

Henry v Aerco Intl., Inc.
2020 NY Slip Op 35010(U)
July 21, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 613842-2017
Judge: Jerry Garguilo
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E-FILE

SHORT FORM ORDER

INDEX NO. 613842-2017

**SUPREME COURT - STATE OF NEW YORK
NYS ASBESTOS LITIGATION IAS PART 47 - SUFFOLK COUNTY**

PRESENT:

**HON. JERRY GARGUILO
SUPREME COURT JUSTICE**

ORIG. RETURN DATE: 4-1-2020 FINAL SUBMITTED DATE: 7-1-2020 MOTION SEQ# 002 MOTION: MD
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Lindsay P. Henry and Jennifer A. Henry, as Co-Executors for the Estate of Patrick Henry,

Plaintiffs,

-against-

Aerco International, Inc. et al.

Defendants.

PLAINTIFFS' ATTORNEY:

WEITZ & LUXENBERG
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NEW YORK, NY 10003
212-558-5790

DEFENDANT'S ATTORNEY:

Attorney for Viking Pump, Inc.
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212-897-9655

**ALL PARTIES VIA NYSCEF
(FULL PARTICIPATION RECORDED)**

Upon consideration of the notice of motion for an order granting summary judgment in favor of the defendant Viking Pump, Inc., the supporting affirmation, exhibits, and memorandum of law, the affirmation in opposition on behalf of the plaintiff Lindsay P. Henry and Jennifer A. Henry, as Co-Executors for the Estate of Patrick Henry [“the plaintiff”], and supporting papers, and the defendant’s reply, it is

ORDERED that defendant Viking Pump, Inc.’s motion for an order granting summary judgment dismissing the complaint insofar as asserted against it is denied.

This action was commenced on July 21, 2017, by the filing of a complaint on behalf of Patrick Henry [“the decedent”], against numerous corporate entities including the movant, defendant Viking Pump, Inc. [“the defendant” or “Viking”]. The complaint made the following allegations against Viking and the other defendants.

Plaintiff Patrick Henry [“the decedent”], continuously worked with and was exposed to the asbestos and asbestos-containing products and materials mined,

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manufactured, processed, imported, converted, compounded, installed, distributed, or sold by the defendants. During the course of his employment, the decedent was exposed to the defendants' asbestos and asbestos containing materials to which exposure directly and proximately caused him to develop an asbestos related disease. During the scope and course of the decedent's employment he was necessarily and unavoidably exposed to and did inhale and ingest dust and/or asbestos fibers emanating from the asbestos and asbestos-containing products and/or equipment of the defendants (Dkt. No. 1).

The original complaint contained six causes of action alleging various theories of liability premised upon the defendants' alleged negligence, strict liability in tort including its failure to warn, breach of warranty-express and implied, market-share liability, and violations of Labor Law §§200 and 241(6), respectively, and for loss of services. The original complaint sought compensatory and punitive damages, each separately in the amount of \$10 million. An amended complaint substituted successor entities to several of the original corporate defendants (Dkt No. 5). On July 22, 2018, the decedent passed away at eighty-eight years of age, having been diagnosed with lung cancer two years earlier.

Viking filed an Answer with Cross Claims dated September 29, 2019 (Dkt. 85). By order dated October 16, 2019, Lindsay P. Henry and Jennifer A. Henry as Co-Executors for the Estate of Patrick Henry were substituted as plaintiff in the above-entitled action (Dkt. 80). Shortly thereafter, the plaintiff filed a Supplemental Summons and Third Amended Complaint (Dkt. No. 82), substituting the Estate as the named plaintiff and adding causes of action for wrongful death, pecuniary loss, and breach of warranty on behalf of the Executors individually. Viking filed an Answer to the Third Amended Complaint dated December 16, 2019, asserting sixty-four affirmative defenses and two cross claims for contribution and indemnification, respectively (Dkt. 85).

In support of summary judgment Viking submitted, among other things, a transcript of the decedent's testimony taken over the course of two days in August of 2017, and a document entitled "PLAINTIFF'S RESPONSES TO DEFENDANT'S FOURTH AMENDED STANDARD SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS" executed by the decedent, dated July 24, 2017, and sworn to at the time of the decedent's deposition the following month (Dkt. Nos. 91 and 92). The Interrogatory Responses conclude with a chart that indicates that in the early 1950's, the decedent served as a gunnery officer in the United States Navy assigned for some period of time to the USS Pictor (AF-54). The decedent's testimony and interrogatory responses indicate that while deployed on the U.S.S. Pictor, the decedent was exposed to

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asbestos and asbestos containing material (Dkt. 92, 204-216).

In the affirmation in support of summary judgment by David E. Freed, Esq., dated March 10, 2020, Viking's attorney submits that "Plaintiffs have produced no evidence that Patrick Henry was ever caused to be exposed to asbestos from, or ever even encountered a product manufactured by Viking." According to the moving affirmation, the decedent did not testify to any asbestos exposure from any Viking products and never mentioned the name "Viking" during his deposition. On two prior occasions, Viking's counsel invited Plaintiff's counsel to discontinue the action insofar as asserted against Viking (Dkt. Nos. 93, 94). Plaintiff's counsel apparently did not respond to defense counsel's requests. The sole basis asserted in support of summary judgment in Viking's favor is summarized in its memorandum of law.

"Here, Plaintiffs cannot point to any sworn testimony that any product manufactured, sold or distributed by Viking contributed to Mr. Henry's alleged asbestos exposure. Neither Plaintiffs' Interrogatory Responses nor Mr. Henry's deposition testimony mention Viking at all. Mr. Henry himself never testified to working with or around any Viking products, much less that he was somehow caused to be exposed to asbestos from one. Accordingly, because Plaintiffs have failed to raise a single issue of material fact that would directly or indirectly show that Viking caused or contributed to Mr. Henry's illness, Viking is entitled to summary judgment as a matter of law." (Dkt. No. 95, p. 4).

As the party seeking summary judgment, Viking had the initial burden of establishing its defense sufficiently to warrant an award of judgment in its favor as a matter of law (*see Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718 99 [1980]). The burden is not met by pointing to gaps in plaintiffs' proof (*see George Larkin Trucking Co. v. Lisbon Tire Mart*, 185 AD2d 614, 615, 585 NYS2d 894 [4th Dept 1992]). Rather, a defendant must affirmatively demonstrate the merit of its defense " * * * by tender of evidentiary proof in admissible form * * * " (*Zuckerman v. City of New York supra*, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718, *quoting Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068, 416 NYS2d 790, 390 NE2d 298 [1979]).

Although a plaintiff in a products liability action generally must establish the identity of the manufacturer or supplier of the allegedly defective product (*see Healey v. Firestone Tire & Rubber Co.*, 87 NY2d 596, 601, 640 NYS2d 860, 663 NE2d 901 [1996]; *Horn v. Homier Distrib.*, 272 AD2d 909, 707 NYS2d 582 [4th Dept 2000]), a defendant seeking summary judgment dismissing the complaint and cross claims against it on the

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ground that it was not the manufacturer or supplier of the allegedly defective product has the initial burden of establishing as a matter of law that it did not manufacture or supply the product (*see Palmatier v. Mr. Heater Corp.*, 160 AD3d 1093, 1094, 75 NYS3d 297, 298 [3d Dept 2018]; *Baum v. Eco-Tec*, 5 AD3d 842, 843–844, 773 NYS2d 161 [3d Dept 2004]).

Here, Viking failed to meet its initial burden of establishing as a matter of law that it was not the manufacturer or supplier of asbestos that allegedly injured the decedent (*see Cordella v Raymond of New Jersey, LLC*, 159 AD3d 975, 976, 72 NYS3d 573, 574 [2d Dept 2018], *citing Ebenezer Baptist Church v. Little Giant Mfg. Co.*, 28 AD3d 1173, 1173–74, 814 NYS2d 471, 471 [4th Dept 2006]; *see also Tompkins v. Trailer Stake Co.*, 131 AD3d 1163, 16 NYS3d 761, 762 [2d Dept 2015]). Viking submitted no affirmative evidence that it did not manufacture a product containing asbestos that is alleged to have caused the decedent's injury and ultimate demise. Instead, Viking points to gaps in the Plaintiff's case, contending that Plaintiff's evidence did not establish the identity of that manufacturer, which is insufficient to meet the burden imposed upon the party seeking summary judgment (*Antonucci v. Emeco Indus., Inc.*, 223 AD2d 913, 914, 636 NYS2d 495, 496 [2d Dept 1996]).

In light of the foregoing, Viking's motion is denied regardless of the sufficiency of the opposing papers (*Tompkins v. Trailer Stake Co.*, *supra*; *citing Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642 [1985]).

The foregoing constitutes the decision and **ORDER** of this Court.

Dated: July 21, 2020


HON. JERRY GARGUILO, JSC