

Larocca v A.O. Smith Water Prods. Co.
2019 NY Slip Op 33496(U)
November 26, 2019
Supreme Court, New York County
Docket Number: 190404/2018
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

**MARK LARocca, as Adminsitrator for the Estate
of RICHARD M. LARocca,**

Plaintiffs,

- against -

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

Defendants.

INDEX NO. 190404/2018

MOTION DATE 10/23/2019

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion for summary judgment by Belden Wire & Cable Company:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____	<u>5 - 6</u>
Replying Affidavits _____	<u>7</u>

Cross-Motion: ☐ Yes ☒ No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Belden Wire & Cable Company's (incorrectly sued as Belden Wire & Cable Company, a division of Belden, Inc. - hereinafter "defendant") motion for summary judgment pursuant to CPLR § 3212 to dismiss Plaintiffs' Complaint and all cross-claims against it, is denied.

Plaintiff Richard M. LaRocca (hereinafter "decedent") was diagnosed with lung cancer on August 1, 2018, he died on March 4, 2019. It is alleged that decedent was employed as an apprentice stagehand and then as a stagehand and electrician using defendant's products at various locations throughout his career. It is alleged that the decedent was exposed to asbestos from asbestos containing wires manufactured by the defendant from 1964 through 1997.

Decedent was deposed over the course of three days on November 28, 29 and 30, 2018 (Mot. Exhs. F and G, Opp. Exh. 1). Decedent specifically recalled using defendant's wire products while working at the Loew's Valencia Movie theater as a theater maintenance mechanic, apprentice stagehand and apprentice electrician from 1964-1966, at the New York Worlds Fair as a theater maintenance mechanic and apprentice stagehand from 1964 through 1967, at NBC Studios in Brooklyn, New York as a stagehand from 1967 through 1971, and the Brooklyn Academy of Music as a stagehand from 1971 though the mid to late 1980's (Opp. Exh. 1, pgs. 52-53, 55-57, 62-67, 68, 70-71, 74-75, 83-86, and 87-89, and Mot. Exh. F, pgs. 179-180).

Decedent testified that he worked at Loew's Valencia Movie Theater in Jamaica, New York, as a theater maintenance mechanic, apprentice stagehand and apprentice electrician, six days a week from Monday through Saturday, for three years from 1964-1966. He stated that his job responsibilities included: making sure the lights were working, re-lamp the theater, change the marquis, repair any non-working switches, maintaining and repairing the switchboard, repairing the circuit breakers and replacing the fuses if the fuses blew. He stated that if he had to re-wire a fixture he would go down to the shop and get a piece of defendant's wire or cable, stripping the rubber case off of it, exposing himself to asbestos, and the complete the job. He testified that the rubber coated asbestos multi-conductor cables were color coded in black, green and white and came on

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

a metal spool with defendant's logo on it. He stated the asbestos was grayish and almost like paper. Decedent testified that he believed he was exposed to asbestos from the wires in the stage lights and when he repaired cables, he specifically recalled using Belden cable and wire products. He stated that the defendant's wires were on spools and black in color (Mot. Exh. F, pgs. 191-198, Opp. Exh. 1, pgs. 50-57).

Decedent testified that he worked part-time as an apprentice stagehand at the World's Fair in Queens, New York for two years starting in 1964. He stated he worked for multiple employers at different pavillions and specifically remembered IBM as one of them. Decedent stated that his responsibilities included: maintaining lights, lighting equipment, running cables, operating lights, and he might have to unload equipment, lighting equipment, switchboards, arc lights and coils of cable. Decedent testified that he believed he was exposed to defendant's asbestos wire and cable while working at the World's Fair (Opp. Exh. 1, pgs. 63-67).

Decedent stated that he worked full-time at NBC Studios in Brooklyn, as a union stagehand and house electrician from 1967 through 1971. He stated that at NBC Studios he worked at the combined studios, one and two. Decedent testified that he was responsible for repairing all the lights as they needed repair, to fix grids whether the defect was the wires, lamp, or lens. He testified that he believed he was exposed to asbestos through the lighting equipment, the lights, the wires and cables. He was not certain if he handled defendant's pigtail wiring but he recalled the asbestos wire used in the stage lights was manufactured by the defendant. Decedent described the wiring as having a rubber coating outside, with a gray asbestos paper-like substance underneath and then two or three conductors each with a rubber color coded coating. He testified that asbestos exposure came from stripping the wires (Mot. Exh. F, pgs. 204-208, Opp. Exh. 1, pgs. 70-75).

Decedent stated that he worked as a stagehand at the Brooklyn Academy of Music starting from about 1971 though the mid to late 1980's. He stated that his duties at the Brooklyn Academy of Music was similar to those at NBC, specifically to repair the lighting equipment and anything that had to do with lights or cables. Decedent testified that he believed he was exposed to asbestos in the cables and wires (Opp. Exh. 1, pgs. 84-87).

Plaintiffs commenced this action on October 19, 2018 (NYSCEF Doc. # 1 and Mot. Exh. A). Issue was joined by the defendant with the filing of its Verified Answer dated November 27, 2018 (Mot. Exh. B). The complaint was subsequently amended and the Third Amended Verified Complaint was filed on April 5, 2019, after the decedent's death to assert a claim for wrongful death (Mot. Exh. C). Defendant filed its Verified Answer to the Third Amended Verified Complaint on April 19, 2019 (Mot. Exh. D).

Defendant move for summary judgment pursuant to CPLR § 3212 to dismiss Plaintiffs' Complaint and all cross-claims against it. Defendant contends that it could not have contributed to the decedent's alleged injury because the plaintiffs failed to produce any evidence that he was exposed to, or worked with asbestos-containing products made by the defendant. Plaintiffs oppose the motion contending that the defendant's products identified by the decedent did contain asbestos and that there remain issues of fact as to product identification.

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]). 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]).

Defendant provides the affidavit of corporate representative, Martin Suddeth, Engineering Manager for Technical Services, employed with the company in 1989 after the period the decedent was able to specifically identify his work with defendant's products. Mr. Suddeth avers that he is familiar with all of defendant's wire and cable products manufactured since 1904, based on his review of product information. He states that after reviewing the decedent's deposition transcripts and records, none of the products he identified and described as manufactured by the defendant contained asbestos. Mr. Suddeth states that defendant did not manufacture any asbestos containing wire or cable product described by the decedent and that the descriptions provided "clearly" match three products: 18107/19107 - 600 volt, UL type S; 18207/19207 - UL type SO; and 8479 - 300 volt, UL type SJ. He refers to excerpts from four catalogs from 1967, 1976, and 1985 as covering the period relevant to the decedent's alleged exposure and demonstrating that product 18107/19107, 18207/19207 and 8479, did not contain asbestos (Mot. Exhs. H, H-1, H-2 and H-3).

Plaintiffs in opposition argue that Mr. Suddeth has no first hand knowledge of the defendant's asbestos containing products and relies solely on his review of records for a majority of the decedent's alleged asbestos exposure period. They claim that Mr. Suddeth's affidavit relies on excerpts from catalogs that are purported to match the decedent's description of defendants asbestos containing wire and cables without providing the complete underlying specifications, or a description of the methodology of the search through back catalogs, to establish that there were no other abestos containing wires and cable manufactured by the defendant during the period relevant to his alleged exposure.

In opposing the motion plaintiffs provide the 2005 deposition testimony of defendant's corporate representative in an unrelated action, Mr. Travis Wake, Senior Product Development Engineer, employed with the company from 1969 through at least 2005. Mr. Wake testified that defendant created master specification ("spec") sheets that would be noted as obsolete when they were no longer used and stored on microfiche. He stated that it would be difficult to obtain and review all of the relevant materials on asbestos containing products. Mr. Wake testified that it was very difficult to find documents because the use of the old microfiche system was "like finding a needle in a haystack." He further testified that it would be very difficult to find the relevant specs and the related catalog entries (Opp. Exh. 4, pgs. 134-140). Mr. Suddeth did not state which records he searched, provide complete copies of catalogs or the relevant specifications of the products he identified to establish there was no asbestos in defendant's products used by the decedent during the relevant period.

Plaintiffs provide defendant's responses to interrogatories in other litigation, wherein it was conceded that some of the wires or cables that were manufactured during the period relevant to dececnet's alleged exposure contained asbestos. Plaintiffs also refer to defendant's interrogatory response that state there are approximately 98 spools of microfilm containing product information, two or three cabinets of three inch by five inch microfiche film with product information, and six specification engineering special assignment books containing handwritten entries, together with a rolodex, that contain customer information and product information (Opp. Exh. 2, pgs. 30). Plaintiffs provide

other interrogatories responses wherein the defendant described asbestos containing products that had similar colors and physical characteristics as those described by the decedent during the relevant period (Opp. Exh. 3, pgs. 23-25).

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 refute the affidavit of defendant's corporate representative, Mr. Suddeth, and create an inference that plaintiff was exposed to asbestos from defendant's asbestos containing wire and cable products (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, combined with plaintiffs' other evidence - including Mr. Wake's deposition testimony and defendant's interrogatory responses in other unrelated actions - create "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. They have shown "facts and conditions from which defendant's liability for the decedent's lung cancer may be reasonably inferred" (Reid, supra), creating credibility issues and issues of fact, warranting denial of summary judgment

Accordingly, it is ORDERED, that Defendant Belden Wire & Cable Company's motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it, is denied.

ENTER:

Dated: November 26, 2019



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE