Rivera v 3M Co.
2020 NY Slip Op 30067(U)
January 6, 2020
Supreme Court, New York County
Docket Number: 190360/2017
Judge: Manuel J. Mendez

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION

SUSAN L. RIVERA, Individually and As Personal Representative of The Estate of FIDEL RIVERA,

Plaintiffs,

- against -

3M COMPANY, f/k/a Minnesota Mining and Manufacturing Co., *et al.*

Defendants.

INDEX NO. 190360/2017
MOTION DATE 12/04/2019
MOTION SEQ. NO. 007
MOTION CAL. NO. ____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits ____ cross motion ____	5 - 6
Replying Affidavits ____	7 - 8

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendant GENERAL ELECTRIC COMPANY's (hereinafter referred to as "GE") motion for summary judgment, dismissing the complaint and all cross-claims asserted against it pursuant to New York Worker's Compensation Law, alternatively, to dismiss plaintiffs' claims for punitive damages, is denied.

Plaintiff, Fidel Rivera (hereinafter "decedent"), was diagnosed with malignant pleural mesothelioma on October 11, 2017 and died from the disease on January 2, 2019.

Decedent was deposed over the course of seven days, December 12, 13, 14, 15, 18. 19 and 20, 2017, and his videotaped de bene esse deposition was conducted on March 9, 2018 (Mot. Exhs. C, D, E, F, G, H, I and J). Plaintiffs allege the decedent was exposed to asbestos from GE's products through his employment with various contractors at multiple locations in New York City, as an electrician's apprentice and a union electrician (International Brotherhood of Electrical Workers - Local 3) from 1956 through 1975.

Decedent testified that from 1956 through 1959, he was an apprentice and in 1959 he became a union electrician (Mot. Exh. C, pgs. 72, 103-104, Exh. E, pgs. 256-257 and Exh. J, pgs. 19-20). Decedent identified various GE asbestos containing products he worked with from 1956 through 1975, including: panels, breakers, switches, arc chutes, and motors (Mot. Exh. C, pgs. 74-79, 86-102 and 114-116, Exh. D, pgs. 158-168, 172-175, 185-188, and 198-202, and Mot. Exh. H, pgs. 696-750). He stated that starting in 1975 he was employed by GE, left the union, and remained with the company until he retired in about 1997 (Mot. Exh. D, pgs. 211-213 and 239, Mot. Exh. F, pgs. 395, 402-403 and 435-436 and Mot. Exh. J, pg. 121). Decedent testified that he was exposed to GE asbestos containing products for about two or three years after being employed by the company (from 1975 through approximately 1978), with no other subsequent exposure from 1978 through his retirement (Mot. Exh. D, pgs. 214-238).

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

This action was commenced on November 16, 2017 (see NYSCEF Doc. No. 1). On December 1, 2017, GE filed an Acknowledgment of Receipt and Verified Answer to Plaintiff's Complaint (NYSCEF Doc. No. 13). The complaint was subsequently amended eight times and the estate was substituted as plaintiff (NYSCEF Doc. Nos. 5, 8, 26, 65, 90, 205, 216 and 246).

GE seeks summary judgment arguing that because the decedent was an employee for approximately twenty years - including for the two or three year period he stated he continued to be exposed to GE's asbestos containing products - his alleged injuries from asbestos exposure are related to his employment, therefore plaintiffs are only entitled to relief pursuant to the Workers Compensation Law and plaintiffs' claims against the company should be dismissed.

It is GE's contention that the plaintiffs' exclusive remedy against it for decedent's asbestos exposure, is Worker's Compensation and there is no other "dual capacity" remedy available. GE provides the affidavit of Denise Kelly, vice president of Commercial Lines at Electric Insurance Company (Mot. Exh. K). She states that after reviewing the records, GE provided the decedent with Workers Compensation insurance coverage from two policies: Electric Mutual Liability Company from 1976 through1995, and Electric Insurance Company from 1996 through 1998 (Mot. Exh. K).

Plaintiffs state that their claims are only for the period prior to the decedent's employment with GE, from 1956 through 1975, when he was employed by various contractors as an apprentice and union electrician. They argue that the Workers Compensation Law does not apply because as GE has conceded, it was not the decedent's employer during the approximately nineteen year period of his alleged exposure to the company's asbestos containing products from 1956 through 1975. Plaintiffs further argue that the "dual capacity" doctrine does not apply, because their claims are based solely on products liability and failure to warn, which resulted in decedent's injuries from asbestos exposure during a period before his employment with GE. They state that the decedent also did not file any Workers Compensation claims related to asbestos exposure during his employment with GE.

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 NY 2d 833, 652 NYS 2d 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 NY 2d 525, 569 NYS 2d 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 AD 2d 583, 677 NYS 2d 136 [1st Dept. 1998]).

New York Workers Compensation Law §11 limits employer liability to an injured employee, as the "sole and exclusive remedy" and includes diseases or infections that are a natural and unavoidable result of employment (Acevedo v. Consolidated Edison Co. of N.Y. , 189 AD 2d 497, 596 NYS 2d 68 [1st Dept. 1993] and Reich v. Manhattan Boiler & Equipment Corp., 91 NY 2d 772, 698 NE 2d 939, 676 NYS 2d 110 [1998]). New York Workers Compensation Law provides that the benefits are the "exclusive remedy" to an employee (Isabella v. Hallock, 22 NY 3d 788, 10 NE 3d 673, 987 NYS 2d 293 [2014]).

The "dual capacity" doctrine is rejected in New York. The "dual capacity" doctrine is applied when "An employer normally shielded from tort liability by the exclusive remedy priniciple [embodied in section 11 of the Workers' Compensation Law] may become liable to his own employee if he occupies, in

addition to his capacity as an employer, a second capacity that confers on him obligations independent of those imposed on him as an employer." Employees cannot sue their employers as the manufacturers of the product that causes their injuries (See Billy v. Consolidated Mach. Tool Corp., 51 NY 2d 152, 412 NE 2d 934, 432 NYS 2d 879 [1980]).

Workers Compensation Law bars recovery for injuries incurred in the course of employment. To the extent a Workers Compensation lien exists, an employee "cannot recover twice." Alternatively, injuries that were incurred separately from the course of decedent's employment, and as a result of GE's potential negligence are not barred (Manswell v. St. Luke's Hosp., 16 AD 3d 182, 792 NYS 2d 389 [1st Dept., 2005] citing to Firestein v. Kingsbrook Jewish Med. Ctr., 137 AD 2d 34, 528 NYS 2d 85 [2nd Dept., 1988] and Matias v. City of New York, 127 AD 3d 1145, 7 NYS 3d 509 [2nd Dept., 2015]).

Plaintiffs have raised issues of fact as to whether the decedent's alleged injuries result from his employment with GE or from GE's negligence (see Manswell v. St. Luke's Hosp., 16 AD 3d 182, supra at pg. 183 and Matter of New York city Asbestos Litigation, 2010 NY Slip Op. 33123 [U]). GE did not contradict plaintiffs' statements, provide proof, or otherwise establish that a Worker Compensation claim or product's liability claim was filed on the decedent's behalf, as an employee of the company, for his alleged exposure from asbestos. The decedent testified to asbestos exposure from GE's products at various locations over the course of approximately nineteen years as opposed to alleged exposure over the course of two or three years while employed by GE (Mot. Exh. C, pgs. 74-79, 86-102 and 114-116, Exh. D, pgs. 158-168, 172-175, 185-188,198-202, and 214-238, and Mot. Exh. H, pgs. 696-750).

Plaintiffs in this action are alleging the decedent had substantial exposure to asbestos before he came to work for GE (see Mot. Exh. M). In this case the decedent's alleged exposure to asbestos from GE's products occurred at multiple locations, with multiple employers other than GE, for a substantial period of time (approximately nineteen years). GE has conceded that no Workers Compensation claim was filed (see Mot. Exh. N).

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 GE's asbestos containing products (Reid v Ga.- Pacific Corp., 212 AD 2d 462, 622 NYS 2d 946 [1st Dept. 1995] and Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.), 7 AD 3d 285, 776 NYS 2d 253 [1st Dept. 2004]). Decedent's deposition testimony, identifying GE's products he worked with from 1956 through 1975, prior to his employment with the company, including: panels, breakers, switches, arc chutes, and motors (Mot. Exh. C, pgs. 74-79, 86-102 and 114-116, Exh. D, pgs. 158-168, 172-175, 185-188, and 198-202, and Mot. Exh. H, pgs. 696-750), creates "facts and conditions from which [GE'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*). Furthermore plaintiffs, as the non-moving party, are entitled to the benefit of all favorable inferences, regardless of GE's allegation that their claims should be dismissed under Workers Compensation law.

Plaintiffs have raised issues of fact on GE's motion for summary judgment under Workers Compensation Law showing "facts and conditions from which GE's liability for the decedent's mesothelioma may be reasonably inferred" (Reid, supra), warranting denial of summary judgment.

GE alternatively seeks summary judgment on the plaintiffs' cause of action for punitive damages arguing that it did not intentionally fail to warn the decedent about any asbestos containing products. GE argues that it did not intentionally suppress or conceal information on the hazards of asbestos from the decedent. GE claims it is also entitled to summary judgment on the punitive damages claim because it did not mine, mill or otherwise manufacture asbestos and plaintiffs have not provided "clear, unequivocal and convincing evidence" to establish entitlement to punitive damages (Mot. Memo. of Law, pg. 10).

The purpose of punitive damages is to punish the defendant for wanton, reckless or malicious acts and discourage them and other companies from acting that way in the future (Ross v. Louise Wise Servs., Inc., 8 N.Y. 3d 478, 868 N.E. 2d 189, 836 N.Y.S. 2d 590[2007]).

Plaintiffs argue that GE has not met its prima facie burden, in that there was no evidence submitted in support of summary judgment on the punitive damages claims. Alternatively, they provide copies of letters and memorandums from GE as proof that the company was aware of the potential dangers of asbestos during the period relevant to the decedent's alleged exposure (1956 through 1975), incorporated asbestos into its products, and chose not to provide warnings to consumers in order to sell more products (Mot. Exhs. 10, 11, 12 and 13).

Plaintiffs' proof creates an issue best left to be determined by the trial judge after submission of all evidence (See In the Matter of the 91st Street Crane Collapse Litigation, 154 A.D. 3d 139, 62 N.Y.S. 3d 11 [1st Dept., 2017] and *Camillo v. Olympia & York Properties Co.*, 157 A.D.2d 34, 554 N.Y.S.2d 532 [1st Dept. 1990] supra).

Accordingly, it is ORDERED that defendant GENERAL ELECTRIC COMPANY's motion for summary judgment, dismissing the complaint and all cross-claims asserted against it pursuant to New York Worker's Compensation Law, alternatively, to dismiss plaintiffs' claims for punitive damages, is denied.

ENTER:

MANUEL J. MENDEZ,
J.S.C.

Dated: January 6, 2020

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE A