



5 of 5 DOCUMENTS

[1] IN RE NEW YORK CITY ASBESTOS LITIGATION; MICHAEL
KOULERMOS and MARIAN KOULERMOS, Plaintiffs -against- A.O. SMITH
WATER PRODUCTS, et al, Defendants. Index 190406/2014**

190406/2014

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

*2015 N.Y. Misc. LEXIS 2977; 2015 NY Slip Op 31523(U)***August 13, 2015, Decided**

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

JUDGES: [*1] HON. PETER H. MOULTON, J.S.C.

OPINION BY: PETER H. MOULTON

OPINION

As is relevant to this motion, plaintiff Micheal Koulermos ("plaintiff") contends that he developed mesothelioma as a result of working at the Northport Power Station in Northport, Long Islands (the "power station") after being exposed to asbestos while working near employees of the moving defendant Treadwell Corporation ("Treadwell"). Although plaintiffs originally opposed the motion, by letter dated July 16, 2015 they withdrew their opposition and filed what is often referred to in the NYCAL Case Management Order as a "No Opposition" summary judgment motion, which would effect dismissal of plaintiffs' claims. However, Treadwell's motion, which was based on plaintiff's failure to produce evidence that he was injured as a result of exposure to products manufactured, distributed, sold or installed by Treadwell, also included a request for dismissal of any cross-claims. That request is opposed by co-defendants National Grid USA and National Grid USA Service Company (the successor to Long Island

Lighting Company) (collectively "National Grid" or "co-defendant").

In its opposition, co-defendant asserts that plaintiff's claim that he was exposed [*2] to asbestos while working on the initial construction Units 1 and 2 at the power station, near other trades [**2] including steamfitters, is sufficient to create an issue of fact concerning co-defendant's cross-claims.¹ It is undisputed that Treadwell employed steamfitters who worked on the construction of Unit 1. Plaintiff testified that the steamfitters used welding rods, installed packing in valves and erected the boiler in his presence (TR 207-09, 343-44, 359-60, video TR 42-46)² and that plaintiff believed that he was exposed as a result (TR 209, 344, 360, video TR 42-46). National Grid (inexplicably through an attorney's affirmation), refers to copies of four agreements between Long Island Lighting Company ("LILCO") and Treadwell concerning the erection of the boiler and associated equipment for Unit 1, a contract summary for Unit 1 (that indicates Treadwell erected the boiler and associated equipment) and a daily construction report that indicates that 70 Treadwell steamfitters were working at the power station.

¹ Paragraph 43 of National Grid's Verified Answer asserts cross-claims against all defendants for contribution and contractual indemnification ("the several and joint carelessness [*3] . . .

contractual indemnification, or breach of the requirements of the Labor Law or other wrongful conduct on the part of some or all of the co-defendants in this action").

2 All transcripts references are references to plaintiff's deposition transcript.

In reply, Treadwell correctly points out that the evidence submitted by National Grid relates to the years 1965, 1967 and 1970 which Treadwell asserts *postdates* plaintiff's work at the power station by 5 to 15 years.³ Treadwell points to plaintiff's testimony that he approximated that he worked at the power station in the early 1950s (Tr 171) and specifically from 1952-54 (Tr 296) for [**3] the paint contractor George Campbell & Company (Tr 298-99).⁴ His social security records, Treadwell further points out, indicate that he worked for George Campbell & Company (bearing an address of 40-11 149th St Flushing New York 11354) from 1955 to 1961. Moreover, Treadwell argues that the facts of this case are similar to the facts in *Matter of New York County Asbestos Litig.*, 52 AD3d 300 [1st Dept 2008]) but liability is even further attenuated. In that case, the First Department dismissed a plaintiff's claim against Treadwell because the plaintiff failed to establish that he was working at various Con Edison powerhouses [**4] "at the same time Treadwell workers or its subcontractors were installing alleged asbestos-based insulation on new equipment" (*id. at 301*).

3 Treadwell raised no objection to National Grid's introduction of documents through an attorney's affirmation. Even absent consideration of such documents, the court would reach the same result in light of Treadwell's failure to submit any supporting evidence and plaintiff's conflicting deposition testimony.

4 Plaintiff later stated that his estimate of 1952-54 was incorrect as it had to be sometime after his 1956 purchase of a home in Northport (Tr 338).

In a sur-reply permitted by the court, National Grid asserts that plaintiff was wrong about the dates that he worked at the power station. National Grid notes that plaintiff testified that he was not sure about the exact years (Tr 339). Also, under questioning, plaintiff agreed that he worked on the "initial" construction of Units 1 and 2 at the power station (Tr 339). National Grid's counsel attaches proof that the initial construction did not occur

until the 1960s. Counsel attaches a document entitled "Units #1 and #2 CONSTRUCTION MEETING 23 November 1966" reflecting the presence of Treadwell Corporation [**5] and Courter & Co., Inc. among others. That document reports on the progress of certain subcontractors including "George Campbell Painting Co." who arrived on the job November 21, 1966 and "started sand-blasting interior of condensate storage tank 22 November and will continue to completion, including painting" at Unit 1. Counsel also attaches letters dated February 26, 1960, July 7, 1961 and January 8, 1964 discussing proposed preliminary construction schedules. A letter dated February 24, 1964 discusses the erection of the boiler and the [**4] "importance of maintaining the scheduled date of November 1, 1964 for start of subconstruction of the boiler area." That letter discusses the targeted "May 1967 operating date" and the need of the construction department to "insist that the currently scheduled starting date of November 1, 1964 be held, and that drawing, specification and bidding schedules be established accordingly." A document entitled "Boiler-Northport Power Station-Unit #1" lists dates in 1964 and 1965 for "Start Boiler Substructures" "Start Boiler Steel" and "Start Boiler." Counsel also attaches progress photos in 1965 for Unit I and in 1966 for Unit 2 depicting only some construction [**6] in progress. Thus, National Grid argues plaintiff could not have been working at the power station in the 1950s as construction did not even start until the 1960s.

Furthermore, although the social security records reflect that plaintiff worked for George Campbell & Company from 1955 to 1961, National Grid points out that plaintiff worked for Gombert-Campbell Corp⁵ in 1969 and 1970 which "might have been a joint venture between Campbell and another one of Plaintiff's earlier employers, Gombert Industries, Inc. and Plaintiff could have been working for Campbell, as part of the joint venture, at Northport." Alternatively, National Grid asserts that plaintiff could have been wrong about the identity of his employer when he worked on the initial construction of Unit 1 and 2.⁶

5 While the Secretary of State website reflects the existence of plaintiff's former employers George Campbell Contracting Corporation with an address of 40-11 149th St Flushing New York 11354 and George Campbell Painting Corp. (listing the same address), and Gombert Industries with an address of 117 Brook Ave Deer Park NY

11729-7204, there is no company listed with the name Gombert-Campbell Corp.

6 Although not noted by National [*7] Grid, plaintiff testified that he worked at the power station for George Campbell & Company, whose sons "more or less ran it." (Tr 299). One son passed away and one son named "Leonard" lived in St. James (Tr 300). Plaintiff's social security records indicate employment at Gombert Industries Inc. with the address of 117 Brook Ave Deer Park NY 11729-7204 from 1961 to 1978. The website for "The Gombert Organization" lists that same address, describes a "Leonard" Gombert who is a member of the "St. James" fire department) and describes the company's work to include sandblasting, among other things.

[**5] At oral argument, the court offered Treadwell the opportunity to submit a response to the sur-reply, in light of National Grid's belated submission of yet more evidence. Treadwell declined.

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 [*8] 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]). 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]). Here, no affidavit was submitted.

Treadwell has failed to establish a *prima facie* case that National Grid's cross-claims have no merit. Treadwell makes no specific argument as to why the cross-claims should be dismissed other than because plaintiff has not produced any evidence that he was injured as a result of exposure to products manufactured, distributed, sold or installed by Treadwell. No affidavit was proffered regarding the dates that Treadwell employees worked at the power station. No affidavit [*9] was [**6] submitted demonstrating that Treadwell employees did not use asbestos products when they worked at the power station. Moreover, even assuming that Treadwell had made a *prima facie* case, issues of fact exist as to when plaintiff worked at the power station, and whether he worked contemporaneously with Treadwell employees.⁷

7 The court is troubled by the fact that National Grid submitted new evidence in its sur-reply, as opposed to in its opposition to the motion, and is especially troubled by National Grid's admission at oral argument that this evidence was not turned over in discovery.

Matter of New York County Asbestos Litig., 52 AD3d 300, *supra* does not dictate a different result.⁸ There the court found that plaintiff failed to establish a temporal connection with Treadwell and plaintiff lacked training in insulation which rendered untrustworthy his identification of asbestos-based insulation. Here, plaintiff had a license for asbestos removal, having taken courses at Northport high school (Tr 46, 48). Further, the court cannot reconcile plaintiff's testimony that he worked at the power station in the 1950s with the evidence that construction did not start until the 1960s. The court cannot reconcile plaintiff's testimony that he painted [*10] the "fully erected" smoke stacks at the power station for approximately three months (Tr 307, 320) when daily construction reports from May 1967 indicate that work was still ongoing, including on the boiler, and progress photos in 1965 reflect that only some construction was in progress, leading to the possibility

that plaintiff worked at the power station much later than he believed. Nor can the court resolve the issue of plaintiff's employer during the period of time that he worked at the power station or the unexplained connection between the Gombert and Campbell companies. The assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier fact, and any apparent [**7] 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]).

8 In light of more recent cases such as *Matter of New York City Asbestos Litig* (123 AD3d 498 [1st Dept 2014]) and *Matter of New York City Asbestos Litig.*, 122 AD3d 520 [1st Dept 2014]), it is not clear that the cited case would come out

the same way today.

It is hereby

ORDERED that Defendant's motion is denied to the extent that it seeks dismissal of any cross-claims against it, and is moot as to dismissal of plaintiffs' claims against it.

This constitutes the Decision [*11] and Order of the Court.

Dated: August 13, 2015

/s/ Peter H. Moulton

HON. PETER H. MOULTON

S.J.C.