

Mauro v Consolidated Edison of N.Y.

2020 NY Slip Op 30636(U)

February 26, 2020

Supreme Court, New York County

Docket Number: 190382/2017

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

MARIA MAURO, Individually, and JOSEPH MAURO, III, and DEAN MAURO as Special Administrators and Co-Administrators to the Estate of JOSEPH MAURO, JR., Deceased,

INDEX NO. 190382/2017
MOTION DATE 01/29/2020
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

Plaintiffs,

-against-

CONSOLIDATED EDISON OF NEW YORK, et al.,

Defendants.

The following papers, numbered 1 to 8 were read on this motion by John Potente & Sons, Inc. pursuant to CPLR §3212 for summary judgment:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1- 4</u>
Answering Affidavits — Exhibits _____	<u>5 - 6</u>
Replying Affidavits _____	<u>7- 8</u>

CROSS-MOTION YES NO

Upon a reading of the foregoing cited papers it is ORDERED that defendant John E. Potente & Sons, Inc.'s (hereinafter "defendant") motion pursuant to CPLR §3212 for summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it, alternatively, partial summary judgment dismissing the plaintiffs punitive damages claims, is granted solely to the extent of dismissing the punitive damages claims. The remainder of the relief sought in this motion is denied.

Plaintiffs' decedent, Joseph Mauro, Jr. (hereinafter "decedent"), was diagnosed with malignant pleural mesothelioma on October 19, 2017 and passed away on April 10, 2018 (Opp. Exhs. 1 and 4). Decedent alleged he was exposed to asbestos in a variety of ways. He alleges exposure from approximately 1970 through November 1976 at various Consolidated Edison of New York (hereinafter "Con Ed") sites while employed by a subcontractor, Michael J. Torpey, Inc..

Decedent was deposed on January 16, 17 and 18, 2018. His de bene esse deposition was taken on January 25, 2018 (Mot. Exhs. H and Opp. Exhs. 5 and 8). Starting approximately in 1970 through November of 1976, he was hired by a union employer, Michael J. Torpey, Inc. (hereinafter "Torpey") to perform excavation and backhoe work (Mot. Exh. H pgs. 62-64). Decedent stated that periodically when Torpey was between jobs, he would be laid off and worked for other employers. He claimed he had no exposure to asbestos on the less than ten other minimal jobs with other employers which were for short time periods. He estimated that altogether he worked on other jobs for other employers a year or less (Mot. Exh. H, pgs. 67, 74-77 and 134-135).

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

Torpey was a subcontractor who got work from Con Ed. Decedent stated that the Torpey foremen directed decedent's work, but the entire site was under the control of Con Edison (Mot. Ex. H pgs. 146-149, 154-156, 229-230 and 235-237 and Opp. Ex. 8, pgs. 33-37). Decedent testified that Con Ed used its own trucks and supplied the asbestos containing conduits, which he also referred to as asbestos containing ducts, at the various sites. He stated that Con Ed chose the pipes that were used (Mot. Ex. H, pgs. 65-67, 213 and 226-229, Opp. Ex. 8, pg. 36). Decedent stated he was exposed to asbestos from breaking and cutting the asbestos containing conduits; helping the laborer with the clean-up using a broom to sweep up the dust created from the asbestos containing conduits; throwing the pieces into the bucket of a Drott 4+1; loading the asbestos containing conduits onto the truck and taking the asbestos containing conduits off the Con Ed trucks (Mot. Ex. H, pgs. 68-69 and 72-73).

Decedent testified he was also exposed to asbestos periodically when the laborers were shorthanded, and he would help out with the installation of the asbestos containing conduits. He would keep the asbestos conduit pieces steady so the carpenter could cut them, and then put them back into the bucket. Decedent testified that when the carpenter cut the pieces, even if he turned his head, he would still get dust blown into his face that he breathed in (Mot. Ex. D, pgs. 66-67, 150-153, and 239-240, and Opp. Ex. 8 pgs. 28-32). Decedent testified that he followed the same procedures with asbestos containing conduits or ducts when working with round asbestos cement pipes that were also delivered by Con Ed to the job sites, and that the dust from those pipes got close enough for him to breathe in (Mot. Ex. H, pgs. 149-153 and 238-244).

Decedent described the asbestos containing conduits or ducts as light gray, smooth, powdery and square on the outside, but round on the inside for the wires to go through. The asbestos containing conduits, or ducts, came in different sizes, ranging from one to four feet for straight pieces, and there were also bends and couplings. He stated that the asbestos containing conduits could be assembled to make bends at the corners that were at forty-five, ninety or twenty-two and a half degree angles. Decedent did not know the name of the manufacturer of the asbestos containing conduits or ducts. Decedent testified that a picture depicting asbestos containing duct, shown to him at the deposition, was the same conduit he worked with during the relevant time period (Mot. Ex. H, pgs. 70-73, 139-142, 231-232, and 234-235, Opp. Ex. 8, pgs. 22-23 and Opp. Ex. 16).

Decedent recalled that he also worked with round grayish-white asbestos cement pipes that had a rough texture, a diamond pattern, and ranged in size from either three, six, or ten feet. Decedent testified that a picture depicting asbestos containing cement pipes, shown to him at the deposition, looked like the same pipe he worked with during the relevant time period (Mot. Ex. H, pgs. 232-233 and 234-235 and Opp. Ex. 8, pgs. 22-25 and Opp. Ex. 17).

Plaintiffs commenced this action on December 15, 2017. The Summons and Complaint was amended multiple times to add new parties, substitute the estate and assert a cause of action for wrongful death. On December 22, 2017 plaintiffs amended the complaint to add defendant, "John E. Potente & Sons, Inc.," as a party to this action. Defendant served its Acknowledgement of Service and Answer on June 20, 2018 (Mot. Ex. B).

Defendant seeks an Order pursuant to CPLR §3212 granting summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it, alternatively, defendant seeks partial summary judgment dismissing the plaintiffs punitive damages claims.

The parties entered into a stipulation and the plaintiffs withdrew their punitive damages claims asserted against the defendant prior to the submission of this motion (Reply, Exh. A). Accordingly plaintiffs' punitive damages claim asserted against defendant John E. Potente & Sons, Inc., is dismissed in accordance with that stipulation.

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, 89 NY 2d 833, 675 NE 2d 458, 652 NYS 2d 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 NY 2d 525, 571 NE 2d 645, 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 (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD 2d 583, 677 NYS 2d 136 [1st Dept. 1998]); Martin v Briggs, 235 AD 2d 192, 663 NYS 2d 184 [1st Dept. 1997]).

Defendant claims the decedent's deposition testimony cannot be used against it because it was not a party to this action or present at any of the depositions. It argues that the decedent's deposition testimony is inadmissible hearsay and cannot be used against the defendant because of its inability to cross-examine the witness (Mot. Memo. of Law, pg. 2 footnotes 1 and 3, and pg. 5 footnote 17). Defendant refers to its Acknowledgement of Service served on June 20, 2018 (Mot. Exh. B) as proof it was not a party to the action or present when the decedent was deposed on January 16, 17, 18 and 25, 2018. Defendant also relies the May 1, 2018 letter sent by plaintiffs' counsel stating the decedent died on April 10, 2018 (Mot. Exh. I) before service of the Acknowledgement of Service, as proof it was unable to be present or otherwise depose the decedent before he died.

Defendant does not provide an Affidavit of Service of the Amended Summons and Complaint dated December 22, 2017, or explains why the Acknowledgement of Service and Answer was served approximately six months later, on June 20, 2018 (Mot. Exhs. B and D, and Opp. Exh. 2). The motion papers do not make it possible to determine whether defendant was served and received any of plaintiffs' Notices of Deposition - including for the de bene esse deposition - which was noticed after the defendant was named as a party to this action. The proof provided by defendant is insufficient to establish that it was not served and did not have notice of any of the decedent's depositions prior to their being taken.

In support of its motion for summary judgment defendant relies on the affirmation of its attorney. Defendant does not provide an affidavit from a person with personal knowledge. An attorney's affirmation, alone, is hearsay that may not be considered, and does not support, prima facie entitlement to summary judgment (Zuckerman v. City of New York, 49 NY 2d 557 404 NE 2d 718, 427 NYS 2d 595 [1980]). A motion for summary judgment can be decided on the merits when an attorney's

affirmation is used for the submission of documentary evidence in admissible form and annexes proof from an individual with personal knowledge, such as plaintiff's deposition testimony (See *Aur v. Manhattan Greenpoint Ltd.*, 132 AD 3d 595, 20 NYS 3d 6 [1st Dept., 2015] and *Hoeffner v. Orrick, Herrington & Sutcliffe LLP*, 61 AD 3d 614, 878 NYS 2d 717 [1st Dept. 2009]).

Defendant has failed to make a prima facie case. Defendants do not provide any sworn testimony from an individual with personal knowledge, defendant's own improperly verified interrogatory and supplemental interrogatory responses (verification is not notarized - see Mot. Exhs. J and K), do not satisfy the requirements of CPLR §3212(b) (see *State v. Metz*, 241 AD 2d 192, 671 NYS 2d 79 [1st Dept. 1998]). The motion papers rely on inadmissible hearsay, and fail to make a prima facie case.

Defendant argues that plaintiffs cannot establish liability for the decedent's alleged exposure to asbestos from products it supplied to Con Ed. Defendant further argues that plaintiffs rely on hearsay and are not able to identify the defendant as the supplier of the alleged asbestos containing conduits or ducts, and cement pipes, to any specific Con Ed location the decedent worked at during the relevant time period.

A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Ricci v. A.O. Smith Water Products*, 143 AD 3d 516, 38 NYS 3d 797 [1st Dept. 2016] and *Koulermos v. A.O. Smith Water Products*, 137 AD 3d 575, 27 NYS 3d 157 [1st Dept., 2016]). Regarding asbestos, a defendant must make a prima facie showing that its product did not contribute to the causation of plaintiff's illness (*Comeau v. W.R. Grace & Co. - Conn. (Matter of New York City Asbestos Litigation)*, 216 AD 2d 79, 628 NYS 2d 72 [1st Dept., 1995] citing to *Reid v. Georgia - Pacific Corp.*, 212 AD 2d 462, 622 NYS 2d 946 [1st Dept., 1995], *Di Salvo v. A.O. Smith Water Products (In re New York City Asbestos Litigation)*, 123 AD 3d 498, 1 NYS 3d 20 [1st Dept., 2014] and *O'Connor v. Aerco Intl., Inc.*, 152 AD 3d 841, 57 NYS 2d 766 [3rd Dept., 2017]). Defendant must unequivocally establish that the decedent's level of exposure to asbestos from its sale of asbestos containing duct, conduit, and pipe products to Con Ed was not sufficient to contribute to the development of his mesothelioma (*Berensmann v. 3M Company (Matter of New York City Asbestos Litigation)*, 122 AD 3d 520, 997 NYS 2d 381 [1st Dept., 2014]).

The initial burden of proof rests with defendant's evidence. It is only after defendant tenders sufficient evidence to make a prima facie showing of lack of causation that the burden shifts back to the plaintiffs to provide evidence to raise any issues of fact. Failure to make a prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers (See *Alvarez v. Prospect Hospital*, 68 NY 2d 320 at 324, 501 NE 2d 572 508 NYS 2d 923 [1986]). Defendant's attempt to "point to gaps" in plaintiffs' evidence fails to establish a prima facie basis for summary judgment, warranting denial of summary judgment.

Alternatively, plaintiffs raise an issue of fact as to whether the defendant supplied the asbestos containing duct, or conduit and pipe to Con Ed for use in locations the decedent worked at during the relevant time period.

Plaintiffs provide the October 1, 2019 deposition testimony of Saverio Potente, defendant's president, wherein he states that his grandfather ran the business in the 1970's, and that a purchase order for Johns Mansville conduit requested by

Con Ed be shipped to defendant's yard was probably prepared by his grandfather. Mr. Potente testified that he came into the business starting in 2012, and there was a fire in the mid-2000's that destroyed all the defendant's company records and paperwork (Opp. Exh. 19, pgs. 13, 22, 29-33, 39, and 47-49)

Plaintiffs also provide copies of purchase orders, invoices, and special products inquiry forms obtained from the Johns-Mansville Personal Injury Trust showing that, at least during part of the relevant time period of 1970 through 1976, defendant supplied asbestos containing conduit, "transite" conduit type II, and "transite Korduct" to Con Ed that was purchased from Johns-Manville (Opp. Exhs. 12 and 13, Aff. In Opp., pg. 7 of 14, footnote 2). Plaintiffs also provide the Johns-Manville Commodity Code Excerpt and Product Dictionary 5th Edition which further demonstrate through codes 9630 and 9640 that asbestos containing "transite" pipe was purchased from Johns-Manville by Con Ed, supplied and distributed by the defendant with conduit shipped directly to Con Ed's "storekeeper" (Opp. Exhs. 12, 13, 14 and 15). These records offered for the truth of the matters they assert, are admissible under the ancient document exception to hearsay (Tillman v. Lincoln Warehouse Corp., 72 AD 2d 40, 423 NYS 2d 151 [1st Dept. 1979]).

The documentation provided by plaintiffs when combined with defendant's corporate representative's deposition testimony, raises an issue of fact as to whether defendant supplied asbestos containing ducts, conduits and cement pipes manufactured by Johns-Manville to Con Ed for use at various job sites - including where the decedent worked during the relevant time period. Construing the evidence in the light most favorable to the plaintiffs as the non-moving party this warrants denial of summary judgment.

Accordingly, it is ORDERED that defendant John E. Potente & Sons, Inc.'s motion pursuant to CPLR §3212 for summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it, alternatively, for partial summary judgment dismissing the plaintiffs punitive damages claims, is granted solely to the extent of dismissing the punitive damages claims, and it is further,


ORDERED that plaintiffs' cause of action for punitive damages asserted against John E. Potente & Sons, Inc. is severed and dismissed, and it is further,

ORDERED that the remainder of plaintiffs' claims and the cross-claims asserted against John E. Potente & Sons, Inc., remain in effect, and it is further,

ORDERED that the remainder of the relief sought in this motion is denied, and it is further,

ORDERED that the Clerk of the Court enter judgment accordingly.

ENTER:



MANUEL J. MENDEZ
J.S.C.

Dated: February 26, 2020

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