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| Sargent v PACCAR, INC. |
| 2020 NY Slip Op 35080(U) |
| August 24, 2020 |
| Supreme Court, Albany County |
| Docket Number: Index No. 902392-19 |
| Judge: Richard T. Aulisi |
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

MERRITT SARGENT and CAROL SARGENT,

Plaintiffs,

-against-

PACCAR, INC., et al.,

Defendants.

DECISION & ORDER

Index No.: 902392-19

RJI No.:01-19-131637

PRESENT: HON. RICHARD T. AULISI
JUDICIAL HEARING OFFICER

APPEARANCES:

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Attorney for PACCAR, INC.,
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Attorney for Plaintiffs
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The plaintiffs commenced the within action to recover damages for personal injuries allegedly incurred by Merritt Sargent, resulting from his exposure to asbestos containing products. The plaintiffs commenced this action on April 24, 2019, by filing a summons and complaint in the Albany County Clerk’s Office. Issue was subsequently joined, and discovery has been conducted pursuant to an expedited schedule. This matter had been scheduled for trial commencing May 5, 2020, but was adjourned due to the closure of the Courts resulting from the COVID-19 virus.

The defendant, PACCAR INC., (Peterbilt or Defendant), has now made a motion for summary judgment, dismissing the plaintiffs' complaint and all cross claims asserted against it, pursuant to CPLR §3212. The defendant seeks summary judgment on the theory that the plaintiffs have failed to adequately identify it as a source of any asbestos containing materials to which the plaintiff, Merritt Sargent, was allegedly exposed. More specifically, the defendant claims that Mr. Sargent had no personal knowledge as to whether the Peterbilt trucks he inspected contained asbestos.

Mr. Sargent is approximately 84 years of age and was diagnosed with mesothelioma in March of 2019. He alleges that he developed mesothelioma as a result of his exposure to asbestos from his work supervising State-employed truck inspectors, while he was employed by the United States Department of Transportation. For the purpose of the within motion for summary judgment, Mr. Sargent alleges that he was regularly present during brake inspections of Peterbilt tractor-trailers, between 1988 and 2000. Mr. Sargent asserts that he was exposed to visible asbestos brake dust from these inspections.

The defendant readily acknowledges the fact that Mr. Sargent recalled numerous brake inspections taking place in his presence on Peterbilt trucks. The defendant, however, relies extensively upon Mr. Sargent's deposition testimony where he stated that he did not have "personal knowledge whether any of the brakes on a Peterbilt tractor contained asbestos".¹ The defendant asserts that in light of this admission by Mr. Sargent, there is no identification of an asbestos containing product which is attributable to the defendant and, as such, it is entitled to summary judgment. As an alternative ground for summary judgment, the defendant has submitted an affidavit from its corporate representative, Rodney F. Curbo. Mr. Curbo states in his affidavit that the defendant stopped utilizing asbestos brakes in its trucks in 1987. The

¹ Plaintiff's Dep. Pages 141-142

plaintiff began conducting his supervision of brake inspections in 1988, thus the defendant argues that there would not have been any asbestos containing brakes which the plaintiff would have encountered.

A proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]). In the context of an asbestos case, the defendant bears the initial burden of demonstrating that its respective products “could not have contributed to the causation” of Mr. Sargent’s injuries (Matter of New York City Asbestos Litig., 116 AD3d 545, 545 [2014]; see Matter of New York City Asbestos Litig., 216 AD2d 79, 80 [1995]). “Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). To that end, “plaintiffs’ burden to establish a material issue of fact as to ‘the facts and conditions from which [defendant’s] liability may reasonably be inferred’ is only triggered in the event that a moving defendant made the aforementioned prima facie showing” (Id. quoting Matter of New York City Asbestos Litig., 216 AD2d at 80).

The Court also notes that since this is a summary judgment motion, it must view the evidence in a light most favorable to the non-moving party, drawing all reasonable inferences in favor of the non-moving party (see Salerno v Garlock, Inc., 212 AD2d 463, 464 [1st Dept 1995]; Greco v Boyce, 262 AD2d 734 [3d Dept 1999]).

In response to the defendant’s summary judgment motion, plaintiffs rely upon the deposition testimony of Mr. Sargent. Mr. Sargent testified that after he left the military, he began taking classes and eventually he was awarded a Master’s Degree from College of Saint

Rose. For the purpose of the within motion, Mr. Sargent testified about his extensive history in the trucking industry, which encompassed many different facets of the industry. In fact, during the depositions, plaintiffs' counsel moved to have Mr. Sargent deemed an expert in the field. Mr. Sargent testified in detail as to how he believed he was exposed to asbestos containing materials from his supervision of brake systems inspections on the defendant's trucks.² Mr. Sargent also testified that he believed that the brake system inspections he was overseeing involved original equipment supplied by the manufacturer.³ In light of the injured plaintiff's identification of a product allegedly supplied by the defendant, the movant bore the initial burden of demonstrating that their respective product could not have contributed to the causation of Mr. Sargent's asbestos-related injuries (O'Connor v Aerco International, Inc., 152 Ad 3d 841, 842[3rd Dept. 2017]).

A moving defendant cannot meet its initial burden of proof on a summary judgment motion by merely pointing to gaps in plaintiff's proof. Rather, the moving party must submit sufficient evidence showing why plaintiff's claim must fail. (Krok v Aerco International, Inc., 146 AD 3d 700[1st Dept. 2017]); (Ricci v A.O. Smith, 143 AD 3d 516[1st Dept. 2016]); (Koulermos v A.O. Smith, 137 AD 3d 575, 576[1st Dept. 2016]); (Torres v Industrial Container, 305 AD 2d 136[1st Dept. 2003])

A plaintiff can successfully defeat a summary judgment motion by raising a material issue of fact and, once again, when this standard is applied to asbestos litigation, it has been held that plaintiff need not show the precise causes of his damages, but only facts and conditions from which defendant's liability may be reasonably inferred. (Lloyd v. W.R. Grace & Co., 215 AD2d 177 [1st Dept. 1995]); also see (In Re New York City Asbestos Litigation v. A.C. & S., 7 AD3d

² Plaintiff's Dep. Pages 135-136

³ Plaintiff's Video Dep. Pages 47-48

285 [1st Dept. 2004]); (In Re Eighth Judicial District Asbestos Litigation v. Amchem Products, Inc., 32 AD3d 1268 [4th Dept. 2006]).

It is apparent to the Court that the moving defendant has not met its initial burden of proof. The Court also notes that, even if the Court were to consider the materials submitted by the defendant in support of the motion, it would simply highlight the fact that there are material issues of credibility and fact which cannot be resolved in the context of a summary judgment motion (Ferrante v American Lung Assn., 90 NY2d 623,631[1997]).

Upon reviewing the record before it, the Court finds that there is a material issue of fact concerning the liability of the defendant, PACCAR INC., with respect to the asbestos containing products that allegedly contributed to Merritt Sargent's injury.

The defendant's motion for summary judgment dismissing the plaintiffs' complaint is denied, without costs.

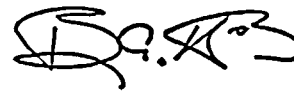
This writing shall constitute the Decision and Order of this Court.

Signed this 24th day of August 2020, at Johnstown, New York.



HON. RICHARD T. AULISI
JUDICIAL HEARING OFFICER

ENTER



08/27/2020