

Mrjaj v Air & Liquid Sys. Corp.
2021 NY Slip Op 33567(U)
January 15, 2021
Supreme Court, Erie County
Docket Number: Index No. 810929/2019
Judge: Deborah A. Chimes
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At a Civil Special Term of the
Supreme Court, held in and for the
County of Erie, State of New York,
on the 5th day of October, 2020

PRESIDING: HON. DEBORAH A. CHIMES

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ERIE

EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION

KATHY MRJAJ, as Executrix of the Estate of
PAL HAIDAR, deceased, and ANA HAIDAR, Individually,

DECISION AND ORDER

Petitioner

INDEX NO.: 810929/2019

vs.

AIR & LIQUID SYSTEMS CORPORATION, et al

Respondent

Pursuant to CPLR § 3212, the Treadwell Corporation (Treadwell) moves for summary judgement dismissing the Complaint and all cross-claims.

In support of its motion, Treadwell filed a Notice of Motion dated August 27 2020, the Attorney Affirmation of Alysa B. Koloms, dated August 27, 2020, together with attached exhibits, and the Reply Affirmation of Alysa B. Koloms, dated October 16, 2020, together with the attached exhibits.

In opposition, plaintiff filed the Attorney Affirmation of Seth A. Dymond dated October 2, 2020, together with the attached exhibits.

Plaintiff brings a claim against Treadwell alleging her deceased husband was exposed to asbestos dust created from a ladle that Treadwell manufactured. The ladle was used to transport

molten steel. Plaintiff worked at Hanna Furnace from 1957 to 1959 and identified a Treadwell ladle from a photograph as the ones that were at Hanna Furnace. Plaintiff's deceased husband worked on furnaces and was assigned to clear foam (a byproduct of manufacturing steel) from the "canal". Plaintiff's decedent testified he was approximately twenty (20) feet away from the ladles when the molten steel was poured into the ladle. When the steel was poured, plaintiff described dust coming from the ladles that he believed was asbestos. He also testified that he neither worked on the ladles nor observed anyone work on them.

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]). With respect to the merits of the complaint, defendant must make a prima-facie showing that its products could not have contributed to the causation of decedent's illness (*see Refermat, Root, Takacs.*)

Further, moving for summary judgment on the ground of product identification bears a very heavy prima facie burden. (*See, e.g., Matter of New York City Asbestos Litig.*, 7 A.D.3d 285, 285-86; *Millerman v Georgia Pac. Corp.*, 214 A.D.2d 362, 362-63; *Matter of New York City Asbestos Litig.*, 212 A.D.2d 463, 46) and a party cannot meet its burden by merely noting gaps or weakness in its opponent's proof. (*Allen v General Elec. Co.*, 32 AD3d 1163, 1165, *citing Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980; *Edwards v Arlington Mall Assocs.*, 6 AD3d 1136).

Though Treadwell argues plaintiff cannot place its ladle at his worksite, it fails to submit affirmative proof that its product was not at the worksite, but merely points to gaps in plaintiff's testimony. Therefore, the defendant failed to meet its initial burden on the issue of identification (*see Universal Resources Holdings Inc v North Penn Pipe Supply Inc*, 129 AD 3d 1671).

Moreover, plaintiff submitted sufficient proof to raise a question of fact as to whether Treadwell was at the Hanna worksite through the testimony of Frank Koletar, who testified he worked on the Treadwell ladles at Hanna Furnace and by identifying from a picture that the ladle in the picture resembled the ladles at his work site. He also recalled Treadwell on the ladles. The evidence raised by defendant regarding the sufficiency of plaintiff's identity goes to the weight of the evidence. "The assessment of the value of a witness's testimony constitutes an issue for resolution by the trier of fact, and any apparent discrepancy between the testimony and the evidence of record goes only to the weight and not the admissibility of the testimony" (*Dollas v W.R. Grace and Co.*, 225 AD2d 319 at 321).

Treadwell next argues their ladle was designed to fully encapsulate the refractory that the customer, not Treadwell, would add to the ladle. In support of this argument Treadwell submitted a patented drawing of its ladle and corporate representative testimony. Though Treadwell acknowledged that its customers may have utilized asbestos as the refractory, it argued such material would have been encapsulated and not have exposed plaintiff to asbestos dust. In opposition, plaintiff relied on the non-party testimony of Frank Koletar, who testified that the Treadwell ladles he worked on had "asbestos paper laid on the bottom, on the brickwork" and the outside of the ladle had a the protective fireproofing which he believed to be asbestos. Plaintiff also relied on the testimony of Mr. Koletar to establish the asbestos lining generated dust, but per the testimony, the dust was generated from the work Mr. Koletar

performed. Specifically, he testified there was dust created when he would “tear-out the old ones – installing the new ones” a different cause for the dust than the cause described by plaintiff.

Nonetheless, plaintiff has raised a question of fact on the issue of whether the refractory on the ladles used at plaintiff’s worksite was encapsulated as indicated by the patented drawings and a source of dust observed by the plaintiff.

Finally, defendant argues the issue of causation. Through an attorney affidavit, the defendant submitted scientific reports to support its position that any dangerous propensities of asbestos, if used and if not encapsulated, would have been destroyed by the high temperatures of the molten steel. However, such reports are hearsay and insufficient to support summary judgement on the issue of causation (*see, Sauter v Calabretta*, 90 AD 3d 1702; *Fallon v Duffy*, 95 A.D. 3d 1416). Defendant therefore failed to meet its initial burden on the issue of causation.

WHEREFORE it is hereby,

ORDERED, Defendant’s motion for summary judgement is denied.

DATED: Buffalo, New York
January 15, 2021



HON. DEBORAH A. CHIMES, J.S.C.