SUPREME COURT OF THE STATE OF NEW YORK : Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK

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IN RE NEW YORK CITY ASBESTOS LITIGATION

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RICHARD R. LEFRAK

Plaintiff

-against-

AERCO INTERNATIONAL, INC. et al

Defendants

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Plaintiff Richard Lefrak ("plaintiff") was diagnosed with mesothelioma and underlying pleural asbestosis in June of 2013. His disease, he claims, is connected to his asbestos exposure from joint compound and floor tiles, as a student and also as a janitor sweeping up dust at Stony Brook University ("Stony Brook") where he went to college from 1965 to 1969. Defendant American Biltrite, Inc. ("defendant" or "AB") is alleged to have manufactured and sold Amtico asbestos-containing vinyl tiles to Stony Brook that were used during various construction projects during the relevant period of time. It is undisputed that during the relevant period of time, AB sold Amtico asbestos-containing vinyl tiles (Exh 4, Plaintiff's Affirm in Opp).

AB moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all claims and cross claims against it. AB's memorandum of law states that the basis for the motion is "that plaintiff, Richard Lefrak, has failed to establish a prima facie case against ABI and no genuine issues of material fact exists which support this action against ABI" (Defendant's Mem of Law at 2). This of course is the incorrect standard, as the moving party (here, AB) must establish

a prima facie case. Tellingly, even AB's memorandum of law reflects that defendant cannot meet its burden by conceding that, at a minimum, "Mr. Galasso's testimony merely raises the possibility that Amtico tiles were used at Stony Brook when Mr. Galasso was present there" (*id.*).

Arguments

AB contends that plaintiff has not shown that he specifically came into contact with absestos-containing floor tiles that AB manufactured and sold, namely Amtico floor tiles. AB points out that plaintiff himself did not identify Amtico floor tiles during the course of his deposition. Defendant asserts that the deficiencies in plaintiff's evidence were not cured by fact witness George Salzman, a concrete worker at Stony Brook from 1966-1970, who, as defendant correctly points out, was not mentioned in plaintiff's opposition papers. Defendant stresses that Salzman recalled numerous brands of floor tile being used at the school – none of which included Amtico. AB further argues that plaintiff cannot rely on the "irrelevant" testimony of Joseph Galasso, a union carpenter working at Stony Brook from 1968-1972. Galasso specifically identified Amtico asbestos-containing floor tiles at Stony Brook. Plaintiff opposes the motion, pointing out the following testimony:

-Plaintiff stated at his deposition that as a student, he was frequently around the laying and cutting of vinyl tiles all over the Stony Brook campus throughout his four years there (Ex 2, Plaintiff's Affirm in Opp, Lefrak TR at 35-38, 50-51, 358-60).

-Plaintiff submits that he specifically recalled that numerous buildings on the campus underwent construction while he was a student, including the library and the earth and space science building, and that construction work was "everywhere" (*id.* at 50-51)

-During the summer of 1968, plaintiff worked all over Stony Brook's campus cleaning up various construction projects. Specifically, in his deposition testimony he recalled cleaning

up after floor tile workers, and that such work often involved exposure to considerable dust (*id.* at 56-58; 357-361).

- Galasso states that while he was on Stony Brook's campus, he was around to witness others install Amtico floor tiles "generally" around the campus (Ex 3, Plaintiff's Affirm. in Opp., Galasso TR at 66).

-Glasso further recalled that Amtico tiles were cut, creating dust, and that such tiles contained asbestos (*id.* at 1201-1214).

Discussion

CPLR 3212 (b) provides, in relevant part:

> A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

Thus, a defendant moving for summary judgment must first establish its *prima facie* entitlement to judgment as a matter of law by demonstrating the absence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Therefore, summary judgment in defendant's favor is denied when defendant fails "to unequivocally establish that its product could not have contributed to the causation of plaintiff's injury" (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995]; *Matter of New York City Asbestos Litig.* (*Berensmann*), 122 AD3d 520 [1st Dept 2014]). An affidavit from a corporate

representative which is "conclusory and without specific factual basis" does not meet the burden (*Matter of New York City Asbestos Litig. (DiSalvo)*, 123 AD3d 498 [1st Dept 2014]). By contrast, in *Root v Eastern Refractories, Co.* (13 AD3d 1187 [1st Dept 2004]), an affidavit from a corporate employee who worked for the defendant since 1948, which stated that the company did not supply any asbestos-containing products to Syracuse University during the relevant time, is sufficient to meet the burden of proof.

It is only after the burden of proof is met that plaintiff must then show "facts and conditions from which the defendant's liability may be reasonably inferred" (*Reid*, 212 AD2d at 463, *supra*). The plaintiff cannot, however, rely on conjecture or speculation (*see Roimesher v Colgate Scaffolding & Equip. Corp.*, 77 AD3d 425, 426 [1st Dept 2010]). Nor can a plaintiff rely upon the affirmation of counsel to fill in a crucial gap regarding how the plaintiff was exposed (*see Matter of Asbestos Litigation (Comeau)*, 216 AD2d 79 [1st Dept 1995] [counsel stated that the deceased plaintiff metal lather must "necessarily [have] scraped . . . W.R. Grace asbestos containing fireproofing . . . in order to perform his job"]). To defeat summary judgment, a plaintiff's evidence must create a reasonable inference that plaintiff was exposed to a specific defendant's product (*see Comeau v. W.R. Grace & Co.-Conn*), 216 AD2d 79 [1st Dept. 1995]).

In addition, issues of credibility are for the jury (*Cochrane v Owens-Corning Fiberglass Corp.*, 219 AD2d 557, 559-60). Where "[t]he deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaint . . . [t]he assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier fact, and any apparent discrepancy between the testimony and the evidence of the record goes only to the weight and not the admissibility of the testimony" (*Dollas v. Grace & Co.*, 225 AD2d 319, 321 [1st

Dept. 1996] [internal citations omitted]). This is particularly true in asbestos cases, like that in *Dollas*, where the testimony presented is often proffered by witnesses attempting to recall remote events that are years and perhaps even decades removed from the present. Furthermore, it is well-settled that in personal injury litigation, a plaintiff is not required to show the precise cause of his damages, but only facts and conditions from which a defendant's liability can be reasonably inferred (*Reid, supra*; *Matter of New York City Asbestos Litg. (Brooklyn Nav. Shipyard Cases)*, 188 AD2d 214, 225 [1st Dept], *affd* 82 NY2d 821 [1993]).

AB has failed to establish a prima facie case. No affidavit was proffered in support of the motion. Nor did AB cite to any deposition testimony which would support a prima facie case. AB's memorandum of law reflects that defendant cannot meet its burden.[1] AB concedes that, at a minimum, "Mr. Galasso's testimony merely raises the possibility that Amtico tiles were used at Stony Brook when Mr. Galasso was present there" (Defendant's Mem of Law at 2). Moreover, even if AB met its burden, issues of fact exist for trial. AB admits in reply that Galasso's presence at Stony Brook overlapped with plaintiff in 1968 and 1969 (Galasso having worked on campus from 1968-1972). AB attempts to minimize the temporal overlap, asserting that "the relevant time frame is only 1972" because Galasso maintained a note book that referred to one project at Stony Brook

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[1]At oral argument, defendant asserted that it is "not fair" to require that AB meet its burden to prove that its product could not have contributed to the causation of plaintiff's injury on the large Stony Brook campus because that is "like a needle in a haystack." However, the burden of proof on summary judgment for asbestos cases is consistent with the burden in non-asbestos cases, even though it may be difficult to establish non-liability (*see e.g., Lopez v New York Life Ins. Co.*, 90 AD3d 446 [1st Dept 2011] [despite affidavits and other evidence, owner, manager, and maintenance company failed to sustain their burden to prove that they did not have constructive notice of a puddle on which plaintiff slipped]). Further, any "unfairness" cuts both ways. At trial, the burden switches to plaintiff to prove his or her case. Among the potential difficulties faced by plaintiff at trial are identification of a product which might not have been labeled or the problem of recalling remote events that could have taken place decades ago.

in 1972. Defendant also attempts to minimize Galasso's testimony because he did not specify exactly where he performed ceiling work on the "massive" Stony Brook campus. Defendant also stresses that plaintiff was a student, whereas Galasso was a construction worker who performed work at Stony Brook "off and on." Defendant also mischaracterizes Galasso's testimony by asserting that he did not testify that he saw an AB package labeled Amtico. In fact, Galasso did testify that he saw the word Amtico on a box, although he could not recall the fonts or whether it was written in script or bold (Exh 3, Plaintiff's Affirm In Opp, Galasso TR at 1210-1213). AB's attempts to minimize plaintiff's, Salzman's and Galassso's testimony presents an issue of fact for the jury to address.[2]

It is hereby

ORDERED that Defendant's motion is denied.

This constitutes the Decision and Order of the Court.

Dated: April 10, 2015

4/9/15

J.S.C.

HON. PETER H. MOULTON
J.S.C.

[2]The court will not address the one sentence reference in defendant's reply, raised for the first time, that AB also manufactured floor tile lines that did not contain asbestos.