

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

2020 NY Slip Op 31255(U)

May 6, 2020

Supreme Court, New York County

Docket Number: 190250/2017

Judge: Manuel J. Mendez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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
THOMAS L. ECKRICH and ROSE B. ECKRICH,

INDEX NO. 190250/2017
MOTION DATE 05/04/2020
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

Plaintiffs,

-against-

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

Defendants.

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

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

CROSS-MOTION YES NO

Upon a reading of the forgoing cited papers, it is ordered that defendant ECR International, Inc.'s (hereinafter "ECR") motion for summary judgment pursuant to CPLR § 3212 to dismiss plaintiffs' complaint, is denied.

Plaintiff, Thomas L. Eckrich, was diagnosed with mesothelioma on August 8, 2017 and died on February 2, 2019 as a result of his alleged exposure to asbestos. He worked as a pollution control engineer for the New York City Department of Air Resource from approximately 1970 to 1995. While employed as pollution control engineer, he worked in the same vicinity as other workers who maintained and repaired asbestos-containing boilers. It is alleged that he was exposed to asbestos when other workers maintained and replaced asbestos-containing boilers before or during Mr. Eckrich's inspection. The maintenance and repair caused asbestos dust that he inhaled.

Plaintiffs commenced this action on August 25, 2017 to recover for the injuries Mr. Eckrich sustained. (Moving papers, Exh. A).

ECR now makes this motion for summary judgment pursuant to CPLR § 3212 to dismiss plaintiffs' complaint against it. ECR alleges that plaintiffs have failed to provide evidence that Mr. Eckrich was exposed to asbestos from any asbestos-containing product manufactured, sold, or distributed by ECR.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(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 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 [1st Dept. 1998]).

In support of its motion, ECR argues that Mr. Eckrich's deposition testimony fails to adequately and properly identify the existence of any ECR product, specifically, Utica brand boilers, over the course of his career. ECR further argues that Mr. Eckrich did not identify any bystander exposure to asbestos-containing boilers and that his deposition testimony was based on speculation.

In opposition to the motion for summary judgment, plaintiffs argue that Mr. Eckrich sufficiently described what he believed to be asbestos-containing Utica boilers. Plaintiffs state that Utica boilers' corporate representative's testimony contradicts ECR's answers to interrogatories that stated their jacketed boilers did not contain asbestos and they never sold unjacketed boilers. Plaintiffs claim that Mr. Eckrich's product identification establishes he worked with and near asbestos-containing Utica boilers, and in any event, contend issues of fact remain as to his exposure. (Opp., Exh. A at 232, 479, and 699).

Plaintiffs allege that ECR does not provide testimony by someone with knowledge of the facts in support of its motion, and thus ECR's motion should be denied.

An attorney's affirmation alone is hearsay that may not be considered, and does not support, prima facie entitlement to summary judgment. (*Kase v. H.E.E. Co.*, 95 A.D.3d 568, 944 N.Y.S.2d 95 [1st Dept. 2012] *citing* *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.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 A.D.3d 595, 20 N.Y.S.3d 6 [1st dept. 2015]; *Hoeffner v. Orrick, Herrington & Sutcliffe LLP*, 61 A.D.3d 614, 878 N.Y.S.2d 717 [1st Dept. 2009]).

Plaintiffs argument that ECR's motion should be denied because it relies on the attorney's affirmation alone, is unavailing. The attorney's affirmation in support of ECR's motion is being used as a vehicle to submit documentary evidence in admissible form and is sufficient to sustain this motion.

Mr. Eckrich's deposition testimony provides product identifications of asbestos-containing Utica boilers. Mr. Eckrich can specifically recall that he worked at locations that had asbestos-containing Utica boilers during his time working for the New York City Department of Air Resource. (Opp., Exh. A, 699-700). As an air pollution control engineer, Mr. Eckrich states that he was responsible for inspecting asbestos-containing boilers, and before or during the inspection, other workers would maintain and repair the asbestos-containing boilers in his presence, which created asbestos dust that he inhaled. (Opp., Exh. A). Mr. Eckrich specifically identified Utica boilers from 1970 through approximately 1995 during his time working for the City of New York.

ECR provided plaintiffs' request for production of documents and their answers to interrogatories that referenced the sale of asbestos-containing jacketed boilers and other asbestos-containing boiler equipment. (Moving papers, Exh D). The request for production of documents and answers to interrogatories state that ECR did not manufacture or produce asbestos-containing products. (Moving papers, Exh. D). ECR's answers to interrogatories contradict the testimony offered by Utica's corporate representative, Peter Desen. The answers to interrogatories also state that ECR may have used asbestos-containing components in their boilers that were manufactured and produced by other companies. The interrogatories state that suppliers began making asbestos-free components available sometime between the mid to late 1970's into the 1980's. (Moving papers, Exh. D).

Plaintiffs further provide the trial testimony of Utica corporate representative, Peter Desen, dated November 22, 2019. Mr. Desen testified that Utica boilers did use asbestos-containing components and that Utica boilers used asbestos thermal insulation. Mr. Desen also testified that the asbestos-containing thermal insulation was used in Utica boilers from at least its founding in 1928 until approximately the 1950s. He further stated that jacketed boilers could have a working shelf-life of approximately 50 years, concluding that asbestos-containing Utica boilers could have been in use until the mid 1990's. (Opp., Exh. B at 538-539, 543-545, and 581).

ECR argues that plaintiffs failed to identify Utica as a manufacturer, seller, or distributor of any asbestos products from which Mr. Eckrich was allegedly

exposed to asbestos because ECR did not manufacture, sell, or distribute asbestos-containing jacketed boilers. ECR further argues that Mr. Eckrich never removed or performed service work on any Utica boiler and that he did not have any bystander exposure to asbestos. (Moving papers, Exh. C).

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 A.D.2d 462, 622 N.Y.S.2d 946 [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 A.D.3d 285, 776 N.Y.S.2d 253 [1st Dept. 2004]).

Mr. Eckrich’s deposition testimony, ECR interrogatories and requests for product identifications, and the trial testimony of Utica’s corporate representative, Peter Desen, provide sufficient evidence 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 demonstrated through ECR interrogatories and requests for product identifications, Mr. Eckrich’s deposition testimony, and the trial testimony of Utica’s corporate representative Peter Desen, that ECR manufactured, sold, and distributed asbestos-containing boilers during the time of Mr. Eckrich’s alleged exposure. 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 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]).

ECR fails to make a *prima facie* showing of entitlement to judgment as a matter of law. ECR’s contention that Mr. Eckrich was never exposed to asbestos-containing boilers and insulation manufactured, sold, or distributed by ECR is unpersuasive. Alternatively, plaintiffs have raised issues of fact to be resolved at trial. Mr. Eckrich has specifically identified Utica boilers manufactured by ECR that he saw during the time of his alleged exposure. Plaintiffs have demonstrated “facts and conditions from which [ECR’s] liability may be reasonably inferred” to warrant the denial of ECR’s 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 ECR International, Inc.'s motion for summary judgment pursuant to CPLR 3212, dismissing plaintiffs' complaint, is denied.

ENTER:



Dated: May 6, 2020

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

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