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Mann v. A.O. Smith Corp. (In re Asbestos Prods. Liab. Litig. (No. VI))

United States District Court for the Eastern District of Pennsylvania

May 14, 2021, Decided; May 14, 2021, Filed

CONSOLIDATED UNDER MDL DOCKET NO. 01-875; CIVIL ACTION NO. 17-4428

Reporter
2021 U.S. Dist. LEXIS 92173 *

IN RE: ***ASBESTOS*** PRODUCTS LIABILITY LITIGATION (No. VI) BARBARA MANN, Personal Representative of the Estate of Richard Nybeck, Plaintiff, v. A.O. SMITH CORP., et al., Defendants.

Core Terms

asbestos, exposure, products, phenolic, summary judgment, magazine, exposed, genuine, boards, summary judgment motion, lung cancer, hearsay, substantial factor, ***asbestos***-ridden, deposition, non-moving, proximity

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Judges: Hon. Mitchell S. Goldberg, J.

Opinion by: Mitchell S. Goldberg

Opinion

MEMORANDUM OPINION

Richard Nybeck originally filed this personal injury action against multiple defendants, asserting claims for alleged harmful, occupational exposure to ***asbestos*** and his development of lung cancer. After Nybeck's unfortunate passing in June 2020, Barbara Mann, as the personal representative of Nybeck's estate, ("Plaintiff") was substituted as Plaintiff. The allegations against Defendant, A.O. Smith Corporation ("A.O. Smith") stem from Nybeck's employment as an HVAC instructor at the Philadelphia Technical Institute.

Presently **[*5]** before me is A.O. Smith's Motion for Summary Judgment on all claims.[1] For the reasons set forth below, I will grant the Motion.

I. STATEMENT OF FACTS

Unless otherwise indicated, the facts presented below are undisputed.[2]

Between 1977 and 1990, Nybeck worked as an HVAC instructor at the Philadelphia Technical Institute. (Def.'s Mem. of Law at 6, ECF No. 296.) Part of his teaching methods included dismantling A.O. Smith electric motors, which housed phenolic boards. (Id. at 7-8.) At his deposition, Nybeck testified that based on an article that he thought he read in a refrigeration trade magazine, he believed that phenolic boards contained ***asbestos***. (Id. at 8-9.) But Nybeck could not recall the name of the magazine or article or when he read it. (Id.) When pressed about whether the phenolic boards within A.O. Smith's motors contained ***asbestos***, Nybeck stated, "I only believe that because I think I read that in the trade magazine." (Id. at 9.)

Nybeck further testified that when a phenolic board broke inside of an A.O. Smith motor, he "could have" been exposed to little puffs of dust that would arise as a result. (Id. at 7.) When asked whether he inhaled some of the dust, Nybeck replied, "I **[*6]** could have." (Id.) When questioned about the number of times that an A.O. Smith phenolic board broke, Nybeck responded, "I'm taking a guess, I don't know for a fact, but maybe ten or twenty. I don't know. I'm not sure." (Id.)

Nybeck also installed some A.O. Smith water heaters while at the Philadelphia Technical Institute. (Def.'s Reply at 4-5, ECF No. 318).[3] He did not know whether he encountered ***asbestos*** materials when he installed the water heaters. (Id.)

Nybeck was diagnosed with lung cancer in November 2016 and passed away on June 17, 2020. (ECF No. 331.)

II. STANDARD OF REVIEW

Pursuant to *Federal Rule of Civil Procedure 56(a)*, summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." A dispute is "genuine" if there is a sufficient evidentiary basis on which a reasonable factfinder could return a verdict for the non-moving party, and a factual dispute is "material" if it might affect the outcome of the case under governing law. *Kaucher v. Cnty. of Bucks, 455 F.3d 418, 423 (3d Cir. 2006)* (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*). The court must view the evidence in the light most favorable to the non-moving party. *Galena v. Leone, 638 F.3d 186, 196 (3d Cir. 2011)*. However, "unsupported assertions, conclusory allegations or mere suspicions" are insufficient **[*7]** to overcome a motion for summary judgment. *Schaar v. Lehigh Valley Health Servs., Inc., 732 F. Supp. 2d 490, 493 (E.D. Pa. 2010)* (citing *Williams v. Borough of W. Chester, Pa., 891 F.2d 458, 461 (3d Cir. 1989)*).

The movant "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial Celotex burden can be met by showing that the non-moving party has "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case." *Id. at 322*.

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[1] Plaintiff's claims against A.O. Smith are for negligence (Count One), strict liability (Count Two), and breach of warranty (Count Four).

[2] Because neither party submitted a statement of facts, I have considered the facts set forth in their briefs that have proper citations to the record. See ***Fed. R. Civ. P. 56(c)(1)(A)***.

[3] A.O. Smith's reply brief is not paginated. Therefore, the page numbers refer to those generated by the Court's electronic filing system.

After the moving party has met its initial burden, summary judgment is appropriate if the non-moving party fails to rebut the moving party's claim by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials" that show a genuine issue of material fact or by "showing that the materials cited do not establish the absence or presence of a genuine dispute." *Fed. R. Civ. P. 56(c)(1)(A)*.

III. DISCUSSION

A.O. Smith seeks summary judgment on Plaintiff's claims of negligence, **[*8]** strict liability, and breach of warranty. A.O. Smith contends that Plaintiff's evidence is insufficient to establish that Nybeck was exposed to A.O. Smith's products allegedly containing ***asbestos***, let alone with the necessary regularity, frequency, or proximity to create an issue of fact. Plaintiff responds that it sufficiently proffered product identification and causation evidence to survive summary judgment.

The parties agree that Pennsylvania law applies. "In the simplest terms, an ***asbestos*** plaintiff must establish that use of a defendant's product exposed the plaintiff to airborne ***asbestos*** fibers and that this exposure occurred with sufficient frequency, regularity, and proximity such that a fact-finder may infer that the plaintiff's exposure was a substantial factor in causing h[im] harm." *Brandt v. Bon-Ton Stores Inc., 227 A.3d 433, 2020 Pa. Super. Unpub. LEXIS 641 at *11, 2020 WL 865276, at *4 (Pa. Super. 2020)* (citing *Rost v. Ford Motor Co., 637 Pa. 625, 151 A.3d 1032, 1052-53 (Pa. 2016)*; *Gregg v. V-J Auto Parts, Co., 596 Pa. 274, 943 A.2d 216, 225-26 (Pa. 2007)*). "[A] plaintiff must present evidence to show that he inhaled ***asbestos*** fibers shed by the specific manufacturer's product." *Krauss v. Trane U.S. Inc., 2014 PA Super 241, 104 A.3d 556, 563 (Pa. Super. 2014)*.

The mere fact that a particular ***asbestos*** product came into a facility does not establish that an individual "ever breathed these specific ***asbestos*** products or that he worked where these ***asbestos*** products were delivered." *Eckenrod v. GAF Corp., 375 Pa. Super. 187, 544 A.2d 50, 53 (Pa. Super. 1988)*. An "'every exposure' to ***asbestos***, **[*9]** generalized opinion does 'not suffice to create a jury question in a case where exposure to the defendant's product is *de minimis*. . . .'" *Rost, 151 A.3d at 1043* (citations omitted). Rather, "to permit trial courts to make a reasoned determination at the summary judgment stage as to whether the plaintiff has proffered sufficient evidence to permit a jury to make the necessary inference of a sufficient causal connection between the defendant's product and the asserted injury," the "frequency, regularity, and proximity" test was adopted. Id. Under this test, trial courts are to evaluate and "distinguish[] cases in which the plaintiff can adduce evidence that there is a sufficiently significant likelihood that the defendant's product caused his harm, from those in which such likelihood is absent on account of only casual or minimal exposure to the defendant's product." Id. (citing *Tragarz v. Keene Corp., 980 F.2d 411 (7th Cir. 1992)*).

Determining the sufficiency of product identification evidence requires a fact sensitive approach. *Gregg, 943 A.2d at 227*. Moreover, "the plaintiff's exposure to each defendant's product should be independently evaluated when determining if such exposure was a substantial factor in causing the plaintiff's injury." *Tragarz, 980 F.2d at 425* (discussed by the Gregg court in setting **[*10]** out the product identification criteria in Pennsylvania).

Here, Plaintiff's evidence includes the fact that while working as an HVAC instructor at the Philadelphia Technical Institute between 1977 and 1990, Nybeck worked with A.O. Smith electric motors, phenolic boards, and water heaters. (Def.'s Mem. of Law at 6-8; Def.'s Reply at 4-5.) Plaintiff also points to evidence that Nybeck's work with the electric motors and phenolic boards would result in puffs of dust being emitted into the air, which Nybeck might have inhaled. (Def.'s Mem. of Law at 7.)

However, the record is devoid of admissible evidence to establish that Nybeck was exposed to any ***asbestos***-ridden A.O. Smith product with the necessary proximity, regularity, and frequency required by Pennsylvania law. In an attempt to establish that ***asbestos*** was within the A.O. Smith phenolic boards to which Nybeck was exposed and that this exposure was a substantial factor in his development of lung cancer, Plaintiff points to Nybeck's prior deposition testimony, various records, and reports by two expert witnesses. None of this evidence creates a genuine issue of material fact for purposes of a *Rule 56* review.

First, in his deposition, Nybeck testified **[*11]** that he believed that the phenolic boards contained ***asbestos*** based on a trade magazine. But Nybeck could not remember the title or the date when he read this magazine. Proffering an unidentified, undated trade

magazine to prove that the A.O. Smith phenolic boards to which Nybeck was exposed at the Philadelphia Technical Institute between 1977 and 1990 contained ***asbestos*** is inadmissible hearsay, which does not create a genuine issue of fact to overcome summary judgment. *Fed. R. Evid. 801(c)* and *802*; see also *Lawler v. Richardson, No 10-196, 2012 U.S. Dist. LEXIS 86055, 2012 WL 2362383, at *2 (E.D. Pa. June 20, 2012)* (magazine and "[n]ewspaper articles are generally considered hearsay, and may only be used during trial in exceptional circumstances."); *Faulman v. Sec. Mut. Fin. Life Ins. Co., 353 F. App'x 699, 704 (3d Cir. 2009)* (affirming the district court's refusal to admit a magazine article into evidence as such was "hearsay, irrelevant, or unduly prejudicial.").[4]

"[A] motion for summary judgment cannot be supported or defeated by statements that include inadmissible hearsay evidence." *Samarin v. GAF Corp., 391 Pa. Super. 340, 571 A.2d 398, 403 (Pa. Super. 1989)*; *Hampshire v. Philadelphia Hous. Admin., No 17-4423, 2019 U.S. Dist. LEXIS 24608, 2019 WL 652481, at *7 (E.D. Pa. Feb. 14, 2019)* (noting that inadmissible hearsay "cannot be considered to defeat defendants' motion for summary judgment"); see also *Fed. R. Civ. P. 56(c)(2)* ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence."). As an unidentified, undated magazine article **[*12]** fails to present the necessary trustworthiness to fall into a hearsay exception, it does not present an issue of fact warranting denial of A.O. Smith's Motion for Summary Judgment.

Next, Plaintiff cites to myriad of other documents in an attempt to create a genuine issue of fact as to Nybeck's exposure to A.O. Smith ***asbestos***-ridden products. These documents include A.O. Smith representatives' deposition excerpts from unrelated lawsuits, A.O. Smith's engineering drawing of various products, and discovery responses by entities other than A.O. Smith in unrelated lawsuits. Even when viewed together, these documents do not present a genuine issue of fact regarding the particular A.O. Smith products to which Nybeck was in contact between 1977 and 1990 at the Philadelphia Technical Institute, let alone whether ***asbestos*** was contained within those products.[5] While I must draw all reasonable inferences in favor of Plaintiff, "an inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat summary judgment." *Halsey v. Pfeiffer, 750 F.3d 273, 287 (3d Cir. 2014)* (citation omitted). This evidence also fails to show that Nybeck was ever exposed to A.O. Smith ***asbestos***-ridden phenolic boards.

Finally, **[*13]** Plaintiff presents the expert opinions of two medical liability and causation experts, Arthur Frank, M.D., and Jonathan Gelfand, M.D., in an attempt to establish that A.O. Smith's products were a substantial factor in causing Nybeck's lung cancer. Dr. Frank provides a general background of Nybeck's employment history, including Nybeck's work at the Philadelphia Technical Institute. (Frank Rep. at 1-2, ECF No. 315-17.)[6] Dr. Frank then concludes that Nybeck's "cumulative exposures that he had to ***asbestos***, from any and all products, containing any and all fiber types, would have contributed to his developing [lung cancer and asbestosis]." (Id. at 2.) Dr. Gelfand also lists Nybeck's prior employment history. (Gelfand Report at 1-2, ECF No. 315-17.) When discussing Nybeck's work as an instructor at the Philadelphia Technical Institute and subsequent work at the Philadelphia airport, Dr. Gelfand offers that "[t]here is no certainty about exposure to ***asbestos*** at those places." (Id. at 2.) Dr. Gelfand further states that "Nybeck has a history of exposure to ***asbestos*** beginning in the 1950s and continuing into the 1970s." (Id. at 3.) Dr. Gelfand opines that "the combination of

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[4] Hearsay is "a statement that the declarant does not make while testifying at the current trial or hearing; and a party offers in evidence to prove the truth of the matter asserted in the statement." *Fed. R. Evid. 801(c)*. Hearsay is generally not admissible except as provided by certain exceptions. *United States v. Casoni, 950 F.2d 893, 903 (3d Cir. 1991)*.

[5] For instance, Plaintiff's Exhibit H is an undated A.O. Smith "Century Pool & Spa Motor Manual," which includes instructions and diagrams for installing and troubleshooting Century pool and spa motors. (ECF No. 315-8.) Plaintiff's Exhibit J is a WestLaw record of a 1970 patent granted to A.O. Smith for a "Filament Winding Apparatus." (ECF No. 315-10). Exhibit L contains pleadings and rulings in a separate, unrelated ***asbestos***-exposure lawsuit against Honeywell, Inc. (ECF No. 315-2.)

[6] Plaintiff also attaches assorted pages from a separate affidavit of Dr. Frank, dated June 28, 2018. (ECF No. 315-19). In this report, Dr. Frank provides a background on his credentials and opines on the general history of ***asbestos*** and the health hazards associated with it. Plaintiff has provided only six of the 216-page affidavit. In any event, this affidavit does not mention Nybeck nor A.O. Smith products. Therefore, this document is not relevant for purposes of the present motion.

asbestos exposure **[*14]** . . . has been a substantial contributing factor to Mr. Nybeck's lung cancer." (Id.)

Upon careful review of both expert reports, neither mentions A.O. Smith products nor contends that Nybeck was exposed to any ***asbestos***-ridden products while at the Philadelphia Technical Institute between 1977 and 1990. Because the factual record outside of these expert reports fails to establish Nybeck's proximity to any ***asbestos***-containing A.O. Smith product while at the Philadelphia Technical Institute, an expert witness could not establish the factual basis to support this claim. *Olivar v. Buffalo Pumps, Inc., No. 09-62577, 2011 U.S. Dist. LEXIS 160686, 2011 WL 13254695, at *8 (E.D. Pa. Mar. 29, 2011)* (granting summary judgment for defendant product manufacturer, in part, because plaintiff's expert testimony, standing alone, was insufficient to establish factual support for plaintiff's exposure to defendant's products); *Conroy v. A.W. Chesterton Co., No. 11-05457, 2012 U.S. Dist. LEXIS 163535, 2012 WL 5458119, at *1 n.1 (E.D. Pa. Oct. 26, 2012)* (granting summary judgment because there was no evidence from anyone with personal knowledge about whether plaintiff worked with or around defendant's products and noting that plaintiff's expert's testimony on this topic was "impermissibly speculative"); *Cardaro v. Aerojet Gen. Corp., No. 11-00876, 2012 U.S. Dist. LEXIS 113846, 2012 WL 3536243, at *1 n.1 (E.D. Pa. July 27, 2012)* (same).

In sum, I conclude that no reasonable jury could determine that Nybeck was exposed to A.O. Smith ***asbestos***-ridden products such that they were **[*15]** a substantial factor in his development of lung cancer. Therefore, summary judgment in favor of A.O. Smith is warranted.

IV. CONCLUSION

For the reasons set forth above, A.O. Smith's motion for summary judgment will be granted. An appropriate Order follows.

ORDER

AND NOW, this 14th day of May, 2021, upon consideration of Defendant A.O. Smith Corporation's "Motion for Summary Judgment" (ECF No. 296), Plaintiff's Memorandum of Law in opposition (ECF No. 315), and Defendant's Reply (ECF No. 318), and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby **ORDERED** that Defendant's Motion is **GRANTED** such that summary judgment is entered in favor of A.O. Smith Corporation on all claims.

The Clerk of Court is directed to mark this action as **CLOSED as to Defendant A.O. Smith Corporation**.

BY THE COURT:

/s/ Mitchell S. Goldberg

Hon. Mitchell S. Goldberg

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