

**Gross v A.O. Smith Water Prods.**

2020 NY Slip Op 30634(U)

February 28, 2020

Supreme Court, New York County

Docket Number: 190358/2015

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

JOANNE M. GROSS and DANIEL R. FOLEY,  
as Co- Executors for the Estate of THOMAS  
J. FOLEY,

INDEX NO. 190358/2015  
MOTION DATE 02/26/2020  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

Plaintiffs,

-against-

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

Defendants.

The following papers, numbered 1 to 6 were read on this motion for summary judgment by Cleaver-Brooks, Inc. pursuant to CPLR § 3212:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3</u>
Answering Affidavits — Exhibits _____	<u>4-6</u>
Replying Affidavits _____	_____

CROSS-MOTION     YES     NO

Upon a reading of the forgoing cited papers, it is Ordered that Defendant Cleaver-Brooks, Inc.'s (hereinafter "Cleaver-Brooks") motion for summary judgment pursuant to CPLR § 3212 to dismiss Plaintiff's complaint, is denied.

Joanne M. Gross and Daniel R. Foley bring this action as co-executors of the Estate of Thomas J. Foley to recover injuries sustained by decedent Thomas J. Foley (hereinafter "Decedent").

Decedent was diagnosed with lung cancer in September of 2015. He died from respiratory failure secondary to his lung cancer in August of 2016. Decedent worked as a boilermaker helper for Wagner & Sons from approximately 1967 to 1974. While employed as a boilermaker, Decedent would work on industrial boilers, got them ready for re-tubing, cleaned the exterior and interior compartments of the boilers, and assisted in getting the boilers ready for the boilermakers. He also removed and replaced the door gaskets on boilers. In getting the boilers ready for the boilermakers, Decedent mixed asbestos-containing cement and applied it to the outside of the boilers with a trowel. In applying the cement and removing the door gaskets, asbestos-containing dust was created.

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

Plaintiffs commenced this action on October 28, 2015 to recover for the injuries and death resulting from the Decedent's exposure to asbestos.

Cleaver-Brooks now moves for summary judgment pursuant to CPLR § 3212 to dismiss Plaintiffs' complaint against it. Cleaver-Brooks contends that Plaintiffs have failed to provide sufficient evidence that Decedent was exposed to asbestos from any asbestos-containing product supplied or distributed by Cleaver-Brooks. Plaintiffs oppose the motion contending that Cleaver-Brooks failed to make a prima facie showing that the Decedent's product identification regarding Cleaver-Brooks does not sufficiently establish that he worked with any asbestos-containing boilers manufactured by Cleaver-Brooks, and in any event, contend issues of fact remain as to whether the Decedent was exposed to asbestos from Cleaver-Brooks products.

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 N.Y.2d 833, 652 N.Y.S.2d 723 [1996]). It is only after the burden of proof is met that the burden switches to the non-moving party to rebut the 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 N.Y.2d 525, 569 N.Y.S.2d 337 [1999]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist. (*Kornfeld v. NRX Tech., Inc.*, 93 A.D.2d 772, 461 N.Y.S.2d 342 [1983], *aff'd* 62 N.Y.2d 686, 465 N.E.2d 30, 476 N.Y.S.2d 523 [1984]).

Summary judgment is a drastic remedy that should only be granted if there are no triable issues of fact. (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 942 N.Y.S.2d 13, 965, N.E.2d 240 [2012]). In determining the motion, the Court must construe the evidence in the light most favorable to the non-moving party by giving the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence. (*SSBS Realty Corp. v. Public Service Mut. Ins. Co.*, 253 A.D.2d 583, 677 N.Y.S.2d 136 [1<sup>st</sup> Dept. 1998]).

In New York City Asbestos Litigation, the "plaintiff is not required to show the precise causes of his damages, but 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]). 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 A.D.3d 285, 776 N.Y.S.2d 253 [1<sup>st</sup> Dept. 2004]).

In support of its motion, Cleaver-Brooks argues that the Decedent's deposition testimony fails to adequately and properly identify Cleaver-Brooks boilers as a specific source of Decedent's alleged exposure to asbestos and that Decedent's testimony was based on speculation and guesswork and a jury verdict

must be based on more than such.

In opposition to the motion for summary judgment, Plaintiffs argue that the Decedent sufficiently described what he believed to be Cleaver-Brooks boilers.

Throughout Decedent's deposition, he offers product identifications of Cleaver-Brooks boilers. Decedent alleges that he worked in multiple locations, but can only recall Pilgrim State Hospital, Lederle Labs, Hudson Power Plant, and Indian Point Nuclear Power Plant by name. (Affirmation in opposition, Exh. 3 at 40:13 - 41:6). Decedent specifically states that he worked at Pilgrim State Hospital for one year continuously sometime between the years of 1967 and 1974. During that time, Decedent worked as a boilermaker helper and installed and renovated asbestos-containing boilers in the powerhouse at Pilgrim State Hospital. (Affirmation in opposition, Exh. 3 at 42:6 - 15, 45:14 - 16). Although Decedent could not state specifically which boilers he worked with and at which location, he identified seeing Cleaver-Brooks boilers during his entire time working for Wagner & Sons. (Affirmation in opposition, Exh. 3 at 72:14-21).

Plaintiffs point to Cleaver-Brooks' product identification interrogatories from January 9, 2020 from a previous case in which Cleaver-Brooks was listed as a defendant. The product interrogatories state that Cleaver-Brooks boilers were present at Pilgrim State Hospital sometime between 1958 and 2016, which coincide with the years of Decedent's alleged exposure. (Affirmation in opposition, Exh. 4). Plaintiffs further point to trial testimony by Cleaver-Brooks corporate representative Mr. Tornetta. Mr. Tornetta states that he has seen evidence of Cleaver-Brooks gaskets, refractories, cement, insulation, mix, tape, pulp, and block containing asbestos. (Affirmation in opposition, Exh. 6 at 3793:18 - 3795:14). Plaintiffs then go on to show that in Cleaver-Brooks' service manuals it states that Cleaver-Brooks did produce and manufactured asbestos-containing gaskets and insulation. (Affirmation in opposition, Exh. 7, 8, and 9).

Cleaver-Brooks alleges that they did not supply boilers to Pilgrim State Hospital during the time Decedent worked at that specific site. Cleaver-Brooks state's in the product identification interrogatories for the current case that they did not supply boilers to Pilgrim State Hospital between 1967 and 1974. Cleaver-Brooks further states that it is not possible Decedent was exposed to Cleaver-Brooks asbestos-containing products during his time working at Pilgrim State Hospital because he only worked in that specific location for one consecutive year between 1967 and 1974. (Affirmation in reply, Exh. C).

Cleaver-Brooks further points to the decision in the Decedent's wife's previous case, *Patricia A. Foley v. A.O. Smith Water Products*, wherein, the Court decided that the summary judgment burden had been met because the Decedent could not recall whether he saw or worked with Kewanee boilers, or if any of his co-workers installed or maintained Kewanee brand boilers. In the previous case Decedent failed to sufficiently identify any Kewanee products as a source of his

exposure to asbestos. The Court determined that the speculative nature of the Decedent's testimony, and the lack of other evidence, was not enough to prove a reasonable inference of exposure. (Affirmation in reply, Exh. B).

In light of the above testimony in the current case against Cleaver-Brooks, there is evidence on the record sufficient to meet the *Reid* standard mentioned above. Plaintiffs have shown facts and conditions from which the Defendant's liability may be reasonably inferred. (*Reid, supra*). Plaintiffs have mentioned Cleaver-Brooks as one of the products that exposed Decedent to asbestos, the Decedent identified the boilers he worked on at the specific locations where Cleaver-Brooks supplied boilers to; and Mr. Tornetta's testimony identifying Cleaver-Brooks asbestos-containing products is sufficient evidence to meet the *Reid* standard. 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.), supra*).

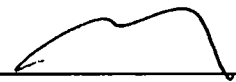
Furthermore, it is not the function of the Court on deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material issues of fact (or point to the lack thereof). (*Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240, 942 N.Y.S.2d 13 [2012]). Conflicting testimonial evidence 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 NYS 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]).

Cleaver-Brooks fails to make a prima facie showing of entitlement to judgment as a matter of law. Cleaver-Brooks contention that Decedent was never exposed to asbestos-containing products manufactured, sold, or distributed by Cleaver-Brooks is unpersuasive. Even if Cleaver-Brooks was able to meet its prima facie burden, Plaintiffs raise issues of fact to be resolved at trial. Plaintiffs have specifically identified Cleaver-Brooks asbestos-containing products and Mr. Tornetta's trial testimony states that Cleaver-Brooks produced and manufactured asbestos-containing products during the time of the Decedent's exposure to asbestos. Plaintiffs also point to recent product identifications that place Cleaver-Brooks boilers, during the time in question, at the specific jobsite the Decedent worked. Plaintiffs have demonstrated "facts and conditions from which [Cleaver-Brooks] liability may be reasonably inferred" to warrant the denial of Cleaver-Brooks' motion for summary judgment (*Reid v. Ga. Pacific Corp.*, 212 A.D.2d 462, 622 N.Y.S.2d 946 [1st Dept. 1995]).

Accordingly, it is ORDERED that Defendant Cleaver-Brooks Inc.'s motion for summary judgment pursuant to CPLR 3212, dismissing Plaintiffs complaint, is denied.

ENTER:

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



\_\_\_\_\_  
**MANUEL J. MENDEZ**  
J.S.C.

Dated: February 28, 2020

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE