J. MENDEZ PART 13**  
*Justice*

**IN RE: NEW YORK CITY ASBESTOS LITIGATION**

**RUSSELL LEAVITT and JOYCE LEAVITT,**  
**Plaintiffs,**  
**- against -**

**INDEX NO. 190240/2017**  
**MOTION DATE 10/23/2019**  
**MOTION SEQ. NO. 007**  
**MOTION CAL. NO.**

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

The following papers, numbered 1 to 5 were read on this motion for summary judgment and to dismiss for lack of personal jurisdiction by Liquidating Reichhold Inc. and plaintiffs cross-motion for jurisdictional discovery:  **PAPERS NUMBERED**

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 2</u>
Answering Affidavits — Exhibits _____	<u>3-4</u>
Replying Affidavits _____	<u>5</u>

**Cross-Motion:      Yes    X No**

Upon a reading of the foregoing cited papers it is Ordered that defendant Liquidating Reichhold Inc.'s motion for summary judgment, pursuant to CPLR §3212 and CPLR §3211 (a)(8) and (c), dismissing plaintiffs' claims and all cross-claims asserted against it, and Plaintiff's cross-motion for Jurisdictional discovery are denied.

Plaintiff, Russell Leavitt, alleges that as result of asbestos exposure he was diagnosed with mesothelioma on January 23, 2017. He was about 71 years old at the time of his diagnosis. Mr. Leavitt was deposed over the course of two days on April 17 and 19, 2018. It is alleged that Mr. Leavitt was exposed to asbestos while working as a security analyst for Argus Research, James H. Olyphant, H.C. Wainwright, Smith Barney and Solomon Brothers, among others, during the years 1969 to 1985. As a Security analyst Mr. Leavitt was responsible for researching electrical product companies, writing reports on them, doing investment analysis, making judgments on their profit outlook and making recommendations to investors. His job required periodic on-site visits to various manufacturing plants to meet with their management and observe their manufacturing process, which enabled him to write his research reports (Exh. E, pgs. 78: 6-15, 80:4-9).

Plaintiffs allege that Mr. Leavitt was exposed to asbestos in Reichhold' s product, Bakelite (a generic name for phenolic molding compound), when he visited Square-D Plants in Cedar Rapids, Iowa and in North Carolina, an Allan-Bradley plant located in Milwaukee, Wisconsin, a General Electric Plant in Schenectady, New York and Cleveland Ohio, and a Westinghouse plant in Lester Pennsylvania and South Carolina between 1969 and 1985 (Exh. E, pgs. 89 to 133:4).

MOTION/CASE IS OFF

Mr. Leavitt testified that while employed by Argus Research he visited the Square D plant in Cedar Rapids, Iowa between two and three times from 1969 through 1975 to prepare reports (Exh. E, pg. 75:24 to 76:21). He stated that he observed the manufacture of the Square D plant's Bakelite line of products for between 15 to 30 minutes during each visit to Cedar Rapids, Iowa (Exh. E, pg. 73:9-12). Mr. Leavitt testified that the Square D plant was forming Bakelite by a process of dumping black pellets into a hopper to create a disc, which generated dust. Mr. Leavitt further testified that the disc was then moved to a molding machine to be shaped into the size needed for the product and when it came out of the mold there were flashings that had to be removed by sanding and this created more dust. He claims that the workers performed additional sanding while moving the product into position and that this also created dust. Mr. Leavitt testified that there was lots of dust from the work on Bakelite at the Square D plant in Cedar Rapids and that there were fans at the factory that blew the dust around (Exh. E, pgs. 71-73). Mr. Leavitt testified that he spent about half a day at the plant (Exh. E, pg. 69:21-22), and that he visited the plant two or three times while working as a research analyst (Exh. E.75:24 to 76:21).

Mr. Leavitt testified that he visited the Square D facility in North Carolina at least two or three times, for a few hours each visit from about 1969 through the mid-1980's. He stated that while at the Square D North Carolina facility he visited a Bakelite line and saw them pouring pellets into a hopper, which gave off a huge amount of dust. Mr. Leavitt observed the Bakelite disc that came out of the hopper being sanded, creating more dust. The disc was molded and then shaped by more sanding to remove flashings, resulting in dust that he breathed in. The workers at the facility next placed the molded and shaped disc into a press and injected it into the product. The process required sanding which created lots of dust (Exh. E, pgs.90:18 to 96:13).

Mr. Leavitt testified that he visited the General Electric Schenectady, New York and Cleveland, Ohio plants to perform the same research duties, met with management team and was given a tour of the Bakelite Line by a guide. He stayed at these plants for the same amount of time- two to three hours- and spent the same amount of time observing the Bakelite Line -15- 30 minutes- and was exposed to dust from the process (see Exh. E, pg. 97:10 to 103:5 and 103:6 to 105:24).

Mr. Leavitt testified he visited the Westinghouse facility in Lester Pennsylvania and South Carolina, and the Allen-Bradley facility in Milwaukee Wisconsin, where again he was exposed to asbestos dust from the Bakelite Line manufacturing process in the same manner previously described, for the same length of time (Exh. E. pg. 109:20 to 110:18, pg. 112:15 to 114:2, pg. 117:5-20 and 158:25 to 174:3). He stated that when he finished with these visits he would have to remove the dust that accumulated in his pant's cuffs (Exh. E, pg. 234:9-21).

Plaintiffs commenced this action on August 17, 2017 and subsequently amended the complaint four times. Defendant has appeared in this action and joined issue.

Defendant's motion seeks an Order granting summary judgment pursuant to CPLR §3212 dismissing plaintiff's claims and all cross-claims for plaintiffs' failure to establish exposure to its asbestos products and pursuant to CPLR §3211 (a)(8) and (c) for lack of personal jurisdiction. Defendants argue that Mr. Leavitt failed to identify their product and there are no documents linking their

product to any of the plants Mr. Leavitt visited from 1969 to 1985. Plaintiff cross-moves for an order allowing him to obtain jurisdictional discovery.

At oral argument defendant withdrew its motion to dismiss for lack of personal jurisdiction. Since that portion of the motion is withdrawn, the relief sought on the cross-motion is moot, therefore the cross-motion is denied.

In support of its motion for summary judgment Reichhold relies on Mr. Leavitt's deposition testimony and its responses to plaintiffs' interrogatories wherein it states, at its response to Interrogatory No. 1 and request for production of documents No. 1, that "Reichhold's former Carteret New Jersey facility alone made Phenolic Molding Compounds. Reichhold sold its Carteret, New Jersey, facility and Phenolic Molding Compound business, including the assets, technology, books and records of the plant, excluding the plasticizer business, to BTL Specialty Resins in June 1986. The terms of the sales agreement...required Reichhold to transfer all documents pertaining to its molding compound operations to BTL, accordingly, records and information which might be responsive to this Interrogatory, if ever existed are no longer in Reichhold's possession." (see Exh. I).

Reichhold argues that this proves that (i) Mr. Leavitt is unable to specifically identify any of Reichhold's products or related materials; (ii) plaintiff is unable to specifically state the relevant time period and at which locations he was exposed to defendant's products (iii) that plaintiff can't prove that he was exposed to asbestos from Reichhold's product at any of the Bakelite manufacturing sites.

In opposing the motion for summary judgment Plaintiffs provide the deposition testimony of Mr. Charles Germain, Allen-Bradley's corporate representative, and defendant Square D's Interrogatory responses.

Mr. Germain stated that Allen-Bradley purchased Phenolic Molding Compound from Reichhold for use in producing its electrical products (Exh. 3, pg. 47:2-11 and pg. 48:2-6), the plastic molding compound purchased by Allen-Bradley from Reichhold contained asbestos (Exh. 3, pg. 55:15-24), Allen-Bradley was still purchasing plastic molding compound from Reichhold in the 1970s (Exh.3,58:6-14), asbestos was removed from plastic molding compound in 1985 (Exh. 3, pg. 59:2-3), the plastic molding compound purchased from Reichhold was used to make contactors, starters, overload relays...and other products that contained plastic (Exh. 3, pg. 59:12-18), a contactor is a control product (Exh. 3, pg. 60:13-18).

Square D's interrogatory responses to question No. 21 which seeks the names of the suppliers of asbestos or asbestos fibers used in its products, and the products in which the asbestos is used, names Reichhold as one of its suppliers of asbestos used in the manufacture or assembly of molded or bonded component parts in certain electrical equipment products (Exh.2). Reichhold in its interrogatory responses dated March 1, 1989 states that it made asbestos containing phenolic molding compound material from 1962 to 1986 at its Carteret, New Jersey plant, but sold this plant to BTL Specialty Resin Corp., in 1986 and has no records (Exh. 4).

To prevail on a motion for summary judgment the proponent must make 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]). It is only after the burden of proof is met that the burden switches to the nonmoving party 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 by giving the nonmoving 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 [1<sup>st</sup> Dept. 1998]).

“In asbestos-related litigation, the plaintiff on a summary judgment motion must demonstrate that there was actual exposure to asbestos from the defendant’s product” (*Cawein v Flintkote Co.*, 203 AD2d 105, 610 NYS2d 487 [1<sup>st</sup> Dept 1994]). The Plaintiff need “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 [1<sup>st</sup> Dept. 1995]). A Plaintiff’s inability to recall exact details of the exposure is not fatal to the claim and should not automatically result in the granting of summary judgment (*Lloyd v W.R. Grace & Co.*, 215 AD2d 177, 626 NYS2d 147 [1<sup>st</sup> 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 [1<sup>st</sup> Dept. 2004]).

Reichhold has not submitted sufficient proof to the court to show that during the relevant time period of 1969 to 1985 it did not supply asbestos containing Phenolic Molding Compound to the sites Mr. Leavitt visited. What Reichhold is saying is that plaintiff has gaps in his proof, and will not be able to show that he was exposed to its Phenolic Molding Compound at those sites because Reichhold has no records, and therefore can’t give Plaintiffs any records of sales made to the sites Mr. Leavitt visited. Reichhold has not made a prima-facie showing that its product could not have contributed to plaintiff’s injury (*In Re New York City Asbestos Litigation (Leavitt)*, 108 N.Y.S.3d 345 [1<sup>st</sup>. Dept. 2019], 2019 N.Y. Slip Op. 07376; *Reid v. Georgia-Pacific Corp.*, 212 A.D.2d 462, 622 N.Y.S.2d 946 [1<sup>st</sup>. Dept. 1995]).

“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 N.Y. 3d 499, 965 N.E. 2d 240, 942 N.Y.S. 2d 13 [2012]). There are material issues of fact raised by plaintiff requiring denial of the motion for summary judgment.

Accordinging plaintiffs the benefit of every possible inference in construing the evidence presented, they have shown through the deposition testimony of Mr. Leavitt, the deposition testimony of Mr. Charles Germain, Allen-Bradley’s corporate representative, Square D’s interrogatory responses and Reichhold’s interrogatory responses, that Reichhold made asbestos containing phenolic molding compound and that it was sold, at least, to Square D and Allen-Bradley during the period Mr. Leavitt visited the Square D and Allen Bradley plant, from 1969 to 1985.

Accordingly, it is ORDERED that defendant Liquidating Reichhold Inc.’s motion for summary judgment pursuant to CPLR §3212, dismissing plaintiffs’ claims and all cross-claims asserted against it, is denied, and it is further,


ORDERED that the portion of the motion seeking to dismiss for lack of personal jurisdiction is withdrawn, and it is further

**ORDERED that plaintiff's cross-motion to compel defendant Liquidating Reichhold, Inc., to respond to jurisdictional discovery is denied as moot.**

**ENTER:**

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

**Dated: November 1, 2019**

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

**Check one:     FINAL DISPOSITION     NON-FINAL DISPOSITION**  
**Check if appropriate:     DO NOT POST     REFERENCE**