

Eylers v Aerco Intl., Inc.
2019 NY Slip Op 33101(U)
October 17, 2019
Supreme Court, New York County
Docket Number: 190364/2017
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ Justice

PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

JOHN D. EYLERS and ANTJE EYLERS, Plaintiffs,

INDEX NO. 190364/2017

- against -

MOTION DATE 10/15/2019

AERCO INTERNATIONAL, INC., et al.,

MOTION SEQ. NO. 001

Defendants.

MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion for summary judgment by Superior Lidgerwood Mundy Corporation:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [] Yes [X] No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon a reading of the foregoing cited papers, it is Ordered that defendant, Superior Lidgerwood Mundy Corporation's (hereinafter referred to as "SLM") motion for summary judgment pursuant to CPLR §3212 dismissing the plaintiffs' complaint and all cross-claims asserted against it, is granted.

In October of 2017 plaintiff John D. Eylers was diagnosed with mesothelioma (Mot. Exh. C). Mr. Eylers's alleged exposure is from asbestos insulation on M.T. Davidson's pumps during his service in the United States Navy from 1956 through 1958 aboard the U.S.S. Chukawan (AO-100) and the U.S.S. Denebola (AF-56). SLM states that it purchased M.T. Davidson in 1959.

Mr. Eylers was deposed on April 10, 2018 and testified that he was exposed to asbestos on the U.S.S. Chukawan (AO-100) an auxiliary oiler, based at Pier 2 in Norfolk, Virginia from September of 1957 through May of 1958. He stated that his rank aboard the U.S.S. Chukawan (AO-100) was seaman apprentice and he was assigned to the First Division deck force (Mot. Exh. D, pgs. 45-48 and 146).

Mr. Eylers testified that as the lowest ranked man of the deck force he would be sent down to the engine room with scrapers, wire brushes and a bucket of water to help change the asbestos gasket on the flanges. He described the process for removing the asbestos gaskets and stated that it would release multiple clouds of asbestos dust into the air. Mr. Eylers testified that after the flange was repaired or replaced, asbestos would have to be reapplied using asbestos rolls that were three feet wide. He stated that they would pull out a section from the asbestos rolls and tear it off, creating another cloud, wet it, mold it around the flange, then tear off another piece and repeat the process and let it dry. Mr. Eylers testified that the U.S.S. Chukawan (AO-100) had just one boiler room and one engine room. He testified that no matter where you went below deck there was always a crew working with asbestos and that asbestos would be blowing around, it was unavoidable (Mot. Exh. D pgs. 49-55).

Mr. Eylers testified that he would also go to the boiler room on the U.S.S. Chukawan (AO-100) to deliver or bring things back. He believed he was exposed

to asbestos dust in the boiler room from people sweeping up, removing and replacing insulation on the pipes. When he approached the people in the boiler room working on the pipes he would get asbestos on him (Mot. Exh. D, pg. 56-59). Mr. Eylers testified he also believed he was exposed to asbestos on the U.S.S. Chukawan (AO-100) when it was in the Portsmouth yard for an overhaul in early 1958. He claimed that he was assigned to the fire watch responsible for observing welders, burners and civilian workers below deck. He looked for any potential fire hazards, protected the equipment and was present when the pipefitters were tearing out sections of pipe covered with asbestos in that area. Mr. Eylers testified that the entire area was full of asbestos dust and you could not get away from it (Mot. Exh. D, pgs. 61-62 and 67-68).

Mr. Eylers testified that a few months after the U.S.S. Chukawan (AO-100) was in the Portsmouth yard for the overhaul, he was transferred to the U.S.S. Denebola (AF-56) where he stayed for about two months. Mr. Eylers stated he remained a seaman apprentice aboard the U.S.S. Denebola (AF-56). He testified that he would be sent all over the ship to make deliveries. Mr. Eylers described his work on the U.S.S. Denebola (AF-56) as being an extra, but he observed people replacing insulation on gaskets in the engine room. He was also sent to the boiler room where he observed the firemen removing one boiler to work on it and using another one for power. Mr. Eylers testified that the firemen were cleaning out the boilers, removing soot, and working on the asbestos insulation. He could not recall how frequently he went to the engine room or the boiler room on the U.S.S. Denebola (AF-56). Mr. Eylers testified that he returned to the U.S.S. Chukawan (AO-100) in Portsmouth for a few more months after leaving the U.S.S. Denebola (AF-56) until he was sent home in May of 1958 (Mot. Exh. D, pgs. 65-66, 69-75, 78, 84 and 155).

Mr. Eylers testified he was exposed to asbestos when he returned to the U.S.S. Chukawan (AO-100) before being sent home, while assigned to fire watch. He claimed that pipefitters working on the pumps, refrigeration units and turbines would tear off old asbestos and put a new layer on the pipes. He also recalled that he was exposed to asbestos from machinists working on insulating pumps to keep them from getting too hot. He described the asbestos insulation used on the pumps as "a grey mass." He remembered pumps were used for hot and cold water, and oil pumps were used to transfer fuel from ship to ship. Mr. Eylers did not recall where the pumps were located on the U.S.S. Chukawan (AO-100), he only remembered being told they were being insulated. He could not give any of the brand names and testified "A particular brand, it would be impossible to ID it." He thought the pumps were made of steel but could not provide the size of the pumps because the machinists worked with them. Mr. Eylers claimed that he was told to stay out of the machinists way but stay close by when the burners or welders were doing something. Mr. Eylers testified that he was required to protect the pumps using asbestos or a firecloth to avoid damage. Mr. Eylers claimed he was exposed to asbestos from the pumps which were located throughout the ship (Mot. Exh. D, pgs. 79-84, 147-154 and 158-159).

Plaintiffs commenced this action on November 11, 2017. The Summons and Complaint were subsequently amended on January 12, 2018 (NYSCEF Docket # 1 and Mot. Exh. A). SLM's Verified Answer is dated February 8, 2018 (Mot. Exh. B).

SLM's motion seeks an Order granting summary judgment pursuant to CPLR §3212, dismissing the plaintiffs' complaint and all cross-claims asserted against it.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied this standard, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary

evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]); *Martin v Briggs*, 235 AD2d 192, 663 NYS2d 184 [1st Dept. 1997]).

In support of its motion for summary judgment SLM relies on the affirmation of its attorney, copies of the pleadings, Mr. Eylers' deposition transcript, and the affidavit of its expert Mr. Clancy Cornwall (Mot. Exhs. A, B, C, D and E).

An attorney's affirmation, alone, is hearsay that may not be considered, and does not support, prima facie entitlement to summary judgment (*Zuckerman v. City of New York*, 49 N.Y. 2d 557 404 N.E. 2d 718, 427 N.Y.S. 2d 595 [1980]). A motion for summary judgment can be decided on the merits when an attorney's affirmation is used for the submission of documentary evidence in admissible form and annexes proof from an individual with personal knowledge, such as plaintiff's deposition testimony (See *Aur v. Manhattan Greenpoint Ltd.*, 132 A.D. 3d 595, 20 N.Y.S. 3d 6 [1st Dept., 2015] and *Hoeffner v. Orrick, Herrington & Sutcliffe LLP*, 61 A.D. 3d 614, 878 N.Y.S. 2d 717 [1st Dept. 2009]).

Plaintiffs argue that SLM's motion should be denied because it relies on the hearsay affirmation of an attorney. However, the attorney's affirmation in support of SLM's motion is being used as a vehicle to submit evidence in admissible form - including Mr. Eylers' deposition testimony - and is sufficient to sustain this motion.

SLM argues that Mr. Eylers' deposition testimony and the expert affidavit of Clancy Cornwall establishes that there is no evidence that Mr. Eylers was exposed to SLM pumps warranting summary judgment.

It is argued by SLM that Mr. Eylers was not able to specifically identify any of the pumps he observed machinists working on. SLM claims its expert Mr. Cornwall reviewed the uncertified copies of declassified U.S. Navy records provided by plaintiffs. Mr. Cornwall identifies three M.T. Davidson pumps on board the U.S.S. Chukawan (AO-100) and one on board the U.S.S. Denebola (AF-56) from plaintiffs' declassified U.S. Navy records. SLM claims that the records show the distiller condensate pump (on the 2nd deck, port side) and the distiller brine pump were in the engine room of the U.S.S. Chukawan (AO-100). The third pump was a water transfer pump located in the forward pump room on the opposite side of the U.S.S. Chukawan (AO-100). SLM claims the only pump located on the U.S.S. Denebola (AF-56) was a distiller brine pump located in the engine room with a capacity of thirty gallons per minute.

SLM's expert, Mr. Clancy Cornwall, is a former lieutenant in the U.S. Naval Reserve responsible for decommissioning surveys of the James River Reserve Fleet. He also holds a Second Assistant Engineers License, Diesel Propulsion, Unlimited Horsepower and Third Assistant Engineer License, Steam Propulsion, Unlimited Horsepower issued by the U.S. Coast Guard. Mr. Cornwall states in his affidavit that he reviewed documents at the U.S. Navy facility known as the Archives II, located in College Park, Maryland. He states that a review of Mr. Eylers' naval record shows he was not trained or qualified to operate, maintain or repair pumps aboard U.S. Navy ships (Mot. Exh. E).

Mr. Cornwall states that the M.T. Davidson pumps aboard the U.S.S. Chukawan (AO-100) and U.S.S. Denebola (AF-56) were manufactured pursuant to specifications and plans provided by the U.S. Bureau of Ships and the Naval Sea Systems Command, which would require any deviation be given written approval from the U.S. Navy. Mr. Cornwall further states that the specifications include the

type of thermal insulation products used and how they would be applied. He provides a copy of the U.S. Navy Specifications in effect for 1947, 1954 and 1958 as Exhibit 2 to his affidavit (Mot. Exh. E). Mr. Cornwall states that the two M.T. Davidson pumps in the engine room of the U.S.S. Chukawan (AO-100) and the one M.T. Davidson pump on the U.S.S. Denebola (AF-56) operated below 125 degrees Fahrenheit and pursuant to U.S. Navy Specifications would not have any external insulation. Mr. Cornwall states that the only remaining pump on the U.S.S. Chukawan (AO-100) was on the other end of the ship in the forward pump room which was closer to the bow or forward part of the ship and Mr. Eyler did not testify to being exposed to any pumps in the forward pump room (Mot. Exh. E).

“In asbestos-related litigation, the plaintiff on a summary judgment motion must demonstrate that there was actual exposure to asbestos from the defendant’s product” (Cawein v Flintkote Co., 203 AD2d 105, 610 NYS2d 487 [1st Dept 1994]). The Plaintiff need “only show facts and conditions from which defendant’s liability may be reasonably inferred” (Reid v Ga.-Pacific Corp., 212 AD2d 462, 622 NYS2d 946 [1st Dept. 1995]). A Plaintiff’s inability to recall exact details of the exposure is not fatal to the claim and should not automatically result in the granting of summary judgment (Lloyd v W.R. Grace & Co., 215 AD2d 177, 626 NYS2d 147 [1st Dept. 1995]). Summary judgment must be denied when the plaintiff has “presented sufficient evidence, not all of which is hearsay, to warrant a trial” (Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.), 7 AD3d 285, 776 NYS2d 253 [1st Dept. 2004]).

Plaintiffs as the non-moving parties are entitled to the benefit of all favorable inferences, regardless of Mr. Eylers’ ability to provide a detailed description of M.T. Davidson pumps on the U.S.S. Chukawan (AO-100) and the only pump on the U.S.S. Denebola (AF-56). The mere presence of M.T. Davidson pumps on the U.S.S. Chukawan (AO-100) and the U.S.S. Denebola is insufficient to establish that Mr. Eylers was actually exposed to asbestos from SLM’s M.T. Davidson pumps (see Cawein v. Flintkote Co., 203 AD2d 105, supra at 106 [1st Dept. 1994]).

Plaintiffs must show that Mr. Eylers was actually exposed to asbestos from the M.T. Davidson pumps. Plaintiffs have not made that showing, and SLM has established its prima facie burden. Plaintiffs do not provide any expert affidavit or other records to refute the statements made by Mr. Cornwall that the M.T. Davidson pumps aboard the U.S.S. Chukawan (AO-100) and the only pump on the U.S.S. Denebola would not have exposed Mr. Eylers to asbestos. The records plaintiffs provided, together with Mr. Cornwall’s affidavit, establish that the M.T. Davidson pumps Mr. Eylers was exposed to would not have been insulated with any material - including asbestos - pursuant to U.S. Navy Specifications. Mr. Eylers did not testify as to any exposure from asbestos insulated pumps in any pump room, including the forward pump room of the U.S.S. Chukawan (AO-100). He only testified that he could not recall where the pumps were located and identified asbestos exposure from the engine and boiler rooms of both ships.

Plaintiffs have not raised genuine issues of fact to overcome SLM's prima facie showing. Their argument that any discrepancies in Mr. Eyler’s deposition testimony raises issues of fact to be resolved at trial, is unavailing. Plaintiffs have not shown "facts and conditions from which SLM’s liability for Mr. Eylers’ mesothelioma may be reasonably inferred" (Reid, supra), warranting the granting of summary judgment to SLM.

ACCORDINGLY, it is ORDERED that Superior Lidgerwood Mundy Corporation’s motion for summary judgment pursuant to CPLR §3212 to dismiss the plaintiffs’ complaint and all cross-claims against it is granted, and it is further,

ORDERED that all claims and cross-claims against Superior Lidgerwood Mundy Corporation are severed and dismissed, and it is further,

ORDERED that all claims and cross-claims asserted against the remaining defendants, continue to be in effect, and it is further,

ORDERED that defendant Superior Lidgerwood Mundy Corporation serve a copy of this Order with Notice of Entry on the General Clerk's Office (Room 119) and on the County Clerk, by e-filing protocol, and it is further,

ORDERED that the Clerk enter judgment accordingly.

ENTER:

Dated: October 17, 2019

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**
Check if appropriate: **DO NOT POST** **REFERENCE**