SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION
ANNE MARIE FAHEY, Individually and As Administrator of the Estate of THOMAS FAHEY,

Plaintiffs,

-against-

ABB, INC., et al.,

Defendants.

INDEX NO. 190231/2015
MOTION DATE 05/18/2020
MOTION SEQ. NO. 010
MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion by Viacom, Inc. and General Electric Company pursuant to CPLR §3212 for summary judgment:

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

CROSS-MOTION ☐ YES X NO

Upon a reading of the foregoing cited papers, it is Ordered that Viacom, Inc. and General Electric Company's (hereinafter "defendants") motion pursuant to CPLR §3212 for summary judgment, dismissing the complaint and all cross-claims asserted against it, alternatively for partial summary judgment dismissing plaintiffs' claims for punitive damages is denied.

Thomas Fahey (hereinafter "decedent") was diagnosed with lung cancer on March 17, 2015 and died from his illness on May 19, 2016 (Opp. Exh. 1). Decedent was deposed over the course of eleven days on August 26, September 3, 9, 10, 11, October 1, 8, 9, and November 4, 10 and 11, 2015. His de bene esse deposition was conducted on December 18, 2015 (Mot. Exhs. G, H, I, J, K and L, and Opp. Exh. 2). Plaintiffs allege that the decedent was exposed to asbestos in a variety of ways. His exposure - as relevant to this motion - is from his work with transformers and electric panels, manufactured by the defendants that were insulated with asbestos materials or contained asbestos wrapped rope from about 1980 through 2015, while employed as an apprentice and union electrician with the International Brotherhood of Electrical Workers, Local #3, from September of 1980 through August of 2015. (Mot. Exh. F and Opp. Exh. 2).

Decedent testified that he was exposed to asbestos from his work removing, replacing and retrofitting the defendants' electric panels. He stated that when he removed the panel doors he observed cables that were wrapped with asbestos rope. Decedent claimed that he demolished the panelboards by hitting them with a hammer. He testified that the defendants were two of the major manufacturers of the brands used and that throughout his career he installed and removed hundreds of electrical panels. Decedent also testified that he was exposed to asbestos

through his work with defendants' two brands of transformers that were insulated with asbestos containing materials (Opp. Exh. 2, pgs. 138-139, 141-144, 215-219, 613 and 660).

Decedent testified that throughout his career, he did not see any warnings and was not advised about any hazards related to asbestos in defendants' products, until he attended a class provided through his union sometime in the mid-2000's and more recently from watching television (Opp. Exh. 2, pgs. 518-519, 530-531, and 610). Decedent stated that his employer provided him with dust masks, but not respirators and that initially none of the people in his union told him about the hazards of asbestos. When asked if he would change the way he did his job had he seen an asbestos warning in the union's magazine, decedent testified "I don't know. I honestly don't know. I don't know what—I can't guess what my approach would have been." (Mot. Exh. I, pgs. 814-815, and Opp. Exh. 2, pg. 514).

Plaintiffs commenced this action on July 29, 2015 (NYSCEF Doc. No. 1, Mot. Exh. A). The Summons and Complaint were subsequently amended multiple times to add additional parties and the Third Amended Complaint dated July 13, 2016 substituted the estate (NYSCEF Doc. No. 94). Plaintiffs subsequently filed the Fourth Amended Complaint on March 31, 2017 (NYSCEF Doc. No. 211). Defendants' "Standard Verified Answer, Cross-claims, Demand for Jury by Defendant to NYCAL – Levy Philips & Konigsberg Standard Complaint No. 1" is dated January 29, 2014 (Mot. Exhs. B and C).

Defendants now move for summary judgment pursuant to CPLR §3212 dismissing the plaintiffs' claims and all cross-claims. They move alternatively for partial summary judgment on plaintiffs' claim for punitive damages.

Defendants argue that decedent's deposition testimony as to his failure to heed warnings related to his cigarette smoking, which were adequate as a matter of law, makes their prima facie case on causation. They further argue that decedent's deposition testimony establishes that he would have also ignored any warnings if they were placed on defendants' 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 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]).

Decedent testified as to his smoking history during the years 1978 through 2007, including that he tried to quit smoking on four or five different occasions for periods of up to two years after 1986. He stated that he used various smoking cessation devices, including Nicorette gum, before permanently quitting in 2007. Decedent stated that it was difficult to quit or change his smoking behavior after he had become addicted to nicotine (Mot. Exh. G, pgs. 43-44, and 46-48, Exh. I, pgs. 794, 801, and 871-872, and Exh. K, pgs. 66-67, and Opp. Exh. 2, pgs. 552-553). Decedent did not recall whether there were warning labels on cigarette packages in the 1970's, he stated that he absolutely did not know smoking could cause lung cancer when he first started smoking. He also stated that he did not recall seeing advertisements in the early 1980's but recalled seeing warnings on television much later (Mot. Exh. G, pg. 48 and Mot. Exh. I, pgs. 795-797).

Defendants rely on the decedent's deposition testimony and cite to the Federal Cigarette Labeling & Advertising Act – Public Law 89-92, July 27, 1965; the Public Health Cigarette Smoking Act of 1969 – Public Law 91-222, April 1, 1970; and the Comprehensive Smoking Education Act – Public Law 98-474, October 12, 1984 to establish lack of causation based on the decedent's failure to heed non-smoking warnings.

Plaintiffs in opposition, also cite to the decedents deposition testimony that he did not recall seeing warnings until just before he started trying to quit. They argue that the decedent did not intentionally fail to heed warning labels on cigarettes but had to fight his addiction to quit. Plaintiffs state that decedent testified he was not provided with asbestos warnings for the defendant's products and did not know what he would have done if he had seen one. They argue that failure to heed a warning due to addiction does not show intent and that it is speculative to interpret decedent's testimony as demonstrating intent, raising an issue of fact.

Plaintiffs are not required to show the precise causes of damages resulting from decedent's exposure to defendant's products "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]). Summary judgment must be denied when the plaintiffs have "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]). The opposition papers have provided sufficient proof with the decedent's deposition testimony, to create "facts and conditions from which [defendants'] liability may be reasonably inferred."

Defendants have not "unequivocally" established that there were warnings about asbestos on their products, or that the decedent would not intentionally heed the warnings if they had existed on their products. The evidence they presented to establish that their products could not have contributed to the causation of plaintiff's injury" is speculative and there must be a credibility determination by a jury of plaintiff's testimony. Defendant fails to make a prima facie case on causation and there is no need to address plaintiffs' arguments in opposition to this motion.

Alternatively, "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]). Credibility issues cannot be resolved on papers and are 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], and Almonte v. 638 West 160 LLC, 139 A.D. 3d 439, 29 N.Y.S. 3d 178 [1st Dept., 2016]).

To the extent decedent provided conflicting testimony as to his knowledge of warnings on packs of cigarettes and as to asbestos in defendants' 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's lung cancer was caused by exposure to asbestos from defendant's asbestos containing products. The conflicting evidence and testimony raise issues of fact on causation that cannot be resolved on a motion for summary judgment.

Defendants alternatively seek partial summary judgment dismissing plaintiffs' claim for punitive damages.

Defendants state that this case was assigned to the April 2016 In Extremis docket and on October 4, 2016 transferred to then Justice Cynthia Kern for trial (Mot. Exh. D). On June 17, 2017, the case was re-assigned and transferred to Justice Gerald Lebovits for trial (NYSCEF Doc. No. 220).

The May 26, 2011 Case Management Order, that was in effect when this action was commenced, did not incorporate a provision for the assertion of punitive damages claims. In April of 2014 the Honorable Sherry Klein Heitler, the NYCAL Coordinating Judge sought to Amend the CMO to permit the assertion of punitive damages claims but the implementation was stayed by the Appellate Division First Department to establish protocols for a punitive damage claim (In the Matter of New York City Asbestos Litigation, 130 AD 3d 489, 13 NYS 3d 398 [1st Dept. 2015]). The June 21, 2017 CMO prepared by the Honorable Peter Moulton removed the deferral of punitive damages and provided protocols in § VII(C), § XI, and § XXIV.

Defendants argue that plaintiffs' punitive damages claims should be dismissed because under the June 21, 2017 CMO § XXIV(A), punitive damages claims are not allowed in a case put on the trial calendar as of the effective date. They argue that pursuant to CMO § VII(C) plaintiffs were required to confer with the defendants before proceeding with any punitive damages claims. Defendants claim

that nearly a year after the June 21, 2017 CMO went into effect, plaintiff for the first time sent letters dated July 11, 2018 seeking to confer pursuant to CMO § VII(C) as to punitive damages (Mot. Exh. E). Defendants alternatively argue that even if the punitive damages claim was valid under the CMO, plaintiffs have not provided "clear unequivocal and convincing evidence" of willful or egregious conduct to obtain punitive damages.

CMO § XXIV, titled "Punitive Damages," specifically states:

"Where there is an assertion of a punitive damages claim that has survived up to the time of trial, it shall be handled as follows."

Subsection A, titled "Cases on a Trial Calendar" states:

"Punitive damages shall not be allowed in cases where the Trial Judge has put the case on a trial calendar as of the effective date of this CMO."

Defendants arguments that plaintiffs' punitive damages claims should be dismissed pursuant to CMO § XXIV(A) are unpersuasive. Plaintiffs' case had been assigned to two different trial judges before the June 21, 2017 CMO became effective, but the case had not yet been "put on the trial calendar" by the any of the assigned trial judges. This case was not assigned a trial date prior to June 2, 2020 and CMO § XXIV(A) does not apply.

CMO § VII (C) titled "Pleading Punitive Damages," specifically states in relevant part:

"...In cases on the Active or Accelerated Dockets, where the complaint contains a prayer for punitive damages at the time that this Case Management Order becomes effective, plaintiff shall consider whether it intends to seek punitive damages against a named defendant or defendants. Plaintiff and defendants shall confer and where plaintiff agrees that it will not proceed with a Punitive Damages claim against a given defendant plaintiff shall sign a stipulation dismissing the prayer for punitive damages pursuant to Section XXII.A of this CMO..."

Plaintiffs had asserted claims for punitive damages as the Fourth Cause of Action in their Standard Complaint No. 1 and 2 that were incorporated into the Complaint and all their Amended Complaints (Mot. Exhs. A and B and NYSCEF Doc. No. 1, 94, and 211). Defendants have not identified any specific provision in CMO § VII (C) stating a time limitation on when the plaintiffs are required to seek to confer on active or accelerated docket cases. The fact that plaintiffs waited nearly a year to seek to confer, in a case that already had a prayer for punitive damages, is not a prima facie basis to obtain summary judgment.

Plaintiff's letters dated July 11, 2018 specifically state:

"Pursuant to Section VII (C) of the Case Management Order dated June 20, 2017, I write to provide notice that Plaintiff presently intends to proceed in seeking punitive damages against your client in this case as pleaded in Levy Konigsberg, LLP's New York Asbestos Litigation Standard Complaint No. 1.

This letter constitutes Plaintiff's attempt to confer about this issue. If you wish to discuss this issue, please contact me directly. If I do not hear from you, I will accept that as your agreement that the requirement to 'confer' about this issue pursuant to Section VII(C) of the CMO has been satisfied." (Mot. Exh. E).

Defendants' arguments that the letters were not appropriate notice are unavailing. They do not deny receiving the letters over a year before they sought the relief in this motion (filed on August 20, 2019), and provide no proof that they objected or in any way attempted to confer with the plaintiffs on the claim for punitive damages. CMO § VII (C) does not state the manner plaintiffs were required to seek to confer or the frequency by which conferral should be sought. Defendants have not cited to any New York precedent or otherwise established that the letters sent to their offices seeking to confer were insufficient to put them on notice.

Defendants argue that summary judgment is warranted because plaintiffs have not provided "clear unequivocal and convincing evidence" of willful or egregious conduct to obtain punitive damages on the plaintiffs' cause of action for punitive damages. 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 Prods., 137 AD 3d 575, 27 NYS 3d 157 [1st Dept. 2016]). Defendants' provide no proof in support of their arguments as to plaintiffs' claims for punitive damages. Their arguments as to the plaintiff's failure to provide "clear unequivocal and convincing evidence" of willful or egregious conduct amounts to pointing to gaps in plaintiffs' proof and fails to state a prima facie case.

Furthermore, the purpose of punitive damages is to punish the defendant for wanton, reckless or malicious acts and discourage them and other companies from acting that way in the future (Ross v. Louise Wise Servs., Inc., 8 N.Y. 3d 478, 868 N.E. 2d 189, 836 N.Y.S. 2d 590[2007]).

Defendants have not met their prima facie burden, in that there was no evidence submitted in support of their motion for summary judgment seeking dismissal of plaintiffs' punitive damages claims. In any event the decision on the punitive damages claim is best left to be determined by the trial judge after submission of all the evidence in the case (See In the Matter of the 91st Street Crane Collapse Litigation, 154 A.D. 3d 139, 62 N.Y.S. 3d 11 [1st Dept., 2017] and *Camillo v. Olympia & York Properties Co.*, 157 A.D.2d 34, 554 N.Y.S.2d 532 [1st Dept. 1990]).

ACCORDINGLY, it is ORDERED that defendants Viacom, Inc. and General Electric Company's motion pursuant to CPLR §3212 for summary judgment, dismissing the complaint and all cross-claims asserted against it, alternatively for partial summary judgment dismissing plaintiffs' claims for punitive damages is denied.

ENTER:

Dated: June 8, 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