

Gatling v Amchem Prods. Inc.

2019 NY Slip Op 33712(U)

December 20, 2019

Supreme Court, New York County

Docket Number: 190362/2016

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

DAVID GATLING and LINDA GATLING, Plaintiff, - against - AMCHEM PRODUCTS INC., et al., Defendants.

INDEX NO. 190362/2016 MOTION DATE 11/20/2019 MOTION SEQ. NO. 001 MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion for summary judgment by Rheem Manufacturing Company:

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

Plaintiff, David Gatling, was diagnosed with lung cancer on August 18, 2015 (Opp. Exh. A). His alleged exposure to asbestos - as relevant to this motion - was allegedly from dust created while he was training to become and working with Rheem's asbestos containing boilers, as an assistant superintendent for the New York City Housing Authority (NYCHA), from 1983 through 1987.

Mr. Gatling was deposed over the course of two days, May 9 and 10, 2017 (Mot. Exhs. A and B and Opp. Exh. B). He testified that he became an assistant superintendent with NYCHA in 1983. Mr. Gatling stated that for about two years before he became an assistant superintendent, from 1981 through 1983, he was a maintenance worker and took classes at NYCHA's Smith Housing Facility. Mr. Gatling stated that part of his training required that he learn about valves, boilers which included Rheem boilers, and plumbing. He testified that the classes were held at night and every two or three weeks he would cycle out for hands-on work. He stated that when he worked on boilers he was in the building's boiler room (Mot. Exh. A, pgs. 124-127).

Mr. Gatling stated that the Rheem boilers he worked with starting in 1983 were rectangular, sectional and smaller boilers, about ten feet tall. He did not initially recall there being doors on the Rheem boilers he worked on. He stated that Rheem boilers had a metal jacket on the outside but did not initially recall there being insulation on the outside of the boilers. Mr. Gatling could not recall the color of a Rheem boiler or the locations he worked on them. He remembered seeing the name Rheem on the boilers but could not initially say where. He subsequently testified the name Rheem was on the front of the boiler. Mr. Gatling testified that he worked on the piping leading to Rheem boilers and did not work on anything located inside of them (Mot. Exh. B, pgs. 315-318, and 437).

Mr. Gatling subsequently testified that his exposure to asbestos from Rheem boilers was the same as that of another manufacturer Dunham Bush. He stated that if there was a leak he would have to open the area and take off material

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

to pinpoint the leak and asbestos material was scraped off from the outside of the boiler, creating dust that he breathed in. Mr. Gatling testified that he was exposed to asbestos from scraping the gaskets connecting the flange of the boiler to the piping. He stated that he had to remove what he believed were asbestos gaskets by scraping them and this created a lot of dust that he breathed in. Mr. Gatling stated that he would remove, round flange gaskets with holes in them located on the outside of Rheem boilers, that contained asbestos by breaking and removing them. He stated that he would install replacement preformed flange gaskets that were provided to him by NYCHA. Mr. Gatling did not see any asbestos warnings on the packaging or literature associated with the Rheem boilers. (Mot. Exh. B, pgs. 416-419, 436-437, 446 and 449-451).

Plaintiffs commenced this action on November 28, 2016 alleging Mr. Gatling's injuries resulted from exposure to asbestos (NYSCEF Doc. # 1). The Summons and Complaint were subsequently amended and filed on December 2, 2016 to add additional defendants, including Rheem (NYSCEF Doc. #2). Rheem filed its Verified Answer on January 5, 2017 (NYSCEF Doc. # 11).

Rheem now seeks an Order granting summary judgment pursuant to CPLR §3212, dismissing the plaintiffs' complaint and all cross-claims asserted against it. Rheem argues that it is entitled to summary judgment because there is no evidence Mr. Gatling was actually exposed to asbestos fibers released from a product manufactured, sold, supplied, distributed and/or installed by Rheem. Rheem argues that plaintiff's testimony is too vague to establish exposure to asbestos, and that it would be pure speculation and conjecture to determine there was any asbestos containing components associated with the Rheem boilers he allegedly worked on during the relevant time period.

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 [1st Dept. 1998]).

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

Rheem relies on the July 12, 2019 affidavit of its corporate representative, Richard Fuhrman, employed with the company from 1966 through 1999. He was employed as a Product Development Engineer with Rheem from 1981 through 1999. Mr. Fuhrman states that he obtained personal knowledge of the company's products through his work which required him to become familiar with "technical drawings, promotional data, parts lists, specifications, component materials and operational and performance characteristics of various Rheem products" both prior to and during his employment with the company (Mot. Fuhrman Aff., paras. 2 and 3). Mr. Fuhrman states that, after reviewing Mr. Gatling's deposition testimony stating he only worked on replacing the insulated pipes leading to and from Rheem boilers, the company did not manufacture or supply pipe insulation. Mr.

Fuhrman states that Mr. Gatling would not have encountered asbestos containing components “manufactured, sold, supplied or distributed by Rheem when working with or around Rheem boilers” (Mot. Fuhrman Aff., paras. 8, 9 and 11).

Mr. Fuhrman failed to identify which of Rheem’s corporate records he searched or reviewed in preparing his affidavit. Mr. Fuhrman relies only on part of Mr. Gatling’s testimony and fails to address the subsequent testimony as to asbestos containing gaskets on the outside of the Rheem boilers and materials inside the boilers. Mr. Fuhrman relies solely on earlier testimony for the conclusion that Mr. Gatling was not exposed to asbestos from component parts “manufactured, sold, supplied or distributed by Rheem when working with or around Rheem boilers” (Mot. Fuhrman Aff., para. 11). Mr. Fuhrman does not specifically state the basis for his conclusion that the gaskets or other component parts on the Rheem boilers Mr. Gatling worked with did not contain asbestos. Mr. Fuhrman’s Affidavit is conclusory and does not state a prima facie case on summary judgment (See *In re New York City Asbestos Litigation (DiSalvo)*, 123 AD 3d 498, 1 NYS 3d 20 [1st Dept. 2014], *Shanahan v. AERCO International, Inc.*, 172 AD 3d 534, 101 NYS 3d 28 [1st Dept. 2019], *Residential Credit Solutions, Inc. V. Gould*, 171 AD 3d 38, 101 NYS 3d 2 [1st Dept. 2019], and *Barraillier v. City of New York*, 12 AD 3d 168, 784 NYS 2d 55 [1st Dept., 2004]).

In any case, plaintiff in opposition provides deposition testimony of Rheem’s corporate representative, Mr. Donald E. Palmatary which states that the company manufactured asbestos containing component parts, including asbestos rope which was located between sections and an asbestos shield that covered the firebox on sectional boilers. Mr. Palmatary testified that Rheem stopped manufacturing the asbestos products sometime in the 1970’s. He did not recall the company putting asbestos warnings on the boilers (Opp. Exh. F, pgs. 42, 51, and 56 - 58). To the extent Rheem argues that these components did not exist in the newer boilers, it has not provided proof that they were removed or did not exist in the units that Mr. Gatling worked on from 1983 through 1987. Plaintiff argues that this evidence, when combined with Mr. Gatling’s deposition testimony, at the very least creates credibility issues warranting denial of summary judgment.

“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]). Summary judgment is a drastic remedy that should not be granted where conflicting affidavits about the work performed by plaintiff cannot be resolved (*Millerton Agway Cooperative v. Briarcliff Farms, Inc.*, 17 N.Y. 2d 57, 268 N.Y. S. 2d 18, 215 N.E. 2d 341 [1966] and *Ansah v. A.W.I. Sec. & Investigation, Inc.*, 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1st Dept., 2015]). Conflicting testimony 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 A.D. 3d 439, 922 N.Y.S. 2d 70 [2011], *Almonte v. 638 West 160 LLC*, 139 A.D. 3d 439, 29 N.Y.S. 3d 178 [1st Dept., 2016] and *Doumbia v. Moonlight Towing, Inc.*, 160 A.D. 3d 554, 71 N.Y.S. 3d 884 [1st Dept., 2018] citing to *S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y. 2d 338, 313 N.E. 2d 776, 357 N.Y.S. 2d 478 [1974]).

Mr. Gatling provided conflicting testimony. However, his conflicting testimony presents a credibility issue to be determined by the trier of fact (See *Luebke v. MBI Group*, 122 AD 3d 514, 997 NYS 3d 379 [1st Dept. 2014] citing to *Vazieiyan v. Blancato*, 267 AD 2d 152, 700 NYS 2d 22 [1st Dept., 1999]). There remain issues of fact as to whether Mr. Gatling’s exposure to asbestos in or on the outside of Rheem boilers he worked on while employed at NYCHA as an assistant superintendent from 1983 through 1987 caused his lung cancer. The conflicting evidence and testimony raise credibility issues that cannot be resolved on papers.

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 [1st 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 [1st Dept. 2004]). Furthermore, plaintiff, as the non-moving party, is entitled to the benefit of all favorable inferences, regardless of Rheem's allegation that he is unable to provide sufficient proof of exposure.

The opposition papers have provided sufficient proof to create an inference that plaintiff was exposed to asbestos from exterior and interior gaskets in the Rheem boilers he worked with during the relevant time period (*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*). Mr. Gatling's deposition testimony, combined with plaintiffs' other evidence, creates credibility issues and "facts and conditions from which [Rheem's] liability may be reasonably inferred" (*Reid v Ga.- Pacific Corp.*, 212 A.D. 2d 462, *supra*), warranting denial of summary judgment to Rheem.

Accordingly, it is ORDERED that Rheem Manufacturing Company's motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiff's complaint and all cross-claims against it, is denied.

ENTER:

Dated: December 20, 2019



MANUEL J. MENDEZ
J.S.C.

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J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE