

Stiglitz v A.O. Smith Water Prods. Co.

2020 NY Slip Op 30882(U)

March 25, 2020

Supreme Court, New York County

Docket Number: 190029/2018

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

**MARILYN STIGLITZ, as Executrix of the Estate of
LOUIS STIGLITZ, and MARILYN STIGLITZ,
Individually,**

**INDEX NO. 190029/2018
MOTION DATE 03/18/2020
MOTION SEQ. NO. 002
MOTION CAL. NO. _____**

Plaintiffs,

-against-

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

Defendants.

The following papers, numbered 1 to 7 were read on this motion by Homasote Company, Inc. pursuant to CPLR §3212 for summary judgment:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1- 3</u>
Answering Affidavits — Exhibits _____	<u>4-5</u>
Replying Affidavits _____	<u>6-7</u>

CROSS-MOTION YES NO

Upon a reading of the foregoing cited papers, it is Ordered that Homasote Company, Inc.'s (hereinafter "defendant") motion for summary judgment pursuant to CPLR §3212 to dismiss the plaintiffs' complaint and all cross-claims against it is denied.

Plaintiff, Louis Stiglitz (hereinafter "decedent") was diagnosed with mesothelioma on October 25, 2017 and died from his illness on December 4, 2018 (Opp. Exh. 1). Decedent was deposed over the course of four days on April 24, 25, 26, and 27, 2018, and his de bene esse deposition was conducted on May 11, 2018 (Mot. Exh. C). It is alleged that the decedent was exposed to asbestos in a variety of ways. His alleged exposure - as relevant to this motion - was from his work as an apprentice and union carpenter working with defendant's asbestos containing board products used on walls as fireproofing and as bulletin boards from about 1962 through 1990.

Decedent testified that he was a union apprentice for about five years from about 1961 through 1966 and worked with multiple contractors on mostly commercial jobs throughout New York City. He stated that when working with a specific contractor during his apprenticeship, Froelich, he worked with a board he called "Soap board." Later in his testimony he corrected himself and called the board "Slope board." He stated that this board was used as fireproofing and to make bulletin boards. He later testified that he did not specifically recall using defendants board products as an apprentice, but probably did (Mot. Exh. C, pgs.

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

56-61, 72-77 and 892-893). His social security records state that he started working with Froelich in 1962 (Mot. Exh. D).

Decedent specifically recalled working with defendant's products at New York University (NYU) for about four or five years starting about 1965 through 1970, and at the World Trade Center starting from the 1970's through his retirement in 1991 or 1992. He stated that during this period he worked with "Slope Board", "Soap Board", "Slote Board" manufactured by "Homasote" (Mot. Exh. C, pgs. 164-169, 188-193, and 870). He relied on his Social Security records which state he worked at NYU from 1965 through 1971 (Mot. Exh. D).

Decedent stated that the boards had the word "Homasote" printed on a sticker that was on the back of the board. He testified that defendant's boards came in 4 x 8foot sheets. Decedent described the boards as gray with a surface that was not smooth or porous in texture and about a half or three quarters of an inch thick. He stated he could lift one of the boards by himself. Decedent testified that the boards had edges that were of a different texture from the face of the board. The boards did not have an overlay material on them (Mot. Exh. C, pgs. 870-872, 874-877). Decedent testified that the board had some give but was not flexible like plywood (Mot. Exh. C, pgs. 879-880).

Decedent testified that he cut the pieces of defendant's board to make bulletin boards using a table saw. Periodically he would affix the board to a wooden frame using nails. He stated that on average he made three or four cuts to the boards. He stated that he would affix the board by either screwing or clipping it onto a surface. To screw it onto a wall he would drill a hole into the board and if the wall was sheet-rock he would use an anchor to screw it into the wall through the face. He would use a french clip with a bevel on it to attach the wooden frame to the wall. He stated that he was exposed to asbestos from cutting defendant's asbestos containing board products. He stated he might have used defendant's products in bathrooms at the World Trade Center. Decedent testified that defendant's product never changed throughout the course of his career (Mot. Exh. C, pgs. 885-888 and 895-897).

Decedent was shown a printed advertisement depicting defendant's "Sote Asbestos Board" product and identified it as the same product he used. He agreed with the statements made in the advertisement that the product "saws and nails like wood" and "could be used for ceilings and side walls" (Mot. Exh. C, pgs. 936-939 referring to dep. Exh. 1). Decedent testified that when he cut and nailed the defendant's asbestos board products it created visible dust that he breathed in (Mot. Exh. C, pgs. 940-942).

Plaintiffs commenced this action on February 7, 2018. The Summons and Complaint were subsequently amended multiple times to add additional parties and to substitute the estate (Mot. Exh. A). Defendant's Acknowledgement of Receipt and Adoption of Standard Answer Pleading is dated March 6, 2018 (Mot. Exh. B).

Defendant now moves for summary judgment pursuant to CPLR §3212 dismissing the plaintiffs' claims and all cross-claims asserted against it.

Defendant argues that it has made its prima facie case by establishing that decedent's description and use applies to its "Homasote board" product that did not contain asbestos. Defendant claims that decedent's description of the board product does not match their asbestos containing "Sote Board" product which was only manufactured from the early 1950's through no later than the mid-1960's.

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]). 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 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 (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]); *Martin v Briggs*, 235 AD2d 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 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]).

Defendant argues that plaintiffs will be unable to present evidence from which liability may be inferred or raise any issues of fact on summary judgment.

A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Ricci v. A.O. Smith Water Products*, 143 A.D. 3d 516, 38 N.Y.S. 3d 797 [1st Dept. 2016] and *Koulermos v. A.O. Smith Water Products*, 137 A.D. 3d 575, 27 N.Y.S. 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 A.D. 2d 79, 628 N.Y.S. 2d 72 [1st Dept., 1995] citing to *Reid v. Georgia - Pacific Corp.*, 212 A.D. 2d 462, 622 N.Y.S. 2d 946 [1st Dept., 1995], *Di Salvo v. A.O. Smith Water Products (In re New York City Asbestos Litigation)*, 123 A.D. 3d 498, 1 N.Y.S. 3d 20 [1st Dept., 2014] and *O'Connor v. Aerco Intl., Inc.*, 152 A.D. 3d 841, 57 N.Y.S. 2d 766 [3rd Dept., 2017]).

Defendant must unequivocally establish that the decedent's exposure to its board products, did not to contribute to the development of his mesothelioma. Defendant's argument regarding plaintiffs' lack of evidence does not state a prima facie case.

Defendant relies on the September 13, 2018 affidavit of corporate representative Peter Tindall, Vice President of Operations employed by the defendant since 2008 (Mot. Exhs. F, Part 1). Mr. Tindall states he reviewed catalogs, advertisements, handbooks, lists, brochures, bulletins and other materials annexed to his affidavit as the basis for his statements (Mot. Exh. F, Parts 1).

He states that the defendant's catalogs from the early 1950s until no later than the mid-1960s, referenced a product called "Sote Asbestos Board." The product was manufactured by the Philip Carey Company, and was offered for re-sale by the defendant. He claims it was not marked with the "Homasote" name and was not referred to as "Homasote." He states that "Homasote Board" and "Sote Asbestos Board" are two separate and distinct products, manufactured by two separate and distinct companies. Mr. Tindall states that "Sote Asbestos Board" was never thicker than one quarter of an inch and that defendant's flagship product, the "Homasote Board", never contained asbestos, was manufactured during the period relevant to the decedent's alleged exposure and continues in production today. Mr. Tindall states that after a review of decedent's deposition testimony, wherein he describes the product as easy to carry, and one half to three quarters of an inch thick with a sticker saying "Homasote", describe "Homasote Board" and not "Sote Asbestos Board."

Plaintiffs in opposition provide defendant's sworn responses to Interrogatories that were sworn by Mr. Tindall wherein it is stated that "Sote Board was sold from 1940 to 1968 (Opp. Exh. 6). They also provide October 11, 2005 interrogatories sworn by defendant's CEO, Warren Flicker that state "Sote Asbestos Board" was sold from 1946 until the early 1960's, but no later than 1967 (Opp. Exh. 7). Defendant's 2005 interrogatories state "Sote Asbestos Board" was manufactured from the early 1950's until 1967 and "No purchase agreements for the Sote Asbestos Board exist" (Opp. Exh. 8, Response to Interrogatory 19).

Defendant's interrogatory responses, produced on October 13, 2005 state that "[f]rom 1946 to 1967 Homasote distributed small quantities of an asbestos board known as "Sote Asbestos Board" which came in 4x8 sheets and was manufactured by the Philip Carey company of Perth Amboy, New Jersey" (Opp. Exh. 9, Interrogatory response 18). Finally, plaintiffs provide several dealer price lists for the "Sote Asbestos Board" for the years 1959 and 1962. The letter accompanying the September 1962 Dealer Price list was addressed to "All Fieldmen and Agents," referenced "New Sote Board Prices," and provided details of the commissions and jobber discounts that were available on certain quantities of "Sote board." Each carload of Sote asbestos board that was sold equaled 40,000 pounds of product (Opp. Exh. 10, pgs. M-HOM00579 and M-HOM00580).

"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]). 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, 78 N.Y.S. 3d 884 [1st Dept. 2018]).

The conflicting statements provided by defendant as to when the company stopped making "Sote Asbestos Board", creates credibility issues concerning whether defendant sold asbestos containing board products during at least part of the period relevant to decedent's exposure and whether decedent was exposed by the residual sale of "Sote Asbestos Board" after the defendant stopped selling it. The conflicting testimony creates issues of fact that cannot be resolved on this motion for summary judgment.

To the extent decedent also provided internally conflicting testimony as to his exposure to defendant's "Sote Asbestos Board" products, it presents a credibility issue to be determined by the trier of fact (See Luebke v. MBI Group, 122 A.D. 3d 514, 997 N.Y.S. 3d 379 [1st Dept. 2014] citing to Vazieiyan v. Blancato, 267 A.D. 2d 152, 700 N.Y.S. 2d 22 [1st Dept., 1999]). There remain issues of fact as to whether the decedent was exposed to asbestos from defendant's asbestos containing "Sote Asbestos Board" during part, or all, of the period relevant to his exposure and whether this exposure was a cause of his mesothelioma. The conflicting evidence and testimony raise issues of fact that cannot be resolved on a motion for summary judgment.

Defendant also relies on the expert affidavit of Rubin Shmulsky, Ph.D., he has his doctorate in Forest Products, and an undergraduate degree in building material and wood technology (Mot. Exh. G). Dr. Shmulsky states that he has worked in the private and public sector since the mid-1990's, in part, he relies on work performed during his studies for Shmulsky Construction and Home Inspection performing subcontracting and carpentry work, which included "Homasote Boards." He also relies on Mr. Tindall's affidavit and the annexed documentation. He states that "There have been more than twenty-six different types of paper-based Homasote board products sold throughout the years, none of which ever contained asbestos" and that most commonly "Homasote Board is sold in four-by-eight foot sheets. The thickness of Homasote board can vary, but it is most commonly ½ inch thick" (Mot. Exh. G, paras. 3 and 4). Dr. Shmulsky, relying on Mr. Tindall's affidavit and its supporting documentation, states that "Sote Asbestos Board was offered in four-by-four feet and eight-by-four feet sheets and it varied in thickness from ½ inch at the thinnest to ¼ inch at the thickest" (Mot. Exh. G, para. 5).

Dr. Shmulsky reviews the decedent's deposition testimony and concludes:

"Homasote Board and Sote Asbestos Board were two completely different board products offered by Homasote. Mr. Stiglitz's description, uses, and characteristics of the board products he used does not comport with Sote Asbestos Board. Mr. Stiglitz used this board product as bulletin boards and for soundproofing, in line with the intended uses of Homasote board, which did not contain asbestos. Due to its nature as a compressed paper board, Homasote was easily cut and nailed. Conversely, the Sote Asbestos Board was a hard cement based product offered for heat-resistant applications. Carpenters and tradesmen would not have used Sote

Asbestos Board for either bulletin boards or for sound insulation. Mr. Stiglitz could not have used Sote Asbestos Board for the uses described, including for use as bulletin boards and for soundproofing. Instead, he would have been using Homasote board, which was suitable, appropriate, and intended for these purposes.” (Mot. Exh. G, para. 16).

He further concludes “with a reasonable degree of scientific certainty” that the decedent’s descriptions indicate he used the non-asbestos containing “Homasote Board” and not “Sote Asbestos Board” (Mot. Exh. G., para. 16).

Dr. Shmulsky’s affidavit does not specifically identify the documentation annexed to Mr. Tindall’s affidavit that he is relying on. Furthermore, plaintiffs have provided proof that Mr. Tindall’s statements are contradicted by other statements provided by the defendant. Dr. Shmulsky does not state that he personally worked with “Sote Asbestos Board” and could not do so, since his work experience started from the “mid-1990’s.” His statements and conclusions do not incorporate the specific additional admissible records annexed to Mr. Tindall’s affidavit, are “conclusory and without specific factual basis, and thus do not establish the prima facie burden of a proponent of a motion for summary judgment” (Matter of N.Y.C. Asbestos Litig. (DiSalvo v. A.O. Smith Water Products), 123 AD3d 498, 1 NYS3d 20 [1st Dept. 2014]).

Plaintiffs provide the report of Amanda Bilenki, a health and safety associate at Environmental Profiles Inc., she performed Polarized Light Microscopy on a sample of “Homasote Board.” Ms. Bilenki’s report includes testing and determined that the sample contained 35% chrysotile asbestos (Opp. Exh. 11). Plaintiff’s reliance on this report to establish that even “Homasote Board” contains asbestos, does not raise an issue of fact. This report is not in admissible form, therefore has no probative value and fails to raise an issue of fact to defeat summary judgment (Grasso v. Angerami, 79 NY 2d 813, 588 NE 2d 76, 79 NYS 2d 813 [1991]; Quinones v. Ksieniewicz, 80 AD 3d 506, 915 NYS 2d 70 [1st Dept. 2013]; and McLoryd v. Pennypacker, 178 AD 2d 227, 577 NYS 2d 272 [1st Dept. 1991] lv. denied 79 NY 2d 754, 590 NE 2d 250, 581 NYS 2d 665 [1992]). Alternatively, defendant provides Ms. Bilenki’s certification with the reply papers, wherein it states she was told the sample tested was “Sote Asbestos Board” contradicting plaintiff’s assertions (Reply Exh. D).

Defendants for the first time on reply attempt to include additional deposition testimony from Mr. Tindal, to establish that his statements are correct (Reply Exhs. B and C). New arguments raised for the first time in reply papers deprive the opposing party of an opportunity to respond and are not properly made before the Court (Ambac Assur. Corp. v. DLJ Mtge. Capital Inc., 92 A.D. 3d 451, 939 N.Y.S. 2d 333 [1st Dept., 2012], In re New York City Asbestos Litigation (Konstantin), 121 A.D. 3d 230, 990 N.Y.S. 2d 174 [1st Dept., 2014] and Chavez v. Bancker Const. Corp., Inc., 272 A.D. 2d 429, 708 N.Y.S. 2d 325 [2nd Dept., 2000]). Additional testimony provided for the first time with defendant’s reply papers, deprive the plaintiffs of the opportunity to respond and are improperly before this Court.

