

Mauro v Consolidated Edison of N.Y.

2020 NY Slip Op 30637(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 01/22/2020
MOTION SEQ. NO. 006
MOTION CAL. NO. _____

Plaintiffs,

-against-

CONSOLIDATED EDISON OF NEW YORK, et al.,

Defendants.

The following papers, numbered 1 to 9 were read on this motion by Kennedy Electrical Supply, Corp. 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 - 9</u>

CROSS-MOTION **YES** **NO**

Upon a reading of the foregoing cited papers it is ORDERED that defendant Kennedy Electrical Supply, Corp.'s motion pursuant to CPLR §3212 for summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it, 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 6). Decedent alleged he was exposed to asbestos in a variety of ways. His alleged exposure is 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. (hereinafter "Torpey").

Decedent was deposed on January 16, 17 and 18, 2018. His de bene esse deposition was taken on January 25, 2018 (Mot. Exhs. F and G). Decedent was hired by union employer, Torpey, to perform excavation and backhoe work, starting approximately in 1970 through November of 1976 (Mot. Exh. F pgs. 62-64). 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 Ed (Mot. Exh. F pgs. 146-149, 154-156, 229-230 and 235-237 and Mot. Exh. G, pgs. 33-37). Decedent testified that Con Ed used its own trucks and supplied the asbestos containing conduits that exposed him to asbestos, 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. Exh. F, pgs. 65-69, 72-73, 150-153, 213 226-229 and 239-

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

240, Mot. Exh. G, pgs. 28-32 and 36). Decedent testified that he was also exposed to asbestos from round asbestos cement pipes, that were delivered by Con Ed to the job sites (Mot. Exh. F, pgs. 149-153 and 238-244).

Plaintiffs commenced this action on December 15, 2017 (Mot. Exh. A). 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 summons and complaint adding defendant, "KESCO SUPPLY, INC. Individually and as successor-in-interest to Kennedy Electric Supply Corporation," as a party to this action (Mot. Exh. D). The address list attached to the Amended Summons listed an attorney for KESCO SUPPLY, INC. (hereinafter "KESCO") (NYSCEF Doc. No. 7). On March 26, 2018 by email, the listed attorney for KESCO SUPPLY, INC. advised the parties that he did not represent Kennedy and had not done so for "many years" (Mot. Exh. E). On April 5, 2018 plaintiffs filed their Second Amended Summons and Complaint, naming "KENNEDY ELECTRICAL SUPPLY CORP.," as a defendant (Mot. Exh.H). Kennedy served its Acknowledgement of Service and Answer on June 27, 2018, identifying itself as "sued improperly as Kesco Supply, Inc. Individually and as successor-in-interest to Kennedy Electric Supply Corporation" (NYSCEF Doc. No. 62).

Kennedy seeks an Order pursuant to CPLR §3212 granting summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it.

Kennedy argues that there is a complete lack of identification and the decedent's deposition testimony is inadmissible hearsay that cannot be used against it, warranting summary judgment on all claims asserted against the company.

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]).

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]). The defendant must "unequivocally" establish that it could not have contributed to the causation of plaintiff's injury to obtain summary judgment (Matter of N.Y.C. Asbestos Litigation (Berensmann), 122 AD3d 520, 997 NYS2d 381 [1st Dept. 2014] citing to Reid v. Georgia-Pacific Corp., 212 AD 2d 462 at 463, 622 NYS 2d 946 [1st Dept., 1995]).

Kennedy states that it did not receive notice and was not present at any of the depositions. The notice to take the deposition of the decedent is dated December 20, 2017, before Kennedy was a party to this action (Mot. Exh. B). The mailing list for the notice and amended notice for the decedent's de bene esse deposition dated January 8, 2018 and January 16, 2018, did not include KESCO's attorney or individually name Kennedy (Mot. Exh. B). The plaintiffs' December 20, 2017 responses to interrogatories were served before Kennedy became a party to this action and do not identify Kennedy (Mot. Exh. C). The decedent passed away on April 10, 2018, approximately five days after the Second Amended Summons and Complaint naming Kennedy as a party to this action, and before any further discovery could be conducted (Mot. Exhs. H and I). Kennedy did not appear in this action before June 27, 2018, long after the decedent passed away (NYSCEF Doc. No. 62).

Pursuant to CPLR §3117(a) decedent's testimony is inadmissible as against Kennedy which was not a party to the action, did not receive notice, and was not present, when the decedent was deposed on January 16, 17, 18 and 25, 2018. Kennedy did not have an opportunity to cross-examine the decedent. The only way the decedent's deposition testimony can be used is if it falls within an exception to the rule against hearsay, which this deposition does not (see *Billok v. Union Carbide Corporation*, 170 AD 3d 1388, 96 NYS 3d 714 [3rd Dept. 2019], *Rivera v. New York City Transit Authority*, 54 AD 3d 545, 863 NYS 2d 201 [1st Dept. 2008], *Andrusziewicz v. Atlas*, 13 AD 3d 325, 788 NYS 2d 395 [2nd Dept. 2004] and *Bigelow v. Acands, Inc.*, 196 AD 2d 436, 601 NYS 2d 478 [1st Dept. 1993]).

Decedent's testimony can only be used against Kennedy under an exception to hearsay. Plaintiffs do not argue that the testimony is admissible under any exception to the hearsay rule, therefore they cannot rely on it. No other witnesses were available to testify or be deposed on behalf of the plaintiffs. Decedent's deposition testimony is inadmissible hearsay as against Kennedy. In any case decedent's testimony did not identify Kennedy.

Kennedy argues that there is no evidence it supplied asbestos containing ducts or conduits and cement pipes to Con Ed that were used by the decedent at various unidentified jobsites throughout the City during the period relevant to his exposure.

Plaintiffs in opposition provide decedent's social security records verifying that he worked for Torpey from 1970 through 1976 (Opp. Exh. 7). They also provide copies of contracts and purchase orders between Torpey and Con Ed to show that during the relevant time period Torpey was hired by Con Ed to install asbestos containing conduit or ducts and pipes at various job sites (Opp. Exh. 8).

Plaintiffs rely on purchase orders from 1975 that they allege were produced by Johns-Manville, as showing Kennedy purchased large amounts of asbestos containing conduit (Opp. Exh. 9). The purchase orders also show that Kennedy purchased asbestos containing "Transite" conduit or duct from Johns-Manville that was shipped directly to Con Ed's storekeeper (Opp. Exh. 9). Plaintiffs argue that the shipments of Johns-Manville asbestos containing duct or conduit sent by Kennedy to Con Ed during the relevant time period, raises an issue of fact as to whether Kennedy supplied the asbestos containing products that caused decedent's mesothelioma. Plaintiffs provide a Johns-Manville "Special Product Inquiry" forms from August of


1973 and March of 1975, showing that Kennedy and another defendant "John E. Potente & Sons, Inc." sought ninety-degree angle bends and electrical conduit bends for asbestos containing "Transite conduit," specifically for use by Con Ed (Opp. Exh. 11). Plaintiffs also provide the Johns-Manville Commodity Code Excerpt and Product Dictionary 5th Edition which further demonstrate through codes 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. 10 and 12).

In asbestos-related litigation, the plaintiff on a summary judgment motion must demonstrate that there was actual exposure to asbestos from the defendant's product (Cawein v Flintkote Co., 203 AD2d 105, 610 NYS2d 487 [1st Dept 1994] and Diel v. Flintkote Co., 204 AD 2d 53, 611 NYS 2d 519 [1st Dept. 1994]). The 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]). A plaintiff's inability to provide the exact details of the exposure is not fatal to the claim and should not automatically result in the granting of summary judgment (Lloyd v W.R. Grace & Co., 215 AD2d 177, 626 NYS2d 147 [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]).

Plaintiffs' evidence establishes that Kennedy sold Johns-Manville asbestos containing ducts or conduit and cement pipe to Con Ed that may have been used at locations where decedent worked and may have exposed him to asbestos during the relevant time period. Kennedy sold Johns-Manville asbestos containing ducts or conduit and cement pipe to Con Ed (see Cawein v. Flintkote Co., 203 AD2d 105, supra at pg. 106 and Matter of New York City Asbestos Litigation (Comeau), 216 AD 2d 79 at 80). The records plaintiffs rely on state that the Johns-Manville conduits or ducts and pipes sold by Kennedy were delivered to Con Ed's storekeeper, these may have been the same as those used by Torpey's workers - including the decedent - during the relevant time period (Opp. Exhs. 9, 10, 11 and 12). Plaintiffs have raised an issue of fact as to whether the decedent was exposed to asbestos containing conduit or ducts and cement pipe while working for Torpey at Con Ed worksites during the relevant 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 Kennedy Electrical Supply, Corp.'s (improperly sued as Kesco Supply, Inc. Individually and as successor-in-interest to Kennedy Electric Supply Corporation) motion pursuant to CPLR §3212 for summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against it, is denied.

ENTER: MANUEL J. MENDEZ
J.S.C.


MANUEL J. MENDEZ
J.S.C.

Dated: February 26, 2020

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE