

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

2019 NY Slip Op 33307(U)

November 4, 2019

Supreme Court, New York County

Docket Number: 190478/2012

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

HELEN STITT, Executrix of the Estate of ROBERT STITT, and HELEN STITT, Individually,

INDEX NO. 190478/2012

MOTION DATE 10/16/2019

Plaintiffs, - against -

MOTION SEQ. NO. 006

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

MOTION CAL. NO.

Defendants.

The following papers, numbered 1 to 8 were read on this motion for summary judgment by Burnham, LLC:

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 Burnham, LLC's (hereinafter "Burnham") motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' complaint and all cross-claims against it, is denied.

Robert Stitt (hereinafter "decedent") was diagnosed with mesothelioma in February of 2012, and he died on September 27, 2013. On March 11, 2014 his wife Helen Stitt was appointed Executrix for the Estate. On March 21, 2014 the plaintiffs filed the Second Amended Verified Complaint substituting the Estate for the decedent and asserting a claim for wrongful death and survival (Mot. Exh. C, pgs. 97-99, Opp. Exh. 3). Decedent's alleged exposure - as relevant to this motion - was from his work as a self-employed commercial plumber servicing residential boilers from 1970 through 1995 (Mot. Exh. C).

Decedent was deposed over the course of three days, February 6 and 7, 2012, and his videotaped de bene esse deposition was conducted on February 12, 2012 (Mot. Exh. C and Opp. Exh. 1). He stated that he started his company "Stitt Fuel Oil" in 1970 and because he had a full-time job at a propane company called Pyrofax, he worked at his business part-time from 5:00p.m. through the next morning and on weekends. He testified that he left Pyrofax in 1980 and at that point worked at his residential fuel oil and service company on a full-time basis from 1980 through 1993 when he closed the business. He claimed that his work at "Stitt Fuel Oil was within a ten (10) mile radius of Patchogue, and he traveled to homes located in Oakdale, Bellport and maybe halfway across northern Long Island. He specifically recalled working in Sayville, Oakdale, Bayport, Blue Point, Bellport and Centerreach. Decedent testified that while he worked part-time at "Stitt Fuel Oil" he had about one hundred and eighty customers and would perform ninety to one hundred cleanings a year. He estimated that he serviced twenty-five Burnham boilers a year. He stated that in the wintertime he would have about three calls a day. Decedent claimed that the amount of customers and boiler cleanings did not change when he started working at his company full-time, and that he made the change because he could not otherwise handle the amount of work. He claimed that he also serviced the boilers. Decedent testified that most of the homes he worked at were built pre-war (World War II) (Mot. Exh. C, pgs. 48-49, 57-62, 84, 185-186, 231-232 and 288).

Decedent identified Burnham boilers as one of the brands he worked on but he could not specifically remember the addresses. He could not remember the

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

first or the last time he worked on a Burnham boiler, but stated that he worked on Burnham boilers as frequently as other boilers he identified (Mot. Ex. C, pgs. 84, 93-94, and 220-221). Decedent described Burnham boilers as being rectangular in shape, two feet wide and three feet high, jacketed and oil burning. He testified that he was able to identify a Burnham boiler by the nameplate that was mostly located on the lower front part (Mot. Ex. C, pgs. 221-222).

Decedent stated that he was exposed to asbestos from Burnham boilers by performing service work for his customers, cleaning burners, removing the soot and the fibrous furnace cement used to seal the openings on the boilers. He claimed that he was exposed to asbestos dust when he opened the Burnham boilers to clean and service them. Decedent stated that opening the Burnham boilers meant removing the outer jackets. He testified that when he opened the Burnham boilers there was asbestos packing and insulation around the openings and asbestos would fall off, making him have to replace it. Decedent stated that he used a putty knife and either a horsehair or steel brush to remove asbestos material from the outside of a Burnham boiler, which created dust. Decedent claimed that the asbestos packing and insulation were gray in color and that he would replace it or apply asbestos cement using a putty knife. He stated the replacement process took about an hour and he would have to do it about once a year depending on how often the jacket was removed. Decedent testified he was also exposed to asbestos dust as part of the cleaning up process. He stated that he used a whisk broom to sweep asbestos into a pile and used a vacuum, which created asbestos dust that he breathed in (Mot. Ex. C, pgs. 61-67, 225-227, 340-341 and 345).

Plaintiffs commenced this action on October 16, 2012 (NYSCEF Docket No. 1). The summons and complaint were subsequently amended on March 21, 2014 to substitute decedent's estate as a plaintiff and add a wrongful death claim (Mot. Ex. A). Burnham filed its Verified Answer on August 12, 2014 (Mot. Ex. B).

Burnham now seeks an Order granting summary judgment pursuant to CPLR §3212, dismissing the plaintiffs' complaint and all 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]). It is only after the burden of proof is met that the burden switches to the non-moving 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]).

Burnham argues that it is entitled to summary judgment on causation because the decedent's deposition testimony does not establish he was exposed to asbestos from its boilers or related products. Burnham further argues that decedent's testimony is too vague to establish specific causation from exposure to asbestos, and that it would be pure speculation and conjecture to determine there was any asbestos containing components associated with Burnham boilers he allegedly worked on during the relevant time period.

A defendant seeking summary judgment in an asbestos case 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]). It is not

until after Burnham meets its preliminary burden that the plaintiffs are required to raise any issues of fact (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, supra).

Burnham relies on the trial testimony in an unrelated action of Roger Pepper, a corporate representative, to establish that any boilers decedent was allegedly exposed to would not have had asbestos cement, packing or insulation on the outside (Mot. Exh. D). Mr. Pepper testified that Burnham started manufacturing jacketed boilers with air cell asbestos insulation starting in the 1930's. He claimed that in the late 1940's into the 1950's Burnham started using fiberglass under the sheet metal jackets to replace the air cell asbestos insulation. Mr. Pepper testified that air cell asbestos insulation was completely eliminated in the early 1950's. He stated that only Burnham's unjacketed boilers were covered in asbestos cement but that as of 1955 about 95% of Burnham boilers sold were jacketed. Mr. Pepper stated that as of the late 1950's through the 1960's Burnham transitioned from asbestos cement to "boiler putty" on the smoke boxes (Mot. Exh. D, Pepper Testimony, pgs. 1991-1993, 1995-1996 and 2001).

Burnham claims that decedent's deposition testimony failed to provide sufficient product identification and that there was asbestos exposure from its boilers, and any asbestos containing related products, or specific causation.

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]).

Plaintiffs oppose the motion contending that Burnham failed to make a prima facie showing that its boilers and related asbestos containing products (ie air cell asbestos insulation) were no longer in circulation after the 1950's, or that the decedent was not exposed to asbestos when he worked on residential boilers in homes built in the 1940's, after World War II. Plaintiffs further argue that Burnham has not met its prima facie burden of showing that its product could not have caused the decedent's mesothelioma and, that issues of fact remain as to whether the decedent's exposure to asbestos from Burnham's boilers and related asbestos containing parts caused his mesothelioma.

Plaintiffs in opposition provide Mr. Pepper's trial testimony in a different unrelated action, wherein he testified that he started working at Burnham after 1991, two years before the end of the time period relevant to the decedent's exposure. Mr. Pepper confirmed that Burnham first started using jacketed boilers in the 1930's and that asbestos insulation was used from the 1930's through the late 1940's. He stated that asbestos gaskets were used through as late as 1986. He stated the gaskets were placed between the burner and the face of the front section of the steel boilers and stated that if the gasket broke off it would need to be scraped off and replaced. Mr. Pepper described the older Burnham boilers as having a company nameplate. He described the smallest residential boiler as two feet wide, about four feet deep and three feet high, which matches the description provided by the decedent (Opp. Exh. 2, pgs. 1288-1289, 1297, 1306-1308, and 1310). Plaintiffs argue that this evidence at the very least creates credibility issues warranting denial of summary judgment.

A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Ricci v. A.O. Smith Water Products*, 143 A.D. 3d 516, 38 N.Y.S. 3d 797 [1<sup>st</sup> Dept. 2016] and *Koulermos v. A.O. Smith Water Products*, 137 A.D. 3d 575, 27 N.Y.S. 3d 157 [1<sup>st</sup> Dept., 2016]). Burnham must unequivocally establish that the plaintiff's level of exposure to its asbestos containing products, was not sufficient to contribute to the development of his mesothelioma (*Berensmann v. 3M Company (Matter of New York City Asbestos Litigation)*, 122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1<sup>st</sup> Dept., 2014]).

Burnham provides no expert testimony to establish a prima facie case for summary judgment on causation. Burnham's arguments that plaintiffs lack evidence, and that decedent's testimony is conclusory and speculative, amounts to "pointing to gaps in plaintiff's proof" and fails to state a prima facie basis to obtain summary judgment. Furthermore plaintiffs, as the non-moving party, are entitled to the benefit of all favorable inferences, regardless of Burnham's allegation that they are unable to provide sufficient proof of decedent's exposure.

Plaintiffs are only required to show "facts and conditions from which defendant's liability may be reasonably inferred." The opposition papers have provided sufficient proof to create an inference that plaintiff was exposed to asbestos from Burnham's asbestos containing component products specifically cement, packing and insulation (Reid v Ga.- Pacific Corp., 212 A.D. 2d 462, supra and Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.), 7 A.D. 3d 285, supra). Decedent's deposition testimony identifying Burnham's residential boilers, his description of the dimensions of the boilers he worked on and asbestos containing component parts, including asbestos cement, and what he described as packing or insulation (Mot. Exh. D, pgs. 61-67, 84, 93-94, 220-221, 225-227, 340-341 and 345), combined with plaintiffs' other evidence - including Mr. Pepper's additional trial testimony - creates "facts and conditions from which [defendant's] liability may be reasonably inferred" (Reid v Ga.- Pacific Corp., 212 A.D. 2d 462, supra), and raises issues of fact. 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, supra).

Plaintiffs have raised issues of fact to overcome Burnham's prima facie showing. They have shown "facts and conditions from which Burnham's liability for the decedent's mesothelioma may be reasonably inferred" (Reid, supra), creating credibility issues and issues of fact, warranting denial of summary judgment.

Accordingly, it is ORDERED, that Burnham, LLC's motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' complaint and all cross-claims against it, is denied.

ENTER: MANUEL J. MENDEZ  
J.S.C.

Dated: November 4, 2019

  
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MANUEL J. MENDEZ  
J.S.C.

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