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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ALAN E. WATTS and LOLA ESTELLE WATTS,

Plaintiffs

-against-

AIR & LIQUID SYSTEMS CORPORATION, as Successor by Merger to Buffalo Pumps, Inc. et al.,

Defendants

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PETER H. MOULTON, J.:

Plaintiff Alan Watts ("plaintiff") claims that he developed mesothelioma as a result of his exposure to asbestos during his 22-year career in the United States Navy ("Navy") from 1944 to 1966. During his career, plaintiff states that he worked aboard various ships where he was assigned to air-conditioning, condensate pumps, water boilers, saltwater evaporators, and foam pumps. Plaintiff states that while working aboard the various ships, including the USS Intrepid, USS Independence, and USS Kitty Hawk, he was exposed to asbestos-containing products manufactured, distributed or sold by Defendant Superior Ledgerwood Mundy Corporation (hereinafter "SLM" or "defendant") as successor in interest to M.T. Davidson[1] ("Davidson"). It is undisputed that during the relevant period of time, Davidson manufactured and sold asbestos-containing pumps.

SLM moves, pursuant to CPLR § 3212, for summary judgment dismissing plaintiff's complaint and all claims and cross-claims against it. SLM's affirmation in support of its motion states that the basis for the motion is that plaintiff has "failed to come forward with any proof that

[1]SLM bought M.T. Davidson's assets in 1959.

Plaintiff, Alan Watts, was exposed to any asbestos-containing product manufactured, distributed or sold by SLM or M.T. Davidson" (*see* Defendant's Aff in Support at ¶ 2). Moreover, SLM's memorandum of law in support of is motion states that "[p]laintiff has failed to establish a prima facie case against SLM" (*see* Memorandum of Law in Support at pp. 4). This of course is the incorrect standard, as the moving party (here, SLM), must establish a prima facie case.

Arguments

SLM contends that plaintiff has not shown that he specifically came into contact with asbestos-containing products manufactured and sold by SLM or Davidson. SLM points out that plaintiff himself did not specifically identify SLM or Davidson as contributing to his asbestos exposure during the course of discovery. As a result, SLM argues that plaintiff has failed to present any valid evidence to establish a claim against it. Specifically, SLM states that a plaintiff in a case such as this must put forth evidence of substantial inhalation of asbestos fibers from a particular defendant's asbestos-containing product, and that the product was a substantial cause in producing the plaintiff's injury. SLM contends that plaintiff has failed to put forth any such evidence that he was exposed to asbestos fibers from any SLM or Davidson product while working around such products during his tenure with the Navy.

Plaintiff opposes the motion, pointing out the following testimony:

-Plaintiff stated at his deposition that during his tenure with the Navy from 1944 to 1966, he served as a fireman, shipfitter, and finally as a chief shipfitter. Much of his work in those various capacities was spent working on pumps and valves (Ex A, Plaintiff's Affirm in Opp, Watts/TR at 34, 36-37, 41, 90-91, 97-98).

-Plaintiff further identified working with saltwater evaporation systems equipped with pumps

that he frequently repaired (Ex B, Plaintiff's Affirm in Opp, Watts/TR at 28). He also noted that he repaired and maintained pumps associated with air-conditioning and refrigeration systems on all the ships he serviced (*id.*).

-Plaintiff testified that he was exposed to asbestos from his work on pumps (Ex B, Plaintiff's Affirm in Opp, Watts/TR at 29-30). Specifically he stated that prior to working on a pump, he would remove lagging that "created a pretty good dust, which was asbestos" (*id.* at 32). He then stated that "there's no way you can be around [the pumps] without being exposed to asbestos" because "[w]hen you['re] re-packing them and doing any maintenance in it that can be done, you're exposed to it" (*id.* at 30). He went on to note that he used packing pullers to remove old packing in the pumps, which caused the old packing to come out in small pieces (Ex A, Plaintiff's Affirm in Opp, Watts/TR at 162, 183). Subsequently he testified that he would use an air compressor to "blow out the dust and particles," which created asbestos dust (*id.* at 170). He then testified that he cut new packing using scissors, which created additional dust (*id.* at 162-63, 169). After this process was complete, plaintiff states that he would clean up the dust and particles (*id.* at 183).

-Plaintiff testified that he was exposed to asbestos from his work on pumps aboard the USS Intrepid, USS Independence, and USS Kitty Hawk (Ex A, Plaintiff's Affirm in Opp, Watts/TR at 90-91). He served on the USS Intrepid for three years in the 1950s as a shipfitter. While there he testified to working "everywhere aboard" and directly with "valves and steams and pumps" doing all kinds of work, including packing (*id.*). He then served aboard the USS Independence for two to three years, working as a shipfitter tasked with working on pumps throughout the vessel as well as other equipment, and performing routine maintenance, including packing work (*id.* at 97-98, 99, 101, 151-52). For his next assignment on the USS Kitty Hawk, plaintiff testified to performing routine

maintenance on valves and pumps located in "all of the machinery spaces" throughout the ship (*id.* at 103-05, 153, 157).

-On all the ships he served on, plaintiff identified the horizontally-mounded foam pumps associated with fire suppression systems as the ones he replaced gaskets and packing on, which exposed him to asbestos (Ex B, Plaintiff's Affirm in Opp, Watts/TR at 32-33).

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 1993], *affd* 82 NY2d 821 [1993]).

In a case involving plaintiffs who spent their careers working aboard Navy ships, the First Department held that "the inability of certain plaintiffs to identify defendant Worthington as the manufacturer of the pumps containing the asbestos to which they were exposed does not require dismissal of their actions, where defendants' own witness conceded that Worthington pumps were on a very high percentage of Navy ships during the relevant time period" (*Berkowitz v. A.C. & S., Inc.*, 288 AD2d 148, 149 [1st Dept 2001]).

Other cases involving plaintiffs on Navy ships have reached similar conclusions (*see Salerno v. Garlock, Inc.*, 212 AD2d 463 [1st Dept 1995] [reasonable trier of fact could find that plaintiff worked in the vicinity of where the products of defendant's predecessor were being used, and that he was exposed to defendant's product]; *Petteys v. Georgia Pac. Corp.*, 214 AD2d 363 [1st Dept 1995][testimony of a worker who spent 30 years at Norfolk Shipyard that defendant's predecessor's products were customarily used at during the relevant time, set forth "facts and conditions from which defendants' liability may be reasonably inferred"]; *Lloyd v. W.R. Grace & Co.-Conn.*, 215 AD2d 177 [1st Dept 1995][plaintiff's evidence that defendant's asbestos products were used by the decedent's employer on all of its ships at shipyards where the decedent worked at times that he worked there was sufficient to permit an inference that decedent was exposed to asbestos products manufactured by defendant]; *Millerman v. Georgia Pac. Corp.*, 214 AD2d 362 [1st Dept 1995] [reasonable trier of fact could find that plaintiff worked in proximity where defendant's

predecessor's products were being used, and that he was exposed to asbestos emitted therefrom]).

SLM has failed to establish a prima facie case here. No affidavit was originally proffered in support of its motion. For the first time in its reply affirmation, SLM submitted the affidavit of Thomas F. McCaffery, a technical consultant and researcher focused on the design and maintenance of Navy and merchant ships, among other things.[2] McCaffery's testimony does not account for the deficiencies in defendant's proof. In fact, McCaffery's affidavit does not dispute the presence of Davidson asbestos-containing pumps on Navy ships during the relevant years in which plaintiff worked. Instead, it states that historically, pipefitters and shipfitters in plaintiff's position were not responsible for the maintenance and repair of pumps of any kind either abroad ships or ashore. This is in contrast to testimony McCaffery gave at his deposition, during which he alluded to the fact that shipfitters could potentially work on pumps because Naval job designations are "not a rigid trade-union type of deal where it's against the rules for me to work on this" (Ex. A, Plaintiff's Sur-Reply, McCaffery/TR at 57-59). Additionally, McCaffery's testimony's stems from work with the Navy that he commenced in 1972, several years after Mr. Watts' exposure between the late-1950s and mid-1960s. Hence, he has no personal knowledge of many events and circumstances that plaintiff testified about. Most importantly, his testimony does not refute the presence of asbestos-containing pumps on Navy ships during the relevant period of time for which plaintiff worked. His testimony therefore fails to refute the possibility that Davidson pumps contributed to plaintiff's injury. Moreover, SLM concedes in its interrogatory responses that, at a minimum, "Davidson pumps may have contained encapsulated, non-friable, asbestos-containing gaskets and packing material"

[2]Even though this affidavit was submitted for the first time in SLM's reply, the court will consider it in light of the fact that plaintiff furnished naval archive records in his opposition to SLM's motion.

(Defendant SLM's Responses to Plaintiff's Standard Set of Liability Interrogatories at No. 8). SLM further concedes that "It is undisputed that Davidson pumps were aboard some of the ships upon which Mr. Watts served" (Defendant's Aff In Response to Plaintiff's Sur-Reply, at ¶ 3).

Additionally, even if SLM had met its burden, the fact that plaintiff's deposition testimony asserts that he worked with the very pumps that Davidson supplied, raises a triable issue of fact. Other triable issues of fact exist as well. For instance, even though plaintiff does not bear the burden of establishing a prima facie case, here plaintiff put forward Naval ship records establishing that Davidson manufactured and sold some of the specific types of pumps located on the exact ships that plaintiff described in his deposition testimony. For instance, a ship record dated October 22, 1960 for the USS Kitty Hawk stated that four pump machinery components analogous to those described by plaintiff were manufactured by Davidson (Ex F, Plaintiff's Affirm in Opp). Even though SLM was presented with an opportunity to challenge the authenticity of such records, it chose not to do so (*see generally* Defendant's Aff In Response to Plaintiff's Sur-Reply, at ¶ 1-16). In fact, the product literature put forward by SLM does not contradict the Naval ship records proffered by plaintiff in any material respect (Ex. 5-1, Defendant's Aff In Response to Plaintiff's Sur-Reply).

It is hereby

ORDERED that Defendant's motion is denied.

This constitutes the Decision and Order of the Court.

Dated: May 1, 2015

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

J.S.C.