

Piepke v CBS Corp.
2020 NY Slip Op 35079(U)
July 27, 2020
Supreme Court, Erie County
Docket Number: Index No. 805478/2019
Judge: Deborah A. Chimes
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

IN Re: EIGHT JUDICIAL DISTRICT ASBESTOS LITIGATION

NICOLE G. PIEPKE, Executrix of the Estate of
HEINRICH O. PIEPKE, Deceased, and Individually
as the Surviving Spouse of HEINRICH O. PIEPKE,
Plaintiff,

DECISION AND ORDER
Index No. 805478/2019

vs.

CBS CORPORATION F/K/A VIACOM INC.,
Successor by merger to CBS CORPORATION
F/K/A WESTINGHOUSE ELECTRIC CORPORATION,
et al.

Defendants.

Attorneys

E. Meghan Dwyer, Esq.
Barclay Damon
*Attorneys for Defendant
Insulation Distributors, Inc.*
The Avant Building Suite 1200
200 Delaware Avenue
Buffalo, New York 14202

Tackjin Kim, Esq.
Lewis Brisbois Bisgaard & Smith, LLP
*Attorneys for Defendant
Niagara Insulations, Inc.*
77 Water Street, 21st Floor
New York, New York 10005
Keith R. Vona, Esq.
Richmond Vona, LLC
Attorneys for Plaintiff
1659 Amherst Street, Suite 100
Buffalo, New York 14214

Chimes, J:

Defendants Insulation Distributors, Inc., (“IDI” or “Buffalo”), and Niagara Insulations, Inc., (“Niagara”), moved for summary judgment dismissing all claims and counter-claims brought against them on the ground that there is no evidence that decedent Heinrich Piepke was exposed to asbestos from any product for which IDI or Niagara are responsible. Plaintiff opposed the motion, asserting that defendants failed to establish prima facie showing that they are entitled to summary judgment or in the alternative that questions of fact exist precluding summary judgment. The motions are being decided on submission.

In support of its motion, IDI has submitted its Notice of Motion, dated February 3, 2020, Affidavit of E. Meghan Dwyer, Esq, dated February 3, 2020, with attached Exhibits, and Reply Affirmation of Jennifer L. Leonardi, Esq., dated April 6, 2020, with attached Exhibits. In support of its motion, Niagara has submitted its Notice of Motion dated February 4, 2020, Affirmation of Tackjin Kim, Esq., dated February 4, 2020 with attached Exhibits, and the Reply Affirmation of Tackjin Kim, Esq., dated May 4, 2020 with attached Exhibits. In opposition to the motions, plaintiff submitted Affirmation of Keith R. Vona, Esq., dated March 3, 2020 with attached Exhibits.

Background

Plaintiff has brought this action to recover for damages associated with the death of Heinrich Piepke on August 1, 2018, which was caused or contributed by mesothelioma. Heinrich Piepke worked as a bricklayer for Balling Construction, a general contractor in Buffalo, New York, from approximately 1957 to 1978. Plaintiff alleges that Piepke was exposed to asbestos in the course of this employment. Plaintiff

claims decedent's mesothelioma was caused or contributed to by exposure to asbestos fibers released by products sold, distributed and installed by defendants IDI and Niagara.

As an initial matter, the defendants assert they are not properly identified because plaintiff's interrogatory answers are made "upon information and belief." Defendant, relying on *Woods v Norse*, 124 A.D.2d 1020, argues that interrogatory responses made only upon information and belief are insufficient to properly identify the moving defendants. However, such reliance is misplaced. In *Woods*, the Fourth Department examined the sufficiency of affidavits submitted in opposition to a summary judgement that were based "upon information and belief", finding they were insufficient to raise a triable issue of fact; it did not examine the sufficiency of a disclosure device made in the same manner. Likewise, defendants' reliance on *Blamowski v. Air & Liquid Systems, Inc.*, Erie County Index Number 808655/2014 (Decision and Order by this court dated May 26, 2016) is also misplaced as there too no defendant challenged the sufficiency of signing Interrogatories "upon information and belief", even though the Estate's Representative did exactly that. In so far as Judge McCarthy found such interrogatories insufficient (see, *Pickard v. Cytec Engineered Materials*, Onondaga County Index No. 2015EF2124 (Decision Order by James M. McCarthy, J.S.C. dated May 23, 2018), this Court respectfully disagrees.

Interrogatories are a disclosure device where the answers are to be made under oath and in writing (CPLR 3130, 3133). Here, the Interrogatories are verified by plaintiff, decedent's wife, as Executrix of the Estate of decedent and as surviving spouse. Such written answers to interrogatories, sworn to under oath, even if made

upon information and belief are in acceptable form, especially where the injured party is deceased. Otherwise, every representative of a decedent who fails to have personal knowledge would be unable to identify a defendant; though there may be sufficient proof developed through further discovery that supports the identification. The plaintiff clearly identified the defendants and their product in her interrogatory responses and the burden on summary judgement remains with the defendants.

Analysis

It is well established in asbestos litigation that to go forward with a motion for summary judgment dismissing a complaint, a defendant must present admissible evidence showing that the complaint has no merit (see *Diel v Flintkote Co.*, 204 AD2d 53 [1994]), or affirmatively establish the merit of its defense (see *Higgins v Pope*, 37 AD3d 1086 [2007]; *Refermat v A. C. AND S., Inc.*, 15 AD3d 928 [2005]; *Root v Eastern Refractories Co., Inc.*, 13 AD3d 1187 [2004]; *Matter of Eighth Jud. Dist. Asbestos Litig. [Takacs]*, 255 AD2d 1002 [1998]; *Reid v Georgia-Pacific Corp.*, 212 AD 2d 462 [1995]). In cases alleging asbestos exposure, a defendant must "make 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 [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 [1st Dept. 2014]). A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Torres v Indus. Container*, 305 AD2d 136 [1st Dept. 2003]).

"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 AD2d 462 [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).

Defendants moved for summary judgment arguing that Mr. Bigham's exposure and product identification testimony concerning the decedent are inadequate. However, as movants, they bear the initial burden of putting forth evidence in admissible form that their asbestos could not have been a source of plaintiff's injury (*O'Connor v. Aerco Intl., Inc.*, 152 AD3d 841, [3rd Dept, 2017]; *Blamowski v. Air & Liquid Systems, Inc.*, Erie County Index Number 808655/2014 (Decision and Order by this court dated May 26, 2016). Defendants have not come forward with any proof, in admissible form, which establishes they could not have been the source of plaintiff's injury. They did not submit an affidavit by someone with knowledge to establish that IDI and/or Niagara were not present at D'Youville or Buffalo State Colleges, or that they did not generate asbestos dust to which decedent could have been exposed. Accordingly, defendants have not met their burden to be awarded summary judgment and the motion is denied.

Further, defendant, Niagara, argues it is a service contractor and not subject to liability. However, defendant failed to assert a factual basis for its contention that it is a contractor only, and therefore, not subject to products liability claims. Defendant failed to establish that "the predicate sale of a good is wholly absent because the transaction was 'clearly on one for services'" *Matter of Eighth Judicial District Asbestos Litigation*,

[*Terwilliger*], 33 NY3d 488, 501 (2019) citing *Perlmutter v Beth David Hospital*, 308 NY at 104) and its motion for summary judgment on this ground is denied.

Finally, Defendants motion for summary judgment on plaintiff's claim for punitive damages is deferred until the completion of the liability and damages trial.

Conclusion

In accordance with this decision, it is hereby;

ORDERED, defendants' motions for summary judgment are denied in all respects, except for the punitive damages claims which are deferred until after the liability and damages trial.

SO ORDERED: July 27, 2020



HON. DEBORAH A. CHIMES
Justice of the Supreme Court